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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Jon Leibowitz, Chairman**
William Kovacic
J. Thomas Rosch
Edith Ramirez
Julie Brill

In the Matter of	)	
	)	
PepsiCo, Inc.,	)	**Docket No. C-4301**
a corporation.	)	
	)	

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Respondent PepsiCo, Inc. ("PepsiCo"), a corporation, has entered into agreements to acquire, and subsequently did acquire, the outstanding voting securities of three of its independent bottlers, Pepsi Bottling Group, Inc. ("PBG"), PepsiAmericas, Inc. ("PAS"), and Pepsi-Cola Bottling Co. of Yuba City, Inc. ("PYC"), and subsequently obtained a license agreement to continue to produce and distribute several carbonated soft drink brands of Dr Pepper Snapple Group, Inc. ("DPSG") that bottlers PBG, PAS, and PYC had produced and distributed, and that the agreements violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that the agreements and terms of such agreements, when consummated or satisfied, resulted in a violation of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. Respondent PepsiCo, Inc.

1. Respondent 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.

2. 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 things, PepsiCo produces the concentrate (or flavor ingredient) for the PepsiCo

carbonated soft drink beverage brands that are distributed by its independent bottlers. Three of those independent bottlers were Pepsi Bottling Group, Inc. ("PBG"), PepsiAmericas, Inc. ("PAS"), and Pepsi-Cola Bottling Co. of Yuba City, Inc. ("PYC"). Some of the PepsiCo carbonated soft drink brands distributed by PBG, PAS, and PYC were Pepsi-Cola, Diet Pepsi, Mountain Dew, Diet Mountain Dew, Sierra Mist, and Mug Root Beer.

3 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.

4. PepsiCo is, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

II. Third Party Dr Pepper Snapple Group, Inc.

5. 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.

6. Among other things, DPSG produces concentrate (or syrup) for the DPSG carbonated soft drink beverage brands that are marketed, distributed, and sold by independent bottlers. Three of those independent bottlers were PBG, PAS, and PYC. Some of the DPSG carbonated soft drink brands distributed by PBG, PAS, and PYC, in at least some territories, were Dr Pepper, Diet Dr Pepper, Crush, Schweppes, A&W, Canada Dry, Squirt, and 7-UP.

7. DPSG in 2009 had total revenues from the sale of all products of about $6 billion. DPSG's United States sales in 2009 of all carbonated soft drink concentrate totaled about $1.5 billion.

8. DPSG is, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

III. Pepsi Bottling Group, Inc., PepsiAmericas, Inc., and Pepsi-Cola Bottling Co. of Yuba City, Inc.

9. PBG and PAS were the two largest independently owned bottlers of the carbonated soft drink brands of PepsiCo. PBG and PAS together accounted for about 75 % of the United States sales of PepsiCo's brands of carbonated soft drinks and about 20 % of the United States sales of DPSG's brands of carbonated soft drinks. PYC was a relatively small bottler that accounted for a relatively small percentage of the sales of PepsiCo and DPSG carbonated soft drink brands.

10. PBG was 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's United States sales in 2009 of all carbonated soft drink brands totaled about $6 billion.

11. The geographic areas or territories in which PBG was licensed to distribute the carbonated soft drink brands of PepsiCo included all or a portion of 41 states and the District of Columbia. The principal geographic areas or territories in which PBG is licensed to distribute some of the carbonated soft drink brands of DPSG include Atlanta, Georgia; Washington, D.C.; Baltimore, Maryland; Buffalo and Rochester, New York; Hartford, Connecticut; Minneapolis and St. Paul, Minnesota; Tulsa, Oklahoma; Denver, Colorado; Salt Lake City, Utah; San Francisco, California; Sacramento, California; Seattle, Washington; Portland, Oregon; and various cities in Florida.

12. PBG accounted for about 56% of sales of PepsiCo's United States bottler-distributed carbonated soft drink brands and about 15% of DPSG's United States bottler-distributed carbonated soft drink brands.

13. PAS was 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's United States sales in 2009 of all carbonated soft drink brands totaled about $ 2.5 billion.

