

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,

¹The 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).

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:

Initial Decision

117 F.T.C.

1979 - 1985 Percentage Increase in Concentrate

<u>Brand</u>	<u>% Increase</u>
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.)

<u>Year</u>	<u>Coke Classic</u>	<u>Annual Increase</u>	<u>Diet</u>	<u>Annual Increase</u>	<u>Inflation Rate</u>
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

<u>1986</u>	<u>share</u>	<u>1987</u>	<u>share</u>
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

<u>year</u>	<u>case sales</u>	<u>total marketing</u>	<u>mrk/case</u>
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

<u>year</u>	<u>Gallons per capita</u>
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

effectively with carbonated soft drinks (Tr. 4162, 4182-83). The packaging for Heileman's flavored waters is "almost identical" to Coca-Cola's and Pepsi-Cola's packaging. "Essentially it's the same package, bottles, cans, six packs, twelve packs" (Tr. 3818-19).

g. Expert Testimony

65. Dr. Lynk, Coca-Cola's expert economist, testified that the relevant product market in this case is the manufacture and sale of all potable liquids because, although all beverages do not substitute for one another on an ounce for ounce basis, the significant demand-side and supply-side linkages between soft drinks and other beverages warrant their inclusion in the same product market (Tr. 2734-35, 2923-28; RX 584-J-K).

66. However, other testimony of Dr. Lynk casts substantial doubt on his conclusion regarding the utility of using an "all potables" concept to define the relevant product market in this case, for he posited a vague, unquantifiable relevant market somewhere in between carbonated soft drink concentrate and all beverages (Tr. 2923-24). As to particular products, however, he testified:

a. As to beer:

Q. You have no basis today to testify that beer is in the same product market as carbonated soft drinks, do you?

A. In the same product market in the sense that I defined it earlier this morning, I would say no, not on a one-for-one or gallon-for-gallon basis.

Q. And did you at any time since February of 1986 have the expert opinion and were prepared to testify that beer was in the product market comprised of carbonated soft drinks?

A. I think there is a sense in which it might have been considered to be a part of the product market relevant for carbonated soft drinks. I just don't think it is -- I just don't think the evidence points in the direction that it is so tightly joined that you would say all beer and all carbonated soft drinks ought to be poured together in some sense to form a product market in which the assessment of shares of that pair of beverages should be assessed.

b. As to coffee:

Q. I am going to ask you to turn to page 88 of your deposition transcript, Dr. Lynk. I am going to ask you whether you gave the following testimony on February 8th, 1990.

"Question: I am asking whether you are prepared to testify whether the substitution between roasted coffee and Pepsi A.M. is direct enough and/or strong

enough to allow you to say that in your expert opinion those two products are in the same antitrust product market?

“Answer: Antitrust product market is not a term I am terribly adept with.

“Question: Product market of analyzing this transaction.

“Answer: But I would say -- I believe the answer to your question is no, from what I am aware of, I don't think that warrants a conclusion of that sort.”

Q. Was that your testimony?

A. Yes.

(Tr. 2924-27).

c. As to bottled water:

Dr. Lynk never considered the possibility that carbonated soft drinks were in a market that comprised bottled water.

(Tr. 2911-13).

2. All Concentrate Used In The Sale Of All Carbonated Soft Drinks

67. Although complaint counsel propose that the most appropriate product market for purposes of antitrust analysis in this case is branded concentrate used to produce branded carbonated soft drinks, they also recognize that another market may exist -- all concentrate used in the sale of all carbonated soft drinks (Complaint Counsel's Brief in Support of Proposed Findings, pp. 24-25, 47-48). Coca-Cola agrees, concluding in its proposed findings that the relevant product market includes at least all carbonated soft drinks (RPF 110-160). The parties disagree on the narrower branded concentrate market proposed by complaint counsel (RPF 161).

3. Branded Concentrate Used To Produce Branded Carbonated Soft Drinks

a. *The Distribution Of Carbonated Soft Drinks*

(1) Channels Of Distribution

(a) *In General*

68. Soft drinks are sold through two channels of distribution: (a) the grocery store (or take-home) channel and (b) the cold drink channel which includes vending and fountain sales, and single drink sales made by convenience stores and “mom & pop” outlets (Tr. 202-05; CX 27-Z-52-Z-62; CX 55-F; CX 696-A).

