IN THE MATTER OF

THE COCA-COLA BOTTLING COMPANY OF THE SOUTHWEST

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

Docket 9215. Complaint, July 29, 1988--Final Order, Aug. 31, 1994*

This final order requires Coca-Cola Bottling Company of the Southwest to divest, within 12 months, the Dr Pepper franchise it acquired from San Antonio Dr Pepper Bottling. If the divestiture is not completed within that period, the Commission may appoint a trustee to complete it. In addition, the order requires the respondent to obtain Commission approval before acquiring any branded carbonated soft drink interests in any area in which it already makes, distributes or sells branded concentrate or syrup, or branded carbonated soft drinks.

Appearances

For the Commission: *James E. Elliott, Thomas B. Carter* and *Mary Lou Steptoe.*

For the respondent: *Gregory Huffman, Thompson & Knight,* Dallas, TX.

INITIAL DECISION

BY JAMES P. TIMONY, ADMINISTRATIVE LAW JUDGE
JUNE 14, 1991

BACKGROUND

Companies and Persons

1. Respondent Coca-Cola Bottling Company of the Southwest ("CCSW") is a privately-held corporation with headquarters in San Antonio, Texas. (CX 980-R-U; RX 549-A.) Its sales in 1988 were $145,496,000. (CX 3806-U.)

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* Complaint previously published 112 FTC 588 (1989).

2. In 1983 the Biedenharn family consolidated their holdings in Temple, Uvalde and San Antonio Coca-Cola Bottling Companies into CCSW, and established The Biedenharn Corporation to hold the stock of CCSW. (RX 232-A-C.) In December 1986, The Biedenharn Corporation merged with CCBG Merger Corp., a subsidiary of Texas Bottling Group, Inc. ("TBG"), resulting in the sale of the Biedenharn family's interest in CCSW. (CX 3052; RX 549-A, B; R. Hoffman, Tr. 5588.) The Biedenharn family of Vicksburg, Mississippi was the first bottler of Coca-Cola. (Howell, Tr. 4005; RX 232-E.)

3. TBG is the sole shareholder of CCSW. (CX 1372-H; CX 1373-Z-23; RX 572-I.) Affiliates of Prudential Insurance Company of America hold 51% of the stock of TBG and 49% is held by The Coca-Cola Bottling Group (Southwest), Inc. ("CCBG-Texas"), a Texas corporation, which is a wholly-owned subsidiary of The Coca-Cola Bottling Group (Southwest), Inc. ("CCBG-Delaware"), a Delaware corporation. (Hoffman, Tr. 5603; CX 1372-G, H.) All of the voting stock of CCBG-Delaware is held by Edmund M. Hoffman and Robert K. Hoffman (the "Hoffmans"). (RX 572-H; RX 2805-J, K, Z-15.)

4. Edmund M. Hoffman is the majority shareholder of CCBG-Delaware. He is also the Chairman and a member of the Board of Directors of each corporation controlled by CCBG-Delaware including CCSW, and is the father of Robert K. Hoffman. (RX 2805-Z-15; CX 1372-Z-37.)

5. Robert K. Hoffman is the second largest shareholder of CCBG-Delaware, and the only other voting shareholder. (RX 2805--Z-15; CX 1372-Z-37.) Robert Hoffman is the President of CCBG--Delaware and of all of its subsidiaries except CCSW, of which he is Vice-Chairman; he is a Director of all entities in the corporate group. (CX 1373-Z-89.)

6. Southwest Coca-Cola Bottling, Inc. ("SWCC"), a wholly-owned subsidiary of CCBG-Texas, is the Coca-Cola bottler in West Texas, Eastern New Mexico, Western Oklahoma and parts of Colorado and Kansas. (CX 4; CX 2805-Z-3, Z-4.) SWCC is a franchisee of The Coca-Cola Company. (RX 2805-Z-5, Z-6.)

7. Snappy Snack is an operating division of CCSW which provides full-line vending and food service in the San Antonio area. (CX 3211.) Bev-Tex until 1986 was a division of CCSW selling fountain syrup and service, and selling and leasing fountain,

refrigeration and institutional kitchen equipment in the San Antonio area. (CX 28-L; RX 232; CX 2068-A.)

8. E. T. ("Toby") Summers III is President and Chief Operating Officer of CCSW. (Summers, Tr. 6360.) Norborne Cole was President of CCSW from 1982 until January 8, 1988. (RX 2805-Z-14, Z-15.)

9. The Dr Pepper Company was a publicly-held corporation with headquarters in Dallas, Texas until 1984, when Forstmann-Little & Co. acquired it in a leveraged buy out. (CX 614-B; RX 1447-D; RX 990-E, N.) After selling the headquarters building, bottling operations, and other assets, except the Dr Pepper franchise contracts and the syrup manufacturing facilities, Forstmann-Little sold Dr Pepper Company in 1986 to a group of investors led by Hicks & Haas Holdings, Inc. (RX 990-N.)

10. In 1986, a group which included some Dr Pepper Company shareholders and bondholders bought Seven-Up Company and combined the administration for the two companies in Dallas, Texas and the manufacturing for the two companies in St. Louis, Missouri. (Knowles, Tr. 2640.) In 1988, the Dr Pepper Company and the Seven-Up Company were combined into Dr Pepper/Seven-up Companies, Inc., the current franchiser of the Dr Pepper and Seven-Up bottling operations in the United States. (RX 1989, pp. 3-4.) Dr Pepper/Seven-up Companies, Inc. is the owner of the trademark and manufacturer of concentrates for Dr Pepper and Seven-Up brand products. (Clarke, Tr. 4297-99; Knowles, Tr. 2638-41.) The term "DPUSA" is used here to mean Dr Pepper Company and its successor Dr Pepper/Seven-up Companies, Inc.

11. Until 1984, DPUSA owned bottling operations in Dallas/Fort Worth, Waco, Houston, San Antonio, and Corpus Christi, Texas. (RX 1648-Z-29-Z-31; Turner, Tr. 916; Antle, Tr. 3041, 3079.)

12. San Antonio Dr Pepper Bottling Company ("DP-SA") was a wholly-owned subsidiary of DPUSA. (RX 1648-Z-29; Turner, Tr. 917-918; Antle, Tr. 3041.) DP-SA sold its bottling plant to Grant-Lydick, Inc. on October 31, 1984. (RX 2409.)

13. From 1982 until the company-owned bottling plants were sold, DP-SA and the other company-owned plants were overseen by Jim Turner, as executive officer in the DPUSA offices in Dallas, Texas. (Turner, Tr. 914-15, 1035-37; Antle, Tr. 3083-85.)

14. Grant-Lydick Beverage Company ("Grant-Lydick") does business in San Antonio, Austin, Corpus Christi, Victoria and South

Texas; in San Antonio, Grant-Lydick uses the trade name Big Red Bottling Company. (Lydick, Tr. 2992-3008.) Grant-Lydick was formed by Bud Grant and Lee Lydick in April 1984 to get into the soft drink bottling business by purchasing some of the assets of DP-SA. (RX 1648-D.) Emery Bodnar is Executive Vice President, general manager and part owner of Grant-Lydick. (Bodnar, Tr. 1225.)

15. PepsiCo, Inc., with headquarters in Purchase, New York, is in the snack, restaurant and soft drink businesses. (RX 2864-D; RX 1218, pp. PC027073-74; Davis, Tr. 4619-4624.) Its sales in 1988 exceeded $13 billion. (RX 1218, p. 116.) PepsiCo, Inc. receives one-third of its revenue from soft drinks, the rest coming from its snack and restaurant businesses. (Summers, Tr. 6767-68.)

16. Pepsi-Cola Company ("Pepsi USA") is a division of PepsiCo, Inc. (RX 2864-Z-34.) PepsiCo, Inc. owns the United States trademark, and produces concentrate for Pepsi-Cola and other brands of soft drinks. (Davis, Tr. 4463, 4638.)

17. Pepsi USA owns bottling operations in various parts of the United States, including San Antonio, Houston, Dallas/Fort Worth, and Austin, Texas. (Amrosowicz, Tr. 791-793, 837-838.) These company-owned bottling operations are responsible for 37% of Pepsi USA bottle and can sales. (RX 1218; p. PC027073.)

18. Pepsi USA's operations were known as the Pepsi Bottling Group. (RX 1213; RX 1216.) In 1987 the name was changed to Pepsi COBO (Company-Owned Bottling Operations). (Amrosowicz, Tr. 787.) The term "Pepsi COBO" is used here to refer to Pepsi company-owned bottling entitles, before and after 1987.

19. The Seven-Up Company ("7-Up USA") is currently part of DPUSA, with headquarters in Dallas, Texas. (Knowles, Tr. 2639.) Philip Morris, Incorporated bought 7-Up USA in the mid-70's to enter the soft drink business, but sold it on November 12, 1986 to an investor group headed by Hicks & Haas Holdings, Inc. (RX 1990, p. 3; Knowles, Tr. 2685.)

20. 7-Up USA owned 7-Up bottling operations in various parts of the United States. (CX 3941, pp. 263-64; CX 997.) From 1982 to January 1986, 7-UP USA owned the Seven-Up Bottling Company of San Antonio ("SA 7-Up"), which held the 7-Up franchise in the San Antonio area. (RX 2002; Lydick, Tr. 2996-97.) Texas Bottlers, Inc. held the 7-Up franchise from January 1986 until May 1987, when Grant-Lydick purchased the assets of Texas Bottlers, Inc., for $7,800,000. (Bodnar, Tr. 1334.)

21. RC Cola Company is a subsidiary of DWG, Inc., a conglomerate. (Coyne, Tr. 3495-96; RX 2836-39; RX 2841, p. 3.) RC Cola Company owns the trademark and produces concentrate for RC Cola products. (RX 2841, pp. 9-10.)

22. Texas Beverage Packers ("Texas Beverage") is a family-owned bottling company with headquarters in San Antonio. Texas Beverage contract packs soft drinks and sells its own "Texas" brand private label soft drinks to retailers throughout Texas. (Hixon, Tr. 7269-1, 7271-87, 7332-43.) Steven Hixon is General Manager of Texas Beverage. (Hixon, Tr. 7270.)

23. Shasta Beverages ("Shasta"), with headquarters in Hayward, California, manufactures concentrate and carbonated soft drinks. (RX 1001-A, B; RX 1532.) Shasta operates bottling plants throughout the United States, including Houston, Texas. (Skinner Test., RX 3011, p. 3166.) Shasta makes Shasta soft drinks which it distributes nationwide. (RX 1532.) Shasta also contract packs other soft drinks, such as IBC Root Beer. (Knowles, Tr. 2689, 2810.)

24. Kroger Company owns and operates a chain of grocery stores in various parts of the United States. (Morath, Tr. 7654-7655.) Garland Beverage Company, a soft drink production plant owned by Kroger in Garland, Texas (near Dallas), produces Kroger's own "Big K" private label line of soft drinks for sale in Kroger stores. (Kaiser, Tr. 3254.) Garland Beverage Co. also contract packs for other brands. (RX 1726.)

25. Kroger has a large regional warehouse and administrative office in Houston, Texas which supervises its operations in most of CCSW's territory. (Kaiser, Tr. 3155-57.) Kroger is several times larger than HEB, but has fewer stores than HEB in CCSW's territory. (Summers, Tr. 6617, 6627-28, 6767.)

26. Winn-Dixie, a large grocery chain, operates a bottling plant in Ft. Worth, Texas which produces "Chek" brand private label soft drinks for sale in Winn-Dixie stores. (Hixon, Tr. 7278-79.)

27. Beverage Packers Inc. is a privately-held company which owns and operates a bottling plant in Fort Worth, Texas. (Hixon, Tr. 7274.) Beverage Packers Inc. produces a number of soft drinks, including its own line of warehouse brand soft drinks. (RX 1819.)

28. Philip Espinoza was an employee and part owner of the Royal Crown Bottling Company of San Antonio. (Espinoza, Tr. 4163-65.) Since retiring in 1986, he has worked for a series of companies (the "Espinoza companies") selling soft drinks in and around San Antonio

and the Rio Grande Valley. The Espinoza companies include La Hacienda, Premier Distributing, Apollo Distributing, and Star Distributing. The Espinoza companies have distributed Nehi soft drinks, and other brands, in the San Antonio area since 1986. (Limon, Tr. 4956-57; Espinoza Tr. 4166, 4169-87; Coyne, Tr. 3431.)

29. The Coca-Cola Company has headquarters in Atlanta, Ga. Coca-Cola USA ("CCUSA") is the division of The Coca-Cola Company that manages domestic soft drink operations. (Howell, Tr. 4004.) CCUSA produces the concentrates for Coca-Cola soft drinks.[1] (Atchison, Tr. 5237-38.)

30. Coca-Cola Enterprises ("CCE"), a publicly-held company with headquarters in Atlanta, Georgia, owns Coca-Cola bottling operations in various parts of the United States, including Dallas/Fort Worth, Houston, and Austin, Texas. (Howell, Tr. 4002-07.) The Coca-Cola Company owns 49% of the stock of CCE. (RX 3131-G.)

31. From 1939 to July 1982 the Big Red Bottling Company of San Antonio was an independent bottler which owned and operated a bottling plant in San Antonio selling Big Red and other brands of soft drinks. In July 1982, DP-SA acquired Big Red Bottling Company of San Antonio for stock, and a non-compete agreement, valued at $6,000,000. (RX 1648-E; CX 3315-Z-4.)

32. From December 1982 to November 1984, DP-SA held the Royal Crown Cola franchise. (RX 3065-A; Bodnar, Tr. 1251-52; Turner, Tr. 1037.) On November 9, 1984, Grant-Lydick became the Royal Crown franchisee. (RX 3105-H-Z-2.)

33. The Huntress family owned a bottling plant which held Pepsi-Cola franchise in San Antonio until 1982, when they sold the operation to Pepsi COBO. (Lauterjung, Tr. 4844.)

34. Oneta Company ("Oneta") owns and operates the Pepsi-Cola bottling plant and franchise in Corpus Christi and Victoria, Texas and surrounding areas. Karl Koch is President and Chairman of the Board. (Koch, Tr. 1801.)

35. Better Beverages, Inc., a closely-held corporation with headquarters in Hallettsville, Texas, owns and operates Dr Pepper, Pepsi, Seven-Up, A&W, Canada Dry, Country Time, Nesbitt's and Hawaiian Punch franchises in southeast Texas between San Antonio and Houston. (Antle, Tr. 3047-48; Campbell, Tr. 1922-23.) Dale

[1] Concentrate companies are "syrup companies" or "parent companies." (Knowles, Tr. 2699-2700.)

Campbell, his mother and his two brothers own Better Beverages. (Campbell, Tr. 1935-36.)

36. The Dr Pepper Bottling Company of Texas ("Turner DP") owns and operates the former DPUSA company-owned bottling operations in Dallas/Ft. Worth, Waco, and Houston, Texas, with plants in Houston and Irving (near Dallas). (Turner, Tr. 915.) Jim Turner is President and CEO of Turner DP, and owns a minority interest in the company. Turner DP holds franchises for DPUSA, RC Cola, 7-Up USA, Big Red, Canada Dry, A&W, Original New York Seltzer, Sunkist, and other flavor companies in various parts of its sales territory. (Turner, Tr. 926-28.)

37. AbTex holds Pepsi-Cola and Dr Pepper franchises for West and Southwest Texas and operates a bottling operation in Abilene, Texas. (Cole, RX 3008, pp. 90-91.)

38. H. E. Butt Grocery Company ("HEB") is a privately-owned regional grocery chain with headquarters in San Antonio, Texas. (Gonzala, Tr. 2024; Summers, Tr. 6767, 6589-93.) HEB is the largest volume grocery chain in CCSW's territory. There are 153 regular HEB stores in Texas, with 86 located in CCSW franchise territory. There are 23 smaller "Pantry Stores" operated by HEB in areas outside the CCSW franchise territory. Robert Chapman is Vice President of procurement at HEB and Tim Brinkley is Manager of Information Services. (Summers, Tr. 6593.)

39. Albertson is a national grocery chain which operates retail stores in parts of Texas. Albertson is several times the size of HEB, although it has fewer stores in CCSW's area. (Summers, Tr. 6767.)

40. Other supermarket chains which operate stores in Texas include Handy Andy and Super S. (Howell, Tr. 4058; Sendelbach, Tr. 7686-89.) Convenience store chains which operate stores in Texas include: National Convenience Stores, which operates the Stop-N-Go stores, the largest volume convenience stores in South Texas (Summers, Tr. 6630-6631; Howell, Tr. 4063; Davis, Tr. 4604-05), with 195 stores in San Antonio (Hiller, Tr. 5531-32); Circle K (Summers, Tr. 6631); and Maverick Markets. (E. Hoffman, Tr. 575.)

41. Concentrate companies and "fountain wholesalers" sell post-mix fountain syrup in this market including: CCUSA (RX 861); DPUSA; Martin-Brower, which supplies McDonald's restaurants (Summer, Tr. 6515, 7060: Knowles, Tr. 2813-17); Burger King Distribution Systems, formerly Distron, which supplies Burger King

restaurants; Sysco; Sugar Foods; White Swan; and McLane. (RX 861; Summers, Tr. 6503; Short, Tr. 7740-45.)

42. Full-line vending companies operating in CCSW's territory include: Servomation (Little, Tr. 657) and ARA (Summers,Tr. 6655), L. C. Vending (a family-owned business, headed by Ladd Little) (Little, Tr. 632-33) and A&W Leasing. (Summers, Tr. 6655.)

This Proceeding

43. The original complaint was filed on July 29, 1988, naming CCSW and DPUSA as respondents. The complaint asked that CCSW be required to divest the Dr Pepper and Canada Dry licenses and assets acquired from DP-SA in 1984. On August 4, 1989, complaint counsel and DPUSA entered into a settlement agreement and DPUSA was dismissed from the case. On November 18, 1988, an amended complaint was filed.

44. Trial in this matter commenced on July 10, 1990 and concluded on October 3, 1990.

History of Challenged Acquisition

45. In 1984 Forstmann-Little began selling the Canada Dry business (Turner, Tr. 920-21) and DPUSA's company-owned bottling plants. (CX 3817.) Jim Turner (DPUSA President of company-owned Bottling Operations) and Don Antle (DPUSA Vice President, Franchise Department) were appointed to handle the sale of the plants. (Turner, Tr. 1411-12.)

46. Bud Grant, a geologist and oilman, and Lee Lydick, owner of Triple XXX Root Beer, wanted to buy DP-SA but their offer of $16-17 million was refused by DPUSA. (Lydick, Tr. 3023.) They made a later offer, but were unable to obtain financing for the purchase. (Turner, Tr. 1097-98, 1150)

47. CCSW wanted the franchises for Dr Pepper and Canada Dry. CCSW had no need for DP-SA's main production facility, the former Big Red Bottling Company of San Antonio plant. CCSW indicated its interest but DPUSA wanted to sell the operation as a whole and initially rejected CCSW's response. (Antle, Tr. 3059.)

48. In 1984, DPUSA preferred granting Dr Pepper franchises to independent bottling companies not owned by competing concentrate companies. The Pepsi bottler in San Antonio was wholly-owned by

Pepsi USA. Further, Pepsi USA officials told DPUSA that the amount requested by DPUSA for the DP-SA bottling operation was too high. (Antle, Tr. 3059-60; Turner, Tr. 1095.)

49. DPUSA sold the operation in two parts. (Turner, Tr. 1152.) CCSW bid on the Dr Pepper and Canada Dry franchises. CCSW initially offered $5 million, later increased to $14.5 million. (CX 3; RX 2092-F; Turner, Tr. 1158.)

50. On August 28, 1984, CCSW purchased from DP-SA assets for $14.5 million (RX 1292, p. 1; CX 1662; CX 253): a warehouse adjacent to the CCSW bottling plant (Bodnar, Tr. 1276; 1518-20); 2150 DP-identified used vending machines with an average age of five to six years (Little, Tr. 653); 40% of the delivery and over-the-road trucks owned by DP-SA, with an average age of seven to ten years (Bodnar, Tr. 1689; CX 254); and DP-SA's rights in contracts relating to the Dr Pepper and Canada Dry franchises were reissued to CCSW. (CX 3, p. 7; CX 247-C; CX 270.)

51. In the same transaction, DPUSA agreed to issue Dr Pepper license agreements to CCSW. (CX 3, pp. 17-18.) DPUSA and Canada Dry issued new franchise agreements for the Dr Pepper and Canada Dry brands to CCSW in 1984. (CX 266-67.)

52. CCSW and DPUSA also entered into a sales agency agreement requiring CCSW to act as DPUSA's agent in the sale of Dr Pepper products produced in DPUSA company-owned plants to customers in CCSW's Dr Pepper territory until a specified number of cases had been sold. (CX 3, p. 276; CX 275; CX 276; CX 1838-A; Schwerdtfeger, Tr. 2571-73, 2622.)

53. After the sale to CCSW, DP-SA still owned the DP-SA bottling plant, the bottling equipment, non-Dr Pepper-identified vending machines, the remaining 60% of the vehicles, and the franchises for Big Red, RC, Crush, and Hires. (Bodnar, Tr. 1668; CX 237.)

54. DP-SA continued to operate its business as Big Red Bottling Company of San Antonio, until DPUSA's assets were sold to Grant-Lydick. (CX 2052; CX 2484; CX 3254-A; CX 237-C.)

55. In October 1984, Grant-Lydick acquired the remaining assets of DP-SA, including the bottling plant (RX 1663), 60% of the trucks, and some vending machines for $6.5 million. (RX 2408; RX 2409; Lydick, Tr. 2981-82; RX 1648.) Grant-Lydick put up $100,000. (Lydick, Tr. 2977, 2984.) The remaining $6.4 million was lent by

General Electric Credit Corporation, which received a 44% share of the business. (Lydick, Tr. 2983-84; RX 2410; RX 2411.)

56. Grant-Lydick hired Emery Bodnar, the manager of DP-SA, to run the business. (Bodnar, Tr. 1223.) Grant-Lydick also hired half of the former employees of DP-SA. (Bodnar, Tr. 1294.)

57. Grant-Lydick obtained licenses to produce and sell Big Red, RC, Crush, Hires, and DP-SA's other remaining brands (CX 3495, CX 3504, CX 3505), about 58% of DP-SA's 1983 sales volume. (Knowles, Tr. 2874.) Grant-Lydick operates its soft drink business in San Antonio as Big Red Bottling Company of San Antonio. (Bodnar, Tr. 1581.)

58. On December 3, 1986, TBG acquired the Biedenharn ownership in CCSW (R. Hoffman, Tr. 5588, CX 3052; RX 2805-K) for $211 million, consisting of $145 million in cash and the assumption of $65.4 million in existing debt. (CX 29; CX 28; CX 3123.) Prudential Insurance Company ("Prudential") provided financing in exchange for 57% of the stock of TBG. Prudential provided $20 million in cash and $40 million as Senior Debt and $80.5 million as Subordinated Debt. Additional financing was provided by a revolving loan of $95 million from Texas Commerce Bank. (R. Hoffman, Tr. 5601; RX 2874-75; Admit.)

59. DPUSA and Canada Dry Corporation then issued new franchise agreements to CCSW. (R. Hoffman, Tr. 5618-20; CX 1391-A; CX 1938-X-Z-1 and Z-10-13; CX 3113; RX 2902.) The new Canada Dry franchise was for 34 counties in South Texas. (CX 2852; CX 3065-B; RX 2932.)

60. In April 1987, CCSW acquired the assets of the American Bottling Company, a Dunnam family partnership, for $54 million. (CX 2805.) The American Bottling Company held the franchises for Coca-Cola, Dr Pepper and several other brands around Corpus Christi, Texas. CCSW closed the Corpus Christi production facility and supplied the Corpus Christi sales center from San Antonio and Cuero. (Summers, Tr. 6365; E. Hoffman, Tr. 230-31.)

61. In March 1989, CCSW acquired the remaining interest held by CCE in Crossroads Canning Company, a canning co-operative located in Cuero, Texas, for $3 million. (Summers, Tr. 6397-98.)

62. CCSW acquired Coca-Cola Bottling Company, Cuero, Texas from the Summers family in 1985 (CX 3261; CX 22) and the Del Rio and Mason/Menard Coca-Cola bottling operations in 1986. (CX 28-29.)

63. Grant-Lydick has acquired additional soft drink brands and new geographic territories. (Bodnar, Tr. 1334-36; RX 2970.) In 1987, Grant-Lydick acquired Texas Bottlers Inc. (the Seven-Up nonproducing bottler in San Antonio and Austin, Texas) for $7.8 million (Bodnar, Tr. 1334) and the Seven-Up bottler in Corpus Christi from the Nielsen family in August 1987 for $1.2 million. (Lydick, Tr. 2999-3000.)

64. Grant-Lydick purchased the assets of Big Red Bottling Company of Austin in December 1988 for $1.3 million. (Lydick, Tr. 3002-03.)

65. In April 1990 Grant-Lydick purchased Timberline Corporation, an RC Cola distributor in LaGrange, Texas, for $134,000. (Lydick, Tr. 3005-06.)

66. Pepsi COBO in the early 1980's acquired the Pepsi bottlers in Dallas, San Antonio, Houston, Austin, and Harlingen. (Davis, Tr. 4451-54; CX 3971.)

67. In September 1984, the Texas Attorney General's Office filed suit to challenge the transactions whereby CCSW acquired the Dr Pepper and Canada Dry brands, charging that the transactions violated Texas antitrust law. (CX 2-A-B.)

68. On July 1, 1986, CCSW, DPUSA, and the Texas Attorney General entered into a Settlement Agreement. (CX 2-E.) CCSW was enjoined until July 1, 1993, from the following: selling to its vending subsidiary on terms different from those offered to third party vendors; placing vending equipment on an "exclusive" basis; seeking or accepting more than 65% of the shelf space "regularly allocated for the sale of soft drinks" in any store; seeking or accepting "exclusive end-of-aisle display space" for "more than 65% of the weeks in any given calendar year"; or "seeking or consenting to participate in, on the average, more than 65% of" promotional ads during any calendar year.

69. CCSW was required to offer to sell the vending machines acquired from DP-SA "to the owner of the site at which such vending machine(s) was currently located" or to any of CCSW's third party vending customers at book value. For any vending machine not sold, CCSW is required to make available at no charge two slots in each vending machine for the sale of products of CCSW's competitors. (CX 2-G, Sec IV; Summers, Tr. 6665.)

70. Texas Attorney General is entitled to seek an extension of the order for a period of up to three years. (CX 2-H, Section VIII).

71. CCSW sent a letter to vending companies offering to sell the vending machines which CCSW acquired from DP-SA at book value. None of the machines was purchased. (Little, Tr. 73132.)

COMPETITION

Soft Drinks

72. CCSW's primary business is bottling, distributing, and selling carbonated soft drinks[2] at wholesale. (F 236-39.)

73. Soft drinks are sold in cans, glass, and plastic (PET) containers. The term "bottles" sometimes refers to soft drinks sold in any container ready to drink. Soft drinks are also sold in five gallon tanks to fountain outlets ready to drink ("pre-mix") or as syrup which must be mixed with carbonated water ("post-mix"). (Turner, Tr. 1085-86; Knowles, Tr. 2681-82.)

74. Soft drinks are produced by combining "concentrate," sweetener, and carbonated or still water. "Concentrate" includes the flavors, extracts, and essences used to produce soft drinks. "Syrup" is concentrate mixed with sweetener and some water. (Turner, Tr. 1046.)

75. In 1987, national sales of carbonated soft drinks totaled $38 billion. (CX 833-X; CX 784-J.)

76. The 1988 per capita consumption of carbonated soft drinks was 45.9 gallons. Carbonated soft drinks lead all beverages in per capita consumption, including water. (RX 990-R.)