14. The principal geographic areas or territories in which PAS was licensed to distribute the carbonated soft drink brands of PepsiCo included all or a portion of 19 states, primarily in the Midwest. The geographic areas or territories in which PAS was licensed to distribute some of the carbonated soft drink brands of DPSG include Kansas City, Kansas and Missouri; and Cleveland, Ohio.

15. PAS was responsible for about 19% of the sales of PepsiCo's United States bottler-distributed carbonated soft drink brands and about 5% of the sales of DPSG's United States bottler-distributed carbonated soft drink brands.

16. PYC was a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 750 Sutter Street, Yuba City, California 95991. PYC's United States sales in 2009 of all carbonated soft drink brands totaled about $21 million.

17. The principal geographic areas or territories in which PYC was licensed to distribute the carbonated soft drink brands of PepsiCo included Yuba City, California and its surrounding areas. The geographic areas or territories in which PYC was licensed to distribute some of the carbonated soft drink brands of DPSG included parts of Yuba City, California and its surrounding areas.

18. PYC was responsible for a relatively small percentage of PepsiCo's and DPSG's United States bottler-distributed carbonated soft drink brands.

IV. PepsiCo's Acquisition of PBG, PAS, and PYC

19. On or about August 3, 2009, PepsiCo entered into separate agreements with PBG and PAS to acquire all of their outstanding voting securities and equity interests. PepsiCo acquired PBG and PAS on or about February 26, 2010. PepsiCo acquired PYC on or about April 19, 2010.

20. At the time of the agreements with PBG and PAS, PepsiCo had about a 40% equity interest in PBG and about a 40% equity interest in PAS. PepsiCo had no equity interest in PYC.

21. Under the terms of the license agreements that DPSG (or its predecessor companies) had entered into with PBG, PAS, and PYC, a change of ownership of those bottlers would, depending upon the brand and/or territory involved, either automatically trigger the termination of the license agreement the bottler had with DPSG or require that DPSG consent to the acquisition of the license by the bottler's new owner.

22. The proposed acquisition by PepsiCo of all outstanding voting securities of PBG and PAS would, before consummation, give PepsiCo control over them. This prospective change in control was the kind of change in ownership of PBG and PAS that, upon consummation, would either trigger the automatic termination clause of the license agreement with DPSG or require that DPSG consent to the change.

23. For brand Dr Pepper, DPSG did not consent to the transfer to PepsiCo of the licenses held by PBG and PAS. For certain other DPSG brands, the proposed change in ownership of PBG and PAS, upon consummation of the ownership change, automatically terminated the DPSG licenses.

V. PepsiCo's Acquisition of DPSG Licenses

24. On or about December 7, 2009, in anticipation of the termination of the DPSG-PBG and DPSG-PAS license agreements upon the acquisition by PepsiCo of those two bottlers, PepsiCo and DPSG entered into an agreement for PepsiCo, upon acquiring PBG and PAS, to obtain a license to distribute the Dr Pepper, Crush, and Schweppes carbonated soft drink brands of DPSG in the former PBG and PAS territories.

25. Under the terms of the DPSG-PepsiCo license agreement, DPSG and PepsiCo also agreed that for any future acquisitions by PepsiCo of bottlers that distribute any DPSG brands in the United States, PepsiCo would automatically acquire rights to distribute those brands. Pursuant to this license provision, PepsiCo acquired rights to distribute some DPSG brands in territories licensed by DPSG to Ab-Tex Beverage Ltd. in some areas of the approximately 125 counties in central Texas where this bottler was a distributor of PepsiCo

carbonated soft drinks. PepsiCo also acquired rights to distribute some DPSG brands in some of the Yuba City, California, areas where PYC was a distributor of some PepsiCo carbonated soft drinks brands.

26. The DPSG-PepsiCo license agreement also provided, among other things, that (a) PepsiCo would acquire the exclusive right to sell and distribute the Dr Pepper, Crush, and Schweppes carbonated soft drink brands in the PBG and PAS territories, (b) the license agreement would have a term of twenty (20) years, with a provision that it be "automatically renewed for additional twenty (20) year successive periods" for "no additional payments," (c) PepsiCo would acquire a non-exclusive right to produce the Dr Pepper, Crush, and Schweppes carbonated soft drink brands in the PBG and PAS territories, and (d) PepsiCo would pay DPSG $900 million.

