IN THE MATTER OF

THE COCA-COLA COMPANY

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 9207. Complaint, July 15, 1986--Final Order, June 13, 1994

This final order requires Coca-Cola, for ten years, to obtain Commission approval before acquiring any part of the stock or interest in any company that manufactures or sells branded concentrate, syrup, or carbonated soft drinks in the United States.

Appearances

For the Commission: *Joseph S. Brownman*, *Ronald Rowe, Mary Lou Steptoe* and *Steven J. Rurka*.

For the respondent: *Gordon Spivack* and *Wendy Addiss, Coudert Brothers*, New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent, The Coca-Cola Company, a corporation subject to the jurisdiction of the Federal Trade Commission, has entered into an agreement with DP Holdings, Inc., described in paragraph four herein, that, if consummated, would violate the provisions of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; that said agreement and the actions of the respondent to implement that agreement constitute violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, the Commission hereby issues its complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5 (b) of the Federal Trade Commission Act, 15 U.S.C. 45 (b), stating its charges as follows:

I. THE COCA-COLA COMPANY

1. Respondent, The Coca-Cola Company ("Coca-Cola"), is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Atlanta, Georgia.

2. For the year ending December 31, 1985, Coca-Cola had net sales of $7.9 billion.

3. Coca-Cola is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

II. THE ACQUISITION

4. Coca-Cola entered into an agreement to purchase 100 percent of the issued and outstanding shares of capital stock of DP Holdings, Inc., which in turn owns all of the outstanding shares of capital stock of Dr Pepper Company. Dr Pepper is engaged in the production, sale and distribution of concentrate (including syrup) used in the manufacture of carbonated soft drinks. The total value of the transaction is approximately $470 million. Coca-Cola and Dr Pepper are direct competitors in the carbonated soft drink industry.

III. TRADE AND COMMERCE

5. For purposes of this complaint, the relevant lines of commerce are:

a. The production, sale and distribution of concentrate (including syrup) used in the manufacture of carbonated soft drinks and narrower markets contained therein.

b. The production, sale and distribution of carbonated soft drinks and narrower markets contained therein.

6. For purposes of this complaint, the relevant sections of the country with respect to each of the relevant lines of are the United States and smaller areas within the United States.

IV. MARKET STRUCTURE

7. In 1985, approximately 7.28 billion case equivalents of carbonated soft drink concentrate and of carbonated soft drinks were produced in the United States. The carbonated soft drink, concentrate and carbonated soft drink markets are highly concentrated, whether measured by Herfindahl-Hirschmann Indices ("HHI") or by two-firm, four-firm and eight-firm concentration ratios.

V. BARRIERS TO ENTRY

8. Entry into the relevant markets is very difficult, risky and time-consuming.

VI. ACTUAL COMPETITION

9. Coca-Cola and Dr Pepper are actual competitors in the manufacture and sale of the relevant products.

VII. EFFECTS

10. The effect of the acquisition, if consummated, may be substantially to lessen competition in relevant product markets in relevant sections of the country in violation of Section 7, of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

a. By eliminating direct competition between Coca-Cola and Dr Pepper;

b. By increasing the likelihood of, or facilitating, collusion where the acquisition would significantly increase already high concentration;

c. By increasing the likelihood that Coca-Cola will unilaterally exercise market power;

d. By increasing the difficulty of entry;

e. By raising the costs and reducing the competitiveness of other firms producing and selling concentrate or syrup used in the manufacture of carbonated soft drinks;

all of which increase the likelihood that firms will increase prices and restrict the output of carbonated soft drinks both in the near future and in the longer run.

VIII. VIOLATIONS CHARGED

11. The proposed acquisition of the stock of DP Holdings by Coca-Cola would, if consummated, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

12. The acquisition agreement set forth in paragraph four constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

13. The proposed acquisition of the stock of DP Holdings by Coca-Cola would, if consummated, violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

INITIAL DECISION

BY LEWIS F. PARKER, ADMINISTRATIVE LAW JUDGE
NOVEMBER 30, 1990

I. INTRODUCTION

The Commission's complaint in this case issued on July 15, 1986 and it charged that The Coca-Cola Company ("Coca-Cola") had entered into an agreement to purchase 100 percent of the issued and outstanding shares of the capital stock of DP Holdings, Inc. ("DP Holdings") which, in turn, owned all of the shares of capital stock of Dr Pepper Company ("Dr Pepper").

The complaint alleged that Coca-Cola and Dr Pepper were direct competitors in the carbonated soft drink industry and that the effect of the acquisition, if consummated, may be substantially to lessen competition in relevant product markets in relevant sections of the country in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

The complaint also alleged that the acquisition agreement itself violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

After extensive pretrial motions and discovery, trial was held in the Spring of 1990. The parties filed their proposed findings of fact, conclusions of law and proposed orders on August 6, 1990. Answers thereto were filed on September 10, 1990. The record was closed on October 17, 1990, after I ruled on extensive requests by Coca-Cola and third parties for in camera treatment of documents which were received in evidence.

This decision is based on the transcript of testimony, the exhibits which I received in evidence, the proposed findings of fact and conclusions of law and answers thereto filed by the parties. I have adopted several of the proposed findings verbatim. Others have been adopted in substance. All other findings are rejected either because they are not supported by the record or because they are irrelevant.

II. FINDINGS OF FACT

A. *The Parties*

1. Coca-Cola is a Delaware corporation with its headquarters located at One Coca-Cola Plaza, N.W., Atlanta, Georgia (Cplt. paragraph 2).[1] It had net operating revenues of $7.904 billion in the year ending December 31, 1985 (Ans. paragraph 2; CX 11-D). Through its Coca-Cola USA division, Coca-Cola manufactures and sells syrups and concentrates used to produce carbonated soft drinks (Tr. 181, 2332). Coca-Cola USA does not manufacture or sell finished carbonated soft drinks. Coca-Cola USA's bottler operations department sells syrups and concentrates to bottlers and canners of soft drinks. Coca-Cola USA, through its fountain sales department, also sells fountain syrup and concentrate to fountain wholesalers, to bottlers who are fountain wholesalers, and to chain retail customers (Tr. 487-88, 2394-95, 3079-80, 3681; RX 631-Z-68; RX 644-H-K).

2. Coca-Cola holds equity investment interests in several bottling companies, including Coca-Cola Enterprises Inc. ("CCE"), Coca-Cola Bottling Co. Consolidated, Johnston Coca-Cola Bottling Group,

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

Cplt.:	Complaint
Ans.:	Answer
Tr.:	Transcript of Testimony
CX:	Commission Exhibit
RX:	Respondent's Exhibit
F.:	Finding of Fact
CPF:	Complaint Counsel's Proposed Findings
RPF:	Respondent's Proposed Findings

Inc., Brucephil Inc., Coca-Cola Bottling Co. of Chicago, Coca-Cola Bottling Co. of Arkansas, and Coca-Cola Bottling Co. of New York, Inc. (Tr. 2335, 3261). Although it owns majority interests in the latter two bottling companies, Coca-Cola does not control their day-to-day operations (Tr. 3261-62, 3981-82; RX 639-Z-18, Z-42-43).[2]

3. In 1986, Coca-Cola manufactured the concentrate and syrup for the following brands of carbonated soft drinks in the United States for the following flavor categories:

Coca-Cola	Sugared cola
Coca-Cola classic	Sugared cola
caffeine-free Coca-Cola	Sugared cola
cherry Coca-Cola	Sugared cola
diet cherry Coca-Cola	Diet cola
diet Coke	Diet cola
TaB	Diet cola
caffeine-free diet Coke	Diet cola
Sprite	Lemon-lime
Minute Maid lemon-lime	Lemon-lime (juice added)
diet Sprite	Diet lemon-lime
diet Minute Maid (lemon lime)	Diet lemon-lime
Minute Maid Orange	Flavor (juice added)
diet Minute Maid Orange	Diet flavor (juice added)
Fanta	Flavor line
Ramblin'	Root Beer
Mello Yello	Citrus
Mr. PiBB	Spicy pepper
diet Mr. PiBB	Diet spicy pepper
Fresca	Diet grapefruit

4. Coca-Cola sells syrup and concentrate to over one hundred bottlers located throughout the United States which are licensed to manufacture and sell specified trademarked soft drinks in bottles and cans ("bottle/can" or "packaged" soft drinks) in a designated exclusive territory perpetually, so long as the bottler lives up to the terms of the contract *(e.g.*, RX 51-A, B, C; RX 53-F, X). Not all Coca-Cola bottlers manufacture and distribute all Coca-Cola products in their territories. Moreover, bottlers of Coca-Cola's products also sell soft drinks made from concentrates purchased from other manufacturers (F. 38).

[2] Since the hearings, Coca-Cola sold its interest in Coca-Cola Bottling Co. of Arkansas to CCE.