77. Texas is the "heartland" of both Coca-Cola and Dr Pepper. (Hoffman, E., Tr. 227-28; Turner, Tr. 982.) Texas is very weak for Pepsi and represents 90% of Pepsi's national share gap with Coca-Cola. (Amrosowicz, Tr. 889; Limon, Tr. 4977.)

78. The national carbonated soft drink industry's main flavors are cola, lemon-lime, pepper, orange, and root beer. (CX 2956-B-C; CX 2527-D; RX 990-S, Z-19.) These five flavors are 95% of all soft drink sales. (CX 3956-B-C; RX 990 Z-19; CX 3982-E.)

79. Colas are about 65% of carbonated soft drink sales. (Bodnar, Tr. 1253, 1263; RX 990-S, Z-19-21.) The cola category is dominated by Coca-Cola and PepsiCo. Royal Crown is a weak third. (CX 41-

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[2] "Soft" drinks contain no alcohol.

V; RX 990-S.) Most consumers of soft drinks regularly drink colas and look for other flavors as a change of pace. (CX 858-C, E.)

80. In 1984, the national market shares for the other soft drink flavors were (CX 864 at p. 14; RX 990-Z-19): lemon-lime, 12.7%; pepper, 6.9%; orange, 7.0%; and root beer, 4.9%.

81. In 1984, the national market sales by brand were (RX 990-Z-18): Coca-Cola, 21.6%; Pepsi, 17.1%; Diet Coke, 5.5%; 7-Up, 5.0%; and Dr Pepper, 5.4%.

82. Market shares of soft drink brands in San Antonio food stores in October, November 1989 were (RX 34-D): Coca-Cola (Classic and New Coke), 25.7%; Pepsi, 9.5%; Dr Pepper, 7.4%; Diet Coke, 7.3%; Big Red, 6.9%; Sprite, 5.2%; 7-Up, 2.5%; Royal Crown, 2.1%; and control brand (private label), 11.6%.

83. In 1984, national sales of non-diet soft drinks by channels included (RX 990-U; CX 3218-K): grocery chain, 50.8%; fountain, 14.0%; vending, 10.2%; small grocery store, 5.7%; convenience store, 4.7%; discount store, 1.4%; and drug store, 0.8%.

84. In 1985, the number of independent bottlers of soft drinks in the United States by brand were (RX 990-Z-29): Coca-Cola - 206; Pepsi-Cola - 167; 7-Up - 24; Dr Pepper - 10; Royal Crown - 45; and Canada Dry - 2.

85. San Antonio is Big Red's largest market, and Grant-Lydick Beverage Company is the largest Big Red bottler. (Turner, Tr. 953.) CCSW introduced Cima Red to compete against Big Red. (Hoffman, E., Tr. 346.)

86. Carbonated soft drink package sizes include 6.5, 10, 12, 16, 20 and 32 ounce glass or PET bottles, 1, 2 and 3 liter PET bottles, and 12 oz. cans. (CX 53-G, Y-Z-6.) Private label carbonated soft drinks are sold in 12 ounce cans and 2 and 3 liter PET bottles. (CX 3158-K.) H.E.B.'s Plaza is only in loose cans and 2 liter bottles. (Chapman, Tr. 7165; CX 4022.)

87. The sales of soft drinks are seasonal. (CX 3816.) The peak selling months are from May to September. Soft drink sales are strong at the holidays: July 4, Memorial Day, and Labor Day. After a lull at Thanksgiving, sales increase during the Christmas/New Year holiday period. Sales are slowest in February. (Summers, Tr. 6609-10.)

Fountain

88. Concentrate firms, including CCUSA, Dr Pepper, and PepsiCo have exclusive geographic territories for their pre-mix fountain syrup. (Admit.)

89. PepsiCo and RC Cola have exclusive geographic franchise territories for post-mix fountain syrup. (Knowles, Tr. 2681-82.) CCUSA and Dr Pepper do not have exclusive franchise territories for post-mix franchise syrup.

90. CCUSA and DPUSA sell post-mix directly to some customers. (Howell, Tr. 4005; Turner, Tr. 1010-11; Koch, Tr. 1804.) Dr Pepper post-mix syrup manufactured by CCSW is sold by CCSW, and resold by Pepsi COBO, and Grant-Lydick. (RX 2783; Summers, Tr. 6509.) Coca-Cola and Dr Pepper fountain products are available from many fountain wholesalers in the San Antonio area. (Short, Tr. 7741-42; RX 861; Turner, Tr. 1172-74; CX 33-Z-18.)

91. Dr Pepper fountain is delivered directly to the customer, or to a bottler, commissary or food broker who services the customers. (RX 1919.) HEB, Kroger, Albertson's, Skaggs and Furr's are all national fountain accounts for DPUSA. (Knowles, Tr. 2831.)

92. Larger fountain accounts qualify for "national account pricing" from both CCUSA and DPUSA. (Short, Tr. 7736; Cassagne, Tr. 7585; Knowles, Tr. 2820-2823.)

93. About 65-70% of CCSW's sales of post-mix are made at the national account price. (Knowles, Tr. 2820; CX 4073.) Coca-Cola fountain syrup is also distributed by food distributors McLane's, Sugar Foods, Frostex and Distron, the Burger King commissary (RX 3108; Summers, Tr. 6505-06, 6515-16; CX 387-Z-103; CX 4039), and Martin-Brower, which supplies McDonald's. (Short, Tr. 7759-60; Turner, Tr. 1177).

94. Most of CCUSA's fountain business is through commissaries and distributors, with the rest through Coca-Cola bottlers like CCSW. (CX 387-Z-103; RX 636-N.)

95. McDonald's and other restaurant chains sell private label fountain products. The largest selling orange fountain soft drink is McDonald's private brand. (Cassagne, Tr. 7759-60.)

Franchises

96. Franchises for bottled soft drinks are territorially exclusive. (CX 1666.) The franchisor grants to the franchisee the exclusive right to make and sell soft drinks in bottles and cans bearing the franchisor's trademark and using the franchisor's formula, in a specified geographic territory. (RX 2848.)

97. Concentrate companies historically required the bottler to own a facility to produce the product sold in the franchise territory. (RX 2848-D, E (CCUSA); RX 2909-A (DPUSA); RX 2932-A (Canada Dry); RX 2930-B (A&W).) Some concentrate companies now waive the production requirement and allow a bottler to become a "non-producing bottler" who may acquire product from elsewhere. (RX 602; RX 2925; RX 912-G.)

98. Coca-Cola (RX 2848-E) and Dr Pepper (RX 2908-A) franchises are perpetual. Franchises for allied products of The Coca-Cola Company are granted for ten-year renewable terms. Both types can be terminated for cause. (Admit.)

99. CCSW has a license to market Hi-C products to schools; all other marketing for Hi-C is conducted by Coca-Cola Foods division of The Coca-Cola Company. (Admit.)

100. CCSW sells New York Seltzer under a distributorship agreement providing for termination on thirty days notice. (Admit.)

101. In many franchise agreements (but not including certain franchises issued by The Coca-Cola Company), a transfer of the franchise, including a change of ownership of the corporation which holds the franchise, constitutes a breach of the franchise agreement unless the franchisor has given prior written consent. The Coca-Cola Company First Line Bottling Contract and Bottler's Bottling Contract each restricts direct franchise transfers, but both are silent as to changes in control of corporate franchisees. (E. Hoffman, Tr. 220; R. Hoffman, Tr. 5618-20.)

102. CCSW and SWCC are licensed under the First Line Bottling Contract for Coca-Cola (RX 2848) as amended by adding geographic territory. (RX 2849; RX 2851; RX 2852; RX 2856; Summers, Tr. 6734-38.)

103. DPUSA does not allow any franchise to be transferred without its consent. The sale of a bottling operation allows DPUSA to choose a different franchisee. (Knowles, Tr. 2802-03, 2877.)

104. Concentrate companies use "transfer restrictions" to control bottler performance. (Knowles, Tr. 2802; Treibelcock, Tr. 5839.) They may refuse to grant a new license to the prospective purchaser. (E. Hoffman, Tr. 491-92.) Or they may revoke the existing license if the bottler is sold (or even refinanced) without their prior approval. (Knowles, Tr. 2872; RX 1390.)

105. Bottling franchises prevent the bottler from selling more than one brand in a "flavor segment." (CX 1668; RX 2938-C.) These provisions are known as "imitative products provisions." (CX 1912.)

106. Concentrate companies may waive imitative products provisions, allowing the bottler to sell more than one brand of a soft drink flavor. CCSW sells two orange flavors, Minute Maid and Sunkist. (RX 2936-A; RX 2937; RX 2136.) CCSW also sells two seltzers, Canada Dry and Original New York Seltzer. (RX 2877; Summers, Tr. 6751; CX 3182.)

107. Franchise agreements establish the standards for bottlers, performance, including sales volume, logos, and vending. (R. Hoffman, Tr. 5625-26; Summers, Tr. 6747-49; RX 2933-34.)

108. Canada Dry requited CCSW to agree to performance requirements to obtain the Canada Dry franchise following the change of control of CCSW, from the Biedenharns to TBG, in December 1986. (RX 2932-33.)

109. CCUSA includes "right of first refusal" clauses in newly-issued franchises. (RX 914-I-M.) By September 1988, 76.7% of Coca-Cola volume was subject to such restrictions. (RX 769.)

110. The performance standard in CCSW's Coca-Cola franchise requires that CCSW "vigorously push," and "use reasonable efforts to sell" Coca-Cola products. So does the DPUSA franchises. (RX 2848-E, O; CX 1861 (Coca-Cola franchise); RX 2850-D (1983 Amendment); Summers, Tr. 6486.)

111. Concentrate companies enforce territorial-exclusivity of the bottling franchises by prohibiting a bottler from "transshipping," selling in another bottler's territory. (CX 1667; Davis, Tr. 4473-74; RX 2850-B; RX 2908-B; RX 2932-A.)

112. Many bottlers are licensed by several concentrate companies to sell their brands of soft drinks. (Shanks Test., CX 3989, p. 35.) CCSW sells Coca-Cola owned by CCUSA, Dr Pepper owned by DPUSA, Sunkist owned by Cadbury-Schweppes, and Original New York Seltzer owned by ONYS, among others. (RX 2931; E. Hoff-

man, Tr. 507-09, 549; CX 2196-Z-37; CX 3716-Z-19.) This practice is sometimes called "piggybacking." (Knowles, Tr. 2764-67.)

113. Piggybacking facilitates entry of new brands. (E. Hoffman, Tr. 507-09; Knowles, Tr. 2764-67, 2770-74; R. Hoffman, Tr. 5627; CX 3646 (Quickick); CX 321; CX 3650 (ONYS Iced Coffee); CX 3782 (ProMotion); CX 3726 (Topo Chico).)

114. DPUSA built its business by franchising Coca-Cola and Pepsi-Cola bottlers, picking the most effective distributor. (Knowles, Tr. 2856, 2667-68; R. Hoffman, Tr. 5620-21; Turner, Tr. 1134-35, 1154-55; Clarke, Tr. 4374-76; Antle, Tr. 3078.)

115. Dr Pepper uses mostly Coca-Cola bottlers (40-45% of Dr Pepper volume) and Pepsi bottlers (40% of Dr Pepper volume). (Knowles, Tr. 2765.) Only one or two bottlers remain who bottle just Dr Pepper products. (Knowles, Tr. 2769.)

116. Other concentrate companies also have a similar policy of licensing the most effective bottler. (Coyne, Tr. 3597 (RC); CX 857 (Crush).)

Production

117. A "case" of soft drinks includes: 24 twelve-ounce aluminum cans; 24 bottles of 6.5-ounce, 10-ounce, 16-ounce or 20-ounce bottles; 6 two-liter PET bottles; 6 three-liter PET bottles; or 12 one-liter bottles. (Summers, Tr. 6491.)

118. Sixteen-ounce returnable is usually sold in 8-packs; sixteen ounce nonreturnable is usually sold in six-packs or singles. Twenty-ounce PET is always sold in singles, while 12 ounce cans may be packaged in six packs, 12 packs, 15 packs or 20 packs. Two and three-liter PET bottles are sold individually. (Summers, Tr. 6492.)

119. Soft drinks are bottled and canned on automated production "lines." (Cole Depo., RX 3008, p. 43.) A bottling plant usually includes a can line and one or more bottle lines. (Morath, Tr. 7662-64.)

120. Equipment for a can line consists of a filler, a can seamer, a proportioner, high-side refrigeration equipment, a can warmer, a date coder, a can rinser, a tray former/case packer, a depalletizer, a Hi-Cone machine, a multi-pack machine, and a conveyor belt. (Summers, Tr. 6447-60.)

121. A bottle line must also have a labeling machine. Returnable bottles also require bottle sorting capability and a bottle washer. (Summers, Tr,. 6373.)

122. There are economies of scale in bottling and canning. (Turner, Tr. 1026-27.) Economies of scale are more significant in canning than in bottling. Most economies of scale are achieved at a soft drink plant of three to five million cases per year of cans and two to four million cases per year of bottles. (CX 3218-P (Figure 16), Z-14; Amrosowicz, Tr. 826; CX 570-N.)

123. Small companies may achieve economies of scale by hiring others to produce the product ("contract" or "copacking"). (Campbell, Tr. 1926; Summers, Tr. 6465-66; Turner, Tr. 1119-22.)

124. The contract packer spreads fixed overhead over a larger number of cases. (Turner, Tr. 1119-20.) The customer does not have to invest in equipment, and can purchase the product for less than it would cost to produce it. (Turner, Tr. 1121.)

125. The 1983 Amendment to the Coca-Cola Bottler's Contract permits the Coca-Cola bottler to provide contract packing services, even for another cola product. (Howell, Tr. 3998.) CCSW provides contract packing for other bottlers. (Cole, RX 3008, p.45, (1.5 million cases in 1986).)

126. Bottlers who contract-pack in Texas include Turner DP (Turner, Tr. 929-30, 1117-18), Better Beverages (Campbell, Tr. 1925-26; Turner, Tr. 1120-21), the Pepsi COBO plants in Conroe and Dallas (Amrosowicz, Tr. 866), Temple Dr Pepper Bottling Company (Espinoza, Tr. 4193; Turner, Tr. 1120-21), Grant-Lydick (Bodnar, Tr. 1534-36, 1656; RX 1607; RX 2015), AbTex (Turner, Tr. 1120), Garland Beverages (Morath, Tr. 7667, 7670; RX 2440; RX 1711), Texas Beverage (Hixon, Tr. 7271), Beverage Packers, Inc. (Hixon, Tr. 7274; Morath, Tr. 7670), the Shasta plant in Houston (Hixon, Tr. 7283; Morath, Tr. 7670; Skinner Test., RX 3011, pp. 3167-68), and the Winn-Dixie plant in Ft. Worth (Hixon, Tr. 727879).

127. Contract packers, price is slightly higher than the marginal cost of production. (Bodnar, Tr. 1657-68.)

128. Some bottlers. including Grant-Lydick, have no can line, and purchase all of their cans from contract packers. (Bodnar, Tr. 1256-57.)

129. New brands have been introduced by contract packing, including Soho (Collier Test., RX 3015, pp. 4082-84), Original New York Seltzer (Miller Test., RX 3013, pp. 3441-45, 3448), and Aga. (Limon, Tr. 4956.)

130. Bottlers can join a cooperative canning or bottling plant. (Howell, Tr. 4011-12; Turner, Tr. 1121-22; CX 3218-Q, R; Summers,

Tr. 6405-06.) Co-ops help bottlers lower their cost of goods and become more efficient. (Howell, Tr. 4012, Summers, Tr. 6405-06 CX 3218-Q, R.)

131. Crossroads Canning Company was a production cooperative formed by Coca-Cola Bottling Company--Cuero, San Marcos Coca-Cola Bottling Company and Coca-Cola Bottling Company of McAllen. In 1989, CCSW acquired it. (Admit.)

132. CCSW and SWCC own Western Container, a cooperative which manufacturers PET bottles for its bottler members at facilities located in Houston and Big Spring, Texas. (Summers, Tr. 6404.)

Excess Capacity

133. There is excess capacity in bottling and canning in Texas. (RX 2939; Summers, Tr. 6465-66; Campbell, Tr. 1983-84; Morath, Tr. 7662-64, 7681-82 (Kroger); Turner, Tr. 1122-25; RX 2983.)

134. During the busiest time of the year Grant-Lydick operates with 20-40% unused capacity. (Bodnar, Tr. 1651-53.)

135. CCE has 23 million cases per year of unused capacity. (CX 167.)

136. In Texas, Pepsi COBO has 42 million cases (65% of total capacity) of excess capacity for cans (CX 2380-J), 13.3 million cases (57%) of excess capacity for 2 liter bottles (CX 2380-K), and 7.0 million cases (53%) excess capacity for nonreturnable bottles. (CX 2380-J, L; Amrosowicz, Tr. 856-57, 892; RX 2986.)

137. Better Beverages, Inc. has excess production capacity on the can line of six million cases annually, which could expand to ten million cases with the addition of a second shift working six days. The capacity of the bottle line is one million cases, and 600,000 cases are produced annually. (Campbell, Tr. 1983-84.)

138. The Turner DP production in Irving is 27 million cases with the capacity of 35 million, and in Houston production is 12 million cases with 20 million cases capacity. (Turner, Tr. 1122-25. Texas Beverage (CX 2710-E; Hixon, Tr. 7294) and Kroger (Morath, Tr. 7662-64) also have excess capacity.

139. In 1986 Procter and Gamble planned to manufacture its Hires/Crush lines through contract bottlers, based on "over capacity in the industry." (CX 858-G.)

Distribution

140. Soft drink bottlers distribute finished goods to retail outlets that sell soft drinks to consumers. For bottles and cans, the tasks include (Clarke, Tr. 4272-75): (a) warehousing (RX 329); (b) taking orders (Turner, Tr. 955); (c) delivering to the retailer's premises (Summers, Tr. 6468; E. Hoffman, Tr. 327); (d) placing on the shelves "fronting," and pricing the product (E. Hoffman, Tr. 327-28; Howell, Tr. 4032; Knowles, Tr. 2662); (e) removing old merchandise (E. Hoffman, Tr. 203, 327-28; Turner, Tr. 956-57); (f) ensuring "point of sale," signs are displayed (Summers, Tr. 6474; CX 2161-D, E); and (g) changing space allocation. (Summers, Tr. 6960-61.)

141. Soft drinks are distributed to retail outlets by "direct-store-door delivery" ("DSD") and warehouse delivery ("warehouse"). (Knowles, Tr. 2662-63.) In DSD the bottler's employees do (a) to (g). In warehouse, the bottler's employees do (a) to (c) and the retailer's employees do the rest. (Knowles, Tr. 2663-64.) Low quality merchandising can reduce sales volume. (Coyne, Tr. 3338-39, 3341; E. Hoffman, Tr. 327-28, 335-37.)

142. In a DSD the driver drives to the store, carries the soft drinks inside, and merchandises the shelves. (Turner, Tr. 955-56.)

143. "Bulk delivery" DSD is used with larger retailers. (Turner, Tr. 1530-31.) Delivery is by a 45 foot tractor-trailer; unloading by a forklift. (Summers, Tr. 6414-15.) A salesperson stocks the shelves.

144. Some bottlers telephone the customer to take the order for "cold drink" the day before delivery is scheduled. This system is called "Tel-Sell." (Summers, Tr. 6640-41.)

145. CCSW (CX 2503-Z-5) and Pepsi COBO (Davis, Tr. 4471-72), use all three types of DSD. (Summers, Tr. 6414-16.)

146. Some bottlers rely on independent distributors. Half of Oneta's sales are handled by independent distributors. (Koch, Tr. 1901.) CCSW has used independent distributors to sell in the Rio Grande Valley. (E. Hoffman, Tr. 621.) DP-SA also used independent distributors. (Bodnar, Tr. 1235-36.)

147. In addition to DSD and warehouse there are food brokers and beer distributors. Food brokers in Texas include Sweeny & Co., Gordon/Southtex, Fleming, Nelson Beverage, Bill Lyons, and Marketing Specialists. (CX 1999-W.) IBC Root Beer (Knowles, Tr. 2685), Canfield (RX 1823). Shasta (RX 1957), BPI (RX 2043; RX

1827), Rocky Top (Morath, Tr. 7667), and Parade (RX 1829-B) have been sold by food brokers. (Knowles, Tr. 2809.)

148. Beer distributors sell beer by DSD. They also sell soft drinks, including: Original New York Seltzer (CX 2725; RX 3013, pp. 3443, 3449; Turner, Tr. 1016), Hawaiian Punch (Anderson, Tr. 3886-87), Jolt Cola (RX 1810), Soho (Collier Test., RX 3015), DPUSA (Bodnar, Tr. 1235-36), RC Cola (Coyne, Tr. 3436-37), and Crush/Hires (CX 2609.)

149. IBC Root Beer, a premium priced soft drink produced by DPUSA through contract packers, is distributed in brown nonreturnable bottles to the home market by food brokers. (Hiller, Tr. 5340; Kaiser, Tr. 3158.) It is better suited to warehouse delivery because it is a premium priced product in a long-necked glass bottle that does not permit high-speed manufacturing or high volume delivery. (Knowles, Tr. 2664-65.) Crush and Hires have been delivered by DSD and warehouse delivery. (Turner, Tr. 954-55.)

150. The "home" market includes soft drinks consumed at home. "Cold drink" is immediately consumed. Cold drink includes vending and fountain sales, and sales from cold vaults in convenience stores. The home market is 83.5% of bottle and can sales, and cold drink is 14.5%. (CX 883-V.)[3]

151. The A.C. Nielsen Company ("Nielsen") tracks sales in the home market. (RX 875.) "Nielsen Audits" show total sales and market share by brand and package for bimonthly periods. (CX 109-A.)

152. The Nielsen Audit for San Antonio includes Bexar County. (CX 3557-F.)

153. Nielsen collects "scanning" data from stores with electronic scanners at the checkout counters. In Texas, Scantrack data is available for Austin/San Antonio. (CX 752; CX 1165; CX 753; RX 780; Bodnar, Tr. 1573-74.)

154. CCSW soft drink sales are 66% bottling and 34% fountain. Pre-mix is 15-18% of fountain sales, three to five percent of CCSW's sales. (RX 405-E; Summers, Tr. 6497.)

155. CCSW delivers Coca-Cola and Dr Pepper fountain syrup to national accounts for a fixed delivery fee per gallon; CCSW also sells Coca-Cola and Dr Pepper fountain syrup to smaller accounts on

[3] Bottles and cans sold to convenience stores may be sold to the consumer "hot" or "cold." Some of the products sold at wholesale in the home market are purchased by third-party vending companies and placed in vending machines. (R. Hoffman, Tr. 5520.)

terms negotiated between CCSW and the local account. (E. Hoffman, Tr. 449-50, 548.)

156. Convenience stores most often buy fountain soft drinks through their wholesale grocery supplier. (Summers, Tr. 6525.)

157. Concentrate for Coca-Cola fountain syrup is supplied to CCSW and SWCC from the Coca-Cola syrup plant in Dallas, Texas. Dr Pepper fountain syrup and concentrate are supplied from the Dr Pepper syrup facility in St. Louis, Missouri. (E. Hoffman, Tr. 546-47.) CCSW manufacturers Dr Pepper and Coca-Cola fountain syrup from concentrate. (Summers, Tr. 6508-09.)

158. Vending companies in the San Antonio area include: CCSW's vending division, Snappy Snack, ARA, Marriott, Canteen, Service America, Drappala, D&J, Tom's Peanuts, A&W Leasing and L.C. Vending. (Summers, Tr. 6655.)

159. Vending customers of CCSW also purchase soft drinks for their vending machines at Sam's Wholesale Club or other wholesale outlets, or at supermarkets when prices are discounted. (R. Hoffman, Tr. 5713, 5520; Jackson, Tr. 3375.)

160. In 1988, CCSW's vending sales were 12.6% of total sales. (Snappy Snack 2%, other vending firms 3.4%, and 7% through its own machines, CX 3418-F; Summers, Tr. 6668-73.)

Prices

161. Few soft drink wholesale sales are made at list price. The price is reduced by a discount or allowance. (RX 327.) In 1990 at least 90% of CCSW's sales were made at less than list price. (R. Hoffman, Tr. 5555, 5645.) only 2% of Pepsi COBO sales are at full list price. (Davis, Tr. 4684-85.)

162. Bottlers change promotional offers often. (Campbell, Tr. 1954; R. Hoffman, Tr. 5551-52; Summers, Tr. 6613 (monthly).) In January 1986 CCSW issued 199 different promotional offers. (CX 2179.) Wholesale prices vary by brand, package and geographic area. (CX 1979; CX 2180; Turner, Tr. 1474; Bodnar, Tr. 1648-49; Davis, Tr. 4702-03; Kaiser, Tr. 3224.)

163. Promotional allowances reduce the price to the retailer and facilitate lower prices to the consumer. (Turner, Tr. 960.) When soft drinks are on sale, consumers consume faster and purchase more soft drinks. (Knowles, Tr. 2838-40.) Soft drink promotions encourage volume purchases. (Coyne, Tr. 3474.)

164. Promotional allowances involve a feature ad, an instore display, or a reduced retail price. (CX 1039-B, C; CX 1041-H; CX 2373-G, I.)

165. Soft drink bottling is a "volume-oriented" business. (Knowles, Tr. 2838-39; Bodnar, Tr. 1271; Turner, Tr. 1395; CX 836-P.) Bottlers seek additional volume to spread overhead over additional sales. (CX 3407-C; Knowles, Tr. 2846, 2899.) Concentrate companies require volume increases from bottlers to increase the concentrate companies' sales of concentrate. (Howell, Tr. 4072-73; R. Hoffman, Tr. 5625-26.) The most effective means of increasing Bales unit volume is to reduce price. (Knowles, Tr. 2838-39, 2845; Howell, Tr. 4020; Coyne, Tr. 3563-64.)

Promotions

166. CCSW's Coca-Cola franchise provides that Coca-Cola USA pays 100% of the national advertising for Coca-Cola Classic and 50% of the national advertising for all other brands, sharing all local media costs equally. (Howell, Tr. 3930-31; E. Hoffman, Tr. 406-07.) DPUSA and Seven-Up Company also fund national and local media advertising and other promotions. (E. Hoffman, Tr. 40607.)

167. In retail stores, soft drinks are in a beverage aisle of the store. Retailers also display soft drinks at the end of the aisle. (Summers, Tr. 6602.) Soft drinks are usually purchased on impulse. (CX 2008-P, Q.)

168. Retailers award display space to suppliers who offer the most attractive promotional deals. (Summers, Tr. 6602-03.) Bottlers offer discount pricing to retailers for displays and lower consumer prices. (Coyne, Tr. 3486, 3488; Summers, Tr. 6613, 6621-22.)

169. Retailers include soft drinks in their weekly newspaper advertising. (Turner, Tr. 1130-31.)

170. In order to obtain a feature ad, a bottler must offer greater discounts than those required to obtain an in-store display. (Gonzaba, Tr. 2057; Davis, Tr. 4616.)

171. Sales volume for products promoted in a feature ad may increase 500 or 600%. When products are promoted on display without a feature ad, sales may increase 250%. (Coyne, Tr. 345152.)

172. Recently, the cost of ad payments has increased. (CX 203; CX 205-06; CX 212-13; CX 3020; CX 1620 ($3.7 million to HEB);

CX 2464-N (DPUSA and CCE); Bodnar, Tr. 1481; CX 4018-G; Cole Depo., CX 3843, pp. 258-60.)

173. In 1986 Pepsi COBO paid Kroger $275,000 for 22 feature ads in South Texas and in 1987 the payment increased to $1.1 million for 20 feature ads. (RX 1130-G.)

