

## IN THE MATTER OF

THE COCA-COLA BOTTLING COMPANY  
OF THE SOUTHWESTFINAL 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 entities, 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.<sup>1</sup> (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

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<sup>1</sup> 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 Biedenbarn 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-Ly dick has acquired additional soft drink brands and new geographic territories. (Bodnar, Tr. 1334-36; RX 2970.) In 1987, Grant-Ly dick 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. (Ly dick, Tr. 2999-3000.)

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

65. In April 1990 Grant-Ly dick purchased Timberline Corporation, an RC Cola distributor in LaGrange, Texas, for \$134,000. (Ly dick, 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<sup>2</sup> 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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<sup>2</sup> "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-Lydic 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 required CCSW to agree to performance requirements to obtain the Canada Dry franchise following the change of control of CCSW, from the Biedenbarns 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 (Quickkick); 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 manufactures 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-Lydict 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.)<sup>3</sup>

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

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<sup>3</sup> 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 1/2 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-Lydicke 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<sup>4</sup> and private label<sup>5</sup> and other carbonated soft drinks are produced on the same equipment. (Summers, Tr. 6445-66; RX 2939.)

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<sup>4</sup> "National brand" - brand of soft drinks distributed in most of the United States, generally by direct-store-door delivery.

<sup>5</sup> "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<sup>6</sup> 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

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<sup>6</sup> "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.