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,

[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).

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[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