

ly you don't understand what sells volume in the soft drink industry. So let me tell you, it is not just price. You can have the lowest price in the world. If you can't get the product delivered, if you can't get the display, you can't keep the display properly priced and stocked, then the price becomes insignificant." Summers, Tr. 7117-19.⁸⁷ Other evidence similarly confirmed the importance of the services involved in DSD delivery for increasing the volume of soft drink sales.⁸⁸

In addition, the DSD delivery system also makes deliveries to smaller outlets economically feasible.⁸⁹ Such outlets, while having a relatively small direct volume effect, are important for image⁹⁰ and permit sampling that can lead to later sales.⁹¹

3. The Importance of Advertising

Branded CSD bottlers and concentrate companies invest significantly in advertising and promotion of their products. Concentrate

⁸⁷ Other CCSW documents indicate the same view. When CCSW considered developing a "house" control brand to compete with private label, its analysis recommended use of DSD over a broker system for several reasons:

1. DSD gives us an opportunity to reach more channels convenience stores, mom & pops, mass merchandisers, etc. without increasing our costs dramatically. It also establishes an image and consumer sampling point of difference versus other private labels.

2. DSD allows us more flexibility to respond to changes in the marketplace (*i.e.*, lack of Coke ad feature activity, high volume hurdles, packaging emphasis changes, competitive features, etc.). RX 398 D.

⁸⁸ See Section IV.B *supra*.

⁸⁹ Use of a warehouse-delivered system of distribution limits a firm to the large retail chains. Turner, Tr. 941. As a result, warehouse-distributed products cannot gain access to retail outlets such as drug stores, convenience stores, and smaller retailers that do not have the capacity to store the product. CX 3921 at 355 [Currie]; Turner, Tr. 941; CX 3943 at 15 [Rapp]; CX 3944 at 3511-12 [Rapp]; Coyne, Tr. 3438, 3445. Even CCSW admitted that "private/warehouse brands are less available in other market segments, including convenience stores, vending and fountain." RPF paragraph 332 (citing Knowles, Tr. 2662, 2892).

⁹⁰ CCSW's president testified that presence in the fountain segment is important to develop the consumer's image of a product. Summers, Tr. 6513-14.

⁹¹ Mr. Clements explained that Dr Pepper was not able to reach all of the types of outlets that they wanted to reach with warehouse delivery in Indianapolis and Los Angeles: "We were only able to get the people like the chains, and not all of them, and some of the independents like IGA that had a warehouse that could deliver. What we couldn't reach were the outlets we needed most, and that's the single drink sales -- the moms and the pops and the cafes and beauty shops and places like that. We did not have enough availability to create any great sampling of the product in order to develop the brand." CX 3582 at 2236 [Clements]. See also RX 398 D. Sampling occurs largely through cold drink sales rather than take-home sales. Turner, Tr. 1028-29.

firms pay millions of dollars annually in total marketing funding.⁹² Huge amounts of monies, in the aggregate and as a percentage of total marketing, are spent by concentrate firms in support of local branded CSD bottler activities. For example, the largest component of Pepsi Cola total cost is allocated to marketing.⁹³

With respect to advertising by retail stores, major retailers typically run two types of carbonated soft drink promotions: "ad features" and "in-store promotions." An ad feature is typically a newspaper advertisement featuring a branded CSD at an attractive reduced price, often at or below cost.⁹⁴ An in-store promotion typically involves a branded CSD in-store display also featuring a reduced price, though not usually as low as the ad feature price and without any accompanying newspaper advertisement.⁹⁵

An ad feature may give a bottler 10 times the non-featured sales volume⁹⁶, while an in-store display may give just twice to 2 1/2 times the normal sales volume.⁹⁷ The volume lift is much lower on the in-store display in part because the retail price to the consumer is usually higher.⁹⁸ Thus, bottlers are willing to pay thousands to hundreds of thousands of dollars to obtain ad features.⁹⁹ Bottlers also offer and pay large dollar amounts in order to have exclusive promotion and advertisement for their branded CSDs.¹⁰⁰ For example, CCSW's 1988 Calendar Marketing Agreement with Diamond Sham-

⁹² Turner, Tr. 965.

⁹³ CX 3913 at 38 [Drewes].

⁹⁴ CX 3806 Z50; Turner, Tr. 973-74; Davis, Tr. 4515 (at or below cost ads are termed "hot ads"); Gonzaba, Tr. 2032.

⁹⁵ Turner, Tr. 1126.

⁹⁶ Bodnar, Tr. 1498; Davis, Tr. 4504; Koch, Tr. 1831-32. Consumers also tend to stock-up during ad features, depending on the attractiveness of the ad feature price. Bodnar, Tr. 1766.

⁹⁷ Bodnar, Tr. 1498.

⁹⁸ Bodnar, Tr. 1498; Turner, Tr. 974; E. Hoffman, Tr. 362-63. Increased sales volume due to an ad promotion or reduced price end-aisle display is known in the industry as volume "lift." E. Hoffman, Tr. 358, 362.

⁹⁹ Turner, Tr. 1129-30.

¹⁰⁰ CX 1040 A-F (Pepsi); CX 1041 A-K (Grant-Lydic); CX 1042 A-V (CCSW).

rock stated that “[n]o national brand soft drink may be co-featured during these promotional periods.”¹⁰¹

Ad features are run as part of retailers’ promotional “ad cycles,” which include bottlers, branded CSDs as part of the advertising.¹⁰² Most major chain retailers advertise one branded CSD in each of their weekly ads during a 52-week cycle.¹⁰³ Major convenience stores usually offer a monthly ad cycle.¹⁰⁴

Bottlers believe that you cannot grow your brands without being in the ad cycle.¹⁰⁵ In fact, some believe that if a bottler never gets an ad feature, the effect will be volume deterioration in the marketplace.¹⁰⁶ Nor can the lost volume necessarily be made up for through in-store displays.¹⁰⁷

There are promotional periods that are more advantageous than others. Holiday periods are the most advantageous and create considerable volume lift.¹⁰⁸ For that reason, a retailer’s holiday ad features cost hundreds of thousands of dollars for bottlers and concentrate firms.¹⁰⁹ Additionally, to obtain such ads from a retailer, the bottler must provide a greater discount than normal on its product.¹¹⁰ Retail-

¹⁰¹ CX 1039-B. Pursuant to Calendar Marketing Agreements (“CMAs”), the bottler and retailer agree to a schedule of promotional activities and the payments to be made to the retailer. CMAs were originally developed to help the retailer offset the cost of advertisements for their chain stores. Davis, Tr. 4506. CMAs usually involve a base payment by the bottler to a retailer for a set number of ads. There are additional incentive payments for incremental volume growth. The bottler and retailer agree to sales projections and various requirements. CMAs are also known as “soft drink agreements,” or “ad buy” agreements, “ad assistance,” or “volume incentives.” Davis, Tr. 4509, 4706; Gonzaba, Tr. 2055; Hiller, Tr. 5355.

¹⁰² Turner, Tr. 970.

¹⁰³ Turner, Tr. 970; Davis, Tr. 4526; Kaiser, Tr. 3177.

¹⁰⁴ E. Hoffman, Tr. 362.

¹⁰⁵ Turner, Tr. 974; CX 3941 at 288-89 [Schmid].

¹⁰⁶ CX 3941 at 288-89 [Schmid].

¹⁰⁷ Turner, Tr. 974.

¹⁰⁸ Turner, Tr. 971; Summers, Tr. 6919; Davis, Tr. 4514-16. The July 4th ad is usually considered the most valuable, followed by other summer holidays, then the Thanksgiving, Christmas and New Year’s holiday periods. Turner, Tr. 971; E. Hoffman, Tr. 367-68; Turner, Tr. 4514. As to non-holiday ad periods, pay week periods are more valuable than non-pay week ads. Turner, Tr. 971; E. Hoffman, Tr. 368; Davis, Tr. 4514.

¹⁰⁹ Summers, Tr. 6919. For example, the holiday ads of H.E.B., a very large retailer in the San Antonio area (and other areas in Texas), run from a low of \$175,000 for Easter to a high of \$500,000 for summer holiday ads. Summers, Tr. 6919; Gonzaba, Tr. 2055.

¹¹⁰ Gonzaba, Tr. 2057. However, there is a safety net of \$50,000 for holiday ads if volume falls short. Summers, Tr. 6918-19.

ers, such as H.E.B., must meet volume requirements in order to receive the ad payments in full.

Bottlers also compete with each other for retail space in retail outlets which sell branded CSDs.¹¹¹ Bottlers attempt to convince retailers that their branded CSD products will generate sufficient traffic to warrant display space and end-aisle displays.¹¹²

D. Branded CSDs as a Relevant Product Market

With this background information in place, we can now properly address the question that the parties have presented to us: whether beverages other than branded CSDs could constrain a price increase by branded CSDs in the relevant geographic market. For this inquiry, we examine all of the relevant evidence concerning price and non-price competition that could affect the likelihood that nonbranded CSDs would constrain a small but significant, nontransitory price increase by branded CSDs. Such evidence includes the opinions of market participants concerning price and advertising differences among different categories of soft drinks, historical evidence of price interactions among different categories of soft drinks, and industry perceptions about the degree of competition between different categories of soft drinks.

As we will discuss, nonbranded CSDs are largely unavailable in the cold drink channel.¹¹³ Therefore, we will focus in particular on the likely substitution responses if branded CSD bottlers in the relevant geographic market raised their prices to retailers in the take-home channel, who purchase branded CSDs for sale to the ultimate consumer.¹¹⁴ The retailer typically receives a discount or allowance off the wholesale list price in return for its promotion of the product.¹¹⁵ "Net price" charged to the retailer equals the list price minus

¹¹¹ CX 4005 at 55 [R. Hoffman].

¹¹² CX 4005 at 55-56 [R. Hoffman].

¹¹³ See Section IV.D.2 *infra*.

¹¹⁴ The Merger Guidelines advise that "[i]n general, the price for which an increase will be postulated will be whatever is considered to be the price of the product at the stage of the industry being examined." Section 1.11. The same sentence appears in the 1984 Guidelines.

¹¹⁵ For example, in 1990, at least 95% of CCSW's sales were made at less than list price. Summers, Tr. 6721. Only 2% of the sales of the Pepsi COBO in the San Antonio area were made at list price. Davis, Tr. 4684-85. See also RX 327.

discounts and allowances.¹¹⁶ “Net/net” or “net/net/net” prices are list prices minus discounts, allowances, and ad payments.

It is also relevant here to examine the likely substitution responses if retailers raised the prices of branded CSDs to consumers, since the demand for the bottlers’ products derives from consumer demand for those finished products.¹¹⁷ Some agreements between bottlers and retailers regarding advertising funds attempt to influence the retailer to offer a certain price to consumers for the finished product, a further indication of the interrelationship between prices to retailers and prices to consumers.¹¹⁸

For the reasons set forth below, we find that the evidence demonstrates a relevant product market of branded CSDs.

1. Overall Substitution Possibilities: Views of Branded SD Bottlers

Both of CCSW’s primary branded CSD competitors in the San Antonio area stated that if branded CSD bottlers in San Antonio raised their prices by 10%, and everything else remained constant, they could profitably raise their price by 10%.¹¹⁹ Bottlers of branded CSDs in other South and Central Texas areas gave similar responses.¹²⁰ This evidence was uncontroverted.¹²¹

¹¹⁶ R. Hoffman, Tr. 5652-53; Summers, Tr. 6713-14; CX 414 B.

¹¹⁷ The Merger Guidelines state that, among other evidence, the Commission may take into account “the influence of downstream competition faced by buyers in their output markets” in evaluating market definition. Section 1.11.

¹¹⁸ Promotional allowances are usually related to a performance requirement. This most commonly takes the form of a feature ad, in-store display, or a reduced retail price. CX 1039 B, C; CX 1041 H (“lowest retail price on featured package”). Although bottlers do not usually suggest retail prices, they often set discounts at levels calculated to drive a desired retail price, based on the margin usually added by a particular retailer. Campbell, Tr. 1972-73. In addition, when soft drinks are in a feature ad, retailers often add little or no margin to the wholesale price, or use incremental funding from the bottler to further reduce the retail price. Turner, Tr. 960, 973-74. As explained by Mr. E. Hoffman, “[w]hat we’re really trying to have happen is for the retailer to pass the cost, the lower cost, on to the consumer so that the benefit of the consumer -- the lower price is to induce more consumption or purchases.” E. Hoffman, Tr. 380.

¹¹⁹ Bodnar, Tr. 1492, 1496, 1762-63; Davis, Tr. 4610.

¹²⁰ Koch, Tr. 1815-16; Turner, Tr. 988-89; CX 3931 at 1801-04 [Westerman].

¹²¹ Respondent CCSW argues that this testimony is not probative because complaint counsel did not specify a time frame for the hypothetical price increase. ABR-A at 8. An example of the testimony elicited by complaint counsel is given by Mr. Davis, a Pepsi official:

Q. If Coke SW and Big Red raised their prices ten percent in San Antonio, would Pepsi find it profitable to raise its prices the same?

The internal documents of the three bottlers of branded CSDs in the San Antonio area confirm that they take into account ~~only~~ the prices of other branded CSD products in deciding on pricing for their own branded CSD products. CCSW's own business records indicate that CCSW does not consider the price of private label or warehouse-delivered soft drinks when it considers increasing the price of its branded CSDs.¹²² Rather, CCSW considers the prices of other branded CSDs in determining the price of its-branded CSDs.¹²³

Moreover, CCSW's business records characterize its major competition as limited to manufacturers, distributors, and sellers of branded CSDs.¹²⁴ CCSW markets its branded CSDs against other branded CSDs.¹²⁵

A. Yes, they would.
Davis, Tr. 4610.

As discussed above, the hypothetical "5%" price increase test is set forth in the Merger Guidelines, which typically define a small but significant and "nontransitory" price increase as a 5% price increase maintained for a year or more. Section 1.11. Although we agree that complaint counsel could have clarified the precise implications of this question by specifying a time frame, we do not find that the absence of a specified time frame renders such testimony worthless. "Profit" is generally understood as the gain still left after expenditures; this is not a short-run concept, but rather something that businesses typically calculate over a time frame of months or years, not days. Thus, we believe that the question implied a "nontransitory" time frame. In any case, the witnesses' responses indicate that the answer may well have been the same whether a short or long time frame had been specified, since no witness asked "Do you mean in the short run or the long run?" Finally, we note that this is just one piece of the evidence supporting a branded CSD product market definition. We interpret the responses to complaint counsel's questions in light of that surrounding evidence, the weight of which also supports a branded CSD product market.

¹²² CX 2244; CX 198; CX 3101 C-H, J; CX 3102 B-H, J, L.

¹²³ CX 104 D, G, H, M-N; CX 198.

¹²⁴ CX 418 Z2-3, Z9, Z12, Z16, Z20; CX 1406 Z9-10; CX 1854 H-I, K-L, T-U, X, Z2-5, Z7-8; CX 1866 K-L. For example, CCSW's records reveal that it viewed Mr. PIBB as the closest substitute to and a direct competitor of Dr Pepper. CX 596 A-I. Indeed, that CCSW recognizes the difference between branded and nonbranded CSDs is well-evidenced by their consideration of a proposal to establish a house product flavor line in the take home segment that would fill the gap between branded CSDs and private label. The proposal was to "[i]ntroduce a DSD house line of flavors to include a Cola, Cherry Cola, Red, Rootbeer, and Orange. The line should be positioned as an image product with a low price (slightly higher than the private labels). Image development can be achieved through quality graphics, package availability, broad channel distribution and a unique trademark (perhaps the Buck Brand label)." RX 398. This document is consistent with other CCSW documents that express concern that CCSW needed a flavor line to compete with an expanding private label market. *See, e.g.*, RX 2059; RX 2060; RX 226 A, K; CX 2974 Q, R.

¹²⁵ CX 3760 ("In summary, beat the hell out of Pepsi!"); CX 104; CX 108 H; CX 1854 R,U, Z2, Z4; CX 2255 S, T; CX 3109 C. Messrs. R. Hoffman and Summers, Tr. 6853, testified that CCSW's branded CSDs compete in a broad sense with virtually all liquids (*See, e.g.*, R. Hoffman, Tr. 5524: CCSW competes with water in the sense that all beverages vie for the same shelf space), but CCSW documents do not evidence the same approach.

CCE bottlers in Texas, Coke-Austin and Coke-Houston, create periodic reports in which they monitor the activities of their competitors. Such activities -- which include pricing, package availability, marketing activities, sales, market share and pricing strategies -- are generally limited to observing the activities of bottlers of branded CSDs.¹²⁶ Similarly, the bottling operations of CCE use Keystone reports that provide information only with regard to branded CSDs.¹²⁷

When Coke-Austin introduced diet Coke, its introductory plans included volume and share forecasts. These projections were limited to branded CSDs and did not include private label or warehouse soft drinks.¹²⁸ When Coke-Austin did a competitive analysis entitled "Competitive Corporate Brands," it discussed only branded CSDs.¹²⁹

Pepsi official Davis testified that at the bottler level, Coke products are the only products to which the Pepsi bottler in San Antonio would react with regard to price.¹³⁰ ". . . Coke [CCSW] is usually the leader in the market. They go up and then we usually follow, depending on our pricing structure."¹³¹ Davis stated that Pepsi does not follow private label CSDs closely enough to know whether they had price increases.¹³²

Pepsi bottler-related testimony and documents evidence a similar distinction between branded CSDs and nonbranded CSDs. For example, Pepsi official Davis testified that Pepsi would not be worried about promoting its products in conjunction with private labels, but would not want Pepsi jointly marketed with Coke.¹³³ When the Pepsi COBO bottler serving the San Antonio area performs comparisons with its competitors, it looks in detail to bottlers of branded

¹²⁶ CX 2689; CX 2690; CX 2691; CX 2693.

Some documents note an increasing private label market share (*e.g.*, CX 2623 F, CX 2561 N, O, Q), but very few suggest a price response from branded CSDs to such brands, and this evidence is much weaker than that pointing in the opposite direction. In one exception, an SWCC employee apparently suggested that a response to private label brands was necessary to forestall the "expense of regaining price leadership long term." RX 1479 J.

¹²⁷ CX 2680; CX 2688 A-D; CX 2695; CX 2918.

¹²⁸ CX 503 B-J.

¹²⁹ CX 171.

¹³⁰ Davis, Tr. 4532-33.

¹³¹ Davis, Tr. 4532; CX 441 C; CX 445 H-I, K; CX 448; CX 449 R-S.

¹³² Davis, Tr. 4531, 4829.

¹³³ Davis, Tr. 4824.

CSDs for their pricing and other competitive activity,¹³⁴ as well as the "ad feature" or in-store allowances and ad assistance that they are offering.¹³⁵

Emery Bodnar, former General Manager of DPSA and current Executive Vice President, General Manager and part owner of Grant-Lydick, similarly testified that Grant-Lydick considers and reacts only to prices of other branded CSDs in setting Grant-Lydick's branded CSD prices, and does not consider the prices of private label or warehouse-delivered soft drinks in setting branded CSD prices.¹³⁶

Other bottlers also consider and react only to prices of the products of branded CSD bottlers in their areas when setting the prices of

¹³⁴ CX 455 G-L, Z-24; CX 456 B-C; CX 457 C; CX 458 B; CX 459 E; CX 460 I; CX 461 J, L; RX 1013 U-W; CX 380. At least one document notes that, in 1989, private label's market share had increased at the expense of Pepsi. RX 1287 E. Mr. Davis of Pepsi COBO explained that this followed the deep discounting of 1987-88, when branded CSD prices had become so low that they were "taking share out of private label." Davis, Tr. 4528-29. When the branded CSD prices went back up, however, then you still have "the price shopper that's going to pick up private label," and so "you're losing share back to the private label." Davis, Tr. 4528-29. See also Section IV.D.3.d *infra*.

¹³⁵ RX 1013 J-Y; CX 455 H-I, K, Z-1, Z-3; CX 456 E, F; CX 457 C, F; CX 458 G.

¹³⁶ Bodnar, Tr. 1359-61, 1364, 1490, 1492-94, 1762-63.

Emery Bodnar, as manager of the Big Red bottler in San Antonio, explained why he would not lower Big Red's price to retailers if a warehouse or private label lowered its price 10%:

- Q. Let me ask you this question. If Texas Beverage Packers lowered its triple net price in the ten-county area including and surrounding San Antonio ten percent and all other things remain constant, again for a sustained period of time, would you find it profitable to lower your prices?
- A. I don't know what Texas Beverage Packers' triple net price is. I wouldn't know if they lowered it or not. See, because that doesn't come through the same channel as we do. We're a direct store and they're through warehouses and through, you know, private label.
- Q. Let's assume you did know.
- A. If I did know that they went down ten percent?
- Q. Yes.
- A. Would I do anything? No.

I've got to -- Let me just, if I can, state why.

Private label or control brands, at least from where I sit, are not direct competition, as I look at Coke and Pepsi in San Antonio and maybe whatever they're calling themselves today, Premiere. Okay?

Those brands that are essentially the warehouse or private label, first of all, space is dictated by somebody at headquarters and we're not going to change that.

Number two, the product is displayed by somebody in the store or has to be handled by somebody in the store.

If you really go out and look at beverage sections, most often than not if you look at a beverage section that looks ragged, it is the section that is supposed to be controlled by store personnel.

As far as display space, that is pretty much, again, dictated, not at store level but at some buyer's level or higher.

So really, there's not much I can do to compete, if I really wanted to. I mean, it's there, just the same say that Kool-Aid is, as we talked about earlier.

So if he lowered his price 15, 20 percent, I wouldn't do anything. Fifty percent. He doesn't have that kind of margin to do it, but if he did.

They just can't execute. I mean, they just don't have the force to execute such a thing.

Bodnar, Tr. 1762-63.

their branded CSDs.¹³⁷ Moreover, bottler collusion cases indicate that branded CSD bottlers in other geographic areas believe that it is possible to raise price successfully together without having to involve bottlers of nonbranded CSDs.¹³⁸

2. Substitution Possibilities: The Cold Drink Channel

In the cold drink channel, which includes fountain, vending machine, and single drink sales¹³⁹ there is relatively little availability of nonbranded CSDs that is, warehouse-delivered and private label CSDS. Respondent admitted that warehouse delivered brands are generally not available in the cold drink channel,¹⁴⁰ and stated that “private/warehouse brands are less available in other market segments, including convenience stores, vending and fountain.”¹⁴¹ The evidence confirms that warehouse distribution does not provide access to the vending and fountain channels.¹⁴²

In addition, the evidence shows that carbonated soft drinks sold in vending machines are almost entirely brands that are direct-store-door delivered, not warehouse-delivered or private label brands.¹⁴³ Vending machines are stocked with nationally branded CSDs, with virtually no private label brands available.¹⁴⁴ Moreover, although private label brands may be marginally more available in the fountain channel, since a few restaurant chains sell certain flavors as their own private label brands,¹⁴⁵ the record does not establish that the occasion-

¹³⁷ Trebilcock, Tr. 5844-46, 5848-50; Davis, Tr. 4532-33; CX 3990 at 923 [Kalil].

¹³⁸ As we discuss in Section VI.C.3 *infra*, we find the bottler collusion cases relevant to this case, and we therefore find that the ALJ erred in excluding evidence relating to them. For the cases cited by complaint counsel (*See* Section VI.C.3.c *infra*), warehouse-delivered and private label firms in areas where branded CSD bottlers have been convicted of fixing prices were not named as defendants. The price-fixing cases involved only branded CSD bottlers.

¹³⁹ *See* Section IV.B *supra*.

¹⁴⁰ RRCCPFF paragraph 876.

¹⁴¹ RPPF paragraph 332, citing Knowles, Tr. 2662, 2892.

¹⁴² RX 3005 at 3759 [Smith]; CX 3978 at 2063-64 [Lowenkron]; Turner, Tr. 941, 1403; CX 3945 at 177 [Rapp]; CX 3944 at 3511-12 [Rapp]; CX 3977 at 72 [Carew]; Coyne, Tr. 3438; CX 3942 at 1905 [Wilson].

¹⁴³ CX 804 G; CX 3989 at 65-66 [Shanks]; RX 3003 at 82-84 [Huey].

¹⁴⁴ Koch, Tr. 1835; Clarke, Tr. 4284; Turner, Tr. 1007; RX 3003 at 84 [Huey].

¹⁴⁵ Summers, Tr. 6517; Short, Tr. 7759-60. For example, McDonald's sells its own, orange private label fountain product. Short, Tr. 7759.

al presence of nonbranded CSDs in the cold drink channel would provide a constraint on the pricing of branded CSDs.

3. Substitution Possibilities: The Take Home Channel

The record shows that private label and warehouse brands are available in this channel. Therefore, we must examine in greater detail whether their presence would be sufficient to constrain a small but significant, nontransitory price increase in branded CSDs.

a. Views of Bottlers of Warehouse and Private Label

Texas Beverage Packers, Inc. ("TBP") is a manufacturer of private label and warehouse-delivered CSDs on its own account and for some of the major supermarkets in San Antonio.¹⁴⁶ Steve Hixon, its general manager, testified that his carbonated soft drinks do not compete with those of CCSW and San Antonio Pepsi,¹⁴⁷ and that to do so would render his company "dead meat."¹⁴⁸ He sees manufacturers and distributors of private label and warehouse-delivered CSDs as his direct competitors,¹⁴⁹ and not CCSW or Pepsi.¹⁵⁰ With respect to pricing, he reported the following:

- Q. Now, in your opinion, there has not been an impact on your business by Coke Southwest's purchasing of the San Antonio Dr Pepper Bottling Company; is that correct?
- A. Yes.
- Q. Your basic opinion is we're dealing with apples and oranges in this case?
- A. We're dealing with apples and oranges other than if there's some kind of pricewar going on. If they get down to 99 cents, then they do impact me, but I don't feel the -- If Coke had bought Pepsi, yes.
- Q. And you feel that that's because -- You don't see a relationship between you and Coke Southwest because you basically sell to different clientele on different bases?
- A. No. We're -- Well, we're sitting in a grocery store next to each other, but I don't -- For the people to take my product over Coca-Cola, there's got to be a substantial differential in price to make them select the private label.

¹⁴⁶ Hixon, Tr. 7269.

¹⁴⁷ Hixon, Tr. 7354-57.

¹⁴⁸ Hixon, Tr. 7356.

¹⁴⁹ Hixon, Tr. 7359.

¹⁵⁰ Hixon, Tr. 7360.

- Q. In fact, when you were first interviewed by FTC staff, you told them this doesn't have anything to do with you and you wish we'd leave you alone?
- A. Absolutely. Still feel that way.

Hixon, Tr. 7354-55.

With respect to the "impact" when branded CSDs reduce their prices, Mr. Hixon explained:

- Q. In your experience, have national brands gotten down to the level of private labels in their pricing?
- A. They haven't gotten quite that low but it's been kind of -- They've gotten close enough to make it scary.
- Q. Have they in fact begun to squeeze out private label with low prices?
- A. That's a tough question. Certainly, to a limited extent, I think they have. When they get in their 99-cent a six-pack wars with cans, yeah, at that point they're driving out private label. It's so low.
- We virtually have given up the major holidays to the national brands. We no longer try to compete with them.

Hixon, Tr. 7303.

Hixon views CCSW and Pepsi as "just out there screwing up the market with [their] occasional low prices." Hixon, Tr. 7360. He sees these bottlers as not trying to get his business, nor as having an impact on his business. Hixon, Tr. 7360-61. Hixon described himself and his "fellow copackers" as competing with branded CSDs only on the fringe:

[We are] out there scrambling over the ten percent of the business that Coke and Pepsi don't realize really exists or have slipped through their fingers, or whatever, that they choose to ignore. So yeah, if Coke or Pepsi drop their prices to 99 cents, it impacts our ten percent that we're fighting over. It takes business away from us.

Hixon, Tr. 7360.

The Kroger Company operates a CSD manufacturing plant in Garland, Texas, called Garland Beverage Company ("GBC").¹⁵¹ GBC does not consider the prices of branded CSDs in determining the price of its private label and warehouse-delivered products. The record does not show such a comparison.¹⁵² GBC monitors only other private label and warehouse-delivered soft drinks, such as

¹⁵¹ Morath, Tr. 7672-73.

¹⁵² RX 1716-17; RX 1721-22; RX 1726; RX 1740-41; RX 1744-45; RX 1750; RX 1754-57; RX 1760.

Rocky Top, Big K, Mega, Parade, and Cragmont.¹⁵³ GBC also monitors TBP.¹⁵⁴

This evidence also supports the existence of a branded CSD product market. The weight of the testimony by and documentary evidence of bottlers of both branded CSDs and nonbranded CSDs indicates that branded and nonbranded CSDs generally do not compete in the sense that a branded CSD price increase could be constrained by nonbranded CSDs.¹⁵⁵ The evidence does establish that branded CSDs occasionally may constrain pricing by private labels and warehouse-delivered soft drinks, but it does not provide any reason to believe that nonbranded CSDs could constrain price increases by branded CSDs.¹⁵⁶

b. Consumer Conduct: The Typical Price Gap Between Branded and Nonbranded CSD Retail Prices to Consumers

Prices of CSDs appear generally to fall into three separated groupings. Most expensive are the branded CSDs; less expensive are warehouse-delivered brands; and cheapest are the private label products.¹⁵⁷ The price gaps separating these groupings may indicate that these soft drinks are in different product markets.¹⁵⁸ Although the Commission and the courts do not always divide premium and

¹⁵³ RX 1760 (991440; 991475-79; 991482-85); CX 2827 D, E.

¹⁵⁴ RX 1756; RX 1757.

¹⁵⁵ For example, Mr. Campbell, warehouse manager for a Pepsi/Dr Pepper/7-Up bottler in Hallettsville, Texas, was asked whether he competed with H.E.B.'s Plaza brand with his Dr Pepper and Pepsi brands. Mr. Campbell responded: "Well, yes and no. I mean, not really. I mean, I don't -- I don't think about competing against those people. I mean, that's not who I go to look in the grocery store to see if they've reduced their price by one cent a can and then I adjust my pricing and my promotional strategies based upon that. I base my competing more against other direct store delivery products." Campbell, Tr. 2007. Even Mr. Howell of CCUSA admitted that he had never seen the price of Coke drop in response to private label prices. Howell, Tr. 4123. And Mr. Summers explained that CCSW created a private label to compete with private label and warehouse brands, being careful not to cannibalize CCSW's branded products. Summers, Tr. 696284.

¹⁵⁶ Similarly, Pepsi's research shows that it is very hard for a private label to steal from a national brand, but that a national brand can gain share from a private label temporarily if its price comes down low enough. CX 3912 at 65-66, 97 [Christiani].

¹⁵⁷ CX 814 E; CX 3989 at 92-93 [Shanks].

¹⁵⁸ See, e.g., *United States v. Archer-Daniels-Midland Co.*, 866 F.2d 246 (8th Cir. 1988), cert. denied, 493 U.S. 809 (1989) (despite functional interchangeability of sugar and high fructose corn syrup, persistent price difference of 10% to 30% resulting from price support system required treatment as separate product markets).

lower-priced brands into separate markets,¹⁵⁹ the existence of a price gap calls for some examination of its degree and possible significance.

We note first that the wholesale prices available to retailers vary, because bottlers may change their promotional offers on a weekly to monthly basis.¹⁶⁰ At any time, there may be a variety of effective wholesale prices for any given brand and package within any given geographic area.¹⁶¹ Retail prices to consumers also vary frequently, depending on the extent to which and whether particular brands are on "promotion." The promoted prices of branded CSDs may be substantial discounts off the everyday or list retail price to consumers. The differences between the promoted retail prices of branded CSDs and the nonpromoted prices of branded CSDs vary from 20% to over 100%.¹⁶²

Despite these variations in price differences, there are clear distinctions between the average prices of branded CSDs and non-branded CSDs, at both the wholesale and retail price level. As respondent CCSW has explained, the wholesale prices paid by the retailer for most private/warehouse brands generally are less than the price charged by the bottler for branded CSDs.¹⁶³ Much of this differential is attributable to the labor cost of stocking and merchandising the product, which is usually borne by the bottler using DSD delivery for branded CSDs, but by the retailer for private/warehouse brands.¹⁶⁴ An additional cost difference is that national concentrate companies often spend significant sums of money advertising and

¹⁵⁹ Coca-Cola Co., Dkt. No. 9207, slip op. at-32 n. 62; *see also Olin Corp.*, 113 FTC 400, 595-600 (1990), *aff'd*, 986 F.2d 1295 (9th Cir. 1993) (finding two relevant product markets, one consisting only of premium-priced product and one consisting of the premium-priced product and its functional equivalent), *cert. denied*, 114 S. Ct. 1051 (1994).

¹⁶⁰ Campbell, Tr. 1954; R. Hoffman, Tr. 5551-52; Summers, Tr. 6613-H. However, some retailers set their promotional schedule for an entire year at the beginning of the year. Summers, Tr. 6618.

¹⁶¹ CX 1979; CX 2180; Turner, Tr. 1474; Bodnar, Tr. 1648-49; Davis, Tr. 4702-03; RX 1200; Kaiser, Tr. 3224.

¹⁶² CX 3973 (20-100%); CX 3926 A (30-50%); CX 3832 (20%); CX 3835 (20%).

¹⁶³ Howell, Tr. 4028-29; RX 2423.

¹⁶⁴ CX 3700 J; Brinkley, Tr. 2191-92; Kaiser, Tr. 3159; Turner, Tr. 1401-02. *See also* Section IV.C.2 *supra*.

promoting their branded CSDs.¹⁶⁵ These costs are often reflected in a higher concentrate price to bottlers.¹⁶⁶

Similarly, the average retail prices of most private/warehouse brands are less than the average retail prices of branded CSDs.¹⁶⁷ Estimates of the price differential vary, but a common estimate is that private/warehouse prices average between 20% to 30% below the prices of branded CSDs.¹⁶⁸ There was testimony that the retail price gap between branded CSDs and private label CSDs is normally two to three price points, per unit.¹⁶⁹ In 1984, CCUSA found that, on average, private and controlled labels net retail prices were an average of 29% lower than those of the national brands, while warehouse-delivered Shasta/Faygo net retail prices were about 20% below the national brands.¹⁷⁰ In 1988, an analysis of the average case price differences for several bottler groups was performed, comparing Fanta, Shasta, Faygo, Controlled label and Coke Classic in 34 geographic areas.¹⁷¹ The average case price difference between Coke Classic and the highest priced control label products was \$0.94. Branded flavor lines were priced above control labels at an average price difference of \$0.77 a case.¹⁷²

This retail price gap shows that certain consumers are willing to pay more for branded CSDs than for private label or warehouse-delivered brands. Many consumers perceive a quality difference

¹⁶⁵ CX 3158 Z11-Z21; CX 814 A-B. Most private label brands are not advertised on television or radio, but may appear in the retailer's newspaper ads or circulars. Some warehouse brands, notably Shasta, have engaged in television and radio advertising in the past. See Section IV.C.3 *supra*.

¹⁶⁶ Bodnar, Tr. 1739.

¹⁶⁷ Hixon, Tr. 7356-57; Trebilcock, Tr. 5841-42.

¹⁶⁸ Trebilcock, Tr. 5841-42; Howell, Tr. 4082; CX 3814 at 39 [Adams]; CX 814 at 874. At different times, the retail price gap between branded CSDs and private label/warehouse soft drinks may range from 10% to 130%, depending on whether special promotions are offered. Trebilcock, Tr. 5841-42 (20-30%); Hixon, Tr. 735657 (30-40%); CX 3989 at 89-90 [Shanks]; Bodnar, Tr. 1715-16; CX 3835; CX 3832; CX 3926B (20-70%); Limon, Tr. 4981 (6-pack ("6-pk") cans: private label CSD is 99 cents; Pepsi is \$1.49 - \$1.69 [49-69%]); Sendelbach, Tr. 7703-06 (6-pk cans: private label CSD is \$1.20; branded carbonated soft drink is \$1.59 [33%]); Brinkley, Tr. 2194-95 (6-pk cans: private label CSD is \$1.20-\$1.32; branded CSD is \$2.50 [50%]); Chapman, Tr. 7208, 7211 (6-pk cans: private label CSD is \$1.06-\$1.26; branded CSD is \$1.59 \$2.00 [26-88%]); Davis, Tr. 4519-24.

¹⁶⁹ CX 3967 at 186 [Carew]. Each price point has significance for a bottlers' revenue; for example, for CCSW, a ten-cent increase in the net price of a six-pack can increase cash flow by an additional \$8 million a year, holding all else constant. E. Hoffman, Tr. 284; CX 875 G.

¹⁷⁰ CX 814 A.

¹⁷¹ CX 3436 S-Y.

¹⁷² CX 3436 F.

