

Complaint

IN THE MATTER OF

PEPSICO, INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE
COMMISSION ACT*Docket No. C-4301; File No. 091 0133**Filed September 27, 2010 — Decision, September 27, 2010*

The complaint alleges that acquisition by PepsiCo, Inc. (“PepsiCo”) of certain assets of Dr. Pepper Snapple Group (“Snapple”) would result in reduced competition in the sale and distribution of branded soft drink concentrate and carbonated soft drinks. The consent order requires PepsiCo, Inc. (“Pepsi”) to set up a firewall to ensure that its ownership of the bottling companies does not give certain Pepsi employees access to commercially sensitive confidential marketing and brand plans for Dr. Pepper Snapple Group.

Participants

For the *Commission*: Joseph Brownman and W. Stephen Sockwell.

For the *Respondent*: Deborah Feinstein and Michael Sohn, Arnold & Porter; James Long, Briggs and Morgan; Michael Knight, Jones Day; and Jay Brown and Richard Steuer, Mayer Brown.

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

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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.

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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

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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,

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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

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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

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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

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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

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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.

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DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent PepsiCo, Inc. (“PepsiCo” or “Respondent”), of carbonated soft drink bottlers Pepsi Bottling Group, Inc. (“PBG”), and PepsiAmericas, Inc. (“PAS”), and the subsequent proposed acquisition and associated agreements for PepsiCo to acquire rights to produce, distribute, market, and sell some of the carbonated soft drink brands of Dr Pepper Snapple Group, Inc. (“DPSG”), that had been distributed by PBG and PAS, and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Acts and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having modified the draft Complaint and the draft Decision and Order in certain respects, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and issues the following Decision and Order (“Order”):

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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. The Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. “PepsiCo” or “Respondent” means PepsiCo, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by PepsiCo, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each; after the Acquisition, PepsiCo includes PBG and PAS.
- B. “Acquisition” means the acquisition by PepsiCo of PBG and PAS.
- C. “Additional Firewalled PepsiCo Personnel” means those employees that are identified and approved pursuant to Paragraph II.C. of this Order
- D. “Bottler” means an entity licensed by a Concentrate Company to produce, distribute, market, price, and sell carbonated soft drink products under the brands of that Concentrate Company.
- E. “Bottler Functions” means the following activities, and no others, of a Bottler, which are typical of a Bottler

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that no Concentrate Company owns or has a controlling interest in: (1) purchasing concentrate from one or more Concentrate Companies for use in the production of carbonated soft drinks, (2) producing carbonated soft drinks, (3) marketing, advertising, promoting, distributing, pricing, and selling carbonated soft drinks, (4) implementing the marketing, advertising, and promotional programs of the Concentrate Company, (5) determining and coordinating the amount or timing of funding of retail-related promotions of carbonated soft drinks for that retailer's operations for the brands of carbonated soft drink products of more than one Concentrate Company, and (6) formulating and engaging in marketing, advertising, or promotional activities for the brands of carbonated soft drink products of more than one Concentrate Company within the Territories or across geographic areas broader than the Territories; *provided, however*, that no Concentrate-Related Functions are included in Bottler Functions. For the avoidance of doubt, for purposes of this Order, Bottler Functions include those of PepsiCo as a Bottler.

- F. "Commission" means the Federal Trade Commission.
- G. "Concentrate Company" means a company that formulates concentrate for the production of carbonated soft drink products and other beverages and sells the concentrate to Bottlers. For the avoidance of doubt, for purposes of this Order, PepsiCo and DPSG are Concentrate Companies.
- H. "Concentrate-Related Functions" means the activities of a Concentrate Company that are typical of a Concentrate Company operating separately from and independently of any Bottler in which it may have an interest, including: (1) setting the price of the concentrate sold by the Concentrate Company and selling that concentrate, (2) making decisions with respect to formulating and introducing new brands and flavors to offer to Bottlers, (3) making decisions with respect to introducing new flavors and package sizes

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of existing brands, (4) formulating and designing marketing and advertising programs of the Concentrate Company, and (5) determining whether, to what extent, and when the Concentrate Company will fund Promotional Activities. For the avoidance of doubt, for purposes of this Order, Concentrate-Related Functions include those of PepsiCo.

- I. "DMA" means the Designated Market Areas or geographic areas defined by Nielsen Media Research Company.
- J. "DPSG" means Dr Pepper Snapple Group, Inc., 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.
- K. "DPSG Beverages" means carbonated soft drink products sold by PepsiCo in the Territories under the DPSG brands and all package sizes and flavors sold under those brands, including fountain sales; DPSG Beverages also includes any new sizes and flavors introduced by DPSG and carried by PepsiCo in the Territories.
- L. "DPSG Bottler Functions" means Bottler Functions related to DPSG Beverages.
- M. "DPSG Commercially Sensitive Information" means all information provided, disclosed, or otherwise made available by DPSG to PepsiCo relating to DPSG Beverages that is not in the public domain, including but not limited to information related to the research, development, production, marketing, advertising, promotion, pricing, distribution, sales, or after-sales support of DPSG Beverages; DPSG Commercially Sensitive Information includes (1) DPSG Information Relating to Concentrate-Related Functions and (2) DPSG Information Relating to Bottler Functions.

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- N. “DPSG Concentrate-Related Functions” means Concentrate-Related Functions related to DPSG Beverages.
- O. “DPSG Information Relating to Bottler Functions” means DPSG Commercially Sensitive Information Relating to DPSG Bottler Functions; DPSG Information Relating to Bottler Functions includes no more than the type of information that DPSG provided to its Bottlers in the Territories prior to the Acquisition; *provided, however*, that DPSG Information Relating to Bottler Functions may not necessarily include all such information.
- P. “DPSG Information Relating to Concentrate Functions” means DPSG Commercially Sensitive Information relating to DPSG Concentrate-Related Functions.
- Q. “DPSG Information Relating to Independent DPSG Promotions” means DPSG Commercially Sensitive Information relating to planned Promotional Activities for DPSG Beverages that are separate from and independent of planned Promotional Activities for PepsiCo Beverages.
- R. “DPSG National Accounts” means those retailers that sell DPSG Beverages in the Territories (or those retailers that do not sell DPSG Beverages in the Territories but that DPSG is calling on to persuade them to sell DPSG Beverages in the Territories) to which DPSG makes account calls in support of the DPSG Beverages sold by PepsiCo in the Territories.
- S. “Legal or Regulatory Functions” means activities necessary to comply with financial or other regulatory requirements, obtain or provide legal advice, or otherwise comply with applicable laws and regulations.

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- T. “License Transaction” means the agreement between PepsiCo and DPSG containing a license to produce, distribute, market, price, and sell DPSG Beverages in the United States, dated on or about December 7, 2009.
- U. “MSA” means the Metropolitan or Micropolitan Statistical Areas or geographic areas defined by the U.S. Office of Management and Budget.
- V. “Management Documents” means all electronic and computer files and written, recorded, and graphic materials of every kind, including copies of documents that are not identical duplicates of the originals, that were written by, addressed to, or delivered to, officials with managerial, oversight, or reviewing responsibilities.
- W. “Monitor” means the person appointed by the Commission pursuant to Paragraph III. of this Order.
- X. “National Accounts Sales Team” means the PepsiCo Bottling Operations Personnel who (1) call on DPSG National Accounts and (2) determine and formulate the level and timing of Promotional Activities in support of PepsiCo Beverages sold by PepsiCo in the Territories that do not include DPSG Beverages.
- Y. “PAS” means PepsiAmericas, Inc., 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.
- Z. “PBG” means The Pepsi Bottling Group, Inc., 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.

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- AA. “PepsiCo Beverages” means PepsiCo brands of carbonated soft drink products and all package sizes and flavors thereof; PepsiCo Beverages shall not include DPSG Beverages.
- BB. “PepsiCo Bottling Operations Personnel” means the persons, functions, or positions of or within PepsiCo that satisfy all of the criteria described in Paragraph II. of this Order; “PepsiCo Bottling Operations Personnel” as of the date the Agreement Containing Consent Order is executed shall include, but not be limited to, the names, functions, or positions described in Appendix A to this Order (“List”) and all people who report (directly or indirectly) to such names, functions, or positions; the List shall indicate those who have limited access under paragraph II.A; all changes to the PepsiCo Bottling Operations Personnel shall be in accordance with the procedure described in Paragraph II. of this Order.
- CC. “Promotional Activities” means price promotions, end-aisle displays, and newspaper inserts.
- DD. “Relating To” means discussing, analyzing, summarizing, describing, or constituting, but not merely referring to.
- EE. “Territories” means, for each brand, those territories shown in Appendix B.