174. A calendar marketing agreement ("CMA") is an ad payment by a bottler to the retailer for displays, feature ads in supermarkets, or in-store advertising, such as window banners. (Kaiser, Tr. 3229-31.)

Bottlers

175. The number of bottling plants in the United States has been steadily declining since 1950. (CX 1671; CX 836-E; CX 3218-M.) The number of bottlers decreased by almost 50% from 1980 to 1988. (CX 858-D.)

176. CCUSA and PepsiCo have acquired over half of the volume of their own bottling systems. (CX 858-E; RX 579.)

177. Economies of scale led to production in larger, modern plants. (CX 3218-M, N; RX 912-0; Bodnar, Tr. 1237-38; E. Hoffman, Tr. 189-90, 277.) Consolidation and the non-producer agreements allow production through more efficient bottlers. (Howell, Tr. 4007-08, 4011-12; Coyne, Tr. 3435.)

178. The geographic consolidation of bottlers increased the efficiency of the bottlers, achieving economies of scale in distribution and administration. (Bodnar, Tr. 1232; Schwerdtfeger, Tr. 2290; Howell, Tr. 3935, 4006; E. Hoffman, Tr. 190-92, 513; Lydick, Tr. 3008-09.)

RELEVANT PRODUCT MARKET

179. Complaint counsel contend that the relevant product market consists of "the manufacture, distribution, and sale of finished carbonated soft drinks (or syrups) produced from the concentrates of widely advertised branded, carbonated soft drinks, merchandised and distributed by direct-store-door delivery, in all channels of distribution" which includes: "branded soft drinks" carried by the Pepsi, Big Red, and Coca-Cola bottlers, and Mr. Espinoza's companies, including fountain soft drinks, mixers and club soda. (Hilke, Tr. 6153-54, 6176-77.) I find that relevant product market must be expanded to

include: private and warehouse brand soft drinks, seltzers and other flavored waters, and non-carbonated soft drinks produced and sold by CCSW and competing bottlers.

Competing Brands

180. The Dr Pepper Company sells: Dr Pepper, Diet Dr Pepper, Caffeine-Free Dr Pepper, Caffeine-Free Diet Dr Pepper, IBC Root Beer, IBC Cream Soda, Diet IBC Root Beer, Diet IBC Cream Soda, Welch's Grape, Welch's Strawberry, Welch's Orange, Welch's Pineapple, and Welch's Punch. (Knowles, Tr. 2642)

181. The Canada Dry Company sells: Ginger Ale, diet Ginger Ale, Club Soda, Tonic, diet Tonic, Seltzer regular, Seltzer Lemon-Lime, and Collins Mixer. (RX 2932-34.)

182. CCSW sells: Coca-Cola Classic, diet Coke, Caffeine free diet Coke, Caffeine-Free Coca-Cola Classic, Coca-Cola (New Coke), Caffeine-Free Coca Cola, Cherry Coke, diet Cherry Coke, TAB, Sprite, diet Sprite, Minute Maid Orange, diet Minute Maid Orange, Mello Yello, diet Mello Yello, Sunkist, diet Sunkist, Fresca, Mr. PIBB, A&W Root Beer, diet A&W Root Beer, A&W Creme Soda, diet A&W Creme Soda, Welch's Strawberry, Welch's Grape, Lipton Tea, diet Lipton Tea, Delaware Punch, Dr Pepper, diet Dr Pepper, Pepper Free, diet Pepper Free, Original New York Seltzer, Raspberry, diet Raspberry, Root Beer, diet Root Beer, Cream Soda, diet Cream Soda, Peach, diet Peach, Lemon Lime, diet Lemon Lime, Cima Red, Canada Dry Ginger Ale, diet Ginger Ale, Club Soda, Tonic, diet Tonic, Tom Collins, diet Tom Collins, Spike Orange, Red punch and Lemon Lime, Hawaiian Punch (in Corpus Christi), and red cream, root beer, orange, strawberry, mixers and tonic Fanta in fountain. (Summers, Tr. 6581-82; Teague Depo., RX 3007, pp. 33-34.) These brands are in cans (6-pack and 12-pack), 1-liter, 2-liter and 3-liter PET bottles, 10-ounce, 16-ounce and 20-ounce non-returnable bottles, BIB and figals as post-mix and pre-mix fountain syrup, 6 ½ ounce and 16-ounce returnable bottles. CCSW sells 145 different items. (Summers, Tr. 6582.)

183. Pepsi COBO sells: Pepsi, Diet Pepsi, Pepsi Free, Caffeine Free Pepsi, Diet Caffeine Free Pepsi, Mountain Dew, Diet Mountain Dew, Orange Slice, Diet Orange Slice, Lemon-Lime Slice, Diet Lemon-Lime Slice, Wild Cherry Pepsi, Diet Wild Cherry Pepsi, and Apple Slice. (Davis, Tr. 4464, 4639.)

184. Grant-Lydick sells: Big Red, 7-Up, Royal Crown, Crush, Hires, Squirt, Diet Squirt, Country Time, Hawaiian Punch, Dr Pepper, Yoo Hoo, Upper 10, Schweppes, Canfields, and Diet Rite. (RX 1665; RX 1614-15.)

185. DP-SA sold: Dr Pepper, Frostie Root Beer, Country Time Lemonade, Hawaiian Punch, Salute Flavors, Canada Dry, Crush, Big Red, Royal Crown, Hires, and Barq's. (Turner, Tr. 1035-37; CX 3825; Bodnar, Tr. 1234.)

186. Star Distributing, Mr. Espinoza's company, sells: Nehi flavors, Koala Springs Mineral Waters, and Mason Root Beer. (Espinoza, Tr. 4182-83.)

187. Texas Beverage Packers produces: Canfield's, Plaza flavors, and Texas Brand. (Hixon, Tr. 7275-83.)

188. HEB sells Plaza brand in 2-liter PET bottles and cans in the same flavors as national brands, including colas. (Chapman, Tr. 7162-68.)

189. Kroger produces and sells Big K brand in 2-liter PET bottles and cans. (RX 2444; RX 1685.)

190. Shasta (RX 1957; RX 958-H-J) and Faygo (RX 1953; RX 958-J) sell flavors in 2-liter PET bottles and cans. (CX 1084; RX 958, pp. 810-13; RX 1001; Skinner, RX 3011, pp. 3161-62.)

191 Yoo-Hoo, Artesia, and Ozarka are sold in the San Antonio area. (RX 3112; RX 2951.)

192. Independent soft drink warehouse brands include (CX 814-Z-7-8): Shasta, Faygo, Sunkist, Hires/Crush/Sundrop, A&W, Dad's/Bubble-Up, Welch's, Nesbitt's, No-Cal, Frostie, NuGrape, Sun Crest, Moxie, Mason's, and Dr. Wells.

193. Royal Crown brands include (Coyne, Tr. 3828): Royal Crown, Nehi and Diet Rite.

194. National brand[4] and private label[5] and other carbonated soft drinks are produced on the same equipment. (Summers, Tr. 6445-66; RX 2939.)

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[4] "National brand" - brand of soft drinks distributed in most of the United States, generally by direct-store-door delivery.

[5] "Private label" (also private brand or control label) - brand of soft drinks owned by a grocery chain or other retailer.

195. National brand and private/warehouse brands[6] are produced in the same plant. (Hixon, Tr. 7275-83.)

196. Non-carbonated soft drinks (such as Lipton's Iced Tea, Hi-C, Hawaiian Punch, and isotonic drinks like Spike) are bottled and canned on the same equipment and in the same containers used for carbonated soft drinks, except that nitrogen is used instead of carbon dioxide. (Summers, Tr. 6426-28.)

197. The same tasks are required for distributing and merchandising private/warehouse brands and national brands and non-carbonated soft drinks. (Summers, Tr. 6469.)

198. Consumers seldom are aware of what type of delivery method was used for soft drinks. (Kaiser, Tr. 3159; Gonzaba, Tr. 2125-26; Brinkley, Tr. 2249-50.)

199. In retail stores, including HEB (Gonzaba, Tr. 2123-24; Chapman, Tr. 7156), Kroger (Morath, Tr. 7682; Kaiser, Tr. 3239), and Super S (Sendelbach, Tr. 7691-92), private/warehouse, non-carbonated, and national brands are sold next to each other in the soft drink aisle. (Summers, Tr. 6595; Howell, Tr. 4024.)

200. Private label soft drinks in stores in CCSW's territory include: HEB ("Plaza") (CX 4022). Kroger ("Big K"), Winn-Dixie ("Chek Cola"), Stop N' Go ("Parade"). (Hiller, Tr. 5337-38; Howell, Tr. 4024-25; Kaiser, Tr. 3158, 3160; Turner, Tr. 1208; Bodnar, Tr. 1311.)

201. Grocery wholesalers and bottlers provide "warehouse brand" soft drinks to independent grocers. Examples include Shasta (RX 1531; RX 1957; Howell, Tr. 4031), Paygo (RX 1953; Summers, Tr. 6551), IBC Root Beer (CX 1294), Rainbow, Rocky Top, and Parade. (Hiller, Tr. 5337-38; R. Hoffman, Tr. 5534-35.)

202. Some bottlers produce their own brand name products, including the "Texas" brand of Texas Beverage Packers (Hixon, Tr. 7277-78) sold in Super S (Sendelbach, Tr. 7691). Rocky Top brand sold in Kroger (Morath, Tr. 7667, 7668-69), and "BPI" brand of Beverage Packers, Inc. (RX 1819; CX 202; RX 2245.)

203. Private label, non-carbonated soft drinks, and warehouse brands are delivered to the retailer's warehouse. The retailer delivers the product to the retail stores, stocking the shelves and displays, and

[6] "Warehouse brand" - brand of soft drinks distributed to retailers by delivery to their warehouses. The brand may be owned by grocery wholesaler, contract packer, bottler, or concentrate company.

merchandising the product. (Summers, Tr. 6468; Turner, Tr. 955; Hoffman, Tr. 327.)

204. National brands are delivered by the "direct store door" ("DSD") method of delivery, where the bottler or distributor delivers the product to the retailer's store and stocks and merchandises the product on the store's shelves and displays. Some brands like Shasta and Faygo are sold nationally but delivered by warehouse delivery. (RX 1001.)

205. The United States Department of Commerce's "Standard Industrial Classification" code for soft drinks, SIC No. 2086, includes private label, non-carbonated and warehouse brands as well as national brands. (CX 4080, Hilke, Tr. 8540; CX 4160.)

206. The National Soft Drink Association, the primary industry trade association, considers private label soft drinks, warehouse soft drinks, and non-carbonated soft drinks produced by soft drink bottlers (Lipton Tea, Delaware Punch, Hawaiian Punch) to be "soft drinks." (RX 3128; Strickland, Tr. 7956-57.)

207. Companies which track the sales of private label and warehouse brand soft drinks include Nielsen Audits (E. Hoffman, Tr. 7289-91; CX 27-V), Nielsen Scantracks (Summers, Tr. 6549-50; CX 1165-H, W, Z-30-37), and Information Resources, Inc. (CX 2392-A).

208. The Share of Intake Panel ("SIP"), prepared by NFO Research, tracks all beverages including private/warehouse brand soft drinks. (RX 2197, pp. 6707-12; RX 2204.)

209. Witnesses from the marketplace perceive private label, warehouse brand, national brand and regional brand soft drinks to be generally competitive products. (Howell, Tr. 4028-29; Campbell, Tr. 1995; Knowles, Tr. 2806-07; Koch, Tr. 1875-76; Trebilcock, Tr. 5873-74, Turner, Tr. 988.)

210. Documents and testimony from soft drink bottlers and concentrate companies refer to competition from private label and warehouse brands. Concentrate firms include Procter & Gamble (CX 774-B, C; CX 858-A); CCUSA (CX 3436, RX 687-D, M, RX 958-B-D, CX 1084, CX 1991-Z-31, CX 3436, pp. 870-71; CX 2230-C, CX 169-C, Howell, Tr. 4029, 4023-25); PepsiCo (CX 4122-E); DPUSA (RX 1405-E); RC Cola (Coyne, Tr. 3602-03, RC Annual Report, RX 2837, p. 10, RX 2838, RX 2841, p. 10); 7-Up (RX 1990, p. 415); Schweppes (CX 2871-B); Canada Dry (RX 2245); and Welch's (RX 1937, pp. J, L-M).

211. The bottlers include CCSW (RX 2060 at C-11965, RX 226-A, K, RX 480-J, CX 3158-K, CX 3784, CX 2974-Q-R, RX 398); Pepsi COBO (RX 2503-A, D, RX 1259-A, RX 1287-E, CX 4122); and CCE (RX 1479-J).

212. The retailers include: HEB (Gonzaba, Tr. 2122-23); Super S (Sendelbach, Tr. 7691); Stop-N-Go. (RX 1506.)

213. In 1984, a CCSW market report stated that (RX 2059 p. 11757): "We continue to watch price brands such as Shasta and private label store brands increase their space, share of market and even ad take."

214. Fanta, the Coca-Cola flavor line, competes directly with private label soft drinks. It is delivered direct-store-door. (RX 687; CX 8134-D-X; RX 958-Z-6.)

Prices

215. When Jim Turner, the Dr Pepper bottler in Houston, sets his prices on the pepper and lemon-lime soft drinks he looks at branded competitors, Coca-Cola and Pepsi. But he watches the prices for private labels because they could affect his sales of Sunkist, NuGrape, Squirt, Big Red and A&W. (Turner, Tr. 988.)

216. Robert Chapman, of H.E. Butt, explained the price gap between private and national brands (Tr. 7190):

Q. Does H-E-B try to maintain Plaza as the cheapest brand?

A. Yes, we do.

Q. Can you tell us why?

A. Yes. To be competitive with other private labels from other companies, other private label brands such as companies like Kroger or somebody else might have.

Also, we pay less for it, and the consumer can only buy it at H-E-B. If the consumer is really a Plaza liker, then the consumer can only get it at our stores. So we want to keep them coming back there and keep them happy, so we try and price it below the other brands.

Q. Does H-E-B make any effort to try to maintain at least an everyday margin between national brands, DSD brands and its private label?

A. We have set our markups based on cost, generally, and because the costs are different, there is a spread. We don't say, well, we are going to be 15 cents a six-pack or whatever difference, but we base it off of costs and the costs naturally do that.

Q. If DSD prices decreased, what impact would that have on your private labels, or would it necessarily have an impact?

A. I believe the sales would decrease on private labels.

217. In February 1989, Texas Bottling Group in San Antonio raised wholesale price six percent resulting in a three to four percent net price increase after discounts. Big Red matched the price increase in mid February. Pepsi matched the increase on March 1. The Nielsen Ratings for the February/March period indicated that private label market share increased up to 20%. (CX 3806-Z-56.)

218. An RC bottler from Iowa testified that he priced off national brands but watched the price gap (20% in his market) between national brands and private labels. (Trebilcock, Tr. 5873.)

219. Texas Beverage, a contract packer, has given up major holidays to national brands because their prices are so low. (Hixon, Tr. 7303.)

220. Shasta seeks a mid-point position between the prices of private label and national brands. (RX 3011, p. 3197.)

221. In 1983, a Coca-Cola official estimated that "private/control labels peg their net prices to those of the national brands (an average of 29% lower)." He estimated warehouse brands, like Shasta and Faygo, at 20% lower in price. (CX 814.)

222. David Davis, Vice President of Pepsi USA, testified about the affect in San Antonio of price competition between national and private brands (Tr. 4528-29):

Q. With regard to San Antonio, did private labels come back or increase in their market share?
A. Yes, they did.
Q. Was that a result of the branded price increase?
A. It's my opinion it is, yes.
Q. How so?
A. We felt like when you're getting national brands down so low -- 99 cents, you're taking market share out of private label then.
When the prices are higher, then you still have the price shopper that's going to pick up the private label. Therefore, you're losing share back to the private label.
Q. Well, since 1988 have you seen any interaction between private labels and your Pepsi brands?
A. You mean in the same ad?
Q. No. With regard to either losing market share or losing volume.
A. Yeah. We took a volume hit when prices came up. Share -- We saw private label pick up some share also.
Q. How significant?
A. I don't recall. It just seems like it was out of both of us.

Q. "Both of us" meaning?
A. Pepsi and Coke.

223. In 1989 Pepsi Cola report on Nielsen performance stated that (RX 2503-A):

Private label was the key beneficiary of 1988 Corp. Pepsi (-0.9) and Corp. Coke (0.7) share losses in Pepsi-Cola South with a 1.3% share growth v. 1987.

The Pepsi report stated that in San Antonio, private label increased market share by 2.4% in 1988 and Coca-Cola lost 2.8% while Pepsi stayed the same. (RX 2503-M.)

224. When setting the retail price for Coca-Cola, the H.E. Butt grocery chain does not consider private label or Pepsi prices, but uses cost-based pricing. (Gonzaba, Tr. 2106-07.)

225. Toby Summers testified about the market share changes caused by price competition between national brands and private labels (Summers, Tr. 6556, 6726-27):

Q. What is your opinion as to why control brands fell that particular bimonthly?
A. It's influenced by the ad feature activity. The summer ad feature activity, the summer of '89 was heavily influenced by national soft drinks and, therefore, I think what you saw would be -- What you should see is that the national soft drinks, when they go on ad, spike down or get down, whatever you want to call it, and suck up and siphon off private label volume.
And the inverse happens when the private labels are on ad. They spike up into the national brand share and siphon off share.
So you see a trade-out that's heavily influenced by the ad feature frequency.
Q. Have you and I discussed that earlier in your testimony concerning the situation in 1989 on the FM and AM Nielsens, bimonthly Nielsens?
A. Yes, we did.
Q. Can you tell us again what that relationship was?
A. It was the same relationship. When private labels hit one of their two strongest months, which was FM at 18 share, I believe, Pepsi hit one of their lowest months.
The following month private labels were at 14-something, which was another strong month, and Pepsi continued to be somewhat depressed.
Later on in the summer months, Pepsi went up and the private label share went down to about seven -- or control brands went down to about seven, I believe.

226. In 1982, private label and control brand soft drinks had 5.7% of the San Antonio market. This is one of the lowest such market shares in the country. The United States average was about 10.5%, and in some markets the share is over 20%. (CX 1084-D.)

227. "Control brand" in Nielsen means private label controlled by retailer (excluding Shasta and Faygo). (Summer, Tr. 6551.) Controlled brands bimonthly share of food stores in San Antonio was (RX 2806-X pp. 17):

	1988	1989
February	5.1%	18.0%
April	7.2%	14.9%
June	8.6%	7.0%
August	8.2%	11.5%
October	10.0%	13.2%
December	6.7%	

The 18% shares in February 1988 and February 1989 coincided with Plaza ads by HEB. The drop in share in December 1988 and June 1989 coincided with ad feature activity by the national brands. (Summers, Tr. 6553-57.)

228. Normally, private/warehouse prices average between 20% and 30% below the prices of national DSD brands. (Adams Depo., CX 3814, p. 39; CX 814-A.)

229. When national brands are promoted, the retail price of national brands drops near or below the price of private/warehouse brands. (Trebilcock, Tr. 5873-74; Bodnar, Tr. 1555-56; Summers, Tr. 6549.) Retailers use reduced prices on national brand soft drinks to demonstrate to consumers that their prices in general to consumers are low. (Howell, Tr. 3951-52.) Retail price reduction of national brand soft drinks reduces sales of private label brands. (CX 3031; RX 538-Z-99 ("The primary victims of lower DSD prices were the warehouse and private label brands, which experienced marked share loss and volume decline"); Hixon, Tr. 7303, 7360; Lydick, Tr. 2973; Chapman, Tr. 7190; Turner, Tr. 988; Campbell, Tr. 1999; Skinner Test., RX 3011, pp. 3171-78, 3197-98.)

230. When the price difference between private/warehouse brands and national brands increases (Davis, Tr. 4528-29), or when retailers promote their private brands heavily, the market share of private label increases. (Kaiser, Tr. 3252; Bodnar, Tr. 1359-60; Sendelbach, Tr. 7692-93; Hixon, Tr. 7303; Howell, Tr. 4118.) Private brands in San Antonio had 18.3% share in February/March 1990. (Summers, Tr. 6554; CX 3708; CX 3784-A, D.)

231. Dr. Hilke, complaint counsels economist, ran "price sign tests" comparing the movement of prices of national brand to that of private label and warehouse soft drinks. (Hilke, Tr. 5948-56; CX 1678) Prices moved in the same direction eight out of ten times. (CX 1678-B.)

232. Respondent's economist, Dr. Strickland, calculated the probability that private label and national brand soft drinks would randomly move in the same direction eight out of ten times was less than six percent. (RX 3088; Strickland, Tr. 7979.)

Consumers

233. The quality of merchandising for DSD and warehouse brands can vary. Some bottlers' employees do a good job of merchandising their DSD products; others do a poor job. (CX 2627-Y to Z-10; Hixon, Tr. 7362.) HEB does a better job of merchandising its Plaza private brand than Pepsi does of merchandising its DSD-delivered brands. (Summers, Tr. 6472.)

234. One market research report perceived that the use of private brand soft drinks is "significantly higher" among Hispanic consumers than it is among other consumers. (CX 2662-Z-66.) About 55% of San Antonio's population is Mexican-American. (Bodnar, Tr. 1224.)

235. The three liter PET bottle is a much better seller than the two liter PET bottle in San Antonio. The opposite is true for the rest of the state. (Kaiser, Tr. 3189, 3249.)

Retailers

236. Private label soft drinks are more profitable for the retailer than national brands. (Sendelbach, Tr. 7692.)

237. Private label soft drinks have more space relative to sales than national brand soft drinks (Kaiser, Tr. 3267-68; Smith Test., Rx 3005, p. 3721) because the retailer controls the allocation of space. (Davis, Tr. 4761-62; RX 256; CX 3270; CX 3384-H.)

Similar Products

238. Canada Dry mixers and seltzers are in the relevant product market. (Hilke, Tr. 6177.343) Similar products like Original New

York Seltzer, Perrier and Artesia should also be included. (Strickland, Tr. 8005, 8012-13.)

239. CCSW sells Canada Dry mixers and Ginger Ale in bottles, cans and fountain syrup. Canada Dry mixers include Tom Collins mix, club soda, sparkling water, and diet versions of these products. (Summers, Tr. 6529-30.)

240. Bottled carbonated water and Canada Dry products are usually in the beverage section of a supermarket. (Summers, Tr. 7860.)

241. Flavored seltzer is a premium-priced drink which is clear in color, premium priced, in flavors such as lemon, raspberry, peach and root beer. (Summers, Tr. 6532; CX 2916 (CD Sparklers).) The seltzer segment has grown recently. (CX 2914-Q, R; CX 2390; Espinoza, Tr. 4196-97.) New products have been introduced by both existing concentrate companies and new entrants. (RX 2235.)

242. CCSW has developed a new product called "Spike," which is an isotonic soft drink similar to Gatorade. (CX 308; CX 3685.) Other isotonic products sold in CCSW territory are QuicKick, ProMotion, and 10-K. (Summers, Tr. 6534; Antle, Tr. 3111-12.)

243. CCSW produces and packages non-carbonated soft drinks, including Lipton Iced Tea (RX 345), Delaware Punch, and Hawaiian Punch. (Summers, Tr. 6426-27.) Grant-Lydick sells Country Time Lemonade, a non-carbonated soft drink, in 12-ounce cans in food stores and vending machines. (Bodnar, Tr. 1547.) These "still" drinks must be packaged with nitrogen to provide pressure to strengthen aluminum cans. (Turner, Tr. 1405-06.) CCSW packages these products, using the same production equipment, in the same sizes and types of containers that it packages carbonated drinks. (Summers, Tr. 6427-28.) CCSW generally prices these still products at the same prices charged for carbonated soft drink brands in food stores and vending machines. (Summers, Tr. 6538.)

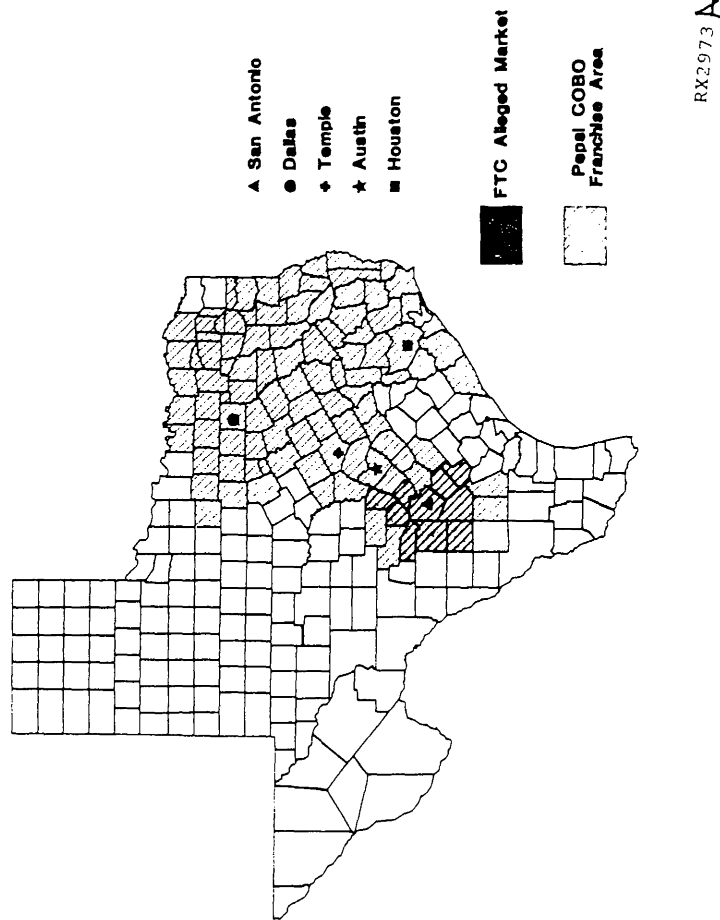
244. Pepsi USA is test-marketing H_2Oh!, a bottled water, Mountain Dew Sport (an isotonic beverage), and Tea Breeze (a canned tea). (Davis, Tr. 4639-43; Christian Depo., CX 3912, pp. 79-83; CX 387; CX 1934; CX 2903-F, G ("Schweppes"); CX 2916-Q.) The differences between carbonated soft drinks and non-carbonated drinks have blurred as products with characteristics of both have been introduced. (RX 2200; CX 2330-D; CX 2903-F, G; CX 2916-Q; RX 2255; RX 2267; RX 2963; Koch, Tr. 1876.)

RELEVANT GEOGRAPHIC MARKET

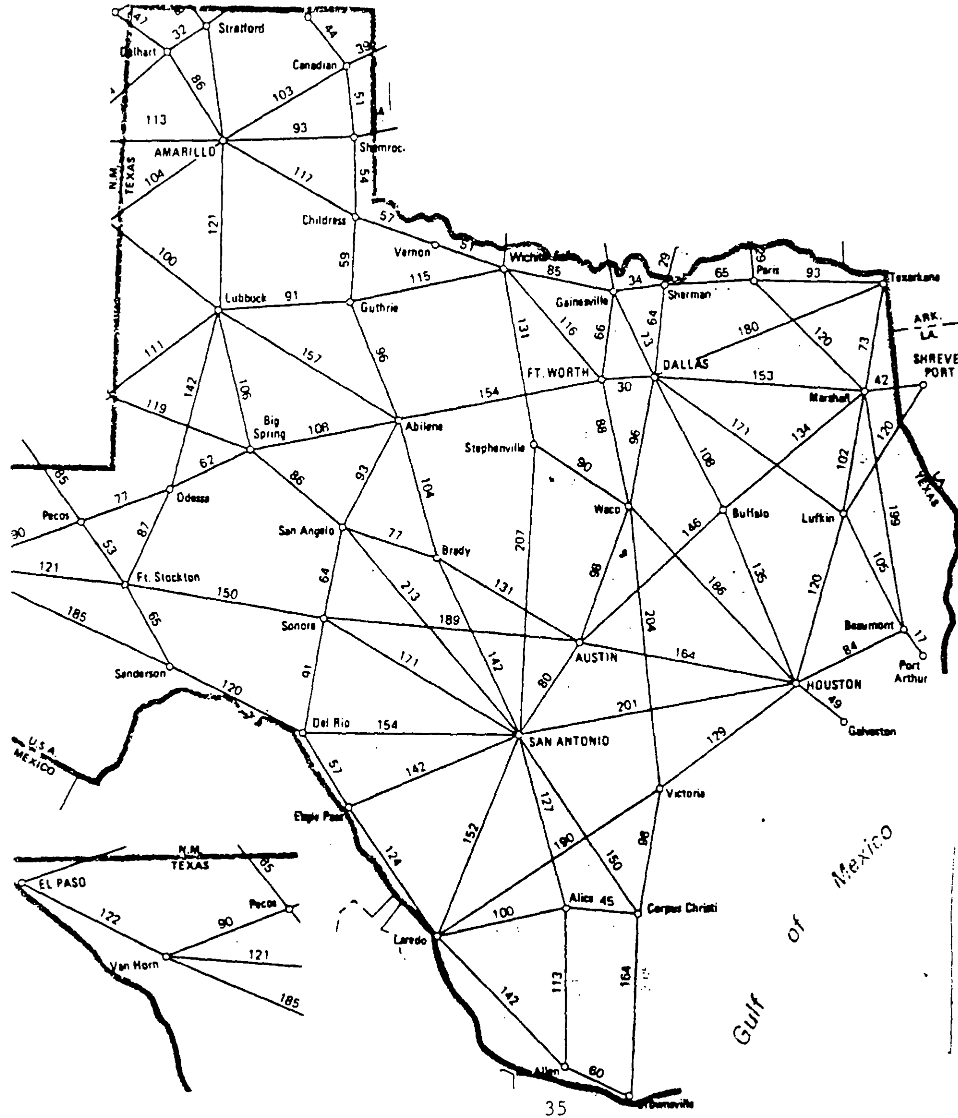
245. The geographic area of the Dr Pepper franchise acquired by CCSW in 1984 consisted of seven counties in Texas (Atascosa, Bandera, Bexar, Frio, Kendall, Medina, and Wilson) and portions of three other counties (Blanco, Comal, and Karnes). This region will be referred to as "the ten-county area." (Amended Complaint, p. 3 Section 9; Hilke, Tr. 5988.) I find that the relevant geographic market exceeds the ten-county area.

246. Here is a map of the ten-county area compared to the Pepsi Cola franchise area (RX 2973-A):

COMPARISON OF THE FTC ALLEGED MARKET TO THE PEPSI COBO FRANCHISE AREA



246a. Here is a map with cities and distances (RX 2964):



Shipments

247. Much of the soft drinks sold within the ten-county area are produced outside that area. Grant-Lydick has no canning line, and has purchased 98-99% of its canned soft drinks from the Turner DP canning plant in Irving (Turner, Tr. 1117; Bodnar, Tr. 1526-27) and the Better Beverage, Inc. plant in Hallettsville (Campbell, Tr. 1926, 1987), both of which are outside the ten-county area. The Seven-Up and RC Cola products sold by Grant-Lydick and its predecessors in the San Antonio area since 1982 have been produced in the Houston bottling facility presently operated by Turner DP. (Turner, Tr. 929; Espinoza, Tr. 4248-49; Bodnar, Tr. 1557.)

248. Until June 1990, Pepsi COBO imported all canned soft drinks sold within the ten-county area from its plant in Houston (Davis, Tr. 4461-62, 4464, 4630-32) which is outside the ten-county area. Fifty percent of Pepsi COBO's sales are in cans. (Davis, Tr. 4630-31.)

249. Pepsi COBO also obtained 22% of its bottled soft drink products from outside the ten-county area. (Davis, Tr. 4632.)

250. In 1990 Pepsi COBO moved a can line from Conroe to its bottling plant in San Antonio, at a cost of from $1.0 to 1.3 million. (Amrosowicz, Tr. 808, 822-23.)

251. Kroger produces its Big K soft drinks for Texas in its plant near Dallas. (Knowles, Tr. 2837; Morath, Tr. 7665-66; Kaiser, Tr 3254-56.) Shasta's plant in Houston, Texas, produces all of Shasta's soft drinks for Texas. (Knowles, Tr. 2689.)

252. Beverage Packers, Inc. supplies all of Texas, including San Antonio, from its Fort Worth plant. (Hixon, Tr. 7274; Morath, Tr. 7670.)

253. Star Distributing purchases Nehi finished products from Temple Dr Pepper Bottling Company in Temple, Texas (outside the ten-county area) for distribution in San Antonio and the Rio Grande Valley. (Espinoza, Tr. 4193; Coyne, Tr. 3433.)

254. CCSW produces 12-pack cans in its Cuero facility (outside the ten-county area) for distribution throughout its franchise territory. (Summers, Tr. 6403-04.)

255. USA supplies Coca-Cola concentrate and much of the Coca-Cola fountain syrup sold in the ten-county area and throughout Texas from its syrup plant in Dallas. (Short, Tr. 7734-35; Howell, Tr. 3984.)

256. Much of the soft drinks produced within the ten-county area is shipped and sold outside that area. CCSW ships soft drinks from San Antonio and Cuero throughout its territory to the Corpus Christi, Victoria, Temple, Uvalde and Del Rio warehouses. (Summers, Tr. 6410; E. Hoffman, Tr. 130, 201.) CCSW produced soft drinks for Fredericksburg Coca-Cola Bottling Company. (Schwerdtfeger, Tr. 2463.) About 45% of CCSW's sales are outside the ten-county area. (Summers, Tr. 6423-25.)

257. Texas Beverage supplies soft drinks throughout Texas from its San Antonio plant. (Hixon, Tr. 7272-74, 7278.) About 50% of Texas Beverage's production is sold outside San Antonio. (Hixon, Tr. 7290.)

258. Grant-Lydick has one bottling plant, located in San Antonio. (RX 2939-D.) Grant-Lydick supplies its sales centers in Austin, Corpus Christi, Victoria, Rio Grande and La Grange with bottled products produced in the San Antonio plant. (Bodnar, Tr. 1338-40.)

259. Pepsi COBO's San Antonio bottling plant packages soft drinks in two-liter and three-liter PET bottles. (Davis, Tr. 4461.) Three-liter Pepsi bottles for shipment throughout Texas are produced in San Antonio. (Davis, Tr. 4636; Amrosowicz, Tr. 827-28; CX 2360-A.) About 35% of the San Antonio three-liter bottle production is sold outside the ten-county area. (Amrosowicz, Tr. 827-28.)

260. In 1983, 75% of the product produced by plants in San Antonio was sold in the ten-county area, and 78% of the product sold within the ten-county area was produced within that area. (Strickland, Tr. 8040-41, 8672; RX 3129.)

261. In 1988, 57% of the product produced by plants in San Antonio was sold in the ten-county area and 77% of the product sold in the ten-county area was produced within that area. (Strickland, Tr. 8046-50; RX 3130.)

262. Hilke performed Elzinga-Hogarty ("E-H") calculations.[7] One set involved an E-H calculation based on a 1990 extrapolation of 1988 production and sales estimates (CX 4089-E), adjusted for the fact that Pepsi has moved a can line to San Antonio in June 1990. (Hilke, Tr. 8516, 8554.) Another set re-calculated Dr. Strickland's E-H figures, but excluded private label and warehouse brand sales and production. (CX 4089-A; CX 4089-C; Hilke, Tr. 8516, 8555.)

[7] The E-H test measures actual shipments of relevant product into and outside of a proposed region. To qualify as a relevant geographic market, an area must satisfy a two-pronged test: "Little in From Outside" ("LIFO") and "Little Out from Inside" ("LOFI").

263. The 1983 calculation gave a LOFI percentage of 81% and a LIFO percentage of 77% (CX 4089-Al B), thus failing the most recent (90%) version of the E-H test. (Hilke, Tr. 8551-52.)

264. The 1988 calculation gave a LOFI percentage of 59% and a LIFO percentage of 76% (CX 4089-C, D), failing the "weak" (75%) LOFI test. (Hilke, Tr. 8553-54.)

265. The 1990 calculations gave a LOFI percentage of 62% and a LIFO percentage of 85% (CX 4098-E, F) thereby failing the "weak" 75% LOFI test. (Hilke, Tr. 8554.)

266. The freight cost to ship a truckload of soft drinks is between $0.75 and $1.10 per mile. (Hixon, Tr. 7286; Amrosowicz, Tr. 807, 859-60; Summers, Tr. 6884, 6915.) Truckload capacity varies with the type of soft drink package; a truck can carry 2200 cases of cans. (Amrosowicz, Tr. 859-60.)

267. Using a cost figure of $0.75 per mile, Toby Summers calculated that a 10% increase ($0.59) in the wholesale price of canned soft drinks would enable canned soft drinks to be shipped a distance of 793 additional miles on a round-trip basis without back hauling. (Summers, Tr. 6437-38, 6885, 6915-17.) Back haul would reduce the shipping cost. (Bodnar, Tr. 1528-29.)

268. CCSW has sales centers in Del Rio, Uvalde, Kerrville, Victoria, Corpus Christi, Temple and San Antonio. (E. Hoffman, Tr. 57, 201-03; Summers, Tr. 6407-08.) CCSW ships from its San Antonio plant up to 150 miles to supply its sales centers. Three of the sales centers are about 150 miles from San Antonio, two are about 100 miles away and one is 60 miles. (RX 353.)

269. Turner DP purchases Original New York Seltzer from a contract producer in Des Moines, Iowa, 900 miles away. (Turner, Tr. 1006; Trebilcock, Tr. 5811, 5867, 5869.)

270. Pepsi COBO ships throughout Texas from its plants in Conroe, Houston, San Antonio and Mesquite. (RX 1238-E, F; Amrosowicz, Tr. 847-48.) Pepsi COBO ships 260 miles from its Conroe can plant. (Amrosowicz, Tr. 847-49; CX 2380-C.)

271. Grant-Lydick purchases soft drinks in cans from Dallas and ships them to San Antonio (280 miles) and from there an additional 240 miles to Harlingen, Texas, for a total cost of 25¢ per case. (Bodnar, Tr. 1528-30.)

272. Kroger supplies soft drinks to its warehouses in Louisiana, Tennessee and throughout Texas from the Garland production facility. (Morath, Tr. 7665-66; Kaiser, Tr. 3254-58.)

Territories

273. The ten-county geographic market consists of the Dr Pepper franchise area acquired by CCSW in September 1984. (F 274.) It is smaller than the territory in which: CCSW operated before and after September 1984 (CX 1854-B); the geographic territory in which DP-SA operated before and after September 1984 (Bodnar, Tr. 1522-24); and the 35 county franchise area for the Canada Dry brands acquired by CCSW in September 1984. (RX 2972.) The ten-county area does not include the eleven additional counties in the Dr Pepper franchise territory acquired by CCSW after September 1984. (Rx 352.)

274. In 1984, the Dr Pepper franchise acquired by CCSW was for ten counties including San Antonio. (RX 2964.) Later the franchise was expanded to 21 counties, through the acquisition of American Bottling Company of Corpus Christi. (RX 352; R. Hoffman, Tr. 5597-98; RX 6-B.) In 1984, CCSW was franchised by Coca-Cola Company in 29 counties, including San Antonio. By 1989, the franchise had increased to 51 counties. (RX 2971; Strickland, Tr. 8085-86.) In 1985, CCSW operated primarily in the ten-county area, but about 30% of its sales were distributed outside of that area. (CX 418-Z-4.) In 1986, CCSW operated in 39 counties in Texas. (CX 1854-B.)

275. CCSW's current franchise territory includes San Antonio and 60 counties in southern, central and eastern Texas. (RX 352; RX 6; E. Hoffman, Tr. 201, 496-98.)

276. Grant-Lydick's current franchise territory includes San Antonio and 60 counties in southern central and eastern Texas. (RX 3; RX 5 (RC Territory); Coyne, Tr. 3502-04; RX 2970.)

277. Pepsi COBO's franchise territory includes San Antonio and 105 contiguous counties in the eastern half of Texas. (RX 2973; RX 2; Howell, Tr. 4013-14; Davis, Tr. 4451-54.) Pepsi COBO also has other counties in West Texas and in the Rio Grande Valley. (RX 2; F 246.)

278. There are no territorial restrictions in the sale of CCUSA or DPUSA fountain syrup to retail accounts. (Howell, Tr. 4005; Cassagne, Tr. 7619-20.)

279. There are no territorial restrictions in the sale of private label or warehouse soft drinks. (Hixon, Tr. 7277-78.)

280. HEB currently operates 165 stores in South-Central Texas. (RX 4; Gonzaba, Tr. 2111-13.) Forty of these are within Bexar

County. (Chapman, Tr. 7144; Summers, 7843.) There are 86 HEB stores in CCSW's franchise territory. (Summers, Tr. 6593; RX-4.) HEB distributes grocery products (including its Plaza soft drinks) to all its stores from the warehouse located in San Antonio. (Chapman, Tr. 7141; Gonzaba, Tr. 2114.)

281. Kroger's Houston "KMA" ("Kroger Marketing Area"), is from Eastern Louisiana to West Texas, and includes San Antonio and the ten-county area. (CX 3966-Z-12; CX 2037-C; Kaiser, Tr. 3156.)

282. Albertson's Texas Division marketing area includes 55 stores in North and South Texas and 12 stores in Louisiana. (Donald, Tr. 5287.)

283. Eckerd's Houston District marketing area includes Houston, Beaumont, Corpus Christi, San Antonio and Austin, Texas. (CX 1144.)

284. The media advertising measure for television and radio is The A.C. Nielsen Company's "Area of Dominant Influence" ("ADI"). (Strickland, Tr. 8075.) The San Antonio ADI is 15 counties larger than the ten-county area. (RX 2967.)

285. The advertising areas for the two major San Antonio papers, the San Antonio Light and the San Antonio Express (Strickland, Tr. 8696-97), includes about 30 counties.

286. Arbitron sells warehouse shipment data for grocery items as a Selling Area Marketing, Inc. ("SAMI") report. (RX 1945; Strickland, Tr. 8077-78.) The SAMI region which includes San Antonio is about 50 counties. (RX 2696.)

Transshipping

287. Transshipping is the movement of franchised soft drink products from the territory of one bottler for resale in the territory of another bottler. The franchise agreements issued by CCUSA, DPUSA and Pepsi USA prohibit transshipping by bottlers. (F 111.) Retailers are not parties to bottling franchises. (Neslage, Tr. 8727; E. Hoffman, Tr. 391; Howell, Tr. 3977.)

288. Almost a million cases of Coca-Cola products were transshipped into an area north of Houston in 1982. (RX 3122.)

289. A Pepsi USA log of transshipment complaints against the Conroe can plant shows 230 complaints within a 62-month period, mostly made by Oneta Company in Corpus Christ. (CX 2327; Davis Tr., 4748; Koch, Tr. 8629-32.)

290. Quality Liquor Wholesalers, a beverage distributor in Amarillo, Texas, dealing primarily in liquor and beer, transships cases of soft drinks into SWCC territory. (R. Hoffman, Tr. 568990.)

291. SWCC received over $200,000 in 1986 and 1987 for lost sales due to transshipping charged to CCE and other bottlers because of the activities of Quality Liquors. (R. Hoffman, Tr. 5691; CX 3623; CX 3645-Z-46 (38,000 cases in 2 months); CX 3624 (153,000 cases in 10 months).) Quality Liquors continues to transship. (CX 3636-A (20,000 cases in 1988); R. Hoffman, Tr. 5688, 5691.)

292. In September 1988 CCUSA fined CCE $177,165 for 35,433 cases of transshipped product found in SWCC's franchise territory. (CX 2409-C.)

293. In 1989, CCE paid more than a million dollars of transshipping fines to CCUSA. (RX 3131-R; Neslage, Tr. 8729-30.)

294. Resellers of soft drinks in CCSW's market sell to others who sell at retail either in or outside of that market. Such resellers include: Sam's Wholesale Club (RX 3121; CX 2199-I), Quality Liquors, and vending companies. (Jackson, Tr. 3365, 3375.)

COMPETITIVE HISTORY

Effect of Acquisition

295. The 1984 acquisition did not reduce the number of competing firms or soft drink plants in the market. (Turner, Tr.1158-59.) DP-SA continued in operation until it was sold to Grant-Lydick. (F 54.)

296. In 1982 DP-SA acquired the former Big Red Bottling Company of San Antonio. (F 31.) In 1987 Grant-Lydick acquired the San Antonio 7-Up bottler. (F 63.)

297. Since 1982, PepsiCo acquired the Huntress bottling company in San Antonio (F 33), the Pepsi-Cola bottler in Houston and in Dallas (F 17), thereby integrating vertically Pepsi operations throughout much of the eastern half of Texas. In September 1986, CCUSA acquired the JTL bottling operations in Dallas, Houston, and Austin, thereby integrating vertically Coca-Cola operations in much of the eastern half of Texas except for CCSW's territory. (CX 1512-D.)

298. As part of the 1984 acquisition, CCSW purchased 40% of DP-SA's fleet of used delivery and over-the-road trucks. (F 50.)

299. CCSW could have acquired the trucks from many other sources, including lease companies that sell trucks at the end of the lease period. (Summers, Tr. 6771.)

300. DP-SA sold CCSW the warehouse that was located on property adjoining the CCSW property. (Summers, Tr. 6661.) DP-SA had its bottling operation in the building until it acquired the Big Red Bottling plant in 1982. (F 56; RX 1580-A.) At the time of CCSW's purchase, DP-SA had publicly listed the warehouse for sale but it had not been purchased. (Bodnar, Tr. 1519.)

301. DP-SA sold CCSW 2,150 used vending machines (F 50), many of which were located in accounts where CCSW already had vending machines. (Summers, Tr. 6773.) Soft drink companies offer programs to finance new vendors, and used vendors are readily available from brokers. (Summers, Tr. 6671-72, 6772, 6957-58; Turner, Tr. 1194-95; F 60.)

302. The average age of the machines was five to six years at the date of the 1984 transactions. (Little, Tr. 653.) The average useful life of a vending machine is ten years. (Turner, Tr. 1194; Lauterjung, Tr. 4901; Little, Tr. 691.)

303. Most of the machines were in place at customer locations. (Schwerdtfeger, Tr. 2452.) Many of the locations already had a Coca-Cola or Pepsi-Cola vending machine in addition to the Dr Pepper machine. (Summers, Tr. 6773.)

304. Dr Pepper products could be added to CCSW vending machines without reducing availability of other products. In locations where another vending machine could not be installed, CCSW replaced the second or third button allocated to Coca-Cola, thereby increasing the variety of products available to consumers, without reducing competition among products. (E. Hoffman, Tr. 418.)

305. Many of the DP-SA vending machines were located at military bases around San Antonio, pursuant to vending contracts between DP-SA and the Army-Air Force Exchange Service ("AAFES"). (CX 255-B, D, Z-8, Z-38, Z-44, Z-67.)

306. After the acquisition of the Dr Pepper brand, CCSW dropped Mr. PIBB, which had a market share of 2.1% in 1983. (Hoffman, E., Tr. 342, 421; CX 122; CX 1681-C.)

Finance

307. After adjustment for inflation, the retail and wholesale prices of soft drinks in the San Antonio area declined over the 1984-1990 period. (Davis, Tr. 4697-99; Bodnar, Tr. 1569; Coyne, Tr. 3500; Campbell, Tr. 1999-2000; Atchison, Tr. 5242.)

308. The costs to produce finished soft drinks increased over the 1984-1990 period. (CX 3258; CX 1026.)

309. CSW's costs increased and financial support from CCUSA has been cut. The cost of an HEB ad buy was 45% higher in 1990 than in 1989, increasing CCSW's marketing costs by $1.4 million. (R. Hoffman, Tr. 5635-36.)

310. Increasing costs and declining prices of soft drinks decreased profits of CCSW (Schwerdtfeger, Tr. 2592-93; CX 1541-C), and Pepsi COBO. (Davis, Tr. 4695-96.)

311. Although the financial performance of Better Beverages, Inc. is improving in 1990, margins decreased fifty percent from the early 1980's to 1989. (Campbell, Tr. 2001-2.) The Victoria area, where Better Beverages, Inc. competes with CCSW, is one of the lowest priced soft drink markets in Better Beverages' territory. (Campbell, Tr. 1950-51, 2000.)

312. L.C. Vending Company's sales have increased since 1985 but profits have not. (Jackson, Tr. 3356.)

313. Texas has the lowest soft drink prices in the United States due to high per capita consumption, the strength of Dr Pepper brands and promotional efforts of PepsiCo to buy market share. (Turner, Tr. 979; Campbell, Tr. 1950-51; Trebilcock, Tr. 5874-75.)

314. CCSW's and SWCC's net prices per case were lower than the national average for Pepsi bottlers during 1988. (Strickland, Tr. 8433-36, 8444; CX 53; RX 2990.)

315. Price competition has been intense in the San Antonio area since the 1984 transactions. (Lydick, Tr. 2974; Bodnar, Tr. 1480; CX 919-A; CX 1459.)

316. Soft drink prices decreased in 1987 when Pepsi COBO increased its discounts on soft drinks in Texas and the San Antonio area. (RX 1126-M; RX 1129-H, K.) CCSW matched these discounts, followed by further reductions by Pepsi COBO. (Davis, Tr. 4548-49, 4549-59.)

317. The price of soft drinks in San Antonio in 1987 was below the price in 1977. (CX 1427-G.) The average net effective price of Pepsi soft drinks in San Antonio during 1987 was $5.45, 12.4% below the $6.22 average for 1986. (CX 2382-Y.)

318. Pepsi COBO forgoes profits at the bottler level to build sales volume and market share in Texas over the long run. (CX 422-C; CX 2389-K, P; RX 2867; CX 2389-K, P, Z-3; Howell, Tr. 4019; Davis 4559-60, 4653; Bodnar, Tr. 1482, 1568; CX 1427-F.) Pepsi COBO has never made a profit at the bottler level in San Antonio. (Coyne, Tr. 3456; Davis, Tr. 4561.)

319. Pepsi COBO directed lower prices at CCSW, hoping to take advantage of CCSW's financial burdens to generate sales, volume and market share. (Davis, Tr. 4605, 4614-15, 4676-80; CX 3141-C; CX 2177-G.)

320. Pepsi planned to offset $10.4 million in bottling losses in South Texas during 1989 with $9.5 million in concentrate profits. (CX 778-Z-25.)

321. CCSW must meet its fixed costs and its interest expense while maintaining the cash flow ratios required by its loan agreements. (CX 1437; R. Hoffman, Tr. 5634.)

322. In 1987, price competition and the inability to generate sufficient volume growth placed CCSW in financial difficulty. (R. Hoffman, Tr. 5643-44; E. Hoffman, Tr. 523-24; Howell, Tr. 3985-86.)

323. Based on the unsatisfactory financial performance of CCSW in 1987, and the risk occasioned by violations of loan covenants, TBG refinanced the acquisition loan. In addition, George Van Houten and David Green replaced Norb Cole and David Schwerdtfeger as President and Chief Financial Officer, respectively, on January 8, 1988. Toby Summers was promoted to Executive Vice President and Chief Operating Officer. The Vice President of Sales, Larry Teague, had been terminated in September, 1987. (E. Hoffman, Tr. 428-31, 525.) In June 1988, Toby Summers replaced

George Van Houten as President of CCSW. (E. Hoffman, Tr. 526; Summers, Tr. 6708.)

324. CCSW's bottling profitability has been below that of other Coca-Cola bottlers in recent years. (RX 759 (1987); RX 760 (1986); RX 598 (1985); RX 2049 (1983); RX 303-U.)

325. The Coca-Cola Bottling Group (Southwest), Inc. (Texas) refinanced its debt in 1990 with a group of insurance companies at a fixed rate with no principal payments for seven years. (CX 891; E. Hoffman, Tr. 291-92.)

Volume Share

326. "Brand loyal" consumers will pay higher prices for their brand of soft drinks. (Turner, Tr. 1397-98.) "Brand loyalty" refers to the extent to which a consumer purchases only one flavor of soft drink. (CX 848-V-W; RX 642-E; RX 686-E-F, I.)

327. Brand loyalty for soft drinks is low and declining. (CX 1126-C, K; RX 642-E; RX 2842; CX 972-E-4; RX 1323-J; Koch, Tr. 1869; Davis, Tr. 4757-58; RX 2842-B-L; RX 1368-A; Coyne, Tr. 3574-75.)

328. In this market, price competition, and the frequency of low "promotional" prices for soft drinks, induce consumers to buy on price. (Hixon, Tr. 7304-05; Knowles, Tr. 2837-38; RX 686-E, I; CX 972-E-4; RX 2843-A007006; RX 1533-F, G; CX 2424-E; CX 2407-S.)

329. At least one cola is always on sale. Cola drinkers are switchers who buy on price, especially in the sugar segment (non-diet). (Coyne, Tr. 3449-50; RX 686-E-F, I.)

330. The decline in brand loyalty is due in part to the proliferation of varieties of one trademark. (CX 1274-H.) Before 1983 the only brand which carried the "Coca-Cola" and "Coke" trademarks was Coca-Cola. Since that time, diet Coke, Coca-Cola Classic, Caffeine-Free Coke, Caffeine-Free diet Coke, and Caffeine-Free Coca-Cola Classic have been introduced. (F 332-36.)

331. Sales of the new brands reduce the sales of existing brands. (Atchison, Tr. 5190-91; Stout, Tr. 5115.) The projected "cannibalization rate" of Cherry Coke was 49%. (Stout, Tr. 512627; CX 1140-A.) TAB share declined 50% when diet Coke was introduced. (Sum-

mers, Tr. 6730-31; CX 168-A.) New packers have the same effect. (RX 1365-E.)

332. In May 1985, CCUSA substituted a reformulated Coca-Cola brand ("New Coke") for the old formula ("Old Coke"). (Stout, Tr. 5042.)

333. Consumers, especially in Texas, rejected New Coke and Coca-Cola market share declined sharply. (RX 680-S.) CCUSA reintroduced Old Coke as "Coca-Cola Classic" in September 1985. (Atchison, Tr. 5202, 5232; Stout, Tr. 5048.) Sales of New Coke dropped dramatically. (Atchison, Tr. 5202, 5205.) New Coke had a 0.3% market share in the October/November 1989 San Antonio Nielsen. (RX 2806-R.)

334. During the May-September 1985 period, CCSW had an 18.8% decrease in its sales/share. (CX 3557-0.) Sales of Royal Crown Cola, Dr Pepper and Pepsi Cola increased. (Nicholson, Tr. 3718, 3804; Knowles, Tr. 2660.) Royal Crown's Nielsen share jumped from 1.8% in the June/July 1985 to 5.2% in the August/September 1985 Nielsens. (RX 2806-U.)

335. In the summer of 1985, CCUSA introduced Cherry Coke. The sales share of Cherry Coke in the San Antonio Nielsens peaked at 3.3% during August/September 1985, and has been declining ever since. (CX 3991-Q; CX 3558-P; RX 2806-R.) Its 1989 annual share was 0.3%. (RX 2806-R.)

336. Caffeine-Free Coca-Cola Classic was introduced in March 1990 and the national share is now 0.9%. (Atchison, Tr. 5219, 5222.)

337. Caffeine-free soft drinks appeal to 15-20% of consumers. The caffeine-free category recently began with SevenUp and Sprite. (Coyne, Tr. 3475-76; Atchison, Tr. 5218.)