5. DP Holdings, Inc., a Delaware corporation, was a holding company created as a vehicle for the leveraged buy out of Dr Pepper Company. DP Holdings, Inc. owned 100 percent of the shares of Dr Pepper Company (Cplt. paragraph 4; RX 2-A). Dr Pepper, a Colorado corporation headquartered in Dallas, Texas, manufactures soft drink concentrate and syrup which it sells to bottlers and fountain syrup wholesalers (RX 2-A). Dr Pepper owns all of the shares of Premier Beverages, Inc. ("Premier") which also manufactures concentrate and syrup (Tr. 2108, 2151).

6. Dr Pepper has manufactured concentrates and syrups for the following brands of carbonated soft drinks in the United States for the following flavor categories:

Dr Pepper	Spicy pepper
Pepper Free	Spicy pepper
Sugar Free Dr Pepper	Diet spicy pepper
Sugar Free Pepper Free	Diet spicy pepper

Dr Pepper's 1988 revenues from sales in the United States of concentrate and syrup exceeded [blank] million (CX 781-K).

B. *The Challenged Transaction*

7. On January 24, 1986, PepsiCo, Inc. ("PepsiCo") announced that it had reached an agreement in principle to acquire the domestic and international operations of Seven Up Company ("Seven Up") from Philip Morris, Inc., for $380 million (RX 235-Z-248; RX 572-A).

8. On February 20, 1986, Coca-Cola was authorized by its board of directors to acquire all of the capital stock or assets of DP Holdings, Inc., for consideration of approximately $295 million plus the repayment of $180 million in debt, totaling $475 million(CX 2-A, B).

9. On February 21, 1986, the stockholders of DP Holdings, Inc. agreed to sell all of the company's outstanding shares to Coca-Cola for approximately $470,000,000 (including the assumption of approximately $170,000,000 in debt) (Cplt. paragraphs 6, 7; Tr. 2358; RX 2-A). The purchase agreement gave both Coca-Cola and the shareholders of DP Holdings, Inc. a unilateral right to terminate the agreement if the closing did not occur on or before August 29, 1986 (RX 2-Z). The purchase agreement also obligated Coca-Cola

to use its best efforts to obtain governmental approval for the transaction and relieved Coca-Cola of any obligation to proceed with the acquisition in the event that a court issued an order precluding consummation of the proposed deal (RX 2-U, Z-2). Dr Pepper had few assets; the acquisition of its trademark was the goal of the proposed transaction (CX 65; CX 368-G).

10. The Coca-Cola-Dr Pepper proposal was a defensive move to effect a blockage of the PepsiCo-Seven Up transaction (CX 81-D-E; CX 84-B-C; CX 88; CX 237), or if that transaction were allowed, to acquire Dr Pepper (CX 88-I).

11. Following a four month investigation of the proposed transaction, the Commission brought suit on June 24, 1986 against Coca-Cola in the United States District Court for the District of Columbia for a preliminary injunction enjoining consummation of the acquisition pending the result of an administrative proceeding to consider the acquisition. On July 15, 1986, the Commission issued the administrative complaint which began this proceeding on July 31, 1986, the District Court issued the requested injunction. *FTC v. The Coca-Cola Co.*, 641 F. Supp. 1128 (D.D.C. 1986), *vacated as moot and remanded*, 829 F.2d 191 (D.C. Cir. 1987). Thereafter, Coca-Cola sought an expedited appeal. The Commission opposed Coca-Cola's request.

12. On August 5, 1986, the shareholders of DP Holdings, Inc. announced that they were terminating the purchase agreement whereby Coca-Cola would acquire DP Holdings, Inc. and its subsidiary, Dr Pepper (RX 572-E). Dr Pepper was thereafter sold to Hicks & Haas, a partnership (Tr. 1292-93, 2206, 2225). Despite the abandonment of the transaction and the sale of Dr Pepper to another entity, the Commission refused to dismiss the administrative complaint (Order Denying Respondent's Motion for Dismissal of the Complaint (Aug. 9, 1988)).

C. *Commerce*

13. Coca-Cola company is, and at all times relevant to this complaint has been, engaged in commerce as the term "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as the term "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44 (Ans. paragraph 3).

14. Coca-Cola produces concentrate for its non-cola sugared products in Atlanta, most of the concentrate for its non-cola diet products in Puerto Rico, and cola concentrate and syrup in 16 locations throughout the United States (CX 176-Z; CX 194-P).

15. Coca-Cola and Dr Pepper Company in June 1986 were, and they currently are, competitors in the manufacture and sale of carbonated soft drink concentrate and syrup (Ans. paragraphs 4, 9).

D. *The Concentrate Industry*

1.The Manufacture Of Concentrates and Syrup and Its Profitability

16. Carbonated soft drinks are produced by mixing "concentrate" with a sweetener and carbonated water. The term "concentrate" is commonly used in the soft drink industry to include flavors, extracts, and essences used to produce soft drinks (Tr. 3303, 3371-72, 4080).

17. In concentrate used to produce diet carbonated soft drinks, the sweetener is artificial, and it is part of the concentrate; in concentrate used to produce regular carbonated soft drinks, the sweetener is corn syrup or sugar, and it is generally added by the bottler (Tr. 22; CX 795).

18. "Syrup" is concentrate with sweetener and extra water added, generally for fountain use (CX 176-B). At the fountain, carbonated water is added to produce carbonated soft drinks (Tr. 22). This is sometimes called "post mix" (Tr. 582).

19. Unlike syrup, concentrates contain very little water and generally do not contain sweetener. This results in lower transportation costs and a more efficient means of producing soft drinks in bottling and canning plants (CX 12-P).

20. There is no use for concentrate other than in the production of carbonated soft drinks (Tr. 21), and the demand for concentrate is therefore derived from the demand for carbonated soft drinks (Tr. 2545, 2744). Concentrate can be produced in-house, or some 25-30 so-called "flavor houses" may be hired to produce it (Tr. 445, 3373, 3376-77).

21. Concentrate companies typically raise prices annually, usually in the first quarter of the year (Tr. 1449, 2123).

22. For the period 1979-85, the percentage increases for the prices of concentrate for the following companies were:

1979 - 1985 Percentage Increase in Concentrate

Brand	% Increase
Coke	64%
Pepsi	85%
Dr Pepper	89%
Sprite	84%
Mt Dew	90%

(Source: Derived from CX 395-B; CX 396-C, D).

23. For the period 1979 through 1988, Coca-Cola's "net concentrate price" for bottle/can concentrate for the brands indicated, on a 288 ounce case basis, was as follows: (Net concentrate price includes a five cents per gallon deduction that Coca-Cola puts in a special fund that bottlers can draw upon to purchase point of sale items.)

Year	Coke Classic	Annual Increase	Diet	Annual Increase	Inflation Rate
1979	0.315	4%	0.709	6%	
1980	0.388	23%	0.753	6%	
1981	0.427	10%	0.824	9%	
1982	0.495	16%	0.936	14%	
1983	0.534	8%	0.955	2%	3.2%
1984	0.551	3%	1.045	9%	4.3%
1985	0.575	4%	1.121	7%	3.6%
1986	0.595	8%	1.152	3%	1.9%
1987	0.613	3%	1.357	18%	3.7%
1988	0.633	3%	1.381	2%	4.0%

(Source: CX 19-Z-20; CX 798-D-E, Z-24).

24. Coca-Cola's per case operating profit in actual dollars (not adjusted for inflation) declined during the ten year period prior to the proposed acquisition (Tr. 2686-87; RX 646-Z-5-26). Coca-Cola USA's overall operating profits from the sale of concentrates and syrups have increased over the past several years because of increasing volume (Tr. 2415-16, 3391; RX 238-Q). PepsiCo's and Dr Pepper's profits have also increased (Tr. 1448-49, 2455-56).

2. Advertising And Promotion By Concentrate Firms

25. Network and spot television advertising expenditures of carbonated soft drinks by concentrate firms, was as follows for the years indicated:

Television Advertising Expenditures - 1986 - 1987

1986	share	1987	share
Coca-Cola			
PepsiCo			
Industry			

(Source: CX 27-Z-137).

26. Coca-Cola's total advertising expenditures for 1986 were as follows:

Coca-Cola's Marketing and Advertising - 1986

television advertising	(CX 27-Z-137).
total advertising	(CX 781-C).
total marketing	(CX 14-H, I).

27. Coca-Cola USA's direct marketing expenditures totaled [ ] million in 1987 (CX 19-Q, Z-6,Z-33), or [ ] net revenues (derived from CX Z-6). Coca-Cola's marketing expenditures per case were:

Coca-Cola's Marketing Per Case

year	case sales	total marketing	mrk/case
1985	2,531,600,000		
1986	2,682,572,000		
1987			

(Source: CX 19-Z-34; CX 781-A, C).

28. Coca-Cola's marketing expenditures per case in 1986 were about [ ] of its sales (CX 19-Z-34; CX 781-A, C-E; CX 798-K, L, Z-32).