II.**IT IS FURTHER ORDERED** that:

- A. PepsiCo shall use DPSG Commercially Sensitive Information only under the following conditions:
1. the DPSG Commercially Sensitive Information consists only of DPSG Information Relating to Bottler Functions;

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2. the DPSG Commercially Sensitive Information is provided, disclosed, or otherwise made available only to PepsiCo Bottling Operations Personnel or to Additional Firewalled PepsiCo Personnel;
3. PepsiCo Bottling Operations Personnel shall include only those persons, functions, or positions that:
 - a. are responsible for Bottler Functions or Legal or Regulatory Functions only; *provided, however*, that persons, functions, or positions included within “PepsiCo Bottling Operations Personnel” because they are responsible for Legal or Regulatory Functions shall have access to and use of such DPSG Commercially Sensitive Information only to the extent such information is necessary to perform such Legal or Regulatory Functions;
 - b. are not responsible for Concentrate-Related Functions, and if any such person, function, or position reports (directly or indirectly) to a person responsible for Concentrate-Related Functions, that person, function, or position shall not disclose, provide, or otherwise make available DPSG Commercially Sensitive Information to the person responsible (directly or indirectly) for Concentrate-Related Functions; and
 - c. do not receive bonus or other tangible benefits related to the marginal sale of PepsiCo Beverages as a disproportionate benefit to any bonus or tangible benefit related to the marginal sale of DPSG Beverages;
4. an executed non-disclosure agreement and a statement attesting that he or she has received a copy of this Order, will comply with its terms, and will take all reasonable steps to assure that

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employees that report to him or her will comply with its terms:

- a. shall be submitted to the staff of the Commission by each person specifically identified in Appendix A no later than twenty (20) days after Respondent executes the Agreement Containing Consent Order; and
 - b. by each PepsiCo Bottling Operations Personnel who replaces any of those specifically identified in Appendix A or who are given responsibilities comparable to those people specifically identified in Appendix A no later than ten (10) days after assuming those responsibilities;
5. the DPSG Commercially Sensitive Information is used only in connection with DPSG Bottler Functions, or solely for the purpose of Legal or Regulatory Functions;
 6. the DPSG Commercially Sensitive Information is used only in the Territories;
 7. the DPSG Commercially Sensitive Information is not used in connection with Concentrate-Related Functions in any way, such prohibition to include but not be limited to using the information even if the DPSG Commercially Sensitive Information is not itself revealed;
 8. all DPSG documents and copies of documents reflecting or containing DPSG Commercially Sensitive Information (whether in the form provided by DPSG or in a form created by PepsiCo) are maintained as confidential until the earlier of five (5) years or when DPSG Commercially Sensitive Information becomes public through no act of PepsiCo; and

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9. DPSG Information Relating to DPSG Independent Promotions shall not be provided to the National Accounts Sales Team any time prior to the disclosure of such information to any Bottler other than PepsiCo.
- B. PepsiCo shall change the PepsiCo Bottling Operations Personnel only pursuant to the following procedures:
1. replacing individuals who report (directly or indirectly) to the people, functions, or positions specifically identified in Appendix A shall be in accordance with the usual and customary business practices of PepsiCo;
 2. replacing any of the people specifically identified in Appendix A or re-organizing functions or positions specifically identified in Appendix A shall be in accordance with the usual and customary business practices of PepsiCo after notification to the Monitor;
 3. adding new functions or positions that are not specifically identified in Appendix A shall require prior notification to the Monitor and staff of the Federal Trade Commission in accordance with the following:
 - a. the staff shall have ten (10) days from notification to consider the proposed change; and
 - b. if the staff does not object to the change within ten (10) days of its notification, PepsiCo shall be permitted to make the change.
- C. PepsiCo shall disclose DPSG Commercially Sensitive Information to Additional Firewalled PepsiCo Personnel only under the following conditions:
1. such Additional Firewalled PepsiCo Personnel:

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- a. are employees or agents of PepsiCo; and
 - b. are approved by DPSG, receive only the limited information approved by DPSG, for the time period approved by DPSG, all according to the procedure described in ¶ II.C.2. of the Order, below.
2. PepsiCo shall comply with the following procedure in connection with Additional Firewalled PepsiCo Personnel:
 - a. PepsiCo shall submit the name, position, and function of any proposed Additional Firewalled PepsiCo Personnel to DPSG, the Monitor, and Commission staff, together with a statement of the reasons for the need to include such person, the specific DPSG Information Relating to Bottler Functions that is necessary to be shared, and the time period during which the information is intended to be shared;
 - b. DPSG shall notify PepsiCo, the Monitor, and Commission staff within twenty (20) days whether or not it objects to the proposal;
 - c. if DPSG does not object within twenty (20) days of receiving notification of the proposal, PepsiCo shall notify the Commission staff;
 - d. if Commission staff does not object within ten (10) days of its notification that DPSG does not object, the person shall be an Additional Firewalled PepsiCo Personnel; and
 - e. PepsiCo must obtain from each Additional Firewalled PepsiCo Personnel an executed non-disclosure agreement and a statement attesting that he or she has received a copy of this Order and will comply with its terms.

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- D. PepsiCo shall develop and implement procedures with respect to DPSG Commercially Sensitive Information, with the advice and assistance of the Monitor, to comply with the requirements of this Order.
1. such procedures shall assure, without limitation, that DPSG Commercially Sensitive Information is:
 - a. disclosed only if it is DPSG Information relating to Bottler Functions;
 - b. disclosed only to PepsiCo Bottling Operations Personnel or to Additional Firewalled PepsiCo Personnel;
 - c. used solely for DPSG Bottler Functions in the Territories or Legal or Regulatory Functions and not for Concentrate-Related Functions; and
 - d. maintained confidentially;
 2. such procedures shall include, without limitation:
 - a. monitoring compliance;
 - b. enforcing compliance with appropriate remedial action in the event of non-compliant use or disclosure;
 - c. distributing information regarding the procedures annually to all employees of PepsiCo associated with its carbonated soft drink products; and
 - d. requiring that the PepsiCo Bottling Operations Personnel and the Additional Firewalled PepsiCo Personnel comply with the requirements of this Order.

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III.**IT IS FURTHER ORDERED** that:

- A. At any time after PepsiCo signs the Consent Agreement in this matter, the Commission may appoint a monitor (“Monitor”) to assure that PepsiCo complies with all obligations and performs all responsibilities required by this Order.
- B. The Commission shall select the Monitor, subject to the consent of PepsiCo, which consent shall not be unreasonably withheld. If PepsiCo has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to PepsiCo of the identity of any proposed Monitor, PepsiCo shall be deemed to have consented to the selection of the proposed Monitor.
- C. Not later than ten (10) days after the appointment of the Monitor, PepsiCo shall execute an agreement that, subject to the prior approval of the Commission, confers upon the Monitor all the rights and powers necessary to permit the Monitor to monitor PepsiCo’s compliance with the requirements of this Order.
- D. If a Monitor is appointed by the Commission, PepsiCo shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:
 - 1. The Monitor shall have the power and authority to monitor PepsiCo’s compliance with the requirements of this Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the underlying purpose of this Order and in consultation with the Commission. In carrying out its functions, the Monitor is authorized (among other appropriate things) to

Decision and Order

provide specific information to Commission staff as to whether:

- a. DPSG Commercially Sensitive Information provided to PepsiCo is DPSG Information Relating to Bottler Functions;
 - b. DPSG Information relating to Bottler Functions is conveyed only to Pepsico Bottling Operations Personnel or to Additional Firewalled PepsiCo Personnel; and
 - c. DPSG Information Relating to Bottler Functions that is conveyed to the PepsiCo Bottling Operations Personnel or to Additional Firewalled PepsiCo Personnel is used solely for the purpose of carrying out DPSG Bottler Functions or Legal or Regulatory Functions.
2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
 3. The Monitor shall serve until five (5) years after the License Transaction is effective; *provided, however,* that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purpose of this Order.
 4. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to PepsiCo's personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to PepsiCo's compliance with its obligations under this Order. PepsiCo shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor PepsiCo's compliance with this Order.