338. Surveys of sales show large swings related to changes in retail pricing. (RX 452-M; Davis, Tr. 4563.) Texas consumers have low prices as a result of the "cola wars" and have become price sensitive, so that a change in price will produce a significant volume change. (Knowles, Tr. 2837-38.)

339. Pepsi sales surged 16% as a result of the price wars in 1987. (RX 2867; RX 2807.) In 1988 Pepsi COBO increased net effective prices by an average of 6.9%. (CX 4148.) During the first seven months of 1989, Pepsi shares were down 19% in bottle/can and 12% overall compared to 1988. (CX 4148-A.)

340. COBO and Grant-Lydick have increased their Nielsen market share in CCSW's territory since 1985. (Summers, Tr. 6766.)

341. Private label sales volume will increase if CCSW raises prices. When private label is featured on ad at a lower price, sales volume rises, eroding CCSW sales volume. (Summers, Tr. 6771.)

342. When private label brands, market share increases, Pepsi COBO's share decreases, and when Pepsi COBO's share increases, private label share decreases. (RX 2975; RX 43; Strickland, Tr. 7966-67; Summers, Tr. 6554-57.)

343. Several retailers, led by HEB, promote private label soft drinks heavily. The market share of private label ("control brands") has increased from 3.9% in 1982 (CX 3557-T), to 18% in 1989. (RX 2806; RX 2961; Summers, Tr. 6553; Howell, Tr. 4092.) From 1984 to 1989, control brands grew 57%, sales of all other brands grew 20%, in Bexar County. (Summers, Tr. 6766.)

344. The 1989 San Antonio private brand share for three flavor categories of soft drinks (7.3% of the market) was: grape 75%; root beer 44%; orange 25%. (CX 421-C; E. Hoffman, Tr. 624.)

345. From 1984 to 1989 the sales share of Dr Pepper in Bexar County increased from five to eight percent, a 60% increase. (RX 34-A; Summers, Tr.6727.)

346. During 1984 and 1985, market share for Dr Pepper, Pepsi (CX 27-Q) and RC Cola (CX 27-U) products increased, while Coca-Cola lost share. (E. Hoffman, Tr. 541-42.)

347. Soft drink sales and market share in Texas are volatile. (CX 2392-H, N; RX 488-N-R; RX 666-E; CX 2533-Z-28; RX 1200; RX 1469-Z-6 (CCE).)

Public Reaction

348. Retailer employees testified that there had been no adverse consequences from the 1984 acquisition. Chapman of HEB called it "a non-event" (Chapman, Tr. 7249) and Sendelbach of Super S Foods said that the acquisition benefited Dr Pepper. (Sendelbach, Tr. 7690.)

349. Ladd Little, president and owner of L.C. Vending, and his sales manager, Terry Jackson, complained about the 1984 acquisition. (Little, Tr. 669-70, 705; Jackson, Tr. 3309-10.) L.C. Vending buys soft drinks from CCSW and sells them as a direct competitor of

CCSW's vending operations. (Jackson, Tr. 3374; Little, Tr. 652, 703-04.)

350. L.C. Vending wants to raise the vending price on its soft drink machines, but competition with CCSW has undercut any higher price. (Little, Tr. 739-41.)

351. Emery Bodnar, former General Manager of DP-SA and currently General Manager of Grant-Lydick also complained about CCSW's low prices. (Bodnar, Tr. 1571-72, 1695.) Mr. Bodnar was concerned about low pricing on CCSW's Cima Red, which is similar to Grant-Lydick's Big Red. (Bodnar, Tr. 1369.)

Innovation

352. New brands introduced in the San Antonio area since 1984 include Coca-Cola Classic, Caffeine-free diet Coke, Cherry Coke, diet Cherry Coke, Minute Maid Orange and Lemon-Lime, Pepper Free, Original New York Seltzer natural fruit-flavored soda, and other seltzers, Lipton Tea, Cherry 7 Up and diet Cherry 7 Up 7 Up Gold, IBC Root Beer, and Slice. (CX 2038-F, G; CX 2503-Z-3; CX 1673-B, C; RX 803, p. CC36128633 (New brands introduced from 1978-87 reached 20.2% share in 1987 Nielsen audit); RX 1183-C (New Pepsi brands introduced since 1982 are 15% of business).) Thirty-four new brands appeared from 1985 to October 1988. (CX 1673-B, D; CX 3998.)

353. New packages have been introduced or emphasized in CCSW's territory since 1984, including 16-ounce PET, 1-Liter PET, 20-ounce PET, 3-Liter PET, Bag-in-Box, and multi-paks of 12, 15, and 20 cans. (E. Hoffman, Tr. 563.).

354. San Antonio was a test market for the 3-liter PET package, introduced in 1984. (Atchison, Tr. 5226.)

Efficiency

355. In January, 1987, CCSW had a "Reduction In Force," reducing payroll by 20%. (CX 920-E, CX 959; CX 241.)

356. CCSW's acquisition of the Corpus Christi territory, from American Bottling Company, and the consolidation into San Antonio,

led to a cost savings. CCSW's labor cost per case dropped 21.7% between 1986 and 1987. (CX 1399-D.)

357. Consolidating production into one facility and using idle equipment reduced CCSW's fixed overhead costs of manufacturing. (Summers, Tr. 6366.)

358. CCSW delivers to the customer's warehouse in truck/trailer rigs rather than route trucks. Soft drinks are loaded on pallets. (Summers, Tr. 6411-12.)

359. Under ownership of The Coca-Cola Bottling Group (Southwest), Inc., CCSW has had cost savings in consolidation and volume discounts on raw materials. (E. Hoffman, Tr. 277-78, 523.)

Dr Pepper USA

360. The Dr Pepper brand and DPUSA have been helped by the 1984 acquisition.

361. Sales volume and share of Dr Pepper brand soft drink in the San Antonio area increased since the 1984 acquisition. (CX 3946; RX 2823; Knowles, Tr. 2784-85.)

362. Dr Pepper per capita sales in the San Antonio area increased 40% between 1984 and 1988. (CX 709-H.) The rate of Dr Pepper sales growth for the nation was about half that rate. (Knowles, Tr. 2848-49.) CCSW provided Dr Pepper products an excellent distribution system and worked to develop the brand. (Knowles, Tr. 2668, 2784-85, 2853-54, 2848; Coyne, Tr. 3598; E. Hoffman, Tr. 413.) Dr Pepper brands benefit when advertised with Coca-Cola. (Kaiser, Tr. 3232-33.)

363. In 1984, per capita sales of Dr Pepper in CCSW territory were 74.5 gallons, lower than the 85.1 gallon per capita sales of surrounding bottlers, but by 1988, per capita sales of Dr Pepper in CCSW territory were 104.7, higher than surrounding bottlers. (RX 2826; RX 2828; Knowles, Tr. 2794-96; Clarke, Tr. 4380.)

364. In San Antonio, Dr Pepper bottle/can sales decreased from 1982 to 1984 but began to increase in 1985 to 1988. (Knowles, Tr. 2878; RX 2823; RX 2980.)

365. Military bids require that 80% of the can vending business be from Coca-Cola and Pepsi bottlers. Dr Pepper Company brands are in many vending machines as a result. (Summers, Tr. 6676-77.)

Other Competitors

366. Grant-Lydick purchased the remaining assets of DP-SA, including the bottling plant and equipment and approximately 60% of the trucks (Lydick, Tr. 2978-79), for $6.5 million. (Antle, Tr. 3074, 3099; Turner, Tr. 1158; Lydick, Tr. 2981-82.)

367. Grant-Lydick estimated that the assets and franchises they acquired were worth over $12 million. (RX 1648; Bodnar, Tr. 1645-46; Lydick, Tr. 2982; Antle, Tr. 3074, 3099.)

368. The brands which Grant-Lydick took over from DP-SA in 1984 accounted for 60% of DP-SA's 1983 volume. (Lydick, Tr. 2978-79.)

369. Respondent's accounting expert compared Grant-Lydick's profitability to the average profitability of 120 bottling companies. (RX 204; RX 205-K; Goode, Tr. 7427-33.) He concluded that Grant-Lydick was "doing very well in relation to the average for the industry." (Goode, Tr. 7439, 7444.)

370. Grant-Lydick has been successful in obtaining feature grocery ads and in-store promotions for its brands. (CX 2954-B; CX 3248-A-E; RX 256-B, C; RX 461; RX 1678.)

371. Nielsen data show that Grant-Lydick receives a higher percentage of the total shelf space than its percentage share of sales. (Bodnar, Tr. 1613-14.)

372. Grant-Lydick increased profits from 1984 to 1988. (RX 2991.) Grant-Lydick has had geographic expansion in recent years. (RX 2970.)

373. Grant-Lydick's brands have had increased sales and share. (RX 201-A; CX 438-B, C; Lydick, Tr. 3011-12.) Sales of the Big Red brand have grown. (Sharp, Tr. 7546-47.)

374. Royal Crown's sales records (RX 2846; RX 1793), and Grant-Lydick's reported sales of RC brand products (RX 2784-C, D) show growth of RC products sold by Grant-Lydick. (RX 2954-Z-2; RX 2955-V, W; RX 2956-V, W; RX 2957-Z-4-7, 10; RX 2958-Z-8, 11, 12.)

375. Emery Bodnar believes that he has caused Grant-Lydick to be a "tremendous success story." (Bodnar, Tr. 1692.)

376. The financial statements of Texas Beverage Packers show a growth in profitability from 1981 to 1988. (Hixon, Tr. 7319-21; RX 2953; RX 1845-49.)

377. TBP's sales increased from 1981 to 1988. (RX 1850-56; RX 2952; Hixon, Tr. 7316-18.)

EASE OF ENTRY

Distributors

378. Bottling plants in Texas are willing to facilitate new entry by producing new products (RX 2273), and new soft drink distributors have entered by having contract packers produce their product. (Limon, Tr. 4956 (AGA Beverages); Hixon, Tr. 2698; RX 2699.) New entrants need not invest the capital required to build a new bottling plant. (Howell, Tr. 3999.)

379. The physical requirements for distributing soft drinks consist of: a warehouse to store the product; trucks to deliver the product to retailers; and delivery and administrative employees. (Espinoza, Tr. 4237; Summers, Tr. 6478-79.)

380. The cost of the equipment to enter into the business of distributing soft drinks is relatively low. The cost of developing a DSD distribution system to serve the San Antonio area is about $25,000. (Espinoza, Tr. 4237.) A 1988 Nehi business plan estimated that the start-up would cost $30,000 (Rx 2858-G), and take three and a half months (RX 2858-E, F), and that profits during the first five months would recoup those costs. (Espinoza, Tr. 4231-33; RX 2858-Q, P.)

381. A soft drink brand must be accepted by retailers and be allotted shelf space, and have access to ad features or instore displays. (Espinoza, Tr. 4210 (with HEB); Donald, Tr. 5293.)

382. CCSW and Pepsi COBO obtained ad features with HEB but lost money because the sales increase did not offset the cost of obtaining the ad. (Summers, Tr. 7829-33; Clarke, Tr. 4387-88 (Dr Pepper); Davis, Tr. 4705; CX 2394-Z-67 (Pepsi).)

383. Brands by newer, smaller distributors, such as IBC Root Beer (Nelson Brokerage) and Nehi (Espinoza), have acquired ad features and sales with San Antonio retailers. (CX 1295; CX 1299 (IBC in HEB ad); CX 88.)

384. Retailers can feature their private label brands in ads or instore displays without incurring any direct costs. (Hilke, Tr. 6282-83.)

385. Access to ad features does not guarantee the success of a soft drink product. (Knowles, Tr. 2656-57.)

386. Grant-Lydick and Texas Beverage, which have obtained fewer feature ads than CCSW and Pepsi COBO in the San Antonio area in recent years (Bodnar, Tr. 1378-80), have been profitable during this period. (F 372.)

387. Mr. Espinoza has formed distribution companies for Nehi flavors and other brands in the San Antonio area and the Rio Grande Valley. (Espinoza, Tr. 4163-67; RX 1777-F, U-V.)

Bottlers

388. The cost to install a can line to produce five million cases of cans per shift per year with used equipment is $825,000. (Summers, Tr. 6460.)

389. Used equipment is available because of recent consolidation in the soft drink industry. (Hixon, Tr. 7296; Bodnar, Tr. 1653-54.) Such equipment costs less than half of the cost of new equipment. (Summers, Tr. 6447-60.)

390. Other requirements for entering into the bottling and canning business are: a plant, a warehouse and trucks. (Summers, Tr. 6464, 6467, 6478-79.)

391. Due to the depressed real estate market in South Texas, a prospective bottler could easily lease a suitable facility to install a bottling line (4,000 square feet). (Summers, Tr. 6465, 6479.)

392. Just-in-time inventory requires little warehouse space; space for seasonally higher inventory is readily available for lease. (Summers, Tr. 6463-64.)

393. Since 984 new firms have entered the bottling business in competition with CCSW. Entry has been quick and inexpensive. Kroger purchased the Safeway bottling and canning plant in Garland, Texas in the fall of 1987 for $1.1 million. (CX 2827; CX 2828-A; Morath, Tr. 7661-62; RX 2304; RX 2441; RX 1740-B, H, I, N; RX 1741; RX 1744; RX 1745; RX 1750; RX 2441-A; RX 1711.) Kroger spent $600-700,000 to get the plant into production (Morath, Tr. 7661-62; RX 2441; RX 1760), which took four months. (Morath, Tr. 7662.) The Garland plant produces five million cases per year, including Kroger's private label brand and contract-packed brands. (Morath, Tr. 7662-64.)

394. HEB previously produced soft drinks (Chapman, Tr. 7155), but now uses Texas Beverages Packers ("TBP"), a contract packer, to produce Plaza, its private label soft drink. (Chapman, Tr. 7147; Hixon, Tr. 7298; Summers, Tr. 6562.) In 1987 HEB determined the costs of installing a bottling line in an HEB warehouse. (CX 201-B, C; RX 2040.) The project would cost $2.7 million and take a year. (Chapman, Tr. 7152-53; CX 201-B; RX 2040-A.) HEB projected that the annual contribution from running the bottling line would be $449,000. (Chapman, Tr. 7153; CX 201-B; RX 2040-A.)

395. HEB compared this cost with price offered by TBP, their current contract-packer. (CX 201-C, E; RX 2040-B; RX 2041.) HEB decided to extend their current contract-packing with TBP for two years. (Chapman, Tr. 7150-51; Hixon, Tr. 7298-7301; CX 201-B, M; RX 2040-A, B.) HEB reserved the right to build their own bottling plant during the life of the contract. (CX 201-A; RX 2039.) Recently, while remodeling an existing warehouse in San Antonio, HEB installed water and sewage equipment to facilitate the installation of a bottling line. (Chapman, Tr. 7150.)

396. Bottling of nationally branded soft drinks, to be delivered-store-door in the San Antonio market, has comparatively high entry barriers. "[N]ew entrants are severely restricted and are relegated primarily to additional regional or other non-major brands with relatively insignificant market positions." (CX 1406-Z-9; CX 102-P.)

Concentrate Manufacturing

397. "Flavor houses" inexpensively provide concentrates for new products. (CX 650 (Monarch); Antle, Tr. 3115-16; Turner, Tr. 1427; Bonica Test., RX 3010, pp. 3373-74.) A new entrant like Soho (Collier Test., RX 3015, pp. 4080-82) can rely on flavor houses to produce concentrates for their products. (Morath, Tr. 7668 (Kroger).) CCSW makes and sells Cima Red and Spike. (CX 436; RX 541; Summers, Tr. 6687.) The flavor extracts for these two products are purchased by CCSW from Universal Flavors. Flavor extracts from a flavor house like Universal Flavors are less expensive than the bottling concentrate sold to CCSW by its soft drink franchisors. (RX 541-B; Summers, Tr. 6546-47.)

398. A bottler could introduce a new product within a short time. (Bodnar, Tr. 1681-82; Clarke, Tr. 4372 ("four weeks"); Turner, Tr.

1425-27 ("8-12 weeks"); Coyne, Tr. 3584-91 ("3-6 weeks"); Amrosowicz, Tr. 869-70 ("60 days").)

399. CCSW introduced Cima Red, a red cream soda product similar to Big Red (Schwerdtfeger, Tr. 2366-69; E. Hoffman, Tr. 345-46; CX 436) within six months at a cost of $7,500 - $15,000 (CX 428-C; CX 436-O). Cima Red reached a 1.1% market share in the October/November 1988 Bexar County Nielsen audit. (RX 2806-X.) CCSW's new isotonic soft drink, Spike (RX 541; CX 3685; CX 308) reached full production within three months after the name was selected. (Summers, Tr. 6692.)

400. Better Beverages introduced ProMotion, an isotonic soft drink product, in May 1990, two months after signing the franchise agreement, with newspaper coupons, point of sale material, and retailer authorization in place. (Campbell, Tr. 1991-93.)

401. Better Beverages introduced Red Red, a red soft drink product of the Monarch Company that is similar to Cima and Big Red, in May 1990 after two months of preparation. (Campbell, Tr. 1995.)

402. Better Beverages introduced Nesbitt's Orange, Strawberry, and NuGrape immediately after obtaining the franchise. (Campbell, Tr. 1994-95.) Oneta Company developed and introduced Everest Seltzer in a two-month period. (Koch, Tr.1902.)

Piggybacking

403. New entry at the concentrate level has been facilitated by "piggybacking." (F 112-16.) A new concentrate can enter a market readily by distribution through a bottler already distributing competing products. (Espinoza, Tr. 4185, 4189.) Dr Pepper distribution through CCSW is piggybacking.

404. Piggybacking allows new entrants to take advantage of the distribution systems developed by established concentrate companies. (Knowles, Tr. 2765-67, 2772-73.)

405. Piggybacking allowed fast, low-cost new entry or geographic expansion of Dr Pepper, Welch's, A&W, Sunkist, and Canfield. (Lydick, Tr. 2975, 2975-76; Knowles, Tr. 2767-68, 2772-73.)

406. As a result of the decision to license cola bottlers, Dr Pepper's national market share grew from 2% in 1960 to 5% in 1978, a growth rate faster than the national average for the soft drink industry. (Knowles, Tr. 2767-69.)

407. CCSW quickly distributed new drinks like Lipton Tea, Delaware Punch and Original New York Seltzer. Caffeine-free Classic Coca-Cola took less than five weeks to introduce in the San Antonio market. (Summers, Tr. 6687.)

POTENTIAL EFFECTS

Market Power

408. CCSW attempted to raise its prices in 1988, but was unable to do so. (Summers, Tr. 6763; R. Hoffman, Tr. 5546-47, 5550-51.) CCSW had to match Pepsi price reductions or lose market share. (F 316.)

409. CCSW in 1989 increased its average list price from $9.37 to $10.06, or 69¢ per case. (RX 2990.) CCSW was unable to increase its prices above the amount required by cost increases. (Strickland, Tr. 8134, 8186.)

410. In 1989 Pepsi COBO attempted a series of price increases averaging 6.9% in South Texas. This led to a 19% reduction in Pepsi COBO's sales during the first seven months of 1989. (RX 2987; Strickland, Tr. 7987-88, 8000-04.)

411. Bottlers' profit margins on soft drinks have shrunk since the early 1980's. (F 310.) This has forced bottlers to cut operating costs and pursue increased sales. (R. Hoffman, Tr. 5634-35; Turner, Tr. 1431.)

412. Pepsi COBO is aware of CCSW's financial difficulties (Davis, Tr. 4605; Schwerdtfeger, Tr. 2375-76, 2601) and is unlikely to allow CCSW to increase prices. (Summers, Tr. 6763.)

Collusion

413. The 1984 acquisition did not reduce the number of competitors in the San Antonio area. (Turner, Tr. 1158-59; F 295.)

414. Soft drinks are sold by thirteen bottling companies in CCSW's territory. This does not include sales of private label and warehouse brands, contract packers, or fountain wholesalers. (RX 3109; Strickland, Tr. 8142-44.)

415. There are numerous fountain wholesalers selling Coca-Cola fountain syrup in Texas. (RX 1869.) DPUSA also has many fountain wholesalers in Texas. (Cassagne, Tr. 7598-99; RX 2799.)

416. Pepsi USA profits from the sale of concentrate in Pepsi COBO's products. (Knowles, Tr. 2840-42, 2894; Howell, Tr. 4019; F 320.) Pepsi USA's concentrate profits are used to offset Pepsi COBO's operating losses at the bottling level in South Texas. (CX 778-Z-25; F 320.)

417. Pepsi COBO has a large bottling and canning plant in Conroe, as well as smaller bottling plants in San Antonio and Houston. (RX 2939.) Because of the volume produced at Conroe, Pepsi COBO has lower production cost for cans than CCSW. (Cole, RX 3008, pp. 118-19.)

418. Pepsi COBO is low priced and buys its way into the ad cycle. (Turner, Tr. 989-90, 1056.)

419. CCUSA profits from the sale of concentrate and syrup to bottlers like CCSW and CCE. CCUSA wants bottlers to reduce prices of soft drinks to stimulate retail soft drink sales, which leads to higher concentrate sales and profits. (Howell, Tr. 4072-73.)

420. CCUSA sells fountain syrup directly to fountain customers and to fountain wholesalers. (Howell, Tr. 4005; F 90, 93.)

421. DPUSA's cost of concentrate sold to bottlers like CCSW and CCE is less than 10% of the DPUSA's price. (Knowles, Tr. 2665.)

422. DPUSA negotiates the price of fountain syrup sold to most Dr Pepper fountain customers and to fountain wholesalers. (Cassagne, Tr. 7590; RX 1919-C.)

423. CCSW must increase unit sales volume. (Summers, Tr. 6636, 6763-64.) If CCSW increased prices, volume would be reduced and the loan covenants could be violated. CCSW has $220 million of debt and interest expense of $27 million per year. (R. Hoffman, Tr. 5471, 5481-84, 5569, 5614, 5600, 5634, 5718, 5633; CX 1354-G.) Cash flow, rather than profitability, is success for CCSW, because TBG's lenders look to cash flow as the source of debt repayment. (R. Hoffman, Tr. 5417, 5481-84, 5612-13, 5706.)

424. Kroger discounts soft drinks to draw consumers to its stores to increase grocery sales. (Howell, Tr. 3951-52.)

425. HEB also uses soft drinks as a loss leader to increase consumer traffic in its stores. (Gonzaba, Tr. 2032; Howell, Tr. 3951; Summers, Tr. 7004.)

426. Convenience stores sell fountain soft drinks because the cost to the retailer is lower than finished soft drinks and the consumer serves himself. (Summers, Tr. 6935.)

427. Fountain wholesalers like Martin-Brower, Sysco and Sugar Foods purchase fountain syrup from CCUSA and resell it to fast-food restaurants and other customers. (Short, Tr. 7740-41, 7753; RX 1869.)

428. None of the sequentially-operated Espinoza companies has owned a bottling plant; each purchased all of its finished soft drinks from contract-packers in Fort Worth and Temple, Texas and in Mexico. (Espinoza, Tr. 4193, 4249-51; Limon, Tr. 4956.)

429. Texas bottlers who contract pack for other soft drink distributors include: Texas Beverages in San Antonio, Beverage Packers in Ft. Worth; Temple Dr Pepper Bottling Company; Better Beverages in Halletsville; CCE at various locations; and Dr Pepper Bottling Company of Texas in Dallas and Houston. (Summers, Tr. 6466; F 126.)

430. There is excess capacity in the bottling and canning of soft drinks in Texas. (F 133-39.)

431. Soft drink price competition in Texas makes collusion difficult. (Knowles, Tr. 2899.)

432. HEB is the leading retail grocery chain in San Antonio and Corpus Christi. (Knowles, Tr. 2836; Howell, Tr. 4041; Bodnar, Tr. 1743.) HEB has 50% of the retail grocery business in the San Antonio area. (CX 3138-B; CX 2088-D.) In 1990, 25% of CCSW's sales were to HEB. (Summers, Tr. 6589; CX 3806-Z-37.) From 20-25% of Pepsi sales in San Antonio were to HEB. (Davis, Tr. 4525.)

433. HEB buys more than five million cases a year from CCSW. (CX 956-A) HEB has a larger market share in the San Antonio area than both Albertson and Kroger (Davis, Tr. 4525 (each 8-9% share)) but Kroger and Albertson are national grocery chains which are much larger than HEB. (Summers, Tr. 6767; Howell, Tr. 4130-31.)

434. Kroger is the second largest customer of CCSW, purchasing 9-12% of CCSW's total unit sales. (Summers, Tr. 6589.)

435. Sam's Wholesale Clubs purchase 7-8% of CCSW total unit sales. (Summers, Tr. 6638.)

436. Sales to convenience stores are 15% of CCSW's total case sales. (CX 53-I.)

437. The Stop-N-Go, operated by National Convenience Stores, is a nationwide chain, and has 203 stores served by CCSW. (Summers, Tr. 6631.)

438. Circle K, with 45 stores, was the second largest convenience store chain served by CCSW. (Summers, Tr. 6631.)

439. Super S is a major retailer in rural markets with 45 stores. (Summers, Tr. 6629-30.)

440. The Army-Air Force Exchange Service [AAFES] and the United States Navy operate stores on military bases in the San Antonio area. (Summers, Tr. 6675-76.)

441. HEB requires that CCSW and other bottlers offer HEB the lowest net wholesale price available to retailers from each bottler. (Brinkley, Tr. 2234; Bodnar, Tr. 1660-61; Chapman, Tr. 7245; Turner, Tr. 1200; Summers, Tr. 6646; CX 3700-D.) Kroger and Albertson have similar policies. (Donald, Tr. 5320-21, 532728; Kaiser, Tr. 3264.)

442. HEB expects that bottlers will offer to other retailers the same prices offered to HEB. (Chapman, Tr. 7245; Howell, Tr. 4055.)

443. HEB pressures CCSW to offer the same wholesale price as CCE on Coca-Cola products. (Summers, Tr. 6626.)

444. Retailers specify the type of payments for promotions, including flat payments for HEB, and flat payments plus per case rebates for Kroger. (Howell, Tr. 3943-44.) Stop-N-Go requires payment in advance. (Summers, Tr. 6638; Howell, Tr. 3988-89, 4059-60, 4063; CX 1068.)

445. Retailers can limit promotions and display activities of soft drink products. (Coyne, Tr. 3487.) Ads and in-store displays are important to soft drink companies. (Turner, Tr. 1130; Coyne, Tr. 3449-50; F 171.)

446. HEB sometimes promotes its private-label soft drinks rather than national brands. Other chains run 52 weeks of national brands. Kroger may run private label on top of national brands. (CX 2379-C; Hixon, Tr. 7303; Brinkley, Tr. 2199; Davis, Tr. 4526; Donald, Tr. 5324.)

447. In Fall 1989, HEB promoted Pepsi products at the same time as Plaza private label products. (Knowles, Tr. 2753-55.)

448. In 1986, Kroger did not buy outside bottlers, 3-liter product so that Big K, its private label soft drink line, could be the only 3-liter package available from its stores. (Howell, Tr. 4063.)

449. In 1988, HEB notified all vendors that it would not accept price increases for four months. CCSW complied rather than risk retribution for HEB. (Summers, Tr. 6769.)

450. In 1986, Stop-N-Go refused to feature Coca-Cola products for six months in South Texas, because CCSW would not agree to Stop-N-Go's terms for promotional programs. (Howell, Tr. 4061-63.)

451. HEB required Oneta, the Pepsi-Cola bottler in Corpus Christi, to remove its vending machines from all HEB stores because Oneta offered Sam's Wholesale Club a lower price than Oneta offered to HEB. (Davis, Tr. 4745-46.)

452. HEB and Kroger have each canceled scheduled ads because the price was not competitive. (Summers, Tr. 6626-27 (HEB); Kaiser, Tr. 3218 (Kroger).)