3. National v. Spot Television Advertising

29. National advertising is a more efficient method of advertising carbonated soft drinks than is local ("spot") advertising (Tr. 278-279, 2384; CX 219-M; CX 280-D-L; CX 372-Z-3; CX 481-U; CX 748 T).

4. The Major Carbonated Soft Drinks Flavors

30. The industry's mainstream carbonated soft drink flavors are cola, lemon-lime, pepper, orange and root beer (CX 6-T; CX 6-Z-21;

CX 18-N; CX 379-L; CX 562-D; CX 141-Y) and they account for over 90% of all sales (CX 6-Z-21; CX 132-E; CX 165-D). Other flavors which have a more limited mass appeal are ginger ale, cream soda, and fruit flavor soft drinks (Tr. 2067, 3309, CX 249-G; CX 532-"O").

31. Cola is the most important flavor, with approximately 65% of all carbonated soft drink sales (Tr. 184, 269, 1526-27, 2116; CX 6-Z-21; CX 18-N; CX 141-Y; CX 721-E), and carrying a cola drink is important to a bottler (Tr. 269-70, 850; CX 742-F, G; CX 720-I; RX 353). The largest selling cola brands include Coca-Cola classic, Pepsi-Cola, and Royal Crown Cola (CX 781-E, H, Q).

32. For private label or warehouse-delivered carbonated soft drinks, the cola flavor represents about 30% of sales (CX 268-Z-13; CX 697-A).

E. *Finished Carbonated Soft Drinks*

33. Price competition in the concentrate industry is not as intense as in the finished carbonated soft drink industry because competitive conditions in the latter can change weekly (Tr. 381, 1369-70; CX 753-Z-2-3); they are essentially two different industries which are interrelated (Tr. 381, 546, 1369-70, 1472-73).

34. Over the last 20 years, average per capita consumption of carbonated soft drinks has more than doubled.

Per Capita Soft Drink Consumption

year	Gallons per capita
1967	19.9
1972	25.3
1977	30.8
1982	35.6
1987	44.1

(Source: CX 798-Z-23).

35. In recent years, there have been substantial cost savings associated with the manufacture and distribution of carbonated soft drinks because of higher sales volume (Tr. 1485-88, 2381), the switch from sucrose as a sweetener to high fructose corn syrup (Tr. 3018-19; CX 7-I, K; CX 10-N; CX 237-G; CX 413-E; CX 795-A;

CX 807-B; RX 235, pp. 70-72; RX 584-Z-32-33), the use of less expensive packaging (Tr. 3233) and increased efficiencies from the decrease of bottlers through consolidation (almost 50% between 1980 and 1989) (Tr. 2110, 2140; RX 409-E; CX 7-I; CX 10-F; CX 10-M; CX 11-N; CX 22-Z-17-22; CX 170-K; CX 176-K; CX 226-D-E; CX 284-A-Z-12; CX 284-C-G, "O"; CX 286-C; CX 287-B-D).

36. Efficiencies from consolidation have resulted in lower prices to consumers than would have otherwise been the case (Tr. 192-93, 2381; CX 12).

F. *The Franchisor-Bottler Relationship*

37. Carbonated soft drinks are produced by franchised "bottlers" that may be independent franchisees or parent company-owned. These bottlers purchase concentrate from the franchiser and then produce, package and distribute finished carbonated soft drinks (Tr. 180-182, 341, 2061-62). Not all franchisees are bottlers; some purchase soft drinks from a neighboring bottler for resale (Tr. 29, 31, 3104).

38. Bottlers normally produce and distribute the brands of more than one company (Tr. 35, 580, 808, 1007, 1082, 1174, 1239, 1444-45, 2344), a practice which is referred to in the industry as "cross franchising" (Tr. 195-96; CX 56-Z-176; CX 59-Z-89). Smaller brands use cross-franchising to gain more effective distribution through the bottler network of a larger, more popular brand ("piggybacking") (CX 149; CX 156; CX 160; CX 224). Many bottlers have enjoyed substantial profits in the last few years (Tr. 1454-55, 2375-76; CX 14-R; CX 65-C-D; CX 288; CX 294-E; CX 368-E-F; RX 235, p. 8; RX 235, p. 70; RX 391-Z-48).

39. Both Coca-Cola and PepsiCo have a network of bottlers that covers the United States. Coca-Cola's bottler network is referred to as the "Coke system" and PepsiCo's is referred to as the "Pepsi system." The Coke and Pepsi systems include independent bottlers as well as parent-owned bottlers (Tr. 55, 423-24, 2066-67; CX 294-A-B; RX 353-J).

40. In most geographic areas there is a bottler in addition to the Coke and Pepsi bottler. These bottlers are referred to by industry members as "third bottlers." These third bottlers carry combinations of franchised products, but not the products of Coca-Cola or PepsiCo. The third bottlers as a group are referred to in this decision as the

"third bottler network" (Tr. 55-57, 313, 430-31, 676-77, 1297, 3133; CX 313; CX 696-B; RX 353-I; RX 409-C).

41. Concentrate firms grant bottlers exclusive rights to produce and distribute their products within specified territories (CX 198-E, Section 2.1; CX 199-A, Section 1; CX 209-A, Section 1.0; CX 724-A-B, Sections 3-4; CX 779-A; RX 387-A, C, Section 1.1). These rights are considered by franchisor and bottler as perpetual; they may be terminated by the franchisor only for cause (CX 198-E, Section 2.3; CX 199-A, Section 1; CX 209-B, Section 2.0; CX 724-D, Sections I, J; CX 779-C, Section 11; RX 387-G, Section 7).

42. Franchisor contracts with bottlers provide that when the latter sells its business, the franchisor may refuse to transfer or reissue the franchise to the new owner (Tr. 2378-79; CX 199-C, Section 18; CX 209-H. Section 14; CX 724-D, Section J(1); CX 779-C, Section 11(b); RX 387-G, Section 6.3).

43. Franchisors prohibit their bottlers from shipping concentrate purchased from the franchisor and carbonated soft drinks produced by the bottler outside of the territory for which they are licensed. This prohibition is strictly enforced (Tr. 1530-32, 1663, 2084-85, 2111-12, 2366; CX 192-B; CX 209-A; CX 451-A-C; CX 570-C; CX 692-A-D; CX 724, Section 13; CX 779-A).

44. Coca-Cola imposes fines of up to three times the gross margin of a bottler engaging in transshipping, or it may appoint an agent to acquire the transshipped product and return it to the offending bottler, which must pay all expenses involved in the acquisition and return (CX 72-B).

45. Bottlers are required by their franchisors to use only the concentrate produced by the latter; they may not substitute products acquired from any other source (CX 198-B, Section 4(d); CX 199-B, Section 6b; CX 209-B, Section 3.1; CX 724-A, Section E; CX 779-B, Section 7; RX 38-A, Section 1.3).

46. Coca-Cola and other concentrate manufacturers prohibit franchisees from producing and distributing another product in the same flavor category as the franchisor's product. These restrictions are often, but not always, enforced (Tr. 199-200, 273-75, 425-26, 644, 646, 690, 1114, 1397, 1526, 2073, 2096, 2111, 2345; CX 175-A; CX 195-V; CX 197-D, CX 198-B, F; CX 199-R, Section 10(a); CX 228-B; CX 724-C, Section 10; CX 779-A, Section 2; RX 387-D, Section 2.8).

G. *Bottler Price Fixing*

47. Over the past several years there have been several convictions for price fixing by carbonated soft drink bottlers. The areas in which these activities occurred were Ft. Lauderdale-Palm Beach, Florida (CX 318-A-E; CX 319-A-F); Athens, Georgia (CX 320-A-J); Akron, Ohio (CX 321-A-E); twelve counties in Tennessee (CX 322-A-B); Greenville County, South Carolina (CX 323-A-G); Norfolk, Richmond and Roanoke, Virginia (CX 325-A-C; CX 327-A-H); Baltimore, Maryland (*U.S. v. Allegheny Bottling Co.*, (4th Cir. 1989)); West Virginia (CX 328-A-F; CX 326-A-K); and the District of Columbia (CX 799-A-G).

48. There is no evidence in the record that persons other than bottlers of direct-store-door-delivered brands of carbonated soft drinks were implicated in these price fixing conspiracies (CX 318-28; CX 799).

H. *The Relevant Product Market*

1. Competition Between Carbonated Soft Drinks And Other Beverages

a. *Share Of Stomach*

49. Average per capita soft drink consumption has grown steadily since 1976 from an annual average of 28.6 gallons in that year to 45.9 gallons in 1988 (Tr. 159, 563, 2030-31, 3049; CX 798-D; RX 55-A; RX 238-L; RX 471-"O"; RX 645-Z-22). It is generally accepted that this growth in consumption adversely affected the market share of other beverages (Tr. 1580-86, 1624-28, 2030-31, 2400, 2402-05, 3049-50, 3216-17, 3222-33), especially milk, coffee, water and juices (Tr. 536, 2031-32, 3222; RX 99-L; RX 112-S; RX 115-R; RX 471-"O").

