

## 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).<sup>1</sup> 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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<sup>1</sup>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).<sup>2</sup>

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).

<sup>2</sup> 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