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5. The Monitor shall serve, without bond or other security, at the expense of PepsiCo, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of PepsiCo, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.
6. PepsiCo shall indemnify the Monitor and hold the Monitor harmless against all losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Monitor.
7. PepsiCo shall report to the Monitor in accordance with the requirements of this Order. The Monitor shall evaluate the reports submitted to the Monitor by PepsiCo. Within thirty (30) days from the date the Monitor receives these reports, the Monitor shall report in writing to the Commission concerning performance by PepsiCo of its obligations under this Order.
8. PepsiCo may require the Monitor and each of the Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, that such agreement shall not restrict the Monitor (and its representatives) from providing any information to the Commission.

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9. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.
10. In the event the Commission determines that the Monitor has ceased to act or failed diligently to act, the Commission may appoint a substitute Monitor in the same manner as provided in this Paragraph.
11. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.

IV.

IT IS FURTHER ORDERED that, for the term of this Order, if PepsiCo intends to acquire a Bottler that is licensed to distribute PepsiCo Beverages anywhere in the United States and is also licensed to distribute DPSG Beverages in geographic areas outside of the Territories ("To-Be-Acquired Bottler"), PepsiCo may use DPSG Commercially Sensitive Information relating to the specific brand or brands in the geographic areas covered by the To-Be-Acquired Bottler's license for the DPSG Beverages, after PepsiCo's acquisition of the To-Be-Acquired Bottler, as long as PepsiCo complies with the obligations of Paragraph II.A. 1. - 5., and 7. - 9. of this Order, and satisfies the following additional conditions:

- A. PepsiCo shall comply with the obligations of this Order with respect to that DPSG Commercially Sensitive Information;
- B. For acquisitions of To-Be-Acquired Bottlers that are subject to Section 7A of the Clayton Act, 15 U.S.C. § 18a ("HSR Act"), PepsiCo shall also comply with the

Decision and Order

reporting and waiting obligations of the HSR Act and the rules promulgated thereunder, 16 C.F.R. § 800 et seq.;

- C. For acquisitions of To-Be-Acquired Bottlers that are not subject to the HSR Act:
1. PepsiCo shall provide at least forty-five (45) days' advance written notification of the acquisition to the staff of the Commission, such notification to include:
 - a. the name, headquarters address, telephone number, and name of contact person of the To-Be-Acquired Bottler;
 - b. a description of the proposed acquisition and the assets to be acquired, and the acquisition price;
 - c. a copy of all existing and draft licenses and performance obligations entered into or anticipated to be entered into between DPSG, Respondent, and/or the To-Be-Acquired Bottler;
 - d. a description of the geographic areas in which the To-Be-Acquired Bottler is licensed, and in which PepsiCo is anticipated to be licensed, to produce, distribute, market, price, or sell PepsiCo Beverages, and, to the extent PepsiCo has such information, a description of the geographic areas in which the To-Be-Acquired Bottler is licensed to produce, distribute, market, price, or sell DPSG Beverages;
 - e. the date each license or anticipated license was, or is expected to be, entered into between DPSG, Respondent, and/or the To-Be-Acquired Bottler with respect to:

(1) PepsiCo Beverages and

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(2) DPSG Beverages;

- f. for each MSA, DMA, city, or other geographic area in which the To-Be-Acquired Bottler bottles, distributes, or sells PepsiCo Beverages and/or DPSG Beverages,

(1) for any and all carbonated soft drinks:

- (a) all Nielsen, IRI, or similar data with respect to that MSA, DMA, city, or other geographic area; and

- (b) all market share information, written or otherwise, with respect to that MSA, DMA, city, or other geographic area,

that PepsiCo has, and

- (2) for the most recent 12-month period for which PepsiCo has such information, sales in units (in constant case equivalents) and dollars, of

- (a) PepsiCo Beverages, by brand, of the To-Be-Acquired Bottler, and

- (b) concentrate, by brand, to the To-Be-Acquired Bottler;

- g. all documents Relating To communications between Respondent, DPSG, and the To-Be-Acquired Bottler with respect to the acquisition of the To-Be-Acquired Bottler, the DPSG Beverage licenses, expected licenses, or performance obligations; and

- h. all Management Documents Relating To the proposed acquisition;

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2. Early termination of the 45-day period described in Paragraph IV.C.1. may be requested and, where appropriate, granted by letter from the Director of the Bureau of Competition; and
3. If, after notification of the proposed transaction (including the information specified in Paragraph IV.C.1. a. - h.), representatives of the Commission make a written request for additional information or documentary material with respect to the acquisition of the To-Be-Acquired Bottler, PepsiCo shall respond expeditiously and submit all such additional information and documentary material and certify substantial compliance with the request;

provided, however, that a determination that PepsiCo has complied with the obligations contained in this Paragraph IV. in connection with its acquisition of a To-Be-Acquired Bottler shall not be construed as a determination by the Commission, or its staff, that the acquisition of the To-Be-Acquired Bottler does or does not violate any law enforced by the Commission; and provided further that nothing contained herein shall preclude the Commission or its staff from investigating the acquisition or proposed acquisition by PepsiCo of any Bottler, including a To-Be-Acquired Bottler, and seeking any relief available under any statute enforced by the Commission.

V.**IT IS FURTHER ORDERED** that:

- A. Within thirty (30) days after this Order becomes final, PepsiCo shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order.
 1. PepsiCo shall include in its report, among other information that may be required, a list of all Bottlers of PepsiCo Beverages that, at the time of submission of the list, also bottle DPSG

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Beverages; for each such Bottler, PepsiCo shall list:

- a. each brand of PepsiCo Beverages that such Bottler is licensed to distribute, together with a description of the geographic areas in which each brand is licensed to be distributed; and
 - b. each brand of DPSG Beverages that such Bottler is distributing anywhere in each county within each geographic area described in Paragraph V.A.1.a. to the extent that PepsiCo has this information or can obtain it from industry publications to which it subscribes.
2. PepsiCo shall at the same time also provide a copy of its report concerning compliance with this Order to any Monitor that may have been appointed.
- B. One (1) year after this Order becomes final, annually for the next nineteen (19) years on the anniversary of that date, and at other times as the Commission may require:
1. PepsiCo shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied, and is complying, with this Order.
 2. PepsiCo shall also include in each of its annual reports:
 - a. any changes to the list of Bottlers of PepsiCo Beverages submitted under Paragraph V.A. of this Order, including any deletions, additions, or other changes; and
 - b. for all To-Be-Acquired Bottlers acquired by PepsiCo during the previous year, a description of the geographic areas in which the To-Be-Acquired Bottler is licensed to produce,

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distribute, market, price, or sell each DPSG Beverage.

VI.

IT IS FURTHER ORDERED that PepsiCo shall notify the Commission at least thirty (30) days prior to:

- A. Any proposed dissolution of PepsiCo;
- B. Any proposed acquisition, merger, or consolidation of PepsiCo;
- C. Any other change in PepsiCo including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

VII.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to PepsiCo made to its principal United States offices, registered office of its United States subsidiary, or headquarters address, PepsiCo shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during business office hours of PepsiCo and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of PepsiCo related to compliance with this Order, which copying services shall be provided by PepsiCo at the request of the authorized representative(s) of the Commission and at the expense of PepsiCo.
- B. The opportunity to interview officers, directors, or employees of PepsiCo, who may have counsel present, related to compliance with this Order.

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VIII.

IT IS FURTHER ORDERED that this Order shall terminate on September 27, 2030.

By the Commission, Commissioner Ramirez recused.

Decision and Order

APPENDIX A**PEPSICO BOTTLING OPERATIONS PERSONNEL****(Dated as of September 27, 2010)**

CEO, Pepsi Beverages Company, who at the time of the closing of the Acquisition will be Eric Foss:

- The CEO will be responsible for all bottler operations.
- The CEO, all of his direct reports, and the entire organization below them, will be part of the PepsiCo Bottling Operations, referred to as “Pepsi Beverages Company” by Respondent; all will have only Bottling Functions and no Concentrate-Related Functions.
- CEO will report to the CEO of PepsiCo (who at the time of the closing of the Acquisition is Indra Nooyi).