453. There are thirteen private brands of soft drinks in the CCSW market, usually with a retail price of six cans for $1.00. (Summers, Tr. 6549.)

454. CCUSA and DPUSA pressure CCSW to keep prices down to increase sales volume, criticizing its performance by comparison to sales records of other bottlers, and granting or withholding marketing support. (R. Hoffman, Tr. 5646-48.)

455. DPUSA provides inducements to bottlers to assure that pricing for Dr Pepper products is low. (Knowles, Tr. 2698, 2846.) If a bottler experiences intense competition, DPUSA provides funds to assist the bottler's efforts to meet competition. (Knowles, Tr. 2747.)

456. Concentrate companies pay part of the cost of promotions by their bottlers. (RX 498-C; RX 337; Coyne, Tr. 3417-18; Howell, Tr. 3928-29; Turner, Tr. 963-65; Knowles, Tr. 2698, 2745-48; Bodnar, Tr. 1484-88.) In 1986 CCUSA's promotional payments to CCSW totaled $3.37 million (CX 3205-A), and DPUSA's funding for the San Antonio area totaled $644,851. (CX 3204-B.)

457. Concentrate companies use "best efforts" requirements in franchise agreement to threaten to terminate the franchises of bottlers who have not increased sales. (RX 2835; CX 2676; Nicholson, Tr. 3775-76; Summers, Tr. 6759.)

458. Low consumer prices increase volume and the purchase of concentrate which bottlers must buy from concentrate companies at a high-margin, fixed price. (Knowles, Tr. 2912, 2838-39.)

459. Personal income is relatively low in San Antonio and consumers are very price sensitive, even more price sensitive (Davis, Tr. 4811) than consumers in other Texas cities. (CX 1489; CX 108-E-G; CX 3778-A; CX 3162; CX 1054-P; Bodnar, Tr. 1545-46, 1664; Davis, Tr. 4758; Kaiser, Tr. 3234-35 ("San Antonio more blue collar").)

460. The 3-liter bottle provides consumers in San Antonio the lowest price per ounce nonreturnable soft drink package. (CX 1999-B, D; Summers, Tr. 6770.)

461. Recent demographic and economic trends in the San Antonio and South Texas (CX 3705-Z-28) areas have led to increasingly price-sensitive consumers. (Knowles, Tr. 2837, Summers, Tr. 6770.)

462. The Texas Attorney General's Office has authority and incentive to deter any collusive price increase by CCSW. (CX-2; F 68-70.) The provisions of the AG's order impose constraints on CCSW's use of marketing programs and practices in the San Antonio area. (CX 2; F 68.)

DISCUSSION

The complaint challenges CCSW's acquisition in 1984 of the Dr Pepper and Canada Dry bottling franchises,[8] alleging a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and Section 7 of the Clayton Act, 15 U.S.C. 18. The acquisition allegedly lessened competition by weakening Grant-Lydick, reducing competition between Dr Pepper and Canada Dry brands and other brands, and by increasing the likelihood of collusion and the likelihood that respondent will unilaterally exercise market power. Amended Complaint paragraph 13.

I. THE RELEVANT PRODUCT MARKET

Complaint counsel argue that the relevant product market is widely advertised, brand, finished carbonated soft drinks or syrup merchandised and distributed by direct-store-door delivery, in all channels of distribution. This definition includes the national brands of carbonated soft drinks sold by CCSW, Pepsi COBO, Grant-Lydick and the Espinoza companies. (F 179.)[9]

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[8] CCSW also acquired from San Antonio Dr Pepper Bottling Company trucks, a warehouse, and Dr Pepper vending machines. (F 50.)

[9] CCUSA and DPUSA also sell fountain soft drinks. The parties agree that those sales are also in the relevant market. Nationally, fountain sales are about one-third of all soft drink sales. (CX 3418-F.)

Respondent argues that the relevant product market includes private and warehouse brand[10] soft drinks, and non-carbonated soft drinks, delivered by DSD or warehouse.

A. Law

Product markets are defined by the "cross-elasticity of demand" or the "reasonable interchangeability of use" between the product in question and potential substitutes. *Grand Union Co.*, 102 FTC 812, 1041-42 (1983). When reliable evidence of cross-elasticity (the extent to which a change in price of the product will cause customers to switch to substitutes) is available, it can be "most important" in product market definition. Less direct evidence may also be considered such as, *Olin Corp.* 5 Trade Reg. Rep. 22,540 at p. 22,543 (1990): "perceptions of buyers that the products are or are not substitutes, certain differences in price movements that are not explained by parallel trends, similarities or differences in use, design, physical composition and technical characteristics, and the perceptions of sellers that the products are substitutes."

B. Private Label

1. Prices

The issue on which this case turns is whether private label soft drinks are in the relevant product market. Private label products sell at prices lower on average than national brand products, in this market traditionally about 30% lower. (F 221, 228.)[11] A lower price alone does not create a submarket. *Brown Shoe Co. v. United States,* 370 U.S. 294, 326 (1962). Here, national brands on discount draw customers from private labels, and vice versa. (F 222, 225, 227, 229-30.) Although private label prices average below the prices of national brands, that difference diminishes during the almost constant promotions (F 229), and private label market share in San Antonio has increased to 18% when on promotion. (F 227.) Similarly, in

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[10] Since private brands and warehouse brands differ solely in ownership of the label, they will be treated together as "private label."

[11] Despite lower retail prices, private labels have been held to be in the same relevant market as national brands. *United States v. Jos. Schlitz Brewing Co.*, 253 F. Supp. 129, 133, 143 (N.D. Cal.), *aff'd per curiam*, 385 U.S. 37 (1966); *International Tel. and Tel. Corp.*, 104 FTC 280, 410-11 (1984).

Olin Corp., 5 Trade Reg. Rep. at 22,545, the two swimming pool sanitizers were in the same relevant market because, after the traditional price spread between them had narrowed, a small price increase would cause consumers to switch. In *Grand Union*, 102 FTC 812, 1046 (1983), despite their lower prices smaller food retailers were held to be in the same relevant product market as the merging supermarkets. 102 FTC at 1046. And in *Beatrice Foods Co.*, 101 FTC 773, 802-03 (1983), chilled orange juice glass containers and cartons were in the same product market, despite a wide price difference between the containers, because their prices were mutually responsive.

2. Characteristics

Private label carbonated soft drinks on store shelves are in the same package sizes and flavors as national brand drinks. (F 188-89.) Private label soft drinks have no peculiar characteristics different from national brand soft drinks, and are formulated, mixed, packaged and consumed in the same manner as national brand soft drinks. (F 194, 197, 199.) Much of the "image" of a soft drink brand is created by advertising. (CX 858-C.) To a great extent, any perceived difference among soft drinks exists in the mind.

Private label soft drinks and national brands are made in the same way. HEB, the largest grocery and private label seller in CCSW's territory, contracts with a local bottler to manufacture and package its Plaza line of soft drinks. (F 394.) Kroger, another private label vendor, purchased its own plant in Garland, Texas (near Dallas) from which it supplies the state. (F 24, 393.) These private label bottling plants are just like national brand bottling plants. (F 194-95.)

Most national brand carbonated soft drinks are delivered and stocked on store shelves by bottler employees ("direct-store-door delivery" or "DSD"). (F 204.) Some (like Shasta) (F 201) are delivered to the retailer's warehouse and then transported and stocked in the stores by the retailer's employees ("warehouse delivery"). (F 203-04.) Some national brands like Crush and Hires are sometimes sold by the DSD method and sometimes by the warehouse delivery. (F 149.) Consumers are generally unaware of how different soft drinks are delivered. (F 198.)

3. Industry perception

Most market analysts put private labels and national brand soft drinks in the same category. The National Soft Drink Association includes all carbonated soft drinks (bottled, canned, or fountain), along with carbonated mixers, seltzers and waters and non-carbonated waters. (F 206.) Government agencies and market reports put private labels with national brands. (F 205, 207-08.)

CCSW focuses on its strongest competitor, Pepsi COBO. That does not mean, however, that other competitors are outside the product market. *Grand Union Co.*, 102 FTC at 1045; *Beatrice Foods Co.*, 101 FTC at 811. CCSW and Pepsi COBO watch private labels. (F 209, 211.) Other firms in this market recognize that private labels compete with national brands. (F 209-10.)

4. Price changes

Similarity in price movements indicates product substitutability. *B.A.T. Industries, Ltd.*, 104 FTC 852, 909 n. 328 (1984). Here, price movements indicate that private labels are in the same market with national brand soft drinks. In one study, prices of national brand and private label soft drinks moved together eight out of ten times. (F 231.) The price movements were not random and were consistent with both being in the same product market. (F 232.)

C. Direct-Store-Door Distribution

Most national brands are delivered to the retailer by "direct-store-door." Employees of the bottler deliver to the retailers' stores, and stock the store shelves and displays. (F 142.) Most private label soft drinks and some national brands are delivered to retailers, warehouses and later distributed and stocked on store shelves by the retailers, employees. Complaint counsel would exclude these sales from the relevant market.

The consumer is unaware of which distribution method is used for the different brands (F 198); private label and national brand soft drinks are displayed in the same aisle of the store, often side-by-side. (F 199.) Concentrate companies, bottlers, and grocery chains believe that private label and warehouse brands compete with branded soft drinks. (F 209-13.) Because of the prevailing industry recognition

that private label and warehouse brands compete, the argument that they do not compete because they tend to use different delivery methods is overstated and-not persuasive. *Beatrice Foods Co.*, 101 FTC at 808, and n. 29.

D. Non-Carbonated Beverages

Lipton Iced Tea, Country Time Lemonade, and Hawaiian Punch appear on the same shelves, fountain dispensers, and vending machines with carbonated soft drinks. (P 243.) Minute Maid Orange Soda and Slice, containing 10% fruit juice, appear in 12-ounce cans side-by-side with carbonated soft drinks like Hires Root Beer and 7-Up. (F 244; RX 2200, pp. 107, 116; CX 2330-G.) Canned and bottled Lipton Iced Tea and isotonic drinks such as Spike and Gatorade are in the same market as carbonated soft drinks. (F 242-44.)

Consumers sometimes choose sparkling waters to replace carbonated soft drinks. (CX 310-B-E; RX 752-C.) Mixers and seltzers belong in the product market. (F 238.)

E. Conclusion on Product Market

The relevant product market includes national brand, private label and warehouse brands of soft drinks, as well as mixers, seltzers, non-carbonated beverages such as Lipton Iced Tea, Country Time Lemonade, and Hawaiian Punch, and isotonic drinks.

II. THE RELEVANT GEOGRAPHIC MARKET

A relevant geographic market must conform to the commercial realities of the industry and be economically significant. *Brown Shoe Co. v. United States*, 370 U.S. 294, 336-37 (1962). The economically significant area is the area of effective competition. *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 359 (1963). The area of effective competition is "the market area in which the seller operates and to which the purchaser can practically turn for supplies." *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961); *B.P. Goodrich Co.*, 110 FTC 207, 289 (1988).

Complaint counsel argue that the effective area of competition is the ten-county area of San Antonio and suburbs[12]. That was the area of the Dr Pepper franchise acquired by respondent. Respondent argues that the relevant geographic market is most of the eastern half of Texas.[13] It is complaint counsels burden to show the size of the market. Respondent is entitled to show that that market is erroneous without proving the size of the market it claims is proper. Topps Chewing Gum Inc., Docket No. 8463, Interlocutory Order, Nov. 15, 1962.

CCSW puts most of its competitive effort into the San Antonio ten-county area. (CX 1405-Z, Z-9.) On the other hand, the area of effective competition "must be charted by careful selection of the market area in which the seller operates and to which buyers can practicably turn of supplies. *Tampa Electric Co. v. Nashville Coal,* 365 U.S. 320, 327 (1961). CCSW's Dr Pepper territory now includes 21 counties. (F 274.) CCSW's sells its other brands in a 60 county territory. (F 275.) Grant-Lydick also has 60 counties. (F 276.) Pepsi also has more than 105 counties. (F 277.) While much of this area may be mostly jack rabbits and sagebrush and sparsely populated compared to the city and its suburbs, the issue of geographic relevant market must be looked at more deeply, beyond what appears to be the marketplace at first glance. Factors which may be considered include, *B.F. Goodrich Co.*, 110 FTC at 289: "persistent price differences; price change differences, similarities or differences in price movements; impediments to trade, such as transportation costs that are high relative to product value; shipment patterns and transshipment levels and industry perceptions.

A. Shipment Patterns

Shipping patterns are perhaps the best test in determining a geographic market. *General Foods Corp.*, 103 FTC 204, 234-35 (1984) (Initial Decision by ALJ Parker).

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12 The arbitrary nature of the alleged market is indicated by the fact that one of the three counties in the San Antonio Standard Metropolitan Statistical Area is not included in the ten-county area. (RX 2965-A; Strickland Tr. 8071-72.)

13 Dr. Strickland identified a relevant geographic market of the eastern half of Texas, which excluded Harlingen and the Rio Grande Valley but included San Antonio, Austin, Dallas and Houston. (RX 2983, 3107; Strickland, Tr. 8094-96, 8702.)

1. The Elzinga-Hogarty Test

The Elzinga-Hogarty ("E-H") test evaluates whether a proposed geographic market is too small. *Hospital Corp. of America,* 106 FTC 361, 396 (1985). It measures shipments into and out of an area. An appropriate market area must satisfy LIFO (little in from outside) and LOFI (little out from inside). When Professors Elzinga and Hogarty first published the test in 1973, they proposed that 75% or more not shipped in or out shows a "weak" market and 90% or more not shipped in or out shows a "strong" market. Elzinga and Hogarty, *The Problem of Geographic Market Delineation in Antimerger Suits*, 18 Antitrust Bull. 45, 74-75 (1973). They now feel that the 90% test is more accurate. Elzinga and Hogarty, *The Problem of Geographic Market Delineations Revisited: The Case of Coal,* 23 Antitrust Bull. 1, 2 (1978). (Hilke, Tr. 8551.)

a. LIFO

Dr. Strickland analyzed shipment patterns in the ten-county area using shipment data for 1983 and 1988. Under the E-H test the relevant geographic market is larger than the ten-county area. Shipments into the ten-county area include the following soft drinks:

- Grant-Lydick canned soft drinks produced by the Turner DP plant in Dallas. (F 247.)
- Pepsi COBO canned soft drinks produced at a canning plant close to Houston until 1990 (most of Pepsi COBO's cans are now produced in San Antonio). (F 248-50.)
- Shasta's soft drinks produced in Houston. (F 251.)
- 7-Up soft drinks produced in Houston. (F 247.)
- Kroger's Big K soft drinks produced in Dallas. (F 251.)
- Original New York Seltzer produced outside the ten-county area. (F 269.)
- CCUSA's fountain syrup produced in Dallas. (F 255.)

Dr. Strickland testified that 78% of soft drinks sold in the ten-county area in 1983 was produced in that area. (F 260.) In 1988 the amount was 77%. (F 261.)

b. LOFI

Much of the soft drinks packaged in the ten-county area is shipped outside for sale:

-- CCSW's San Antonio plant ships throughout its Texas territory. (F 256.)
-- Texas Beverage ships HEB's Plaza brand and other brands to all parts of the state from its plant in San Antonio. (F 257.)
-- Grant-Lydick supplies its sales centers in Austin, Corpus Christi, and Victoria from its plant in San Antonio. (F 258.)
-- Pepsi COBO's three-liter PET bottles are produced in San Antonio and shipped throughout Texas. (F 259.)

Dr. Strickland testified that 75% of all soft drinks produced in San Antonio in 1983 were sold inside the ten-county area. In 1988, the amount was 57%. (F 260-61.)

The ten-county area therefore fails the more accurate and newer version of the E-H Test.

2. Shipping costs

Products with low shipping costs relative to price are more likely to be traded in a broader geographic market. *General Foods Corp.*, 103 FTC 204, 232 (1984). Soft drinks are shipped from $.75 to $1.10 per mile, with about 2000 cases per truckload. (F 266.) A 5% increase price would increase the shipping radius by 390 miles. A 10% increase in price would increase it by 780 miles. (F 267.) A price increase in San Antonio could be undercut by shipment from Dallas/Fort Worth, Austin or Houston. All of these cities are outside of the ten-county area, yet within Pepsi COBO's franchise territory, and thus are not subject to Pepsi transshipment prohibitions. (Strickland, Tr. 8088.)

CCSW ships from its San Antonio plant to Corpus Christi and Temple, about 100 and 150 miles. (F 268.) Pepsi COBO shipped cans from its Conroe plant to Harlingen, about 260 miles. (F 270.) Grant-Lydick purchases cans from Dallas and ships them to San Antonio and from there to Harlingen, a total distance of 500 miles.

Warehouse and private brands also are shipped widely.[14] (F 269, 272.)

If prices were to increase in the ten-county area, low shipment costs would increase the supply of soft drinks from outside of that area. (Hilke, Tr. 8559.)

B. Prices

Another factor delineating a geographic market is similarity in prices. *Grand Union Co.*, 102 FTC 812, 1041 (1982). Soft drink prices are uniform in a trade area beyond the ten-county area.

The HEB stores in CCSW's and CCE's territories have a leveling effect on prices because of HEB's preference for the same price throughout its territory. (Chapman, Tr. 7246-47.) Pepsi COBO offers HEB unified pricing throughout its territory. CCSW, CCE and Grant-Lydick provide similar prices across HEB's marketing area. (RX 2985.)

C. Other Market Factors

The marketing areas of wholesale purchasers show that the ten-county area is not a realistic geographic market. The largest retailer in CCSW's territory is HEB. (F 433.) About half of HEB's stores are in CCSW's franchise territory. The others are in CCE's territory adjoining CCSW's territory. (F 280.) Except for the area around Corpus Christi and Halletsville, HEB's territory is within the Pepsi COBO franchise area of more than 100 counties. (RX 2; RX 4; F 277.)

Kroger's marketing area includes Eastern Louisiana to Western Texas and both San Antonio and Houston (F 281); Albertson's marketing area includes 55 stores in North and South Texas, and 12 stores in Louisiana (F 282); Eckerd's marketing area includes Houston, Beaumont, Corpus Christi, San Antonio and Austin, Texas. (F 283.)

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[14] A company which measures trade areas of supermarkets, Selling Area Marketing, Inc. ("SAMI"), indicates that warehouse shipping patterns for supermarkets located in San Antonio includes an area of about 50 counties. (F 286.)

D. Transshipment Prohibitions

Concentrate companies, franchise agreements restrict bottlers from transshipping their national brand soft drinks outside of the franchise territory. (CX 102-G; CX 166-A-E; CX 418-F.) These market restrictions, while severe, are authorized by statute. They are not, however, completely effective. Transshipment prohibitions do not apply to private labels and to some fountain soft drinks, nor to customers who purchase soft drinks from the bottlers to resell. (F 287.)

Despite transshipment prohibitions, soft drinks are shipped, to some extent, between bottlers' franchise territories. Unauthorized transshipments have occurred in the San Antonio market. (F 288-89, 291.)

Concentrate companies do seek to restrict bottlers from transshipping. But defiant transshipment indicates that such barriers might be discounted in defining the geographic market. "[T]heoretical concepts must yield to the facts which have persisted in the industry through the years and reflect an industry pattern." *United States v. Bethlehem Steel Corp.,* 168 F. Supp. 576, 599 (S.D.N.Y. 1958).

E. Conclusion on Area of Competition

The relevant geographic area of effective competition is larger than the ten-county area around San Antonio. The respondent sells in a larger area, and customers turn to a larger area for supplies of competing products.

III. COMPETITIVE HISTORY

The alleged relevant market having failed for lack of proof, no accurate concentration analysis is possible. There is, however, a wealth of proof of competition in respondent's trade.

A. Post-Acquisition Evidence

Post-acquisition evidence is relevant in a Section 7 case when it is reliable and cannot be manipulated by the respondent. *United States v. General Dynamics Corp.*, 415 U.S. 486, 506 (1974). When

so much time goes by between the acquisition and the trial, business records may be prepared with litigation in mind, *e.g.*, CX 3806-Z-56 (the history of respondent's 1989 attempt to raise prices). When such evidence is unchallenged on cross-examination, or is corroborated, however, it must stand regardless of its unnatural clarity and intent.

B. Number of Competitors

The acquisition did not reduce the number of competitors in the market. The asset acquisition left DP-SA as a viable bottler.[15] There was no transfer of any production plant or capacity. The physical assets which were transferred were used and of relatively small value.[16] The important assets transferred were the Dr Pepper and the Canada Dry franchises.

In 1982, DP-SA had acquired Big Red bottling Company of San Antonio, an independent bottler. (F 31.) After CCSW obtained the Dr Pepper and Canada Dry franchises in 1984, Grant-Lydick acquired the DP-SA bottling plant and the rest of DP-SA's brands. (F 53-55.) In 1987, Grant-Lydick purchased the Seven-UP distributor, reducing the number of soft drink bottlers. (F 63.)

C. Prices Since 1984

Soft drink prices in San Antonio have declined since 1984. (F 307.) Soft drink prices in Texas are among the lowest in the United States. (F 313-14.)

Concentrate companies profit from increases in bottler sales volumes. Pepsi USA reduced its bottling subsidiary's[17] prices in order to boost bottling sales volume and market share. (F 318, 320.)

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[15] DP-SA continued as a bottler of a number of products including Big Red and Royal Crown until November 1984, when it sold its plant to Grant-Lydick. Grant-Lydick continued and expanded the bottling operations.

[16] CCSW purchased approximately 40% of DP-SA's used delivery trucks. Also purchased was a warehouse adjacent to CCSW is bottling facility which DPSA no longer used and which had been listed for sale with a real estate agent for several months. (F 50, 300.) CCSW also purchased 2150 used vending machines, the average age of which was three to five years at the time of the 1984 acquisition. (F 50, 301.) The useful life of the average vending machine is seven to ten years. (F 302.) The acquisition of these assets had little competitive significance. (Hilke, Tr. 6321-24.)

[17] The Pepsi bottler in San Antonio, Austin, Houston, Dallas, and much of the rest of the state is Pepsi COBO, which is a wholly-owned subsidiary of Pepsi USA. (F 17-18.)

Pepsi USA also hoped to increase the sale of its own high profit concentrate.[18] (F 320, 421.)

Pepsi COBO is aware that CCSW has financial difficulty and directed its lower prices at CCSW. (F 319; CX 3141-C; RX 2465-G.) Further, costs have been increasing at the bottling level. The costs of concentrate, sweetener, and containers have risen since 1984. (F 314.) The effect of increasing costs and declining prices pushed CCSW to the edge of default on its loan. (F 310, 321, 323.)

Pepsi COBO can incur losses more easily than CCSW. Pepsi can afford low prices. (F 15.) This disparity of size must be considered in assessing competitive effects. "[T]he [Clayton Act] would not impede, for example, a merger between two small companies to enable the combination to compete more effectively with larger corporations dominating the relevant market *Brown Shoe Co. v. United States*, 370 U.S. 294, 319 (1962).

Another reason for the low prices of soft drinks in CCSW's trade area is the competition from private labels. Private labels have increased market share in Bexar County (San Antonio) grocery stores from 3.2% in 1981 to 11.6% in 1989 and 18.3% in 1990. (CX 27-W; RX 2806-X; F 230.) This increase was at the expense of Pepsi and Coca-Cola brands. (F 222-23.) Pepsi COBO was battling CCSW, and private label sales were increasing at HEB and Kroger. (F 230.)

CCSW attempted to raise list prices in 1987 and in 1989, and was forced to discount prices back to the former levels due to lost sales. In 1989, CCSW raised its list price by $.69 per case, but over the year had a net profit increase of $.01 per case. (F 419.) CCSW came close to default, and had to refinance.[19]

Pepsi also unsuccessfully attempted to raise prices in 1989. (F 410.) Pepsi COBO lost 19% of its Nielsen share during the first seven months of 1989. (F 410.)

D. Brand Loyalty

"Brand loyal" consumers attach a premium to a soft drink brand and are willing to pay more for it. (F 326.) Recently brand loyalty in Texas has eroded due to intense price competition which induces

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[18] Pepsi USA's gross profit from the sale of concentrate is approximately 90 to 95%. (Drewes Dep., CX 3913, pp. 32-33.)

[19] CCSW's profitability has been below that of other Coca-Cola bottlers in recent years. (F 324.)

consumers to shop for lower-priced soft drinks. (F 327-31.) The trend is also due to "brand dilution" caused by the influx into the market of new brands. (F 330.) The "New Coke" episode shows that consumers easily substitute other brands. (F 332.)

Consumers in CCSW's territory are more price-sensitive than elsewhere. (F 458.) Consumers like the economical three-liter package (F 459), and buy private labels and national brands when put on sale.

E. Benefits to Dr Pepper and Grant-Lydick

Since the acquisition, sales of Dr Pepper have increased in the San Antonio market, in volume and compared to the sales by neighboring bottlers. (F 361-62.) This contrasts with the decline in sales Dr Pepper experienced when piggybacked with Big Red from 1982-1984. (F 364.)

Grant-Lydick has operated profitably since 1984 and has acquired other bottlers. (F 63, 372.) Grant-Lydick increased sales through in-store displays while avoiding costly CMA expenses.[20] (F 369.) Grant-Lydick has outperformed both CCSW and Pepsi COBO and is a "success story" of this marketplace.[21] (F 375.)

F. Impact of the Acquisition

A key factor to consider in analyzing whether an acquisition violates Section 7 is the impact of the transaction on customers. *FTC v. Great Lakes Chem. Corp.*, 528 F. Supp. 84, 94-95 (N.D. Ill. 1981). The Commission in *Weyerhaeuser Co.*, 106 FTC 172, 286 (1985), said:

> In considering [anecdotal] testimony we do find it significant that complaint counsel did not offer any evidence of opposition to the acquisition, either from the integrated box producers without medium mills in the west, or from customers of the box companies. Although lack of customer complaints is not always a reliable indicator of the competitive effect of an acquisition, the fact that the representatives from groups likely to be harmed by any diminution of competition in the western

[20] "CMA" is a lump dollar payment to a retail chain which agrees to promote the soft drink, typically over a holiday weekend. (F 172-74.)

[21] Texas Beverage, the fourth bottler located in San Antonio has grown and also continues to grow. Its sales have expanded substantially over the last seven years. (F 377.)

market in fact have only testified in support of the acquisition suggests to us, in this case, that Weyerhaeuser's move into North Bend is unlikely to promote collusion.

No retailer complained about the transaction. Some felt that CCSW's acquisition of the Dr Pepper branches benefited competition. HEB felt that the 1984 licensing was a "non-event." (F 348.)

A competing third-party vendor, L.C. Vending Co., complained that its supplier/competitor CCSW kept the price of soft drinks in vending machines down to $.50. (F 350.) Emery Bodnar of Grant-Lydick complained because of CCSW's low prices in competing with Grant-Lydick's Big Red product. (F 351.)

That an acquisition would allow the acquiring company to lower prices and capture market share states no antitrust injury since vigorous price competition is what antitrust laws were designed to promote. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 115-16 (1986). The testimony of injury in this case is the wish of two competitors for higher prices.

IV. POTENTIAL EFFECTS

Effective competition in the soft drink industry in this part of Texas rebuts the allegations that interbrand competition is deficient in the relevant market. There is no credible proof that the 1984 acquisition will allow CCSW "to collude, expressly or tacitly, and thereby force prices above or farther above the competitive level." *United States v. Rockford Memorial Corp.*, 898 F.2d 1278, 1283 (7th Cir. 1990).