27. Pursuant to the DPSG-PepsiCo license agreement, PepsiCo and DPSG entered into additional, associated terms, whereby PepsiCo has undertaken performance obligations to, among other things (a) distribute the Dr Pepper brand in all classes of trade based in some measure upon the Pepsi and Mountain Dew brands; (b) grow the Dr Pepper brand based in some measure upon the sales of other carbonated soft drink brands; (c) advertise, promote, and market the DPSG beverages, and provide sales support for such promotions, based in some measure upon PepsiCo's promotions of the PepsiCo brands, and (d) in connection with price-off promotions, promote the Dr Pepper brand based in some measure upon the Pepsi and Mountain Dew brands and engage in media advertising at a tie-in rate based upon those PepsiCo brands.

28. The DPSG-PepsiCo license agreement would not provide adequate safeguards against the passage access by PepsiCo to competitively sensitive and confidential information regarding DPSG carbonated soft drink brands provided to PepsiCo by DPSG pursuant to the license.

VI. Trade and Commerce

A. Relevant Product Markets

29. The relevant product markets in which to assess the effects of the PepsiCo - DPSG license agreement and the associated performance terms are (a) branded, direct-store-door delivered carbonated soft drinks and (b) the branded concentrate used to produce branded, direct-store-door delivered carbonated soft drinks.

B. Relevant Geographic Markets

30. The relevant geographic markets in which to assess the effects of the DPSG-PepsiCo license agreement and the associated performance agreement terms, in both relevant product markets, are (a) the United States as a whole and (b) local areas in the PBG, PAS, and PYC territories.

C. Conditions of Entry

31. Entry into each relevant market would not be timely, likely, or sufficient to prevent or mitigate any anticompetitive effect.

32. Effective (price constraining) entry requires that branded carbonated soft drinks be delivered by direct-store-door delivery. There are generally only three bottlers in the local carbonated soft drink markets that have exclusive rights to distribute their branded carbonated soft drink products, and they do so by direct-store-door delivery. Bottlers operate under flavor restrictions imposed upon them by concentrate companies PepsiCo, DPSG, and The Coca-Cola Company. The bottlers therefore are not permitted to carry the new brand of an existing flavor without first dropping the brand of that flavor that they carry. For the cola flavor, the bottlers of PepsiCo and Coke are required to carry Pepsi-Cola and Coca-Cola, respectively, as well as no other cola flavored carbonated soft drink.

33. There is no market for branded concentrate other than for the production of branded carbonated soft drinks.

D. Market Structure

34. Each relevant market is very highly concentrated, whether measured by the Herfindahl-Hirschman Index ("HHI") or by two-firm and four-firm concentration ratios.

35. The carbonated soft drink brands of PepsiCo and DPSG are the first and second choices for a substantial number of consumers.

VII. Effects of the Acquisition

36. PepsiCo's access to competitively sensitive confidential information provided by DPSG to PepsiCo in furtherance of the DPSG-PepsiCo license agreement, or the use by PepsiCo of competitively sensitive information passed to it by DPSG in furtherance of the DPSG-PepsiCo license agreement, may substantially lessen competition in the relevant markets in some or all of the following ways,

(a) by eliminating direct competition between PepsiCo and DPSG,

(b) by increasing the likelihood that PepsiCo may unilaterally exercise market power or influence and control DPSG's prices, and

(c) by increasing the likelihood of, or facilitating, coordinated interaction;

each of which may result in higher prices to consumers.

VIII. Violations Charged

37. PepsiCo's access to competitively sensitive confidential information from DPSG, provided in furtherance of the DPSG-PepsiCo license agreement and associated performance terms entered into between Respondent PepsiCo and DPSG for the sale and distribution by PepsiCo of DPSG's brands of carbonated soft drinks, could lead to anticompetitive conduct and constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and upon consummation, constituted a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15, U.S.C. § 18.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-seventh day of September, 2010, issues its Complaint against Respondent PepsiCo.

By the Commission, Commissioner Ramirez recused.

Donald S. Clark
Secretary

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