President, North America Field Operations, who at the time of the closing of the Acquisition will be Mike Durkin:

- This position will be responsible for operations in the U.S., Canada, and Mexico.
- This position will oversee Pepsi Beverages Company’s day-to-day field operations with responsibility for developing and delivering the annual operating plan of Pepsi Beverages Company.
- This position will report directly to CEO, Pepsi Beverages Company.

Executive Vice President and Chief Commercial Officer, who at the time of the closing of the Acquisition will be Tom Greco:

- This position will lead the retail selling efforts across the U.S. and Canada.
- This position will have responsibility for national accounts, channel strategy, shopper insights, field marketing and category management for the bottling organization.
- This position will manage sales for the warehouse-delivered beverages.
- This position will have a dual reporting relationship to CEO of Pepsi Beverages Company and to CEO of PepsiCo Beverages Americas (PBA), who at the time of

Decision and Order

APPENDIX A

the closing of the Acquisition is Massimo d'Amore, for other PepsiCo products, such as Tropicana and Gatorade. There will be a firewall between this position and the CEO of PBA.

Executive Vice President, Supply Chain and System Transformation, who at the time of the closing of the Acquisition will be Victor Crawford:

- This position will be responsible for manufacturing and warehouse, transportation and logistics, selling and delivery and information technology.
- This position will report directly to CEO, Pepsi Beverages Company.

Senior Vice President of Human Resources and Integration, who at the time of the closing of the Acquisition will be John Berisford:

- This position will be responsible for all aspects of Pepsi Beverages Company's human resources function, including talent management, compensation and benefits, labor relations, diversity and communications.
- This position will report directly to CEO, Pepsi Beverages Company.

Chief Strategy Officer of Pepsi Beverages Company, who at the time of the closing of the Acquisition will be Eric Liopis:

- This position will be responsible for identifying local market opportunities, and seeking strategic distribution opportunities.
- This position will report directly to CEO, Pepsi Beverages Company.

Senior Vice President of Global Bottling Capabilities and Best Practices, who at the time of the closing of the Acquisition will be Jim Rogers:

- This position will be responsible for identifying best practices in the areas of supply chain, sales execution, and service and support tools and capabilities, and bringing

Decision and Order

APPENDIX A

these practices and initiatives throughout the broader global PepsiCo organization.

- This position will report directly to CEO, Pepsi Beverages Company.

General Counsel of Pepsi Beverages Company, who at the time of the closing of the Acquisition will be Dave Yawman:

- This position will be responsible for overseeing Pepsi Beverages Company's legal, regulatory and legislative affairs and manage both internal and external counsel.
- This position will report directly to CEO, Pepsi Beverages Company.

Senior Vice President and Chief Financial Officer, who at the time of the closing of the Acquisition will be Cindy Swanson:

- This position will be responsible for leading the integration of the finance functions of PBG and PAS - as public companies - into the larger PepsiCo organization.
- This position is also responsible for analyzing and refining financial algorithms to help plan for overall system transformation and long-term performance.
- This position will report directly to CEO, Pepsi Beverages Company.

Decision and Order

APPENDIX B

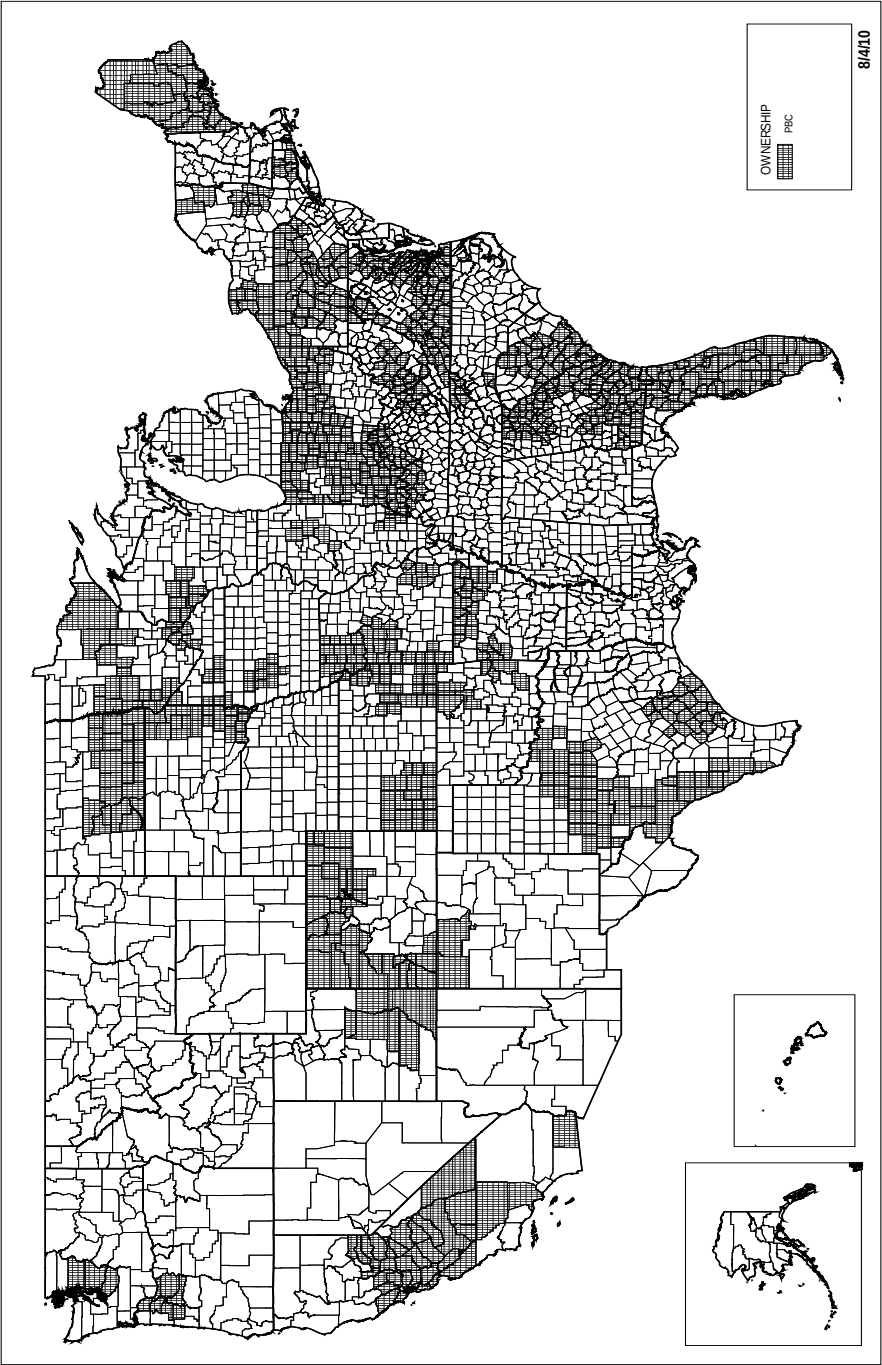
Appendix B includes the following maps:

1. PEPSI BEVERAGES COMPANY
DR PEPPER FOOTPRINT
8/4/10
2. PEPSI BEVERAGES COMPANY
7UP FOOTPRINT
8/4/10
3. PEPSI BEVERAGES COMPANY
A&W FOOTPRINT
8/4/10
4. PEPSI BEVERAGES COMPANY
CANADA DRY FOOTPRINT
8/4/10
5. PEPSI BEVERAGES COMPANY
CRUSH FOOTPRINT
8/4/10
6. PEPSI BEVERAGES COMPANY
SUNKIST FOOTPRINT
8/4/10
7. PEPSI BEVERAGES COMPANY
SQUIRT FOOTPRINT
8/4/10
8. PEPSI BEVERAGES COMPANY
SCHWEPPES FOOTPRINT
8/4/10
9. PEPSI BEVERAGES COMPANY
VERNORS FOOTPRINT
8/4/10