(b) *The Cold Drink Channel*

69. Sales in all three segments of the cold drink channel accounted for approximately [] of 1988 soft drink sales (CX 27-G).

70. Vending sales, *i.e.*, on-premise consumption of carbonated soft drinks purchased from a vending machine (Tr. 25), account for about 10-12% of total carbonated soft drink consumption. Bottlers often provide full service vending in which they stock and service the vending machines (Tr. 750, 1200-01). Vending machine drinks are generally sold at full price (Tr. 611, 1693, 1895; CX 55-Z-23; CX 516-G; CX 697-F; CX 774-A-F; RX 237-M; RX 409-G).

71. Sales through fountain outlets accounted for approximately 21% of all carbonated soft drink sales in 1988 (CX 27-G; CX 447-K).

72. Coca-Cola estimated that the manual cold drink channel accounted for about [] of all carbonated soft drink sales in 1988 (CX 27-G).

(c) *The Take-Home Channel*

73. The take-home channel, which is primarily composed of chain supermarkets and independent grocery stores (Tr. 827-28, 1475), accounted for approximately [] of all carbonated soft drink sales in 1988 (CX 27-G).

(2) *Methods Of Distribution*

(a) *Direct-Store-Door Delivery*

74. Under the direct-store-door delivery system, a route driver delivers carbonated soft drinks directly to retail outlets such as supermarkets, convenience stores, and mom & pop stores (Tr. 27, 423, 530, 834, 3185-87).

75. The route driver services retail outlets on a set schedule which may be altered as necessary to service his accounts (Tr. 28). Depending on the needs of a particular retail outlet, the route driver may service a store every day, or several times a week. Large supermarket chain stores may be serviced more than once a day (Tr. 695, 1020).

76. In a supermarket, the route driver restocks shelves (Tr. 504, 834), sets up displays and point of purchase materials (Tr. 27, 355,

504, 505, 672, 1661), rotates the stock (Tr. 672), cleans the shelves (RX 369-D-E) and picks up returnable bottles in mandatory deposit states (RX 369-H).

77. All of the major carbonated soft drink brands are distributed by direct-store-door distribution, using soft drink bottlers or soft drink distributors (Tr. 181, 1518-19, 1661, 2111, 2238). Some very small firms use beer distributors rather than soft drink bottlers or soft drink distributors for direct-store-door delivery (Tr. 3449, 3487, 3539, 4096).

78. The two largest direct-store-door delivery systems are the Coca-Cola and PepsiCo bottler systems (Tr. 929, 2066, 2128, 2496; CX 742-H-I). In addition to these systems, there is normally one other direct-store-door delivery bottler (or "third bottler") in a given area (Tr. 550, 924-25; CX 696-B).

(b) *Warehouse Delivery*

79. In a warehouse delivery system, finished carbonated soft drink products are delivered from the bottler directly to the loading dock of a retailer's central warehouse (Tr. 529, 3190-91). Warehouse delivered products are available almost exclusively in chain supermarkets (Tr. 355, 530, 834, 3192).

80. Warehouse delivery is used by one national branded concentrate firm, Shasta (Tr. 3167, 3187), a small number of regional branded concentrate firms, including Faygo and C&C Cola (Tr. 3163-64, 3998), and by private label firms (Tr. 183, 3587, 3997-98).

b. *Firms In The Concentrate Industry*

(1) *National Direct-Store-Door Delivery Firms*

(a) *Coca-Cola*

81. Coca-Cola is the largest concentrate firm in the nation; its 1988 market share was approximately [] (CX 781-B). Its soft drink products are distributed entirely by franchised bottlers through direct-store-door delivery. No warehouse delivery is used (Tr. 181; CX 13-A).

(b) *PepsiCo*

82. PepsiCo is the second largest concentrate firm in the nation; its 1988 market share was [] (CX 781-B). Pepsi-Cola Company is the domestic beverage division of PepsiCo (Tr. 1437).

83. Pepsi-Cola Company-owned bottling operations are referred to as "COBO"; Pepsi-Cola Company franchise-owned bottling operations are referred to as "FOBO" (Tr. 1436, 1456). The COBO operations account for approximately 50% of Pepsi-Cola Company sales volume. The COBO and FOBO operations bottle for other concentrate firms as well as for the Pepsi-Cola Company (Tr. 1454-57).

84. PepsiCo brands include Pepsi, Diet Pepsi, Pepsi-Free, Mountain Dew, Mug Root Beer, Teem, the Patio flavor line, and the Slice flavor line (Tr. 1519-21; CX 781-H).

85. Pepsi-Cola Company is committed to the direct-store-door delivery system for its products in the United States; it has not attempted warehouse delivery or alternative methods of distribution for brands that do not have national distribution in this country, although it does use warehouses in Canada (Tr. 1523-24).

(c) *Dr Pepper*

86. Dr Pepper is the third largest concentrate firm in the nation. Its market share in 1988 was [] (CX 781-B).

87. Dr. Pepper products are sold through direct-store-door delivery (Tr. 2153, 2163, 2232). No Dr Pepper Company products are merchandised by warehouse delivery (Tr. 2163, 2167-68).

88. Approximately 40% of Dr Pepper products are distributed through the Coke bottler system and approximately 40% are distributed through the Pepsi system. Of the 20% volume not in the Coke or Pepsi system, about 10-11% is distributed by bottlers that also carry Royal Crown or Seven Up (Tr. 2178-79).

89. Dr Pepper is the leading soft drink in the "pepper" or "spicy cherry" category, regularly accounting for more than 90% of total pepper volume (Tr. 2238; CX 6-C).

90. Dr Pepper produces Dr Pepper, Diet Dr Pepper, CF regular and CF diet Dr Pepper, IBC Root Beer, and Welch's flavors (Tr. 2441; CX 781-K). Dr Pepper markets the Welch's Line through its Premier Beverages, Inc., subsidiary (CX 6-"O").

(d) *Seven Up*

91. The market share of Seven Up products was approximately [] in 1988 (CX 781-B). Its products are mostly sold through a bottler direct-store-door-delivery system (Tr. 2111, 2153).

92. Approximately 8-10% of Seven Up's volume is through the Coca-Cola bottler system and approximately 20% is through the Pepsi bottler system (Tr. 2113, 2178).

93. Seven Up brands include Seven Up, diet 7-Up, cherry 7-Up, diet cherry 7-Up, 7-Up gold and the Howdy line flavors (Tr. 2110, 2164-65).

94. Seven Up and Dr Pepper merged in November, 1986, when Hicks and Haas acquired Seven Up from Philip Morris, Inc. (Tr. 2109). The combined entity, Dr Pepper/7 Up Companies, had a market share of [] in 1988.

(e) *Royal Crown Company*

95. Royal Crown Company ("Royal Crown") distributes its products primarily through the direct-store-door delivery system (Tr. 600-61, 1657). Some products are sold through warehouse delivery and beer distributors (Tr. 1662-64, 1668). Its market share in 1988 was approximately [] (CX 781-B).

96. Royal Crown brands include Royal Crown Cola, Diet Rite, RC 100, and Nehi, its flavor line (Tr. 1657-58).

(f) *A&W Brands, Inc. ("A&W")*

97. A&W products are distributed primarily through franchised bottlers using direct-store-door delivery (Tr. 2066). Its market share in 1988 was approximately [] (CX 781-B).

98. Approximately 30% of A&W's products are sold through the Coca-Cola bottler system, and 30% is sold through the Pepsi bottler system (Tr. 2066-67).

99. A&W brands include Squirt, Vernor's and Rochester, a private label concentrate (Tr. 2076), and A&W root beer and cream soda (Tr. 2070).

(g) *Cadbury Schweppes*

100. Cadbury Schweppes' market share in 1988 was approximately [] (CX 781-B). Its products are delivered primarily through direct-store-door delivery (Tr. 1891-93).

101. Cadbury Schweppes soft drink brands include Schweppes, Canada Dry, Sunkist, Barrel Head Root Beer, Wink, Crush, Hires, Cactus Cooler, and Sundrop (Tr. 1886; CX 781-T).

102. Cadbury Schweppes products are distributed almost exclusively through franchised bottlers. Approximately 85% of brand Schweppes products and 30% of brand Canