# UNITED STATES OF AMERICA BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Jon Leibowitz, Chairman William F. Koyagia

William E. Kovacic J. Thomas Rosch Edith Ramirez Julie Brill

In the Matter of )

The Coca-Cola Company, a corporation.

Docket No. C-4305

## **DECISION AND ORDER**

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by The Coca-Cola Company ("TCCC"), of the North American soft drink bottling business of Coca-Cola Enterprises, Inc. ("CCE"), and the subsequent proposed acquisition and associated agreements for TCCC 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 CCE and TCCC, and TCCC (hereinafter sometimes referred to as "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, 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"):

- 1. Respondent TCCC 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 Coca-Cola Plaza, Atlanta, GA 30313.
- 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. "TCCC" or "Respondent" means The Coca-Cola Company, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by TCCC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each; after the Acquisition, TCCC includes the North American soft drink bottling business of CCE acquired in the Acquisition.
- B. "CCE" means Coca-Cola Enterprises Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by CCE, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. "Acquisition" means the acquisition by TCCC of the North American soft drink bottling business of CCE.
- D. "Additional Firewalled TCCC Personnel" means those employees that are identified and approved pursuant to Paragraph II.C. of this Order
- E. "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.

- "Bottler Functions" means the following activities, and no others, of a Bottler, which are typical of a Bottler 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 TCCC as a Bottler.
- G. "Commission" means the Federal Trade Commission.
- H. "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, TCCC and DPSG are Concentrate Companies.
- I. "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 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 TCCC.
- J. "DMA" means the Designated Market Areas or geographic areas defined by Nielsen Media Research Company.
- K. "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 infibeld Type 0.00 (rgBT133.2000 143.0400 rtu u)e(e)locaDe

- L. "DPSG Beverages" means carbonated soft drink products sold by TCCC in the United States 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 TCCC in the Territories.
- M. "DPSG Bottler Functions" means (1) Bottler Functions related to DPSG Beverages, and (2) DPSG Freestyle Functions.
- N. "DPSG Commercially Sensitive Information" means all information provided, disclosed, or otherwise made available by DPSG to TCCC 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 Func

- 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 TCCC in the
  Territories; and
- 2. those retailers that sell DPSG Beverages in Freestyle Machines (or those retailers that do not sell DPSG Beverages in Freestyle Machines but that DPSG is calling on to persuade them to sell DPSG Beverages in Freestyle Machines) to which DPSG makes account calls in support of the DPSG Beverages sold in Freestyle Machines.
- V. "Freestyle Machine" means TCCC's proprietary Freestyle™ fountain machine.
- W. "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, including this Order.
- X. "License Transaction" means:
  - the agreement between TCCC and DPSG containing a license to produce, distribute, market, price, and sell DPSG Beverages in the United States, the form of which TCCC and DPSG agreed upon on June 7, 2010; and
  - 2. the Freestyle Participation Agreement in the form of which TCCC and DPSG agreed upon on June 7, 2010.

- DD. "Relating To" means discussing, analyzing, summarizing, describing, or constituting, but not merely referring to.
- EE. "TCCC Beverages" means TCCC brands of carbonated soft drink products and all package sizes and flavors thereof; TCCC Beverages shall not include DPSG Beverages.
- FF. "TCCC Bottling Operations Personnel" means the persons, functions, or positions of or within TCCC that satisfy all of the criteria described in Paragraph II. of this Order; "TCCC 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 TCCC Bottling Operations Personnel shall be in accordance with the procedure described in Paragraph II. of this Order.
- GG. "Territories" means, for each brand, those territories shown in Appendix B.

II.

#### **IT IS FURTHER ORDERED** that:

- A. TCCC 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;
  - 2. the DPSG Commercially Sensitive Information is provided, disclosed, or otherwise made available only to TCCC Bottling Operations Personnel or to Additional Firewalled TCCC Personnel;
  - 3. TCCC 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 "TCCC 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;

- a. TCCC shall submit the name, position, and function of any proposed Additional Firewalled TCCC 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 TCCC, the Monitor (if so appointed), 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, TCCC shall notify the Commission staff;
- d. if Commission staff does not object, in writing including its reasons for objecting, within ten (10) days of its notification that DPSG does not object, the person shall be an Additional Firewalled TCCC Personnel; and
- e. TCCC must obtain from each Additional Firewalled TCCC Personnel an executed non-disclosure ahe pers

- a. monitoring compliance;
- b. enforcing compliance with appropriate remedial action in the event of non-compliant use or disclosure;
- distributing information regarding the procedures annually to all employees of TCCC associated with its carbonated soft drink products; and
- d. requiring that the TCCC Bottling Operations Personnel and the Additional Firewalled TCCC Personnel comply with the requirements of this Order.

III.

## IT IS FURTHER ORDERED that:

- A. At any time after TCCC signs the Consent Agreement in this matter, the Commission may appoint a monitor ("Monitor") to assure that TCCC complies with all obligations and performs all responsibilities required by this Order.
- B. The Commission shall select the Monitor, subject to the consent of TCCC, which consent shall not be unreasonably withheld. If TCCC 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 TCCC of the identity of any proposed Monitor, TCCC 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, TCCC 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 TCCC's compliance with the requirements of this Order.
- D. If a Monitor is appointed by the Commission, TCCC shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilit Mb.0000 T00 0.00 (

- a. DPSG Commercially Sensitive Information provided to TCCC is DPSG Information Relating to Bottler Functions;
- DPSG Information relating to Bottler Functions is conveyed only to TCCC Bottling Operations Personnel or to Additional Firewalled TCCC Personnel; and
- c. DPSG Information Relating to Bottler Functions that is conveyed to the TCCC Bottling Operations Personnel or to Additional Firewalled TCCC 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 TCCC'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 TCCC's compliance with its obligations under

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- 7. TCCC shall report to the Monitor in accordance with the requirements of this Order. The Monitor shall evaluate the reports submitted to the Monitor by TCCC. Within thirty (30) days from the date the Monitor receives these reports, the Monitor shall report in writing to the Commission concerning performance by TCCC of its obligations under this Order.
- 8. TCCC 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.
- 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 to act diligently, 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 TCCC intends to acquire a Bottler that is licensed to distribute TCCC 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"), TCCC 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 TCCC's acquisition of the To-Be-Acquired Bottler, as long as TCCC complies with the obligations of Paragraph II.A. 1. - 5., and 7. - 9. of this Order, and satisfies the following additional conditions:

- A. TCCC 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"), TCCC shall also comply with the 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. TCCC shall provide a

- (2) for the most recent 12-month period for which TCCC has such information, sales in units (in constant case equivalents) and dollars, of
  - (a) TCCC Beverages, by brand, of the To-Be-Acquired Bottler, and
  - (b) concentrate, by brand, to the To-Be-Acquired B

# IT IS FURTHER