Decision and Order

APPENDIX B

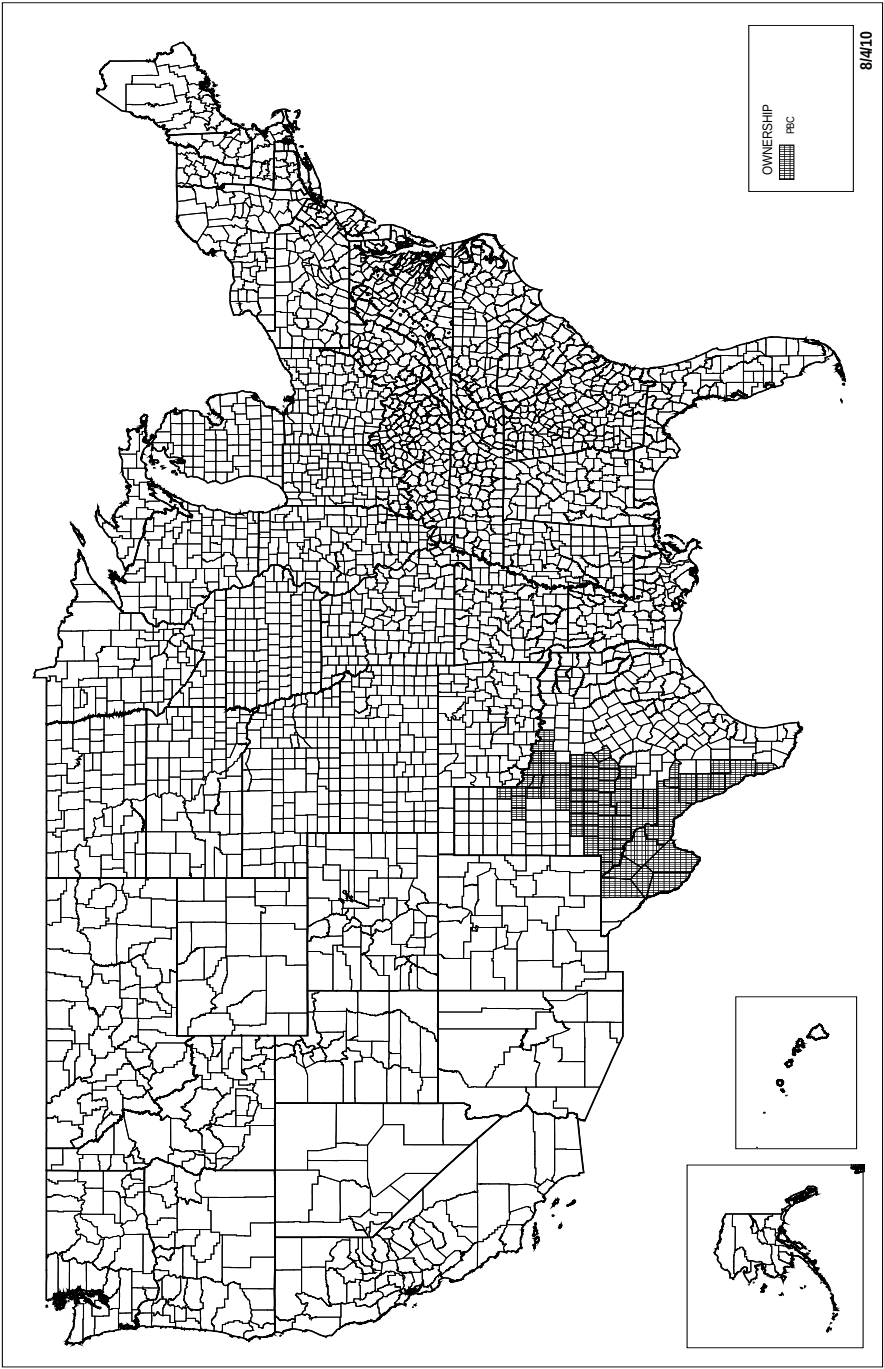
PEPSI BEVERAGES COMPANY
DR PEPPER FOOTPRINT



Decision and Order

APPENDIX B

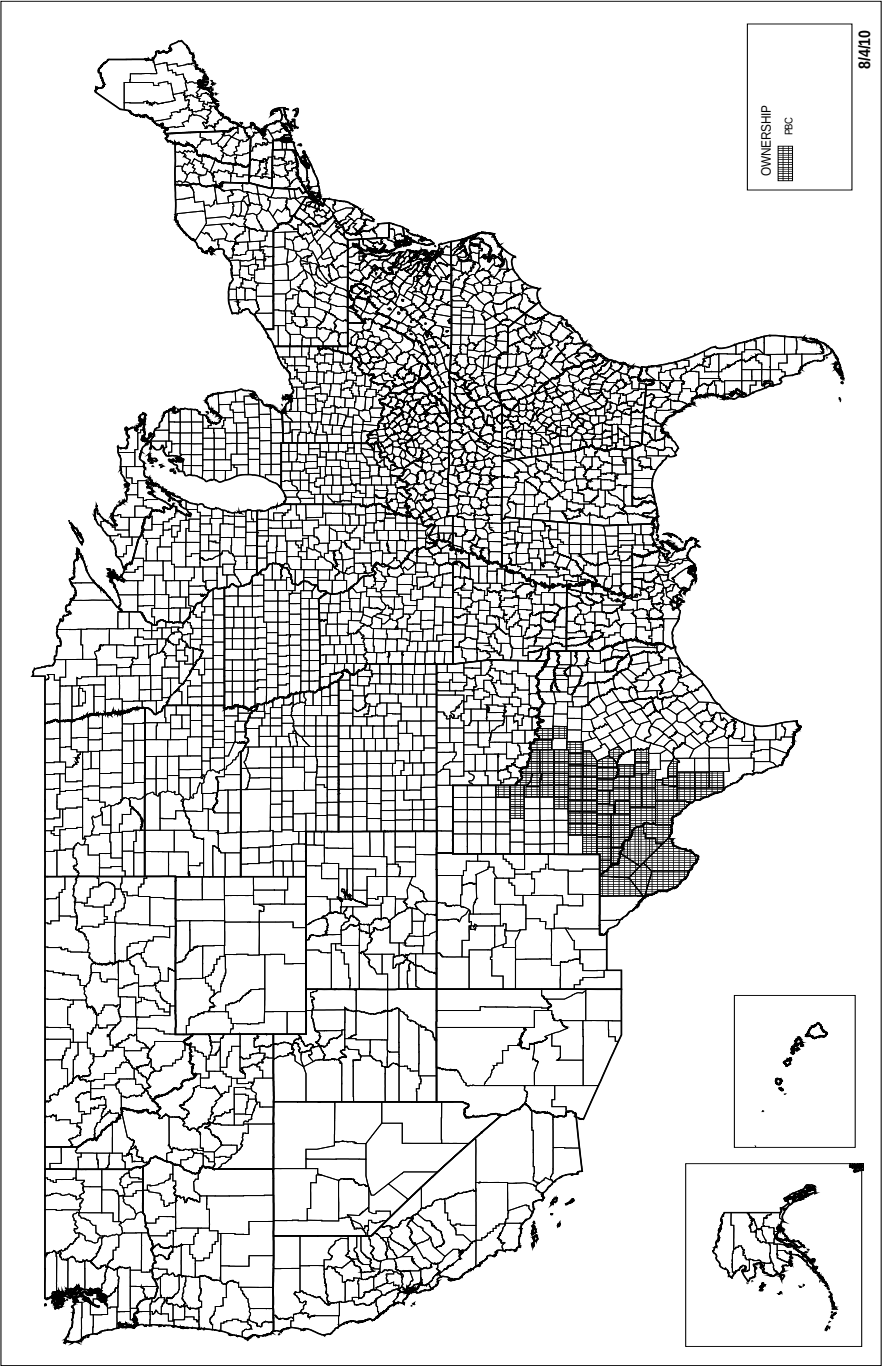
PEPSI BEVERAGES COMPANY
7UP FOOTPRINT



Decision and Order

APPENDIX B

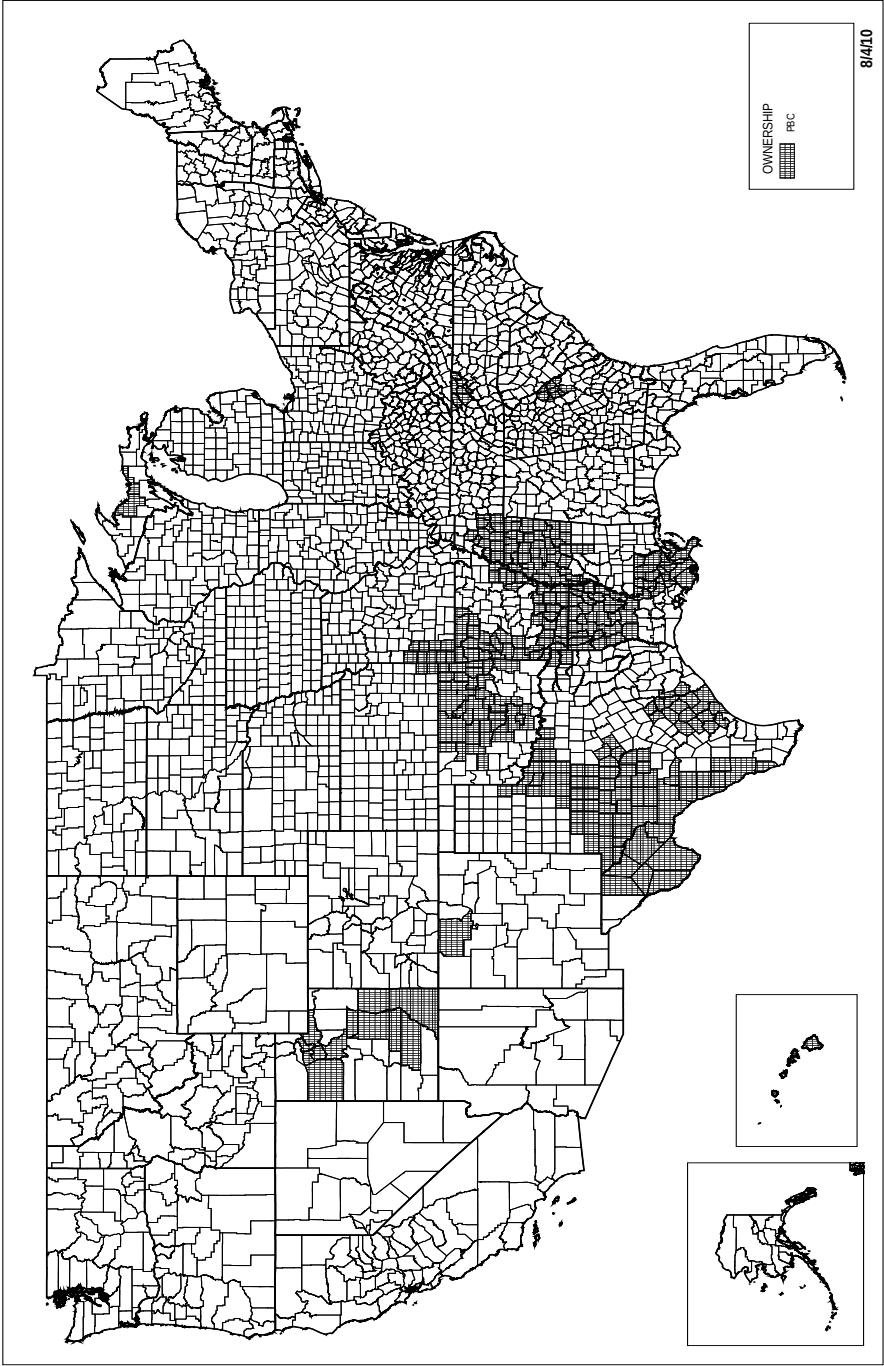
PEPSI BEVERAGES COMPANY
A&W FOOTPRINT



Decision and Order

APPENDIX B

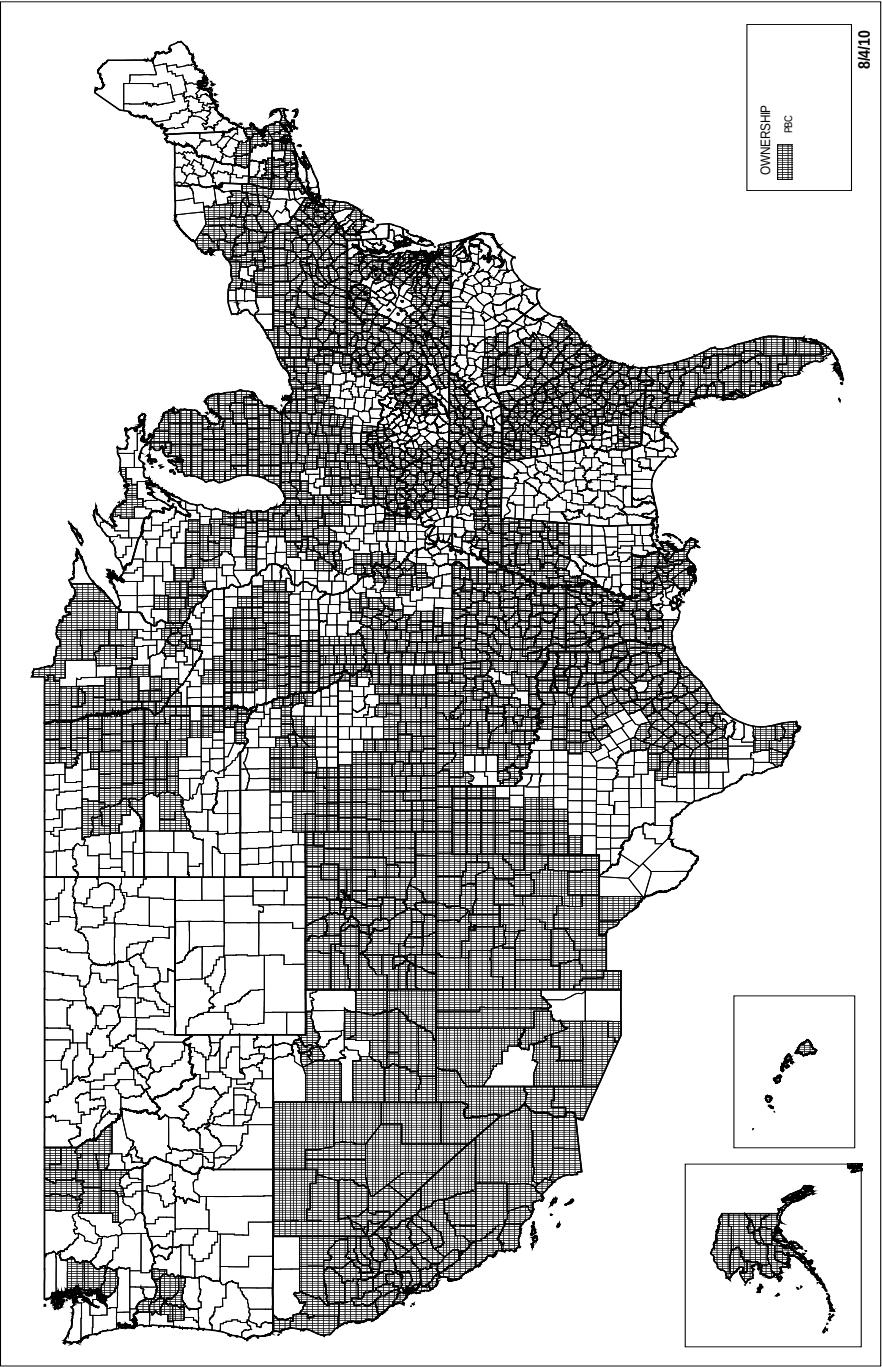
PEPSI BEVERAGES COMPANY
CANADA DRY FOOTPRINT



Decision and Order

APPENDIX B

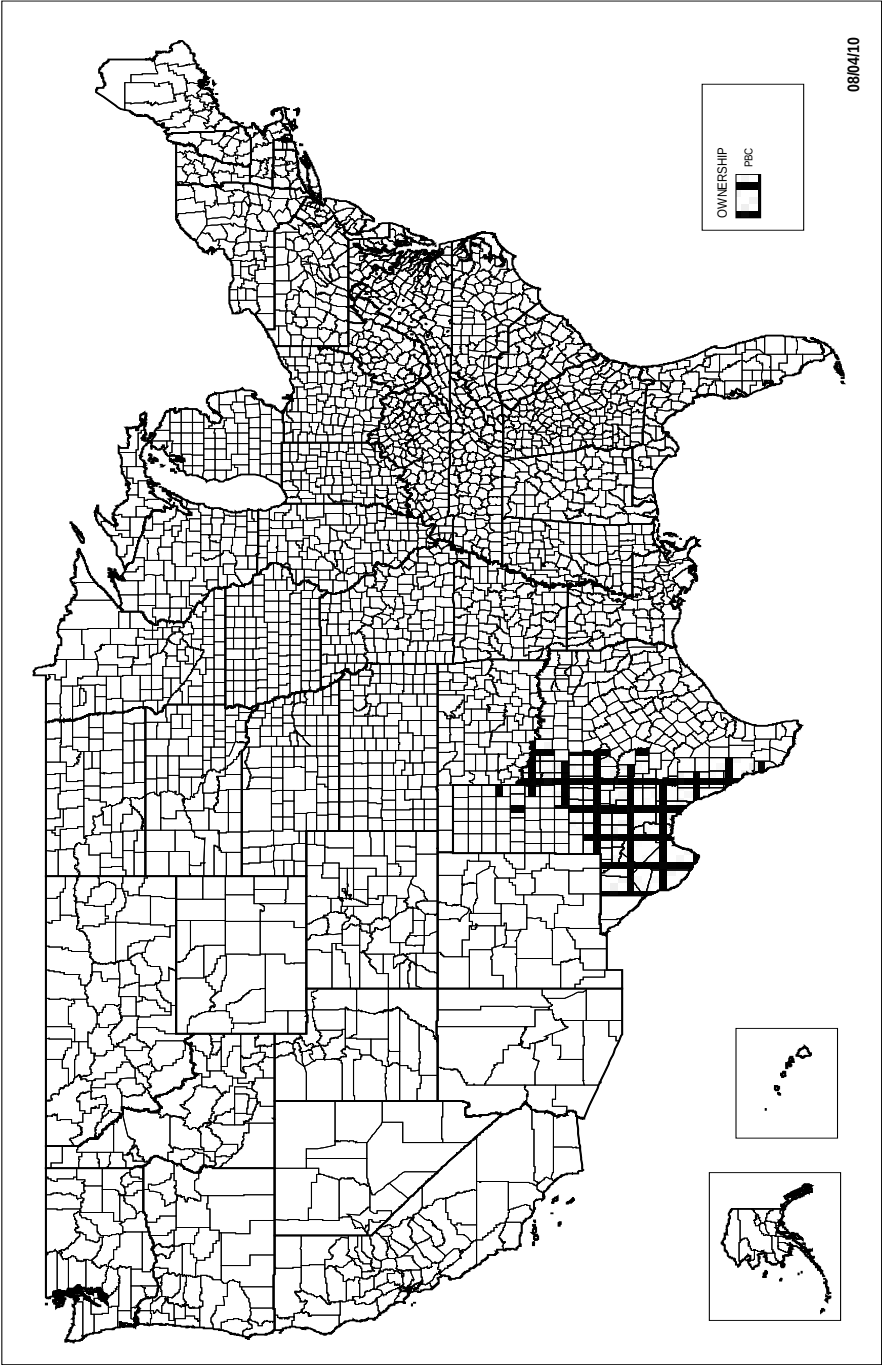
PEPSI BEVERAGES COMPANY
CRUSH FOOTPRINT



Decision and Order

APPENDIX B

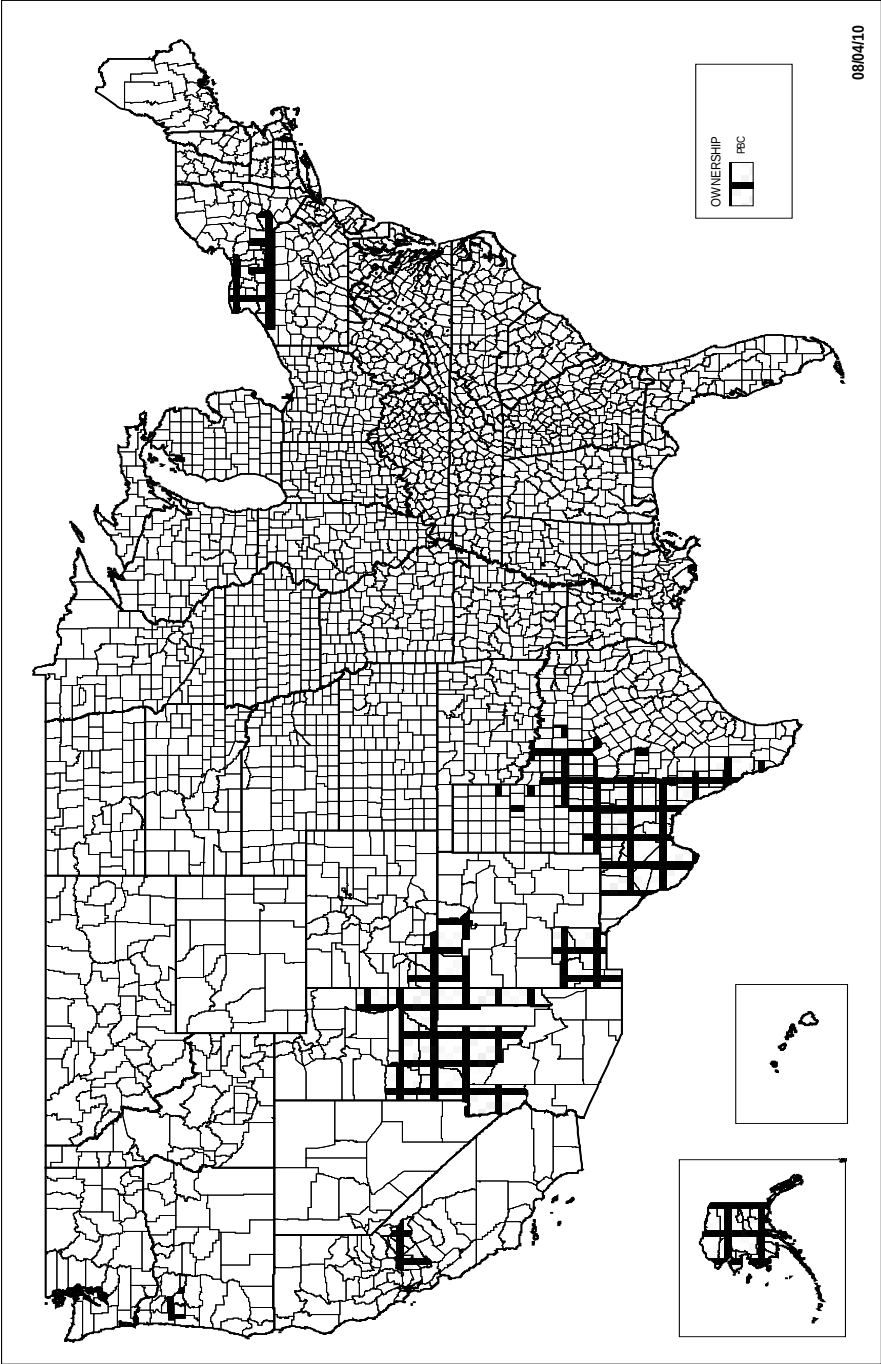
PEPSI BEVERAGES COMPANY
SUNKIST FOOTPRINT



Decision and Order

APPENDIX B

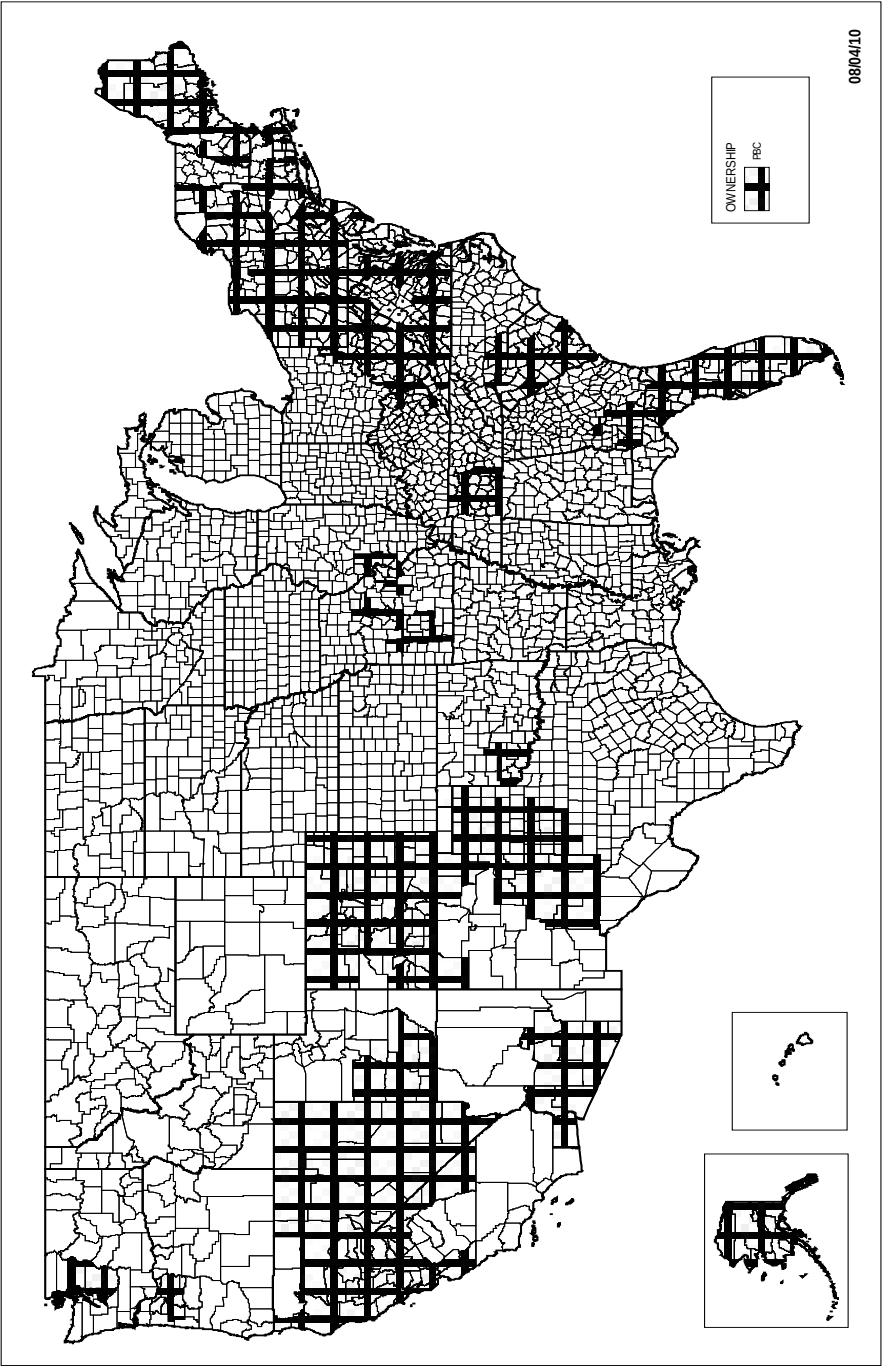
PEPSI BEVERAGES COMPANY
SQUIRT FOOTPRINT



Decision and Order

APPENDIX B

PEPSI BEVERAGES COMPANY
SCHWEPPES FOOTPRINT

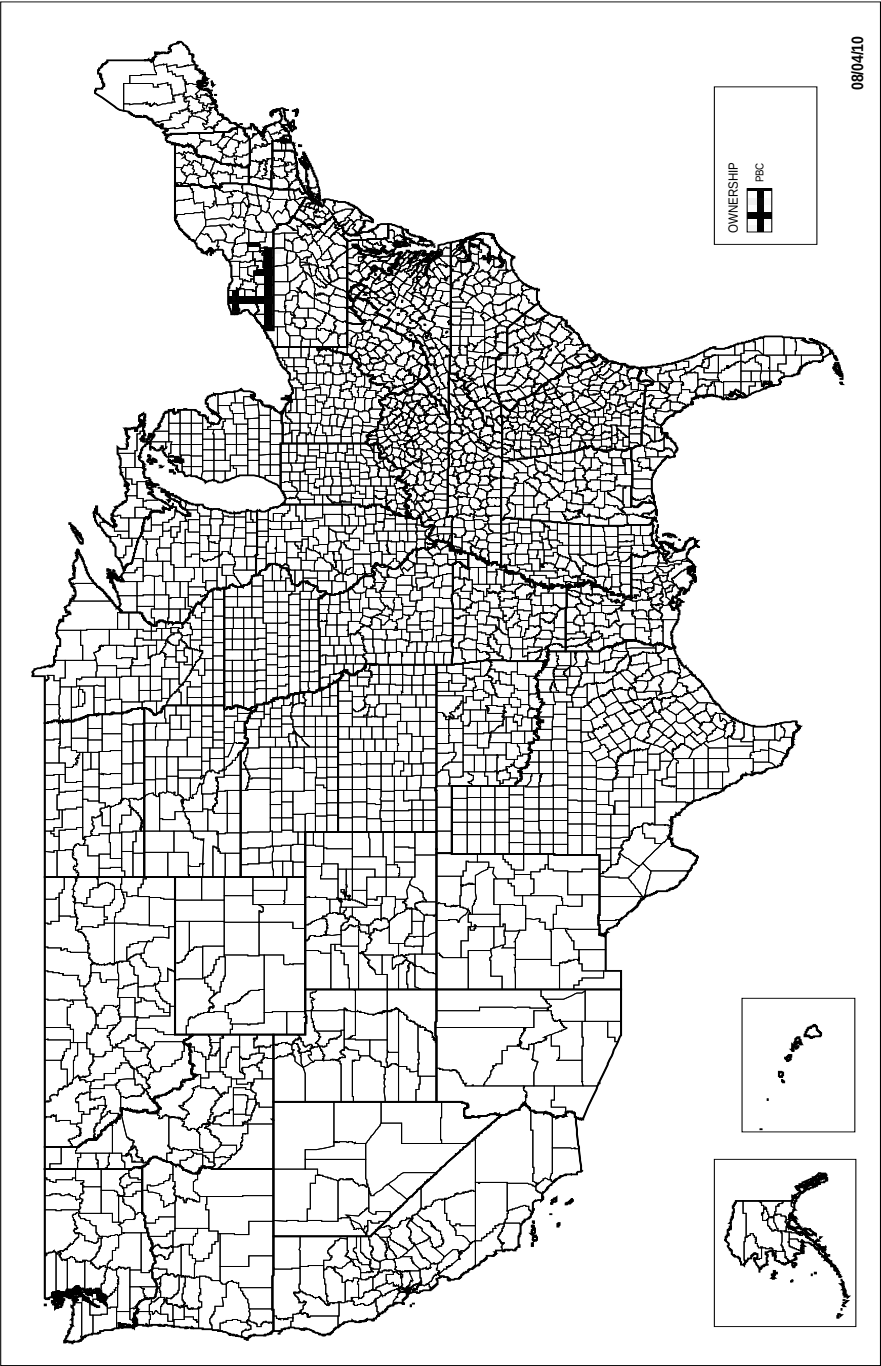


08/04/10

Decision and Order

APPENDIX B

PEPSI BEVERAGES COMPANY
VERNORS FOOTPRINT



Analysis to Aid Public Comment

**ANALYSIS OF AGREEMENT CONTAINING CONSENT
ORDER TO AID PUBLIC COMMENT****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.

Analysis to Aid Public Comment

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

Analysis to Aid Public Comment

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

Analysis to Aid Public Comment

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 produce¹ and an exclusive, twenty-year² 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 States sales

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.

Analysis to Aid Public Comment

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.

Analysis to Aid Public Comment

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.

Complaint

IN THE MATTER OF

NOVARTIS AGCONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE
COMMISSION ACT

Docket No. C-4296; File No. 101 0068
Filed August 16, 2010 — Decision, September 28, 2010

The consent order addresses allegations that Novartis AG's acquisition of Alcon, Inc. would create a monopoly in the market for injectable miotics, a class of prescription eye care drugs used during cataract surgery. The consent order requires Novartis to divest the rights and assets related to its Miochol-E miotics product to Bausch & Lomb. The consent order also requires Novartis to provide transitional services and technical assistance to Bausch & Lomb to ensure that the transfer is successful.

Participants

For the *Commission*: *Stephanie C. Bovee, Thomas D. Mays,*
David Von Nirschl, Kari Wallace, and James Weiss.

For the *Respondent*: *Michael H. Byowitz and David Schwartz,*
Wachtell, Lipton, Rosen & Katz.

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act, and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that the Respondent Novartis AG ("Novartis") has entered into an agreement to acquire 52 percent of the issued and outstanding shares of Alcon, Inc. ("Alcon") from Nestle, S.A. ("Nestle"), all subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. § 45, that such acquisition, if consummated, would violate Section 7 of the of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, 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: