

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.)

* 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.¹ (Atchison, Tr. 5237-38.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This Proceeding

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

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

History of Challenged Acquisition

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

58. On December 3, 1986, TBG acquired the 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 drinks² 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-

² "Soft" drinks contain no alcohol.

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

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

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

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

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

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

85. San Antonio is Big Red's largest market, and Grant-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.)