50. The human stomach can consume only a finite amount in any given period of time (Tr. 562-63, 1069, 1580-81, 1631-34, 2135, 3272, 3275, 4111, 4154-55; RX 538-B), and the sales growth of any beverage is affected by this fact, known as "share of stomach" (Tr. 158-59, 1009, 4154-55; CX 352-D). For example, Mr. Thomas Pirko, an expert on beverage marketing, testified that he was preparing to address the National Coffee Association on how coffee

had lost share of stomach to soft drinks (Tr. 4155-56). He concluded that "the great growth of soft drinks . . . has very much come through competition with other beverage products" (Tr. 4155).

51. Mr. William Atchison of Coca-Cola views "our competitors rather broadly, as all commercial beverages and beyond that, as tap water, anything that competes for share of stomach" (RX 643-R). Other record evidence reveals industry belief that carbonated soft drinks compete for consumer dollars with other beverages (Tr. 2134-35, 3088, 4011-12; CX 52-Z-4; CX 53-U-X; CX 748-K-L; RX 28-A-B; RX 236-G).

b. *New Beverages*

52. New categories of beverage products, such as flavored seltzers, all-natural carbonated soft drinks, bottled waters, coolers and adult juices have emerged as competitors of Coca-Cola's and PepsiCo's products (Tr. 3220; RX 204-C; RX 509-B; RX 113-A-C; RX 231-H). Coca-Cola has, in turn, targeted non-carbonated beverages as a source of increased sales volume; its fountain sales department, for example, is particularly interested in expanding Coca-Cola's share of beverages in the morning to take sales from coffee and tea (RX 19; RX 20-E-F; RX 30-Z-24; RX 32-M; RX 32-Z-22; RX 644-Z-18). Accounts serving alcohol are also "a major local market opportunity" (RX 32-Z-12).

c. *Expansion Of Product Lines*

53. Evidence of the competitive interaction between carbonated soft drinks and other beverages can be seen in the decision of carbonated soft drink bottlers to offer their customers non-carbonated drinks such as lemonade, Hawaiian Punch, iced tea, Delaware Punch and so forth (Tr. 107, 580, 672-73, 736-37, 809, 913-15, 937, 1008, 1015, 1033, 1278-79, 1455-56, 2112, 3095-96, 3117-20, 3263, 3341; RX 642-Z-124).

54. Conversely, distributors of other beverages, particularly beer, also sell carbonated soft drinks (Tr. 3236-37) in order to maintain their volume (Tr. 1424, 1427-28, 3811-12, 3853-56, 3834, 4098).

55. Dr. Lynk, Coca-Cola's economic expert, testified that manufacturers of other beverages should be included in the relevant

product market because they could rapidly enter the carbonated soft drink business if an incumbent attempted to raise prices (Tr. 2084).

d. *Sales Monitor*

56. Coca-Cola and other national soft drink companies monitor the sales and per capita consumption of other beverages (Tr. 3055-56; CX 17-Z-3; CX 20-Z-5; CX 21-Y-Z; CX 22-Z-145; CX 24-G-J; CX 58-M; CX 60-Z-9; CX 249-F; CX 331-D).

57. Each year Coca-Cola receives from A.C. Nielsen a 10-year trend report on food store sales in a dozen beverage categories (RX 74-A) and conducts analyses to determine how to compete more effectively with other beverages (RX 17-B-Z-38).

58. PepsiCo monitors coffee, milk, juice, and tea sales through Nielsen and SAMI, a market research study of warehouse deliveries (RX 187-Z-30, Z-32-35; RX 630-Z-123-124) and it monitors beverage consumption trends through internal and independent studies (RX 167-A-S; RX 168-A-R; RX 169-A-O; RX 170-A-Z-40; RX 171-A-Z-70; RX 204-A-H). Seven Up and Dr Pepper also monitor consumption of other beverages (RX 108-A-Z-3; RX 127-B-Z-19; RX 346-A-Z-5).

e. *Price, Promotions And Advertising*

59. There is some price sensitivity between carbonated soft drinks and other beverages. On occasion, the Pepsi Bottling Group has lowered its prices because major grocery chains were engaged in a price war on milk and Pepsi hoped to get them to promote Pepsi (Tr. 1585-86, 3272-73). The Pepsi Bottling Group has also studied and reacted to beer pricing. For example, on a number of occasions in the mid-1980's, it adjusted its prices in reaction to a price promotion on Budweiser beer, which was priced below Pepsi (Tr. 1584, 1621, 1630-31). One witness explained that under existing conditions, prices of other beverages are relatively higher than soft drink prices and are not carefully monitored for that reason (CX 754-F-G). Nevertheless, Kalil Bottling monitors the feature activity of bottled waters such as Vittel, Arrowhead, and Evian (CX 816-K, M, N), and Mr. Craig Weatherup, president of PepsiCo, testified that his company looks at beer prices and promotions (Tr. 1620-24, 1630).

60. Mr. Pirko testified that there is some competition between beverage categories (Tr. 4183), but he also agreed that the retail prices of different beverages move in different directions at the same time, that factors that affect the price of beer, milk, and juices do not affect the price of carbonated soft drinks, and that factors that affect the price of carbonated soft drinks do not affect the prices of other beverages (Tr. 4216-17).

61. Coca-Cola cites, as an example of the interaction between soft drinks and other beverages, the fact that Heileman Brewing initially targeted its flavored water products at Perrier but that their prices eventually "drifted down to the soft drink level" (Tr. 3815-16). However, this evidence does not detract from Dr. Hilke's conclusion, from admittedly "crude analyses" (Tr. 2566-67), that there is a lack of price relationship between various beverage categories (Tr. 2561-71; CX 785-A-B; CX 786-A-B; CX 787-A-B; CX 788-A-B; CX 789-A-B; CX 790-A-B; CX 791-A-B; CX 792-A-B; CX 793-A-C).

62. Coca-Cola has, at times, aimed promotions at other beverage categories (Tr. 3088-89; RX 19-B-M; RX 20-B-U; RX 644-Z-18) and Safeway has run promotions on other beverages and decided not to run them on soft drinks at the same time (Tr. 3725-26). When it has run promotions on both products simultaneously sales of one category have been affected (Tr. 2728, 3726-29).

63. Coffee, milk, tea, and orange juice ads have portrayed those products as ones that can be consumed at any time of the day so as to compete more directly with soft drinks (Tr. 160-61, 3057-58, 3821; RX 584-Z-92) and soft drink companies have tried to convince consumers to switch to their products from alcoholic beverages (Tr. 4160; RX 158-A).

f. *Packaging*

64. Producers of other beverages have begun to imitate the packaging of carbonated soft drinks (Tr. 4162). IBC root beer, for example, is sold in a brown long necked bottle, like beer bottles (Tr. 687). Juice, milk, fruit drinks and Gatorade have adopted convenient aseptic packaging to compete with soft drinks (Tr. 4166-70, 4189; RX 204-C; RX 231-H; RX 242-U), and tea, coffee and powdered drink firms have adopted the traditional 12-ounce soft drink can (Tr. 2033, 4162-63, 4178-79, 4189-90; RX 231-H). Water companies have begun modifying their packages in order to compete more

effectively with carbonated soft drinks (Tr. 4162, 4182-83). The packaging for Heileman's flavored waters is "almost identical" to Coca-Cola's and Pepsi-Cola's packaging. "Essentially it's the same package, bottles, cans, six packs, twelve packs" (Tr. 3818-19).

g. *Expert Testimony*

65. Dr. Lynk, Coca-Cola's expert economist, testified that the relevant product market in this case is the manufacture and sale of all potable liquids because, although all beverages do not substitute for one another on an ounce for ounce basis, the significant demand-side and supply-side linkages between soft drinks and other beverages warrant their inclusion in the same product market (Tr. 2734-35, 2923-28; RX 584-J-K).

66. However, other testimony of Dr. Lynk casts substantial doubt on his conclusion regarding the utility of using an "all potables" concept to define the relevant product market in this case, for he posited a vague, unquantifiable relevant market somewhere in between carbonated soft drink concentrate and all beverages (Tr. 2923-24). As to particular products, however, he testified:

a. As to beer:

Q. You have no basis today to testify that beer is in the same product market as carbonated soft drinks, do you?

A. In the same product market in the sense that I defined it earlier this morning, I would say no, not on a one-for-one or gallon-for-gallon basis.

Q. And did you at any time since February of 1986 have the expert opinion and were prepared to testify that beer was in the product market comprised of carbonated soft drinks?

A. I think there is a sense in which it might have been considered to be a part of the product market relevant for carbonated soft drinks. I just don't think it is -- I just don't think the evidence points in the direction that it is so tightly joined that you would say all beer and all carbonated soft drinks ought to be poured together in some sense to form a product market in which the assessment of shares of that pair of beverages should be assessed.

b. As to coffee:

Q. I am going to ask you to turn to page 88 of your deposition transcript, Dr. Lynk. I am going to ask you whether you gave the following testimony on February 8th, 1990.

"Question: I am asking whether you are prepared to testify whether the substitution between roasted coffee and Pepsi A.M. is direct enough and/or strong enough to allow you to say that in your expert opinion those two products are in the same antitrust product market?

"Answer: Antitrust product market is not a term I am terribly adept with.

"Question: Product market of analyzing this transaction.

"Answer: But I would say -- I believe the answer to your question is no, from what I am aware of, I don't think that warrants a conclusion of that sort."

Q. Was that your testimony?

A. Yes.

(Tr. 2924-27).

c. As to bottled water:

Dr. Lynk never considered the possibility that carbonated soft drinks were in a market that comprised bottled water.

(Tr. 2911-13).

2. All Concentrate Used In The Sale Of All Carbonated Soft Drinks

67. Although complaint counsel propose that the most appropriate product market for purposes of antitrust analysis in this case is branded concentrate used to produce branded carbonated soft drinks, they also recognize that another market may exist -- all concentrate used in the sale of all carbonated soft drinks (Complaint Counsel's Brief in Support of Proposed Findings, pp. 24-25, 47-48). Coca-Cola agrees, concluding in its proposed findings that the relevant product market includes at least all carbonated soft drinks (RPF 110-160). The parties disagree on the narrower branded concentrate market proposed by complaint counsel (RPF 161).

3. Branded Concentrate Used To Produce Branded Carbonated Soft Drinks

a. *The Distribution Of Carbonated Soft Drinks*

(1) Channels Of Distribution

(a) *In General*

68. Soft drinks are sold through two channels of distribution: (a) the grocery store (or take-home) channel and (b) the cold drink channel which includes vending and fountain sales, and single drink sales made by convenience stores and "mom & pop" outlets (Tr. 202-05; CX 27-Z-52-Z-62; CX 55-F; CX 696-A).

(b) *The Cold Drink Channel*

69. Sales in all three segments of the cold drink channel accounted for approximately [ ] of 1988 soft drink sales (CX 27-G).

70. Vending sales, *i.e.*, on-premise consumption of carbonated soft drinks purchased from a vending machine (Tr. 25), account for about 10-12% of total carbonated soft drink consumption. Bottlers often provide full service vending in which they stock and service the vending machines (Tr. 750, 1200-01). Vending machine drinks are generally sold at full price (Tr. 611, 1693, 1895; CX 55-Z-23; CX 516-G; CX 697-F; CX 774-A-F; RX 237-M; RX 409-G).

71. Sales through fountain outlets accounted for approximately 21% of all carbonated soft drink sales in 1988 (CX 27-G; CX 447-K).

72. Coca-Cola estimated that the manual cold drink channel accounted for about [ ] of all carbonated soft drink sales in 1988 (CX 27-G).

(c) *The Take-Home Channel*

73. The take-home channel, which is primarily composed of chain supermarkets and independent grocery stores (Tr. 827-28, 1475), accounted for approximately [ ] of all carbonated soft drink sales in 1988 (CX 27-G).

(2) Methods Of Distribution

(a) *Direct-Store-Door Delivery*

74. Under the direct-store-door delivery system, a route driver delivers carbonated soft drinks directly to retail outlets such as supermarkets, convenience stores, and mom & pop stores (Tr. 27, 423, 530, 834, 3185-87).

75. The route driver services retail outlets on a set schedule which may be altered as necessary to service his accounts (Tr. 28). Depending on the needs of a particular retail outlet, the route driver may service a store every day, or several times a week. Large supermarket chain stores may be serviced more than once a day (Tr. 695, 1020).

76. In a supermarket, the route driver restocks shelves (Tr. 504, 834), sets up displays and point of purchase materials (Tr. 27, 355,

504, 505, 672, 1661), rotates the stock (Tr. 672), cleans the shelves (RX 369-D-E) and picks up returnable bottles in mandatory deposit states (RX 369-H).

77. All of the major carbonated soft drink brands are distributed by direct-store-door distribution, using soft drink bottlers or soft drink distributors (Tr. 181, 1518-19, 1661, 2111, 2238). Some very small firms use beer distributors rather than soft drink bottlers or soft drink distributors for direct-store-door delivery (Tr. 3449, 3487, 3539, 4096).

78. The two largest direct-store-door delivery systems are the Coca-Cola and PepsiCo bottler systems (Tr. 929, 2066, 2128, 2496; CX 742-H-I). In addition to these systems, there is normally one other direct-store-door delivery bottler (or "third bottler") in a given area (Tr. 550, 924-25; CX 696-B).

(b) *Warehouse Delivery*

79. In a warehouse delivery system, finished carbonated soft drink products are delivered from the bottler directly to the loading dock of a retailer's central warehouse (Tr. 529, 3190-91). Warehouse delivered products are available almost exclusively in chain supermarkets (Tr. 355, 530, 834, 3192).

80. Warehouse delivery is used by one national branded concentrate firm, Shasta (Tr. 3167, 3187), a small number of regional branded concentrate firms, including Faygo and C&C Cola (Tr. 3163-64, 3998), and by private label firms (Tr. 183, 3587, 3997-98).

b. *Firms In The Concentrate Industry*

(1) National Direct-Store-Door Delivery Firms

(a) *Coca-Cola*

81. Coca-Cola is the largest concentrate firm in the nation; its 1988 market share was approximately [ ] (CX 781-B). Its soft drink products are distributed entirely by franchised bottlers through direct-store-door delivery. No warehouse delivery is used (Tr. 181; CX 13-A).

(b) *PepsiCo*

82. PepsiCo is the second largest concentrate firm in the nation; its 1988 market share was [ ] (CX 781-B). Pepsi-Cola Company is the domestic beverage division of PepsiCo (Tr. 1437).

83. Pepsi-Cola Company-owned bottling operations are referred to as "COBO"; Pepsi-Cola Company franchise-owned bottling operations are referred to as "FOBO" (Tr. 1436, 1456). The COBO operations account for approximately 50% of Pepsi-Cola Company sales volume. The COBO and FOBO operations bottle for other concentrate firms as well as for the Pepsi-Cola Company (Tr. 1454-57).

84. PepsiCo brands include Pepsi, Diet Pepsi, Pepsi-Free, Mountain Dew, Mug Root Beer, Teem, the Patio flavor line, and the Slice flavor line (Tr. 1519-21; CX 781-H).

85. Pepsi-Cola Company is committed to the direct-store-door delivery system for its products in the United States; it has not attempted warehouse delivery or alternative methods of distribution for brands that do not have national distribution in this country, although it does use warehouses in Canada (Tr. 1523-24).

(c) *Dr Pepper*

86. Dr Pepper is the third largest concentrate firm in the nation. Its market share in 1988 was [ ] (CX 781-B).

87. Dr. Pepper products are sold through direct-store-door delivery (Tr. 2153, 2163, 2232). No Dr Pepper Company products are merchandised by warehouse delivery (Tr. 2163, 2167-68).

88. Approximately 40% of Dr Pepper products are distributed through the Coke bottler system and approximately 40% are distributed through the Pepsi system. Of the 20% volume not in the Coke or Pepsi system, about 10-11% is distributed by bottlers that also carry Royal Crown or Seven Up (Tr. 2178-79).

89. Dr Pepper is the leading soft drink in the "pepper" or "spicy cherry" category, regularly accounting for more than 90% of total pepper volume (Tr. 2238; CX 6-C).

90. Dr Pepper produces Dr Pepper, Diet Dr Pepper, CF regular and CF diet Dr Pepper, IBC Root Beer, and Welch's flavors (Tr. 2441; CX 781-K). Dr Pepper markets the Welch's Line through its Premier Beverages, Inc., subsidiary (CX 6-"O").

(d) *Seven Up*

91. The market share of Seven Up products was approximately [ ] in 1988 (CX 781-B). Its products are mostly sold through a bottler direct-store-door-delivery system (Tr. 2111, 2153).

92. Approximately 8-10% of Seven Up's volume is through the Coca-Cola bottler system and approximately 20% is through the Pepsi bottler system (Tr. 2113, 2178).

93. Seven Up brands include Seven Up, diet 7-Up, cherry 7-Up, diet cherry 7-Up, 7-Up gold and the Howdy line flavors (Tr. 2110, 2164-65).

94. Seven Up and Dr Pepper merged in November, 1986, when Hicks and Haas acquired Seven Up from Philip Morris, Inc. (Tr. 2109). The combined entity, Dr Pepper/7 Up Companies, had a market share of [ ] in 1988.

(e) *Royal Crown Company*

95. Royal Crown Company ("Royal Crown") distributes its products primarily through the direct-store-door delivery system (Tr. 600-61, 1657). Some products are sold through warehouse delivery and beer distributors (Tr. 1662-64, 1668). Its market share in 1988 was approximately [ ] (CX 781-B).

96. Royal Crown brands include Royal Crown Cola, Diet Rite, RC 100, and Nehi, its flavor line (Tr. 1657-58).

(f) *A&W Brands, Inc. ("A&W")*

97. A&W products are distributed primarily through franchised bottlers using direct-store-door delivery (Tr. 2066). Its market share in 1988 was approximately [ ] (CX 781-B).

98. Approximately 30% of A&W's products are sold through the Coca-Cola bottler system, and 30% is sold through the Pepsi bottler system (Tr. 2066-67).

99. A&W brands include Squirt, Vernor's and Rochester, a private label concentrate (Tr. 2076), and A&W root beer and cream soda (Tr. 2070).

(g) *Cadbury Schweppes*

100. Cadbury Schweppes' market share in 1988 was approximately [ ] (CX 781-B). Its products are delivered primarily through direct-store-door delivery (Tr. 1891-93).

101. Cadbury Schweppes soft drink brands include Schweppes, Canada Dry, Sunkist, Barrel Head Root Beer, Wink, Crush, Hires, Cactus Cooler, and Sundrop (Tr. 1886; CX 781-T).

102. Cadbury Schweppes products are distributed almost exclusively through franchised bottlers. Approximately 85% of brand Schweppes products and 30% of brand Canada Dry products are distributed through the Coke and Pepsi systems. The company's two largest bottlers are COBO and CCE (Tr. 1891).

(2) Regional Direct-Store-Door Delivery Firms

103. Firms which sell their carbonated soft drinks in regions of the United States primarily through direct-store-door delivery include Double Cola USA ("Double Cola") (Tr. 34-35); Barq's Inc. ("Barq's") (Tr. 417, 422-23); Monarch & Dad's (Tr. 1390-91); Carolina Beverage Company-Cheerwine (Tr. 384); Big Red (RX 462-D-E); A.J. Canfield (outside of Chicago, warehouse delivery and beer distributors are used) (Tr. 1786); and Frank's Beverages (Triple Cola brand is warehouse-delivered) (Tr. 3312-13, 3315)

(3) Shasta Beverages ("Shasta")

104. Shasta manufactures its own concentrate in Hayward, California which is then shipped to eleven bottling and canning plants located throughout the United States (Tr. 3166).

105. Shasta products are distributed exclusively through a warehouse delivery system (Tr. 3167, 3187).

(4) Local And Regional Warehouse-Delivered Brands

106. Firms which sell their carbonated soft drinks locally and regionally primarily through warehouse delivery systems include: Faygo (Tr. 3163, 3183); Vess (Tr. 1098, 3184); C&C Cola (Tr. 3319, 3589, 3998); Triple Cola (Tr. 3314-15, 3358).

(5) Private Label Products

107. Private label soft drinks include those manufactured by Safeway (Cragmont) (Tr. 3717, 3756-58) and Waldbaum's (Tr. 3996).

(6) Boutique Firms And Firms With Niche Products

108. So-called "boutique" firms and firms producing "niche" products include original New York Seltzer (Tr. 3440-41); Jolt (Tr. 3465); Soho (Tr. 4066); Snapple (Tr. 3527-28); and Orangina (Tr. 496, 506). These products appeal to a limited population. For example, Jolt contains twice the caffeine of Coca-Cola and Pepsi-Cola (Tr. 3465).

c. *Industry Perceptions Of Competition Between Branded, Private Label And Warehouse Firms And Beverages Other Than Carbonated Soft Drinks*

(1) Concentrate Companies

(a) *Coca-Cola*

109. An outline entitled "Competitive Characteristics" was prepared by Coca-Cola when it considered an acquisition entry into the mid-premium (warehouse) brands tier of the carbonated soft drink industry. The competitive characteristics of the three tiers of the carbonated soft drink industry were described as follows:

COMPETITIVE CHARACTERISTICS
* NATIONAL BRANDS
    * HEAVY ADVERTISING CONSUMER PROMOTION
    * PRICE AT OR NEAR TOP OF SPECTRUM
    * PRICE IS BASIS-POINT FOR OTHER BRANDS/SYSTEMS
    * BROAD NATIONAL PENETRATION
    * FRANCHISED, BOTTLER DISTRIBUTION
* TARGETS
    MID-PREMIUM BRANDS
    * MODERATE, GENERALLY SEASONAL, ADVERTISING & CONSUMER PROMOTION
    * PRICED BETWEEN NATIONAL & PRICE BRANDS
    * WIDE PRODUCT LINE - I.E., MULTIPLE FLAVORS
    * WAREHOUSE DISTRIBUTION, LIMITED AVAILABILITY
    * CHARACTERIZED BY SHASTA/FAYGO
* PRICE BRANDS

* LITTLE OR NO ADVERTISING, CONSUMER PROMOTION
* PRICE, WIDE PRODUCT (FLAVOR) SELECTION SOLE MARKETING EFFORT
* GENERALLY RESTRICTED AVAILABILITY
* CHARACTERIZED BY PRIVATE, CONTROLLED LABELS

(CX 267-E; RX 69-E). The "National Brands" were identified in this document as including only Coke, Pepsi, 7-Up, RC and Dr Pepper (CX 267-P; RX 69-F).

110. Mr. John D. Carew, Jr., vice president of planning for CCE, recommended in 1987 that Coca-Cola introduce a Fanta Cola so that it would have a brand which competed with the Shasta and Faygo brands. Because of the price difference between Shasta and Faygo colas and Coca-Cola classic, he was not concerned that the colas would take business from Coca-Cola except at the fringes (Tr. 243-45; CX 221-F).

111. A Coca-Cola document entitled "Cherry Coke Fountain Orientation" contains a competitive classification chart which appears to place brands and flavors that are closest to its "Coca-Cola" brand near it, and the brands and flavors that are unlike "Coca-Cola" away from it. Dr Pepper is next to cherry Coca-Cola, Pepsi and Coke -- with the "sugar cola," noting that they are "mainstream" and "major advertised brands." "Store brands," the "specialty" items and "sugar flavors" are at the other end of the scale:

COMPETITIVE CLASSIFICATION

Coke	Pepsi	Cherry Coke	Dr Pepper	7 Up	Sprite	Ginger Ale	Mountain Dew	Mello Yello	Sunkist	Root Beer	Black Cherry	Grape

Sugar colas	Sugar flavors
Major advertised brands	Store brands
Mainstream	Specialty

Despite the competitive spectrum which this document reveals, its author concluded that cherry Coca-Cola "has potential to attract users from all other soft drink segments" (CX 124-P).

112. Coca-Cola does not consider the prices of other beverages such as coffee, tea, milk, bottled water or powdered drinks when it establishes its concentrate and syrup prices (CX 751-F; CX 754-E-F).

113. Documents in the record establish that when it prices its concentrate and syrup, Coca-Cola looks mainly to the prices of branded products produced by PepsiCo, Dr Pepper, Seven Up, Crush, and Sunkist (CX 76; CX 79; CX 91; CX 92; CX 93; CX 98-C-E; CX 98-J-K; CX 100; CX 101-J-M; CX 102; CX 249-Z-1). However, there are areas of the country where regional brands, warehouse brands, and private label brands are important (Tr. 715-18, 1049-50, 2653-54). In fact, one Coca-Cola document notes that "control labels are a factor in every market" (CX 263-F).

114. Although Coca-Cola also markets Minute Maid juices, Hi-C fruit drinks, and Five Alive juices in its Foods Division, there is no communication or business relationship between the two groups (CX 749-C, D).

(b) *Cadbury Schweppes*

115. Stephen R. Wilson, former president of Cadbury Schweppes, testified that when its prices for carbonated soft drinks were established, the concentrate companies he was concerned about were those which sold branded soft drinks. As to other beverages, he testified:

> You know, I think once in awhile, like every two or three years, we might ask ourselves, what is the cost of a soft drink versus or the price of a soft drink to the consumer as compared to a cup of coffee or a glass of juice. Really on a real tactical pricing basis we looked at other soft drink concentrates. That's all that really mattered

(Tr. 1910-11).

(c) *Dr Pepper*

116. Dr Pepper does not monitor the prices of products other than carbonated soft drinks (Tr. 2469) and as to these products, it

compares its concentrate prices with those of other companies producing branded products, *i.e.*, Coca-Cola, PepsiCo, Seven Up, Royal Crown, Cadbury Schweppes and A&W (CX 391-99; CX 404-07; CX 410-12; CX 414-16; CX 418; CX 420; CX 429; CX 430).

(d) *PepsiCo*

117. When PepsiCo sets its concentrate prices, it looks primarily at the branded concentrate prices of Coca-Cola, Dr Pepper, Seven Up, A&W, and Cadbury Schweppes. It also monitors the retail prices of finished products produced by these companies (Tr. 1480-81; 1504-07).

118. Mr. Weatherup, PepsiCo's president, testified at the hearing that he monitored numerous private label companies (Tr. 1508-15). However, he also testified at his deposition:

> "Question: Do you look at private label in local markets as much as you look at the national brands in local markets?
>
> "Answer: Again, it would depend on what is taking place in that market.
>
> "Question: Does PepsiCo normally look at the retail prices of the national brand products in local markets throughout the country?
>
> "Answer: Yes.
>
> "Question: What about private label, to what extent does it also, I'm trying to get a sense, do you also look at private label in every market or only where there is a particular need?
>
> "Answer: In some markets you have huge private label businesses. In other markets you have small private label businesses. Where they are small you don't waste your time and energy looking at them unless some special circumstances arises; whereas you normally would be inclined to look at the national players consistently because they are always there.
>
> "Question: What do you mean by small, what would be a small, what would be sort of small?
>
> "Answer: Private label share?
>
> "Question: Yes.
>
> "Answer: Less than 4, 5 percent.
>
> "Question: This would be for an individual private label company in its local market?
>
> "Answer: Right"

(Tr. 1513-14).

(e) *Seven Up*

119. Seven Up does not track the prices of any beverage other than carbonated soft drinks (Tr. 2124) and when it was owned by Philip Morris, did not look at the prices of warehouse or private label companies in setting its concentrate prices (Tr. 292-93). Today, it looks at private label prices "generally," and not a great deal at Shasta's prices. It does not purchase Scantrak data for private label or warehouse brands (Tr. 2125, 2137).

(f) *Procter & Gamble - Crush*

120. When Procter & Gamble owned Crush, it did not look at the prices of private label or warehouse brands, including Shasta and Faygo, when setting the price at which the Crush concentrate would be sold (Tr. 382-83), and it did not get routine reports or do financial analyses of other beverages with respect to its sale of Crush concentrate. Although Procter & Gamble manufactured and distributed Folgers coffee and Citrus Hill Juice, Crush employees did not consult with Procter & Gamble people involved with Folgers or Citrus Hill when establishing the prices at which the Crush concentrate would be sold (Tr. 382-83).

(g) *Barq's*

121. Barq's can charge more for its branded concentrate than non-branded concentrate. John Koerner III, its president, explained:

> Q. What enables Barq's to charge 92 cents per case and these other manufacturers to charge a dime a case?
>
> A. Barq's sells at the retail level. A non-branded thing, there is no inducement for a consumer to buy it except price. People that choose Barq's generally choose to pay a higher price for a product that they feel comfortable with, that they can hold in their hand and won't feel like a jerk, that tastes good, that is properly marketed, that given (sic) them a thirst-quenching, ego-boosting experience.

(Tr. 450).

(2) Bottlers

122. At his 1986 deposition, Richard Hiller, then a Coca-Cola employee, testified that its company-owned bottlers did not price carbonated soft drinks in response to beverages such as coffee, tea, fruit juice or powdered drinks (CX 751-N-P).

123. Employees of other bottlers gave similar testimony (Tr. 593, 705-06, 759, 923, 926, 1023-24, 1061, 1105-06, 1130, 1186, 1246-47, 3233).

124. CCBME, when it was owned by Procter & Gamble, looked at private label prices only semi-annually, and even then, the private label pricing did not have the same importance as the prices of Coke, Pepsi, and RC (Tr. 385).

> Whether or not the private label increased their volume in the short term wasn't too terribly important to us and if it continued over time, we began to feel we were losing share, it would become important, but if a private label were going to increase its volume because of a weekend sale and it didn't significantly cut into our volume, then that wasn't going to be a major point of concern.

(Tr. 387).

125. Bottlers consider and react mainly to prices of the Coke and Pepsi bottlers in their areas when setting the prices of their branded carbonated soft drinks (Tr. 704, 758, 856, 1022, 1104-05, 1186, 1246).

126. Bottlers do not consider the prices of non-carbonated soft drink beverages, or of private label and warehouse-delivered carbonated soft drinks, when setting the prices of their branded carbonated soft drinks (Tr. 593, 705-06, 759, 923, 926, 1023-24, 1061, 1105-06, 1130, 1186, 1246-47).

127. When it owned bottlers, Dr Pepper did not regularly monitor private label, and noted private label prices only if they dropped excessively and remained low for a couple of months (Tr. 1311-12, 1316-17). The prices of private label pepper-type drinks do not affect the prices of Dr Pepper (Tr. 1317).

128. Bart Brodkin, who distributes some carbonated soft drinks through his Avalon warehouse and branded carbonated soft drinks through direct-store-door delivery in Southern California, testified:

> Q. Now, what companies or what products do you look at in helping you to determine what your own prices should be for carbonated soft drink products?
>
> A. For the majority of my trademarks, which are carbonated products, I really look at only two companies to determine my strategy, that being the Pepsi-Cola bottler and the Coca-Cola bottler.
>
> Q. Do you look at beverages other than carbonated soft drink products to determine what your pricing strategy or prices should be?
>
> A. As pertains to carbonated products, I do not.
>
> Q. And as pertains to carbonated soft drink products, do you look at private label products to determine what your prices or pricing strategy should be?

A. I do not.

Q. Are you familiar with the company Shasta?

A. Yes.

Q. Is that a warehouse-delivered product?

A. Yes.

Q. Do you look at Shasta to determine what your pricing, prices or pricing strategy should be?

A. I do not.

Q. To what extent do you look at the prices of other beverages and for what purpose?

A. All beverages obviously to some extent compete against each other in terms of the consumer's purchase, but those products outside of the products of the Coca-Cola bottler and of the Pepsi-Cola bottler tend to be an insignificant impact as pertains to pricing of the majority of our products in our portfolio.

(Tr. 856-59).

129. Mr. Trebilcock, president of Mid Continent Bottlers, Inc., and Mr. Stanford Frank, president of Frank's Beverage, echoed Mr. Brodkin's testimony (Tr. 1103-06, 3341-42).

d. *The Prices Of Branded, Warehouse-Delivered, And Private Label Carbonated Soft Drinks*

130. Carbonated soft drinks are priced according to their method of distribution. Most expensive are the direct-store-door delivered brands. Warehouse-delivered brands are less expensive and private label products are the cheapest (Tr. 92-93, 831-32, 1107, 2167; CX 267-E).

131. Witnesses familiar with the industry testified that the price gap between direct-store-door delivered brands and private label brands is generally 10 to 40% (Tr. 831-32, 1165 (35%), 89, 694 (.99 - 1.09 for Pepsi two liter and .39 to .69-.79 for store brand), 1021 (branded 6-pack on promotion: 1.39 to 1.49 and 2-liter: .99; private label everyday --cheaper when on promotion --: 6-pack is .99 and 2-liter is .69), 3356 (2-liter Coke: 1.39 to 1.49, on promotion: .49 to .99, Triple lists at .79 and is promoted at .59 to .69). 924 (branded 2 liter is .99; private label 2-liter is .69 to .89), 610 (promoted 2 liter is .99 to 1.19 and promoted six pack is 1.29 to 1.39; Shasta 2 liter would be 20 to 30 cents lower; 6-pack would be about 40 cents lower), 590, 4002 (even if Coke is on promotion and private label is not), 1317 (10 to 20 cents per unit for flavors).

132. In 1984 Coca-Cola found that, on average, private and control labels pegged their net prices to those of the national brands

an average of 29% lower, while Shasta/Faygo net prices were about 20% below the national brands (CX 267-A).

133. For the period 1981 to 1983, Coca-Cola measured differences in the price between national brands (defined as Coke, Pepsi, 7-Up, RC and Dr Pepper) with Shasta/Faygo and private/control for 6 pack cans and 2-liter sizes.

Price Gap - 1981 to 1983

6-pack	1981 Price	Gap	1982 Price	Gap	1983 Price	Gap
National	1.59		1.59		1.57	
Shasta	1.29	.30	1.23	.35	1.19	.38
Private Label	1.10	.49	1.05	.53	1.03	.54

2-liter	1981 Price	Gap	1982 Price	Gap	1983 Price	Gap
National	1.08		1.08		1.04	
Shasta	0.90	.18	0.87	.21	0.86	.18
Private Label	0.84	.24	0.78	.30	0.74	.30

(Source: CX 267-P).

134. For the period 1981 to 1983, the percentage in the gap variance, viewed as a discount from the national brands, was as follows:

Price Gap as a Percentage: 1981-1983

6-pack	1981 Gap%	1982 Gap%	1983 Gap%
National Brands	--	--	--
Shasta/Faygo	19%	22%	24%
Private Label	31%	34%	34%

2-liter	1981 Gap%	1982 Gap%	1983 Gap%
National Brands	--	--	--
Shasta/Faygo	17%	19%	17%
Private Label	22%	28%	29%

(Source: CX 267-P).

135. An analysis of the average case price differences for several bottler groups was performed in 1988, comparing Fanta, Shasta, Faygo, controlled label and Coca-Cola classic in 34 geographic areas (CX 263-S-Y). The average case price difference between Classic and the highest priced control label products was [ ]. Branded flavor lines were priced above control labels at an average price difference of [ ] a case (CX 263-F).

136. If private label carbonated soft drinks are promoted at a substantial discount from branded soft drinks, they begin to have an effect on the latter's pricing. When a "monster promotion" (Tr. 3588) was held by Kroger in Cincinnati, a Pepsi bottler in that city testified that when Kroger priced its 2-liter Big K brand at 39 cents:

> they jumped to about a 15, 17 share for a period of time. They ran that promotion for almost a year.
>
> Q. So that's a jump of about 10 Nielsen share points?
>
> A. In that store.

(Tr. 3229).

137. Waldbaum's, a grocery chain located in metropolitan New York (Tr. 3995), prices private label carbonated soft drinks during a hot promotion at a 40% discount from branded soft drinks (Tr. 4052-54).

138. Faygo, a warehouse-delivered brand, has been given away on occasion (Tr. 638-39), and aggressive deals such as this by warehouse and private label brand do create problems for Coca-Cola, as Mr. Edward Hiller, its senior vice president for development, testified:

> Q. Do you worry about Royal Crown?
>
> A. Yes, we do.
>
> Q. Do you worry about Shasta?
>
> A. Yes, we do.
>
> Q. Do you put Shasta in the same category as Pepsi and Royal Crown?
>
> A. Some of that mid-pricing area, regional brands, private label, Faygo, you know, people like that, they maneuver around in that mid-price area. And we don't like to get too far afield of them, either. And they give us problems from time to time with dealing and with our capacity problems and that sort of thing. And from time to time they can get very aggressive with deals, so we have to be mindful of that.

(CX 751-L-M).

139. Canfield, which distributes branded carbonated soft drinks in Chicago, finds that it competes on occasion with private label products, but not on a long-term basis (Tr. 1799).

140. If branded products were not promoted for a period of six months, industry witnesses agreed that a shift to private label products would occur (Tr. 1133, 1255, 2301, 2399-2400, 3549-50, 3719, 3729).

141. Mr. Edwin Epstein, Coca-Cola's retailing expert, testified:

Q. In your opinion, Mr. Epstein, do warehouse-delivered soft drink brands constrain the prices of store-door-delivered brands, soft drink brands?

A. Constrain? I would say so, yes.

(Tr. 3611).

142. On the other hand:

Q. You testified in response to a question by counsel at the very end of the direct examination that you believe that private label constrained the prices of branded carbonated soft drink products. Do you recall that subject being discussed?

A. Yes.

(Tr. 3636).

Q. And my question is whether you gave the following testimony on March 12th, 1990:

Question: What is the cross-price elasticity of demand between warehouse-delivered soft drink products and national brands of soft drink products?

Answer: You will have to ask the research director that one. That's a little bit out of my expertise.

Question: As you have used the term "competition" you don't really know what the cross-price elasticity of demand is between warehouse-delivered soft drinks and national brands?

Answer: Whether it is one percent-one percent or one percent-ten percent switch, I have no way of knowing.

Q. Was that your testimony, Mr. Epstein?

A. Yes.

(Tr. 3642-43).

e. *Differences Between Branded, Private Label, And Warehouse-Delivered Carbonated Soft Drinks*

143. Consumers believe that there is a quality difference between national brand and private label carbonated soft drinks and because of that belief, branded soft drinks have a much greater consumer appeal than do private label soft drinks (Tr. 3633-36). A PepsiCo study showed that:

> The people who bought private label tended to circulate in that universe and not trade up to branded products and the people who bought branded soft drinks tended not to move down to private label. They just circulated in those two universes and didn't cross over much, which is one reason I think why private label has stayed relatively constant. It hasn't grown.

Thus, brand switching by consumers is generally limited to branded products (Tr. 1911-12).

144. Mr. Tom Tyler, president of Tyler Beverages, testified about his indifference to the pricing of private label and warehouse brands:

> Q. Do you look at the sales and prices of Shasta and Faygo?
> A. No.
> Q. Why not?
> A. I don't consider it a direct competitor.
> Q. Why is it not a direct competitor?
> A. Because it is my belief that when the shopper goes to the market that they have a preset idea in their mind, the woman shopper or the male shopper, that they have it preset that they are going to buy a major brand, and they may buy a private label brand, but I don't think they can substitute a private label brand for a major brand soft drink.
> Q. Do you consider Shasta and Faygo to be in the same grouping as private labels?
> A. I consider it a private label brand.

(Tr. 1185-87).

145. The perceived differences in quality apparently account for the fact that branded carbonated soft drinks have brand loyalty (Tr. 205). This phenomenon has decreased recently, and consumers readily switch between national brands if prices differ significantly; however, there is little evidence of such switching between branded and private label products (Tr. 1021-22, 1911-12, 1940-41), at least until the price differences are very large.

146. Since consumers perceive differences between branded and private label soft drinks, retailers offer both (Tr. 3758, 4019), although private label products may be sold in a different area of the supermarket than branded ones (Tr. 858-59, 3187-89).

147. In some cases, concentrate firms that have flavor restrictions are unconcerned about warehouse delivered or private label products produced by their bottlers (Tr. 1857-58).

f. *The Pricing of Carbonated Soft Drinks*

(1) The Price Elasticity of Demand

148. Dr. Hilke, complaint counsel's expert economist, testified that the test for determining the correct product market is whether a collusive arrangement could profitably raise prices by a small but significant amount for an extended period of time (Justice Department Merger Guidelines ("DOJ Guidelines"), Sections 2.0 and 2.11) (Tr. 2529-48).

149. The ideal price evidence in a product market test is cross price elasticity (Tr. 2548) and the general approach in this test is to determine whether a 5% increase in the price of the product sold by the merging parties may be constrained by other products. If they are, the other products belong in the product market along with the products of merging firms (DOJ Guidelines, Section 2.11).

150. Because of the concept of derived demand, Dr. Hilke testified that a 5% increase in the price of concentrate, which is an input product for carbonated soft drinks, if fully passed on, translates to an increase of 0.5% at the carbonated soft drink level:

Q. Are you familiar with the concept of derived demand?

A. Yes. Derived demand refers to the notion that in any particular industry, its products may not be directly sold to consumers, but may rather pass through another stage of processing before they actually get to the consumer level, so in the instance of soft drink concentrates, those concentrates go through additional stages of processing and distribution, marketing and so forth before they get to consumers. So the demand for concentrate is essentially derived from the consumer demand of carbonated soft drinks.

Q. How would you apply the 5 percent Guidelines test in the carbonated soft drink industry in which the proposed acquisition is at the concentrate level but that consumers are purchasing finished product at the carbonated soft drink level?

A. Well, to undertake that type of exercise, one would have to make an inquiry as to the relationship between the price of concentrate and the price that consumers pay for the downstream product. The evidence that I have seen to date suggests that the price of the concentrate constitutes roughly 10 percent of the ultimate consumer price of carbonated soft drinks, so, therefore, to translate a 5 percent test at the concentrate level into a price test you would be looking at a half of a percent price change in the ultimate consumer product, assuming that the entire concentrate price were passed on to consumers.

Q. If the Guidelines product market test were being applied at the carbonated soft drink level, are you saying that a half of 1 percent price test would be the test rather than a 5 percent test?

A. That would be the translation between the two. If you were doing a case at a different level, there would be basically a different industry which you would be looking at.

(Tr. 2545-46).

Dr. Lynk agreed with Dr. Hilke:

Q. Do you have any information as to what a 5 percent price increase at the concentrate level would translate into at the consumer level?

A. Only the rough estimates that I had heard earlier. To the extent that the net price of concentrate constitutes something on the order of 10 percent or so of what's been referred to as the floor cost of carbonated soft drinks, just working through the simple numbers, anyway, 5 percent increase there at the concentrate level would be something along the order of a half a percentage point difference at the finished product level.

(Tr. 2740).

(2) Price Interaction Between Direct-Store-Door-Delivered Carbonated Soft Drinks And Private Label Or Warehouse-Delivered Soft Drinks

151. There is little price interaction between direct-store-door-delivered carbonated soft drinks and private label or warehouse-delivered soft drinks.

152. Mr. Michael Skinner of Shasta testified that increasing the price difference between his warehouse-delivered brands and direct-store-door delivered brands was not profitable (Tr. 3198-3201), that he saw little response by Pepsi or Coca-Cola to Shasta's prices (Tr. 3201), and that he experiences price pressure from private label brands only in certain areas of the country.

153. The president of Double-Cola believes that private label products compete primarily with warehouse brands (Tr. 93).