Even if the relevant market had been more narrowly drawn in this case, the most the evidence shows is high concentration. A high HHI alone "cannot guarantee litigation victories." *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 992 (D.C. Cir. 1990). Market share alone is not conclusive proof of market power, but may be rebutted by other market considerations. *United States v. General Dynamics*, 415 U.S. 486, 498-504 (1974).

Competition rather than preservation of rivals is the "lodestar that shall guide the contemporary application of the antitrust laws, not excluding the Clayton Act." *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1386 (7th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987). Market share cannot supplant a careful analysis of the factors pertinent to predicting future competitive conditions in a market. *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 988 (D.C. Cir. 1990).

A. *Entry Into This Market*

In the absence of barriers to entry, an acquisition cannot violate Section 7. *B.F. Goodrich Co.*, 110 FTC 207, 296 (1988). This case involves an acquisition by a bottler of licenses to be used in soft drink bottling and distribution.

1. Entry as a distributor

Entry as a soft drink distributor is easy.[22] The cost of equipment and facilities necessary to warehouse and move finished soft drinks is low. (F 379-80.)

The cost to lease the delivery trucks and warehouse is about $25,000. The time to set up as a distributor is about 3 ½ months. (F 380.) A distributor does not need to be a bottler; the excess capacity in Texas allows a distributor to purchase contract-packed bottled and canned soft drinks at low prices and without any capital expenditures for bottling equipment. (F 378.)

Numerous non-bottling distributors exist in this market. There are many fountain distributors.[23] (F 90, 93.) Independent bottle and can distributors actively compete. Approximately 50% of the Pepsi distribution in the Victoria/Corpus Christi area is through independent distributors. (F 146.)

Promotional payments paid to retailers can be expensive in sales to food chains.[24] However, as Grant-Lydick has demonstrated, in-store promotions are available, at no cost other than the discounts granted. The companies which engage in CMA programs spent mightily and have lost money, and the companies with the least promotional cost have been profitable.[25]

Major competitors are able to advertise and promote soft drink products without the necessity of any payment program. Retailers like HEB and Kroger promote and advertise their private label

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[22] If the prevalent product and geographic market had been found as alleged by complaint counsel, entry barriers exist. (F 396.)

[23] Fountain accounts for 34% of all CCSW carbonated soft drink sales. (F 154.)

[24] Both CCSW and Pepsi COBO have spent millions of dollars on CMAs in the last seven years. (F 172-73.)

[25] Grant-Lydick and Texas Beverage have been profitable during the same time period. (F386.)

products without any promotional cost other than the low cost of a newspaper ad. These promotions have caused increases in volume and market share. (F 230.) Retailers face no barrier to entry as far as promotional costs are concerned. (Hilke, Tr. 6282-83.) The retailer opens as much shelf space as it chooses for its private label products.

2. Entry as a bottler

All of the bottlers in the relevant market are operating with excess capacity. (F 133-38.) Each may add a new product to its production line of products and ship it in weeks. (F 398402.) Entry does not depend on the construction of a bottling plant.[26] Expansion of existing capacity to produce is just as effective entry as the construction of new facilities. *Weyerhaeuser Co.*, 106 FTC 172, 287-88 (1985); *Grand Union Co.*, 102 FTC 812, 1064 (1983). Since 1984, existing bottlers have added many new products: Coca-Cola Classic, Caffeine-free diet Coke, Cherry Coke, diet Cherry Coke, Minute Maid Orange and Lemon Lime, Pepper Free, Original New York Seltzer natural fruit flavored soda and other seltzers, Lipton Tea, Cherry 7-Up and diet Cherry 7-Up, 7-Up Gold, IBC root beer, Pepsi Free and Slice. (F 352.)

Used bottling equipment is cheaply available to facilitate entry. Kroger entered the market as a new bottler since 1984 and HEB stands poised to do so. (F 393, 395.) Entry as a bottler is easy, rapid, and relatively inexpensive. (F. 393-94.)[27] The recent trend in closing bottling plants leaves physical facilities available which indicates barriers to entry are not high. (F 175.) *Dairymen, Inc.*, 102 FTC 1151, 1158 (1983).

Economies of scale can easily be achieved in the bottling industry. (F 122.) Kroger and Winn-Dixie have entered the Texas market with very little capital investment. HEB anticipates the expenditure of $2.7 million to erect a canning facility to serve its South Texas area which would rival Texas Beverage's existing plant in efficiency. (F 394.)

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[26] The flavor exclusivity provisions in the bottlers' franchises do not prevent a new flavor from coming into the market. Contract packers such as Texas Beverage, Kroger, Beverage Packers, Better Beverages, and Turner DP have excess capacity available. (F 137-38.)

[27] Kroger spent $600,000 - $700,000 and four months to start up the old Safeway plant. (F 393.) HEB estimated $2.7 million and 12 months would be required to start up a new production facility. (F 394-95.)

B. Unilateral Price Increase By CCSW

CCSW tried in 1987 and 1989, to raise prices but was forced to lower prices within a short time. (F 408-09.) In 1988, Pepsi COBO's unilateral price increase failed. (F 410.) CCSW, Pepsi COBO, Grant-Lydick, and other sellers in the market, have been forced to keep prices low despite rising costs.

C. Collusion

Collusion is a primary concern underlying Section 7. *United States v. Rockford Memorial Corp.*, 898 F.2d 1278, 1282-83 (7th Cir. 1990). Collusion here is unlikely to occur because of the number of sellers (F 414), varied cost structures and profit incentives (F 416-28), excess capacity (F 133-39), price competition (F 161), and strong buyers. (F 441, 449-52.)

1. Competitive conditions

a. Competitors

Collusion is easier as the number of competitors decreases. *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 905 (7th Cir. 1989). The 1984 acquisition left unchanged the number of competitors. (F 295.) Here, there are a large number of competitors. In the ten-county market, four DSD companies (CCSW, Pepsi COBO, Grant-Lydick, and the Espinoza companies), two concentrate companies (CCUSA and DPUSA), and dozens of fountain distributors compete. In a larger market which recognizes actual shipment patterns and product substitutability, 13 national brand bottlers (F 414), private label bottlers (F 424-25), and many distributors (F 415), also sell. Collusion in this market is unlikely.

b. Costs and profit incentives

The concentrate companies (Pepsi USA, CCUSA, and DPUSA) profit on sales of concentrate (F 416, 419, 421); their interest is in keeping bottler prices low to spur retail sales and sales of concentrate to the bottler. Pepsi COBO is a wholly-owned subsidiary of Pepsi USA. (F 17-18.) Pepsi COBO's prices sacrifice bottler profits to

increase sales volume (F 320), which increases the parent's sales of concentrate on which Pepsi USA makes a 95% gross profit. CCSW, as an independent bottler, makes no profit from CCUSA's concentrate sales. Any bottler collusion would be less likely because of Pepsi COBO's and CCSW's different profit motivations.

Grant-Lydick operates with a different cost structure. Unlike CCSW and Pepsi COBO, Grant-Lydick must purchase its cans of soft drinks from an independent packer in Dallas. (F 247.) Grant-Lydick has a greater incentive to keep can prices high relative to other packages which Grant-Lydick produces itself in San Antonio. "If cost functions vary widely from one firm to another, each will prefer a different industry price level, and developing a collusive consensus price will consequently be more difficult." *B.F. Goodrich Co.*, 110 FTC 207, 321 (1988).

In addition, HEB and Kroger, which sell soft drinks to increase store traffic, have little incentive to maintain higher prices on private label soft drinks. Higher-priced soft drinks would be less of a consumer draw, and HEB and Kroger would lose profits from their grocery sales if they were to raise their private label soft drink prices.[28]

The variety of brands, packages, and flavors for soft drinks further complicates the market. (F 73, 86, 180-93.) With more variety of relevant products, price collusion is more difficult. *Cf., United States v. Container Corp. of America*, 393 U.S. 333, 337 (1969); *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1390 (7th Cir. 1986).

c. Price competition

Prices in this market fluctuate. (F 347.) Only 10% of CCSW's soft drinks sell at list price and 90% is discounted, changing monthly and varying store-to-store. (F 161.) In order to increase volume, especially during holidays, discounts vary. (F 162.)

Collusion is more likely when prices are relatively steady and change gradually. "Greater stability and predictability make it easier to create and sustain a collusive arrangement." *B.F. Goodrich Co.*, 110 FTC 207, 326 (1988). In a volatile market, parties to the collusive agreement can cheat more easily without detection by the others, thereby frustrating any collusion.

[28] Supermarkets like HEB and Kroger have the incentive to keep prices of all soft drinks low as loss leaders. *General Foods Co.*, 103 FTC 204, 362 and n. 68 (1984).

d. Ad and display competition

Colluders would also have to agree on advertising before any collusive agreement could succeed. Pepsi COBO and CCSW promote their products through CMAs (F 172-74); Grant-Lydick relies on in-store promotions. (F 370.) Private label competitors advertise and rely on in-store promotions and consistently lower price to boost sales. (F 222; Turner, Tr. 1208.) Colluders would have to agree on promotional programs so that volume changes would not disrupt each colluders' profit.

2. Buyers

Large retailers have the power and incentive to thwart any collusive agreements made by bottlers. Grocery stores account for 40% of soft drink case sales in San Antonio, (CX 53-I.) HEB sells half of the soft drinks sold through supermarkets in San Antonio. (F 432.) Convenience stores account for 15% of soft drink case sales. (CX 53-I.)

Large sophisticated buyers deter collusion and price discretion by sellers. *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 905 (7th Cir. 1989); *Hospital Corp. of America v. FTC,* 807 F.2d 1381, 1391 (7th Cir. 1986); *B.F. Goodrich Co.,* 110 FTC 207, 323-24 (1988). Here, HEB controls the most important channel in the soft drink business.[29] It and other large retailers assert power over soft drink suppliers.

HEB, Kroger and Stop-N-Go allocate and control bottlers, promotions in ads or point-of-sale displays within the store. (F 445.) HEB and Kroger have their own private label soft drinks to supplant national brands on the shelf, in ads, or on displays. (F 188-89, 446.) In the face of a price rise among national brand soft drinks, HEB, Kroger, and other retailers who stock private labels could easily promote those brands in place of national brands.[30] (F 446.) HEB and other retailers can shatter any collusive agreements to raise soft drink prices. Soft drinks are a favorite loss leader in San Antonio to

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[29] HEB alone buys more than five million cases of soft drinks a year from CCSW. (F 433.) That is 50% of all volume in Bexar County. (F 432.)

[30] HEB demands non-discriminatory pricing from soft drink sellers. (F 442.) This power has an effect in deterring collusion. Private label soft drinks take volume from the national brands. For example, private labels attained an 18% Nielsen share in San Antonio when HEB advertised Plaza two weeks out of nine in a bi-monthly period. (F 230.)

generate store traffic for the purchase of all grocery items. Retailers watch the national brand prices closely and would quickly spot collusive agreements to raise prices.

3. Concentrate companies

Concentrate companies such as CCUSA, Pepsi U.S.A. and DPUSA have the power and incentive to deter collusion at the bottler level. (F 454-56.) Bottlers lack power in the fountain segment of the market. (F 92.) Most of the fountain sales of Coca-Cola and Dr Pepper are made on the account of the concentrate companies or by grocery wholesalers and distributors other than CCSW.[31] (F 93-94.) CCSW services the accounts sold directly by CCUSA and DPUSA, but does not set the price or terms for the sale. (F 92.) Much of this market is not subject to control by CCSW.

The concentrate companies also fund and arrange for advertising and promotions in selling national brands. (F 456.) If CCSW were to collude with other bottlers to reduce promotional allowances, not only the retailers but also the concentrate manufacturers would know. Like the retailers, the concentrate companies can deter bottler misconduct by reduction of funding, and even the threat of litigation under the terms of the franchise agreements. (F 166, 457.)

Soft drink licenses contain best-efforts clauses requiring the bottler vigorously to promote and sell that line of products. (RX 2932-B.) The bottler could face nonrenewal of the contract.[32] (F 104, 457.) If a bottler wants to sell its business, it must request the concentrate company to approve the purchaser as a new franchisee. (F 101-03.)

4. Consumers

If consumer demand drops in response to price increases, suppliers are constrained. Soft drink sales are particularly susceptible to price. (Strickland, Tr. 7982-85.) The sensitivity of soft drinks to

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[31] Usually syrup and carbonated water are mixed after the sale ("post-mix") at the customer's place of business, but some fountain accounts prefer a single container of already mixed beverage ("pre-mix"). (F 73.) The sale of pre-mix is usually governed by an exclusive franchise. (F 88.) Coca-Cola and Dr Pepper post-mix is not sold through an exclusive franchise. (F 89.)

[32] Sprite, Tab, Fanta and Fresca licenses are for ten-year terms. (F 98.) CCSW's Original New York Seltzer distributorship agreement is an at-will license. (F 100.)

price, and the growth of national brand soft drinks is due to consumer demand by price promotion. (F 229.)

Consumers in San Antonio are particularly price sensitive. (F 459, 461.) The economical three-liter PET bottle sells well (F 460), and private labels went from 3.2% to 18.2% in the Nielsen ratings from 1981 to 1989. (CX 27-W; RX 2806-X.)

5. The Texas Attorney General

CCSW signed a consent decree with the Texas Attorney General under which CCSW is constrained competitively. (F 68-69.) CCSW, unlike the other competitors in the relevant market, is subject to this decree and to court supervision until 1993, or to 1996 if the decree is extended. Collusion therefore seems unlikely.

CONCLUSION AND ORDER

Respondent's acquired assets from a competitor in 1984, the most important of which were the franchises for Dr Pepper and Canada Dry for the San Antonio area. The record in this case shows a failure of proof that this transaction may substantially lessen competition. The relevant product and geographic markets are broader than alleged, including private label and other soft drinks in a market which extends well beyond the environs of San Antonio. Further, the market was competitive in 1984 and competition is healthy now, with over capacity and low prices being hallmarks. Respondent lacks market power and collusion appears unlikely.

The complaint must, therefore, be dismissed.

OPINION OF THE COMMISSION

BY YAO, *Commissioner*:

I. INTRODUCTION[1]

In 1984, Coca-Cola Bottling Company of the Southwest ("CCSW") acquired the Dr Pepper and Canada Dry bottling franchises for certain areas around and including San Antonio, Texas.[2] Previously, these franchises were held and operated by a so-called "third bottler," San Antonio Dr Pepper Bottling Company ("DP-SA"), a wholly-owned subsidiary of Dr Pepper Company.[3] Certain other assets held by DP-SA -- including franchise rights for a regionally distributed branded soft drink, Big Red -- were subsequently acquired by Grant-Lydick Beverage Company ("Grant-Lydick"), a successor "third bottler" in the market.[4]

Complaint counsel alleges that this acquisition substantially lessened competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and Section 7 of the Clayton Act, 15 U.S.C. 18. The administrative law judge ("ALJ") who tried the case found that a reduction of competition was unlikely and thus ordered dismissal of the complaint. Complaint counsel now appeals.

Our review of this matter is *de novo*, and our assessment of the evidence differs from that of the ALJ. We reverse the initial decision, find violations of the FTC and Clayton Acts resulting from

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[1] The following abbreviations are used in this opinion:

ID	Initial Decision (page no.)
IDFF	Initial Decision Findings of Fact (paragraph no.)
CCPFF	Complaint Counsel's Proposed Findings of Fact (paragraph no.)
RPFF	Respondent's Proposed Findings of Fact (paragraph no.)
RRCCPFF	Respondent's Reply to Complaint Counsel's Proposed Findings of Fact (paragraph no.)
CCAPB	Complaint Counsel's Appeal Brief (page no.)
ABR-A	Answering Brief of Respondent-Appellee (page no.)
CX, RX	Complaint Counsel and Respondent Exhibits
RCX	Rejected Complaint Counsel Exhibit
Name, Tr.	Administrative Hearing Transcript

[2] CX 3.

[3] Turner, Tr. 918, 928, 1035. As we noted in Coca-Cola Co., Dkt. No. 9207 (June 28, 1994), "[m]ost local markets for carbonated soft drinks have a Coca-Cola bottler, a Pepsi-Cola bottler, and a so-called 'third bottler,' which carries soft drinks other than Coca-Cola or Pepsi-Cola brands." Slip op. at 57.

[4] Lydick, Tr. 2978-79.

CCSW's acquisition of the Dr Pepper franchise, and now enter an order of divestiture as to the Dr Pepper franchise. For reasons differing from those of the ALJ, we find that CCSW's acquisition of the Canada Dry franchise did not violate the FTC and Clayton Acts.

II. THE BACKGROUND OF THE ACQUISITION

Respondent CCSW is a privately held corporation with headquarters in San Antonio, Texas.[5] CCSW holds the Coca-Cola franchise (among others) for San Antonio and the surrounding area.[6] CCSW's sole shareholder is Texas Bottling Group ("TBG")[7]; a sister corporation is Southwest Coca-Cola Bottling, Inc. ("SWCC"), which is the Coca-Cola bottler in West Texas, Eastern New Mexico, Western Oklahoma, and parts of Colorado and Kansas.[8]

CCSW's primary business is bottling, distributing, and selling carbonated soft drinks pursuant to franchises from several concentrate companies. IDFF paragraph 72. The franchisor grants the franchisee the exclusive right in a specified geographic territory to make and sell soft drinks in bottles and cans bearing the franchisor's trademark and using the franchisor's fomula.[9] CCSW sells Coca-Cola brands,[10] Dr Pepper brands, [11]and Sunkist brands, [12]among others.

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[5] CX 980 R-U; RX 549 A.

[6] RX 232 A-C.

[7] CX 1372 H; CX 1373 Z-23; RX 572 I. The stock of TBG in turn is held by affiliates of Prudential Insurance Company of America, which hold 51% of the stock, and a 49% stockholder, the Coca-Cola Bottling Group (Southwest), Inc. ("CCBG-Texas"), which in turn is a wholly-owned subsidiary of the Coca-Cola Bottling Group, Inc. ("CCBG-Delaware"). Hoffman, Tr. 5603; CX 1372 G, H. All of the voting stock of CCBG-Delaware is held by Edmund M. Hoffman and his son Robert K. Hoffman. RX 572 H; RX 2805 J, K, Z15. At the time of the acquisition at issue in this case, CCSW was held by the Biedenhorn Corporation, RX 232 A-C, which sold its interest in CCSW to a TBG subsidiary in 1986. CX 3052; RX 549 A, B.

[8] SWCC is a wholly-owned subsidiary of CCBG-Texas, which is controlled by CCBG-Delaware, which is owned by the Hoffmans. CX 4; CX 2805 Z3, Z4; RX 2805 Z5, Z6.

[9] RX 2848.

[10] Coca-Cola USA ("CCUSA") is the division of the Coca-Cola Company that manages domestic soft drink operations and produces the concentrate that CCSW purchases to make Coca-Cola soft drinks. Howell, Tr. 4004; Atchison, Tr. 5237-38. The Coca-Cola Company also owns 49% of the stock of Coca-Cola Enterprises ("CCE"), which owns Coca-Cola bottling operations in various parts of the United States, including Dallas/Fort Worth, Houston, and Austin, Texas. Howell, Tr. 4002-07; RX 3131 G.

[11] As noted above, the Dr Pepper franchises were previously held by San Antonio Dr Pepper Bottling Company ("DP-SA"), a wholly-owned subsidiary of Dr Pepper Company. Turner, Tr. 918, 928, 1035. The Dr Pepper Company was a publicly held corporation until 1984, when it was bought

The practice of having a single bottler licensed by each of several concentrate companies to sell their brands of soft drinks is sometimes called "piggybacking."[13]

Prior to CCSW's acquisition of the Dr Pepper franchise, the franchise was held by DP-SA, a wholly-owned subsidiary of DPUSA.[14] Until 1984, DPUSA owned bottling operations in San Antonio, as well as in Dallas/Fort Worth, Waco, Houston, and Corpus Christi, Texas.[15] After DPUSA was bought in a leveraged buyout, its acquirer, Forstmann-Little, began selling off the DPUSA company-owned bottling plants and the Canada Dry business.[16] CCSW wanted the San Antonio area franchises for Dr Pepper and Canada Dry, but had no interest in DP-SA's main production facility, the former Big Red Bottling Company of San Antonio plant.[17] Although DPUSA initially wanted to sell the operation as a whole,[18] it eventually sold the operation in two parts.[19] CCSW bid on both the Dr Pepper and Canada Dry franchises, initially offering $5 million, but subsequently increasing its offer to $14.5 million.[20] On August 28, 1984, CCSW bought the Dr Pepper and Canada Dry franchises, along with other assets, from DP-SA for $14.5 million.[21]

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in a leveraged buyout. CX 614 B; RX 1447 D; RX 990 E, N. After some assets were divested, the Dr Pepper franchise contracts and syrup manufacturing facilities were sold to an investment group, which subsequently bought the Seven-Up Company. Knowles, Tr. 2640. The current franchiser of Dr Pepper bottling operations in the United States is Dr Pepper/Seven-Up Companies, Inc. ("DPUSA"). The Dr Pepper and Seven-Up companies were combined in 1988. RX 1989 at 3-4. Dr Pepper/Seven-Up owns the trademarks and manufactures the concentrates for Dr Pepper and Seven-Up brand products. Clarke, Tr. 4297-99; Knowles, Tr. 2638-41. For convenience, we will use "DPUSA" to refer to both the Dr Pepper Company and its successor, Dr Pepper/Seven-Up Companies, Inc.

[12] RX 2931; E. Hoffman, Tr. 507-09.

[13] Knowles, Tr. 2764-67.

[14] RX 1648 Z29; Turner, Tr. 917-18; Antle, Tr. 3041.

[15] RX 1648 Z29-Z31; Turner, Tr. 916; Antle, Tr. 3041, 3079.

[16] CX 3817; Turner, Tr. 920-21.

[17] Antle, Tr. 3059.

[18] Antle, Tr. 3059.

[19] Turner, Tr. 1152.

[20] CX 3; RX 2092 F; Turner, Tr. 1158.

[21] CX 3 at 7; CX 247 C; CX 270; RX 1292 at 1; CX 1662; CX 253. In the same transaction, DPUSA agreed to issue Dr Pepper license agreements to CCSW. CX 3 at 17-18. DPUSA and Canada Dry issued new franchise agreements for the Dr Pepper and Canada Dry brands to CCSW in 1984. CX 266, CX 267. CCSW also received a warehouse, 2150 used vending machines, and 40% of DP-SA's used delivery and over-the-road trucks. Bodnar, Tr. 1276, 1518-20, 1689; Little, Tr. 653.

After the sale, DP-SA still owned the franchises for Big Red, RC, Crush, and Hires, and various equipment including the DP-SA bottling plant.[22] DP-SA continued to operate its business as Big Red Bottling Company of San Antonio until DPUSA's assets were sold to Grant-Lydick in October, 1984.[23] Grant-Lydick obtained DP-SA's franchises to produce and sell Big Red, RC, Crush, Hires, and DP-SA's other remaining brands, which accounted for about 58% of DP-SA's 1983 sales volume.[24] Grant-Lydick also hired DP-SA's manager, Emery Bodnar, to run its business, as well as about half of DP-SA's other employees.[25]

Grant-Lydick operates its soft drink business in San Antonio as the Big Red Bottling Company of San Antonio,[26] and has subsequently acquired additional soft drink brands and new geographic territories. In 1987, Grant-Lydick acquired the Seven-Up bottler in San Antonio and Austin, as well as the Seven-Up bottler in Corpus Christi.[27] In 1988, Grant-Lydick purchased the assets of Big Red Bottling Company of Austin, and, in 1990, an RC Cola distributorship in La Grange, Texas.[28]

The other major branded carbonated soft drink ("CSD") bottler in San Antonio is the Pepsi COBO (Company-Owned Bottling Operation), owned by the Pepsi-Cola Company ("Pepsi USA").[29] Pepsi USA also owns bottling operations in various parts of the United States, including San Antonio, Houston, Dallas/Fort Worth, and Austin, Texas. These company-owned bottling operations ac-

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[22] CX 237; Bodnar, Tr. 1668.

[23] CX 2052; CX 2484; CX 3254 A; CX 237 C; RX 1663; RX 2408; RX 2409; Lydick, Tr. 2981-82; RX 1648.

[24] CX 3495; CX 3504; CX 3505; Knowles, Tr. 2874.

[25] Bodnar, Tr. 1223, 1294.

[26] Bodnar, Tr. 1581.

[27] RX 2970; Bodnar, Tr. 1334-36; Lydick, Tr. 2999-3000. From 1982 to January, 1986, the 7-Up franchise was held by the Seven-Up Bottling Company of San Antonio, which was owned by Seven-Up USA. RX 2002; Lydick, Tr. 2996-97. The franchise was then held by Texas Bottlers, Inc. ("TBI") until May 1987, when G-L purchased TBI. Bodnar, Tr. 1334.

[28] Lydick, Tr. 3002-03, 3005-06.

[29] Pepsi USA is a division of PepsiCo, Inc., which owns the United States trademark and produces concentrate for Pepsi-Cola and other brands of soft drinks. RX 2864 Z34; Davis, Tr. 4463, 4638; Amrosowicz, Tr. 787.

count for about 37% of Pepsi USA bottle and can sales.[30] In addition, there is a small, branded CSD distributor, Star Distributing, that has undergone three corporate restructurings in the last three years.[31]

III. THE HISTORY OF THE PROCEEDING

The Commission's complaint in this matter was issued on August 28, 1988, and was amended on November 18, 1988. Administrative hearings on the merits began before Administrative Law Judge James P. Timony on July 10, 1990. The hearings on the merits were concluded on October 3, 1990. IDFF paragraph 44.

On June 14, 1991, the ALJ issued his opinion, finding a failure of proof that CCSW's acquisition of the Dr Pepper and Canada Dry franchises may substantially lessen competition. He found that "[t]he relevant product and geographic markets are broader than alleged, including private label and other soft drinks in a market that extends well beyond the environs of San Antonio." ID 78. He found further that "[r]espondent lacks market power and collusion appears unlikely[,]" and that "the market was competitive in 1984 and competition is healthy now, with over capacity [sic] and low prices being hallmarks." *Id.*

For the reasons set forth below, we reverse the ALJ's findings as to the relevant product and geographic markets and as to the likely competitive effects of CCSW's acquisition of the Dr Pepper and Canada Dry franchises, and find that CCSW's acquisition of the Dr Pepper franchise constitutes a violation of the FTC and Clayton Acts. Although we agree with the ALJ that CCSW's acquisition of the Canada Dry franchise did not violate the FTC and Clayton Acts, we reach our conclusion based on factual findings and legal reasoning that differs from that of the ALJ.

IV. THE RELEVANT PRODUCT MARKET

Bottlers may sell to retailers a variety of beverages, ranging from nationally known, branded CSDs to non-branded CSDs, non-carbon-

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[30] RX 1218; Amrosowicz, Tr. 791-93, 837-38.

[31] Espinoza, Tr. 4166-67; Bodnar, Tr. 1559-60, 1713.

ated soft drinks, seltzers, juices, and even iced tea drinks.[32] Here, the franchises that were transferred were those of branded CSDs: Dr Pepper and Canada Dry.[33] The issue is whether the relevant product market is confined to branded CSDs or conversely includes certain beverages in addition to branded CSDs. As we explain in detail below, we define "branded CSDs" as widely available carbonated soft drinks distributed by direct-store-door delivery and heavily promoted by concentrate companies, bottlers, and retailers. "Private label" carbonated soft drinks are less heavily promoted and are available in fewer channels of distribution since they are sold by retail chains that own the trademark. "Warehouse" carbonated soft drinks use warehouse delivery, are less heavily promoted, and are also available in fewer channels of distribution. *See* Section IV.C. *infra.*

Complaint counsel has asserted that all branded CSDs comprise the relevant product market.[34] CCAPB at 12. By contrast, CCSW has claimed that the relevant product market consists of all carbonated soft drinks (including private label and warehouse brands) and certain non-carbonated soft drinks packaged and sold in the same manner as CSDS. RPFF paragraph 348. The ALJ found that the relevant product market includes "national brand, private label and warehouse brands of soft drinks, as well as mixers, seltzers, non-carbonated beverages such as Lipton Iced Tea, Country Time Lemonade, and Hawaiian Punch, and isotonic drinks." ID 62.

