091-0133

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Jon Leibowitz, Chairman**
Pamela Jones Harbour
William E. Kovacic
J. Thomas Rosch

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

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 the outstanding voting securities of two of its independent bottlers, Pepsi Bottling Group, Inc. ("PBG"), and PepsiAmericas, Inc. ("PAS"), 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 the bottlers PBG and PAS had produced and distributed, and that the agreements may violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that the terms of such agreements, were they to be satisfied, would result 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. Two of

those independent bottlers are Pepsi Bottling Group, Inc. ("PBG"), and PepsiAmericas, Inc. ("PAS"). Some of the PepsiCo carbonated soft drink brands distributed by PBG and PAS are 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. Two of those independent bottlers are PBG and PAS. Some of the DPSG carbonated soft drink brands distributed by PBG and PAS, in at least some territories, are Dr Pepper, Diet Dr Pepper, Crush, Schweppes, Canada Dry, and Vernor's.

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. Third Parties Pepsi Bottling Group, Inc., and PepsiAmericas, Inc.

9. Third parties PBG and PAS are the two largest independently owned bottlers of the carbonated soft drink brands of PepsiCo. PBG and PAS together account 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.

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

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

IV. <u>PepsiCo's Proposed Acquisition of PBG and PAS</u>

16. 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.

17. At the time of the agreements, PepsiCo had about a 40% equity interest in PBG and about a 40% equity interest in PAS.

18. Under the terms of the separate license agreements entered into between DPSG (or its predecessor companies) with PBG and PAS, a change of ownership of those entities would, depending upon the brand and/or territory, either automatically trigger the termination of the license agreement with DPSG or require that DPSG consent to the acquisition of the license by the new owner.

19. The proposed acquisition by PepsiCo of all outstanding voting securities of PBG and PAS would give PepsiCo control over them, and is the kind of change in ownership of PBG and PAS that, upon consummation, would either trigger the automatic termination clause or

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

V. PepsiCo's Proposed Acquisition of DPSG Licenses

20. On or about December 7, 2009, in anticipation of the termination of the DPSG-PBG and DPSG-PAS license agreements, 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.

21. Under the terms of the PepsiCo - DPSG license agreement, among other things, (a) PepsiCo will 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 stated term of the license agreement is twenty (20) years, with a provision that it be "automatically renewed for additional twenty (20) year successive periods" for "no additional payments," (c) PepsiCo will 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 will pay DPSG $900 million.

22. Pursuant to the PepsiCo-DPSG 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.

23. The PepsiCo-DPSG license agreement would not provide adequate safeguards against the 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

24. 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

25. The relevant geographic markets in which to assess the effects of the PepsiCo-DPSG license transaction 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 and PAS territories.

C. Conditions of Entry

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

27. 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 ("Coke"). 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 currently 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.

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

D. Market Structure

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

30. 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

31. 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, among others:

(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 in the industry;

each of which may result in higher prices to consumers.

VIII. Violations Charged

32. 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, would constitute 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 ______ day of _____________, 2010, issues its Complaint against Respondent PepsiCo.

By the Commission.

Donald S. Clark
Secretary

SEAL