For the reasons set forth below, we find that the evidence in this case supports a relevant product market consisting of branded CSDs.

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[32] For example, CCSW at various times has distributed in the San Antonio area the following beverages: Coke (and allied brands, such as Sprite, Fresca, and Mr. PIBB), Sunkist, A & W (and allied brands), Welch's Grape and Strawberry, Cima Red, Minute Maid CSDs, Old New York Seltzer, Spike, Hawaiian Punch, Delaware Punch, Lipton Iced Tea, and Country Time Lemonade. CX 3489 Z29, Z1O-13; CX 3483 R,Q; Summers, Tr. 6581.

[33] As a result of acquiring the franchises, CCSW added the following Dr Pepper and Canada Dry products to its list of brands for sale and distribution in the San Antonio area:

Dr Pepper products: Dr Pepper, Sugar Free Dr Pepper, Pepper Free, Sugar Free Pepper Free. CX3 at 396.

Canada Dry products: Ginger Ale, Sugar Free Ginger Ale, Club Soda, Tonic Water, Sugar Free Tonic Water, Seltzer, Collins Mixer. CX3 at 397.

[34] Complaint counsel presented evidence that the relevant product market is "the manufacture, distribution, and sale of finished carbonated soft drinks (or syrups) produced from the concentrates of widely-advertised, branded, carbonated soft drinks, merchandised and distributed by direct-store-door delivery, in all channels of distribution." IDFF; *see* Hilke, Tr. 5944-86.

A. The Legal Standard for Defining the Relevant Product Market

The purpose of defining a relevant market is to identify a market in which market power might be exercised and competition thereby diminished. *H.J. Inc. v. Int'l Tel. & Tel. Corp.*, 867 F.2d 1531, 1537 (8th Cir. 1989). Product markets may be defined either by "the reasonable interchangeability of use or the cross-elasticity of demand." *Brown Shoe Co. v. United States,* 370 U.S. 294, 325 (1962). To assess whether market power might be exercised, the courts and the antitrust enforcement agencies have sought to define a market in which "sellers, if unified by a hypothetical cartel or merger, could raise prices significantly above the competitive level." *H.J. Inc.*, 867 F.2d at 1537. Under the Merger Guidelines,[35] the federal antitrust agencies seek to identify a product market as a "product or group of products such that a hypothetical profit-maximizing firm that was the only present and future seller of those products ("monopolist") likely would impose at least a 'small but significant and nontransitory' increase in price." Merger Guidelines, Section 1.11.[36] This inquiry focuses on whether other products are sufficiently substitutable that customers would turn to them in the event of a "small but significant and nontransitory" price increase by the hypothetical monopolist. At the point at which other products are not substitutable in that sense, the contours of a relevant product market have been defined. Because a "small but significant and nontransitory" price increase is generally interpreted to be 5%, this test is known as the "5% test." Merger Guidelines, Section 1.11.

In *Beatrice Foods Co.*, 101 FTC 733, 801 (1983), the Commission stated that "cross-elasticity of demand [is] the most important factor in product market definition." Although the Commission considers all reliable evidence of interchangeability, *Olin Corp.*, 113 FTC 400, 594-95 (1990), the Commission has recognized the utility of evidence of cross-elasticity of demand such as the 5% test is designed to elicit, despite some of the difficulties in calculating such

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35 *United States Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, reprinted in* 4 Trade Reg. Rep. (CCH) paragraph 13,104 (Apr. 2, 1992) ("Merger Guidelines").

36 The version of the Merger Guidelines that was generally used by both enforcement agencies at the time of the ALJ's decision, *United States Department of Justice Merger Guidelines, reprinted in* 4 Trade Reg. Rep. (CCH) paragraph 13,103 (June 14, 1984) ("1984 Guidelines"), uses essentially the same methodology for product market definition as the 1992 Merger Guidelines. Coca-Cola Co., slip op. at 26 n.50.

elasticities. Coca-Cola Co., slip op. at 27-29; *see also* Merger Guidelines, Section 1.11. The ALJ here, however, failed to discuss any of the testimony relating to the 5% test. The testimony in this case is undisputed that bottlers of branded CSDs in the San Antonio area could profitably raise prices more than 5%.[37] Moreover, the weight of the other evidence relevant to this issue -- including the opinions of market participants, historical evidence of price interactions, and industry business records -- also supports a product market limited to branded CSDs.

The ALJ's narrow focus on certain selected pieces of evidence concerning industry perception, characteristics of the product, and price movements failed to give an accurate and complete picture of the relevant product market. *E.g.*, ID 60-62. We find that the ALJ erred in asking only whether certain beverages "competed" against each other in a broad sense, without focusing on which products were sufficiently substitutable that they could constrain a small but significant, nontransitory price increase. For example, the ALJ implies that an inverse relationship between branded and non-branded CSD market shares shows that they are in the same product market. ID 60. That this alone is an insufficient basis on which to reach such a conclusion is easily illustrated by considering the case of two different product markets that are arbitrarily lumped together to calculate shares, such as two unrelated products: branded CSDs and mouthwash. Assuming that mouthwash sales are stable throughout the year, an increase in branded CSD sales (because of feature activity with consumers stocking-up on favorite brands or seasonal swings in consumption) will produce a share increase for branded CSDs and a share decrease for mouthwash. However, this inverse relationship provides no reasonable basis for claiming that branded CSDs are in the same product market as mouthwash; rather, it is an artifact of arbitrarily treating the unrelated products as though they are in the same market.

Moreover, even if branded CSD price increases produced some consumer switching to non-branded CSDS, that would not establish that both products are in the same antitrust product market. The key to product market definition is not whether some consumers will switch to other products in the event of some price increase. Unless demand for a product is perfectly inelastic, some consumers will

[37] *See* Section IV.D.1 *infra*.

switch in response to a minimal price increase. Rather, the question is which beverages are sufficiently substitutable that they could constrain, *i.e.*, make unprofitable, a price increase in the relevant market. The evidence here establishes that consumers will not switch to other products in the event of a small but significant, nontransitory price increase of branded CSDs in sufficient numbers to make such a price increase unprofitable.

B. The Concentrate and Carbonated Soft Drink Industry

In order to assess the extent to which branded CSDs face competition from other beverages, it is necessary to understand some aspects of the soft drink industry. Soft drinks are produced by combining concentrate, sweetener, and carbonated or still water. "Concentrate" includes the flavors, extracts, and essences used to produce soft drinks. "Syrup" is concentrate mixed with sweetener and some water. IDFF paragraph 74.

Bottlers purchase concentrate from concentrate companies, such as CCUSA, DPUSA, and PepsiCo, Inc. ("Pepsi"). IDFF paragraphs 10, 16, 29. Bottlers generally sell soft drinks to retailers in cans, glass, and plastic (PET) containers; retailers in turn sell the finished soft drinks to consumers. IDFF paragraph 140. Concentrate companies, bottlers, and wholesale grocery suppliers sell soft drinks to fountain outlets in ready to drink form ("pre-mix") or as a syrup that must be mixed with carbonated water ("post-mix"). IDFF paragraph 73.

The record in this case establishes that soft drinks are differentiated products.[38] One obvious difference among soft drinks involves flavors, such as colas, lemon/limes, and oranges. However, in addition to flavor differences, soft drinks are also differentiated in other, less obvious ways. For instance, there are differences among soft drinks as to the image that their advertising projects to

[38] The Commission also recently found this to be the case in Coca-Cola Co., slip op. at 30.

consumers,[39] and even whether the soft drink is advertised significantly at all.[40]

There are also differences among soft drinks as to their availability in either the "take home" distribution channel (cans and bottles to be consumed later) or the "cold drink" distribution channel (chilled soft drinks, usually sold for immediate consumption ("fountain") or dispensed by vending machines ("vending") through convenience stores and restaurants). Soft drinks that are available through fountain or vending outlets are typically branded CSDs that use "direct-store-door" or "DSD" delivery,[41] or are private label CSDs of the outlet itself (such as McDonald's private soft drink brands).[42] Warehouse and private label brands are generally not available in the cold drink channel.[43]

In the "take-home" distribution channel, soft drinks also may be differentiated by the services that the bottler provides to the retailers, such as grocery and convenience stores. Typically, bottlers provide only delivery to the retailer's central warehouse for private label and warehouse brand soft drinks, whereas bottlers provide DSD delivery for branded soft drinks such as Coke and Pepsi. *See* Section IV.C.2 *infra*. The in-store merchandising[44] by the bottlers' own employees in DSD delivery provides advantages generally not available through

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[39] Mr. Carew, Vice President for Planning of CCE, which owns Coca-Cola bottling operations in various parts of the United states, testified that "soft drink service is called a necktie product. They are sold on image. If you have any success, you have built an image up." CX 3967 at 205-06. Mr. Carew testified that brands that have the kind of consumer demand that allow them to "sit back and do nothing" for a long time while "selling off share" include Coca-Cola, PepsiCo, Dr Pepper Company, Seven Up Company and Royal Crown. CX 3967 at 205.

[40] Most private label brands are not advertised on television or radio, but may appear in the retailer's newspaper ads or circulars. Turner, Tr. 1208; Summers, Tr. 6546-47; Howell, Tr. 4025; Hixon, Tr. 7344. Some warehouse brands, notably Shasta, had engaged in television and radio advertising at one time, although Shasta now markets itself more as a private label brand. Chapman, Tr. 7171-72. By contrast, concentrate firms allocate millions of dollars annually toward acquiring, improving, securing, protecting, and capitalizing on the value of trademark equity they develop for their trademark names and branded CSD products. Summers, Tr. 6523, 6547-48. Branded CSD bottlers and their concentrate firms realize that it is important to manage and protect the equity of the brand. Knowles, Tr. 2802; CX 3915 at 29 [Clements]; Amrosowicz, Tr. 891; Summers, Tr. 6547-48, 6523.

[41] CX 3989 at 65-66 [Shanks].

[42] Summers, Tr. 6517; Short, Tr. 7759-60.

[43] *See* Section IV.D.2 *infra*.

[44] "Merchandising" the produet includes the tasks of placing the product on the shelves or other displays, "fronting" the product to ensure the label is facing forward and, if necessary, individually pricing the product, "rotating" the product to remove older, out-of-date merchandise from the shelves, and ensuring that the price and other merchandising signs (called "point of sale" or "POS") are adequately displayed. Coyne, Tr. 3439-41; CX 2161 D, E.

warehouse delivery, such as: (a) ensuring the visual impact of trademarked brands,[45] (b) ensuring quality control of damaged or out-of-date stock,[46] (c) maintaining shelf space,[47] (d) facilitating responsiveness to competitive situations,[48] (e) maintaining and promoting a full stock of product,[49] (f) maintaining a good relationship with the retail account.[50]

A review of the evidence shows that soft drinks are divided into at least three distinct categories: major national and regional brands; "warehouse" brands; and private label brands.[51] Major national and regional brands are characterized by: wide availability in both the take home and cold drink distribution channels;[52] DSD delivery;[53] and heavy advertising to promote a particular image and trademark.[54] For convenience, we will refer to these as "branded CSDs."

The remaining soft drinks consist of those that have brand names, but use warehouse distribution ("warehouse brands"), such as Shasta and Faygo,[55] and private label products, such as H.E.B.'s Plaza, that

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45 CX 505 C; CX 1948; CX 2240 D-ZI3; CX 2243 D-2.

46 CX 505 D, G, H; CX 2240 F, O, Z; CX 2243 I-ZI7.

47 CX 505 E. Although the shelf space that retailers allocate to their own private labels may be considered "untouchable," (Summers, Tr. 6624; Davis, Tr. 4526, 4764; Bodnar, Tr. 1763; Howell, Tr. 4050; Sendelbach, Tr. 7718), bottlers still compete among themselves for shelf space not allocated to the retailer's own private label. Summers, Tr. 7119.

48 CX 505 E.

49 CX 505 D, I-J,O; CX 2240; CX 2240; CX 2627 Y-Z1O; Summers, Tr. 7119.

50 CX 505 E.

51 In Coca-Cola Co., this Commission reached the same conclusion. Slip op. at 30-32.

52 Donald, Tr. 5291; RX 990 E. *See also* Section IV.D.2 *infra*. There was also testimony that, to have a fully effective merchandising operation, carbonated soft drinks must be distributed in all channels of distribution. Turner, Tr. 934; CX 3915 at 17-18 [Clements]; CX 3988 at 530-531 [O'Donnell]; CX 1853 N; CX 1909.

53 *See* Section IV.C.2 *infra*.

54 For example, the trademark "Coca-Cola" is "the most widely known brand name in the world." CX 131 D. Concentrate firms typically make available marketing support to local branded CSD bottlers. CX 3989 at 78-79, 104 [Shanks]; CX 3987 at 2085 [Lowenkron]; CX 3976 at 2129 [Quirk]; Coyne, Tr. 3413-17; Knowles, Tr. 2745-49; Trebilcock, Tr. 5812; Turner, Tr. 963-65; Howell, Tr. 3928-31; RX 990 Z2.

55 RX 1531; RX 1957; Howell, Tr. 4031; Summers, Tr. 6551. Other examples include: IBC Root Beer, CX 1294; Rainbow, Rocky Top and Parade. Hiller, Tr. 5337-38; Hoffman, R., Tr. 5534-35. This category includes the proprietary brand name products produced by bottlers, such as the "Texas" brand of Texas Beverage Packers. Hixon, Tr. 7277-78.

are sold by the particular store chains that own the trademark.[56] Warehouse brands are available primarily in large retail chains[57]; are generally not available in the cold drink channel[58]; are less heavily advertised than major national and regional brands[59]; and are less expensive than branded CSDs.[60] The private label products are also not usually available in the cold-drink channel;[61] use little or no advertising;[62] and are even less expensive than warehouse brands.[63] For convenience, this opinion will refer to warehouse and private label brands collectively as "unbranded" or "nonbranded" products.

C. The Distribution and Marketing of Branded Carbonated Soft Drinks

1. Channels of Distribution

Soft drinks are sold through various "channels" of distribution.[64] One broad distinction is between the "home market" or "take home" channel, which consists of sales for later consumption, and the "cold drink" channel, which consists of sales for immediate consumption.[65]

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56 CX 4022. Private label soft drinks are usually proprietary brand names of retail chains. Hixon, Tr. 7278-79. *See also* Morath, Tr. 7674-75; Howell, Tr. 4023-24; Knowles, Tr. 2860-61.

The A.C. Nielsen Company ("Nielsen") tracks sales in the home market segments of the bottling market, including sales to supermarkets and convenience stores. RX 875. Nielsen refers to private label brands as "control" brands. RX 2806 X.

57 *See* Section IV.C.2 *infra.*

58 *See* Section IV.D.2 *infra.*

59 Although one warehouse brand, Shasta, has engaged in television and radio advertising, [Chapman, Tr. 7171-72], most do not. *See also* Section IV.C.3 *infra.*

60 *See* Section IV.D.3.b *infra.*

61 *See* Section IV.D.2 *infra*; CX 3989 at 65-66.

62 Most private label brands are not advertised on television or radio, but may appear in the retailer's newspaper ads or circulars. Turner, Tr. 1208; Summers, Tr. 6546-47; Howell, Tr. 4025.

63 *See* Section IV.D.3.b *infra.* In addition, private label soft drinks are available in many fewer package sizes than branded CSDs. Branded CSDs come in a variety of package sizes, including 6.5, 10, 12, 16, 20 or 32 ounce glass or PET bottles, 1, 2 and 3 liter PET bottles, and 12 oz cans. CX 53 G, Y-Z6. Typically, private label CSDs are sold in 12 ounce cans and 2 and 3 liter PET bottles. CX 3158 K. H.E.B.'s Plaza is available only in loose cans and 2 liter bottles. Chapman, Tr. 7165; CX 4022. Warehouse-delivered CSDs are also limited in their package availability. Hixon, Tr. 7279, 7285-86, 7300, 7342.

64 CX 836 H, S.

65 Knowles, Tr. 2647-48; Turner, Tr. 1185-86; CX 418 J, K.

The take-home channel is primarily served by chain supermarkets and independent grocery stores, mass merchandisers, and convenience stores.[66] The cold drink channel is served by stores and other locations that offer (a) vending sales, (b) fountain sales, and/or (c) single drink sales.[67]

Concentrate companies and bottlers recognize significant differences between the take-home and cold-drink channels. As described in a 1985 CCSW "Corporate Information Memorandum":

> Almost all Coca-Cola bottlers divide their business into two broad categories, the home market and the cold drink market. The home market consists of all soft drinks which are sold for consumption at some place other than where they are purchased - hence for "home" consumption. The major types of outlets which comprise the home market are supermarket chain stores, mass merchandisers and discount stores, drug stores, independent supermarkets, and convenience stores. The cold drink market segment is composed of those outlets where soft drinks are purchased for immediate consumption: vending machines, restaurants and bars, athletic and other social events, and convenience stores. It is obvious that almost all cold drink accounts require some form of special equipment since the product must be delivered cold, while home market accounts generally sell soft drinks off the shelf or possibly off of a special rack.
>
> Soft drinks are sold in different packages in different market channels. In the home market, soft drinks are sold in bottles and cans. In the cold drink market, product is sold in bottles, cans, and cups. Approximately 76% of all soft drinks are sold in bottles and cans. The remaining 24% are sold in cups or similar containers. Cups are filled using either a post-mix or pre-mix system. Pre-mix, which is the same as the product in bottles and cans, and accounts for only 18% of cup sales today, is distributed in five gallon metal tanks. It is pumped out under pressure and is used primarily where no local water hook-up is available. Post-mix is also distributed in five gallon tanks, as well as one gallon jugs. It is very similar to bottling syrup and must be mixed with carbonated water at the point of serving.

CX 418 J, K.

In addition to these differences, there are other significant differences between the take-home and the cold-drink channels, especially the fountain portion of the cold-drink channel. For example, both CCUSA and DPUSA handle fountain sales differently than sales of take-home, branded CSDs in that CCUSA and DPUSA -- not bottlers -- set the price at which a large proportion of Coca-Cola and Dr Pepper fountain sales are made. Large fountain accounts qualify for

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[66] CX 883 V; RX 990 U; CX 418 J, K.

[67] CX 783 E; CX 3419 Z56; RX 990 U.

"national account pricing" from both CCUSA and DPUSA.[68] About 65-70% of CCSW's sales of post-mix fountain syrup are made at the national account price.[69]

In addition, CCUSA and DPUSA do not have exclusive franchise territories for post-mix fountain syrup, although DPUSA does restrict each bottler's sales of post-mix fountain syrup to its specified territory for bottle and can sales.[70] This means that Coca-Cola and Dr Pepper post-mix fountain syrup can be sold by a variety of entities, such as wholesalers, in addition to concentrate companies and bottlers. As a result, Coca-Cola and Dr Pepper fountain products are available from many fountain wholesalers in the San Antonio area in addition to the two franchised bottlers.[71] Indeed, Mr. Carew, Vice President for Planning of CCE, the owner of Coca-Cola's bottling operations, described the marketing of post-mix fountain syrup as "so totally different from bottle/can marketing that efforts to merge the two are not in the best long term interest of either system."[72]

Finally, there are often significant price differences between the take-home and cold-drink channels. For example, an individual branded CSD can is typically $.50 in a vending machine in the San Antonio area.[73] By contrast, a six-pack of Pepsi take-home cans in San Antonio sells at an everyday price of $1.99 and may be sold at a promotional price of $1.49 or even $.99 on occasion.[74]

2. Direct-Store-Door Delivery

Nationally and regionally branded CSD manufacturers overwhelmingly use "direct-store-door" ("DSD") delivery for their prod-

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[68] Short, Tr. 7736; Cassagne, Tr. 7585; Knowles, Tr. 2820-23.

[69] Knowles, Tr. 2820.

[70] Knowles, Tr. 2681; Turner, Tr. 1086. DPUSA does allow post-mix fountain to be distributed by food wholesalers and brokers within a bottler's exclusive territory. Turner, Tr. 1086.

By contrast, PepsiCo and RC Cola <u>do</u> have exclusive geographic territories for post-mix fountain syrup. Knowles, Tr. 2681-82.

[71] CX 33 Z18; RX 861; Short, Tr. 7741-42; Turner, Tr. 1172-74.

[72] CX 799 M.

[73] Turner, Tr. 646.

[74] CX 3973; Davis, Tr. 4526.

ucts[75] as opposed to warehouse delivery.[76] For DSD delivery, the bottler's own employees will: place the product on the shelf, "front" it to make sure that the label is properly displayed, and price the product; remove old merchandise; ensure that "point of sale" signs are properly displayed; and change space allocation.[77] For warehouse delivery, the bottler relies on the retailer's employees to perform these tasks.[78] In such circumstances, the private label and warehouse soft drinks are delivered to the retailer's warehouse.[79]

Under DSD delivery, the DSD vendor bears the cost of distribution, stocking, and in-store checks on promotional efforts past the point of the warehouse; in the warehouse delivery sequence, this cost is borne by the retailer.[80] Distribution costs typically account for about 35% of a branded CSD bottler's overall costs.[81]

The DSD delivery system provides at least two strengths which justify its added expense to the bottlers. First, it allows bottler control. Second, given sufficient overall volume, the DSD delivery system allows the bottler to reach smaller outlets.

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[75] All of the major carbonated soft drink brands are distributed by DSD distribution, using soft drink bottlers or soft drink distributors. CX 3967 at 181; CX 3976 at 2111; CX 3582 at 2238; Nicholson, Tr. 3713. In fact, major franchises prohibit warehouse distribution. Turner, Tr. 956; Koch Tr. 1814. The Coca-Cola Company's soft drink products are distributed entirely by Coca-Cola franchised bottlers through DSD delivery. No warehouse delivery is used for retail channels. CX 3967 at 181 [Carew]; CX 793 A. Pepsi built its business on the merchandising advantages of DSD distribution. David Davis, Vice President for Trade Development for Pepsi USA, testified that Pepsi had better control of where its products went and how to merchandise them and move business by keeping itself vertically integrated. Davis, Tr. 4471-72. Consequently, Pepsi has not explored warehouse and beer distributors as an alternative to DSD distribution. Davis, Tr. 4471-72.

[76] Turner, Tr. 956-57; Nicholson, Tr. 3713-14; CX 3582 at 2238 [Clements]. The two largest systems of DSD delivery are the Coke bottler system and the Pepsi bottler system. CX 3976 at 2128 [Quirk]; CX 3978 at 2066-67 [Lowenkron]; CX 3990 at 929 [Kalil]; CX 864 H, I.

[77] Knowles, Tr. 2662-63; Turner, Tr. 956-58; Nicholson, Tr. 3711; CX 3989 at 27 [Shanks]; CX 3988 at 505 [O'Donnell]; CX 3921 at 355 [Currie]; Hoffman, E., Tr. 327-28.

[78] Knowles, Tr. 2663-64. In some cases, bottlers have relied on independent distributors to perform DSD distribution for them. Koch, Tr. 1901. It is significant that the bottlers have hired independent distributors to ensure that these tasks are performed, rather than relying on retailers' employees for them.

[79] Warehouse delivery is used for retailers' private labels (also known as "control brands"). Private labels are a retailer's proprietary brand of soft drink. Howell, Tr. 4031; E. Hoffman, Tr. 412-13. There are a few national brands -- Shasta, Faygo, and IBC Root Beer -- that also use warehouse delivery. Howell, Tr. 4031. IBC Root Beer, produced by DPUSA, uses warehouse delivery among other reasons because of its unique bottle. IDFF paragraph 149.

[80] Summers, Tr. 6469.

[81] *See* RX 0867.

Bottler control means that the bottler has someone in the store pushing the brand.[82] This marketing push is extremely important given the degree to which sales respond to advertising, promotions, displays, and price (see next section).[83] It also gives the bottler the ability to get the product merchandised, priced, rotated,[84] and looking fresh. A bottler would lose this with the warehouse delivery system.[85] Bottlers characterized the services performed by bottler employees in DSD as extremely important in producing volume sales of soft drinks. Toby Summers, President of CCSW, stated: "We are an impulse item. If you don't have a display to execute it, you can't sell it off the shelf." Summers, Tr. 7117-19.[86] In response to questioning by complaint counsel, Mr. Summers stated: "Apparent-

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[82] Davis, Tr. 4471-72. David Davis, Vice President of Trade Development for Pepsi USA, testified that he viewed a new 7Up brand as a competitive threat, but not a comparable warehouse delivered brand, in part because of the differences in the delivery system: "7-Up is a DSD brand. You've actually got people in the store pushing the brand versus a Jolt Cola that's warehouse. They have to kind of depend on the store personnel doing it themselves. So you've got more selling involved with a DSD brand on the store level, which is where the product gets moved or not." Davis, Tr. 4569. Texas Beverage Packer ("TBP")'s lack of volume for its private label and warehouse brands is blamed on its failure to gain proper distribution. Hixon, Tr. 7332.

[83] Hoffman, E., Tr. 358, 362; CX 3814 at 22-23; Koch, Tr. 1831; Turner, Tr. 974. When soft drinks are on sale, consumers purchase more soft drinks. Knowles, Tr. 2838-40.

[84] Soft drinks--especially diet soft drinks--deteriorate in quality over time, so careful attention must be paid to stocking and rotation of these items. Carbonation, flavorings, and aspartame are all sensitive to heat. CX 851. The level of carbonation in plastic containers, the quality of flavorings in all containers and the sweetening effect of aspartame decline over time. CX 851; E. Hoffman, Tr. 330-31. Regular soft drinks after 150 days, and diet products after 90 days have diminished quality sufficient to adversely affect repeat sales and consumer preferences. CX 851; CX 4005 at 63 (R. Hoffman). CCSW believes that its CSDs with aspartame have an expected shelf life of approximately 90 days. E. Hoffman, Tr. 328-29. Consumers are sensitive to aspartame breakdown. CX 2281. When aspartame breaks down it turns bitter and the flavor and quality become substandard due to deterioration. CX 4005 at 63; E. Hoffman, Tr. 328-29. Although this substandard product can be consumed safely, bottlers run the risk that consumers might never buy that product again, resulting in loss of volume. E. Hoffman, Tr. 32829; Turner, Tr. 956-57. *See also* CX 851, CX 3186 B.

[85] Turner, Tr. 956-57; Knowles, Tr. 2663; E. Hoffman, Tr. 327-28; CX 505 C-K; CX 3145 Y.

Mr. Clements, President and CEO of Dr Pepper from 1974 through 1986, testified that his attempts to use warehouse delivery for Dr Pepper in Indianapolis and Los Angeles in the 1950's had convinced him "that with a product like Dr Pepper, and if you want to develop a consumer franchise and if you want to develop an equity in that market, that we could not do it anyway except the store door delivery." CX 3582 at 2238 [Clements]. He explained that retailers "didn't reorder because they were not accustomed to having soft drinks that way, they were accustomed to having store door delivery, and if they did reorder, they didn't reorder in sufficient quantities, and so we went out of stock and after about six months we determined that that test was a failure and voted off." CX 3582 at 2236 [Clements].

CCSW disputed this point, citing testimony by CCSW President Summers that, in his opinion, the retailer H.E.B. merchandised its private label, Plaza, better than Pepsi merchandised its DSD delivered brands. Summers, Tr. 6472. Summers, testimony, however, supports the importance of control over distribution and merchandising by the entity that ultimately would benefit most from volume sales of the product.

[86] *See also* CX 2008 P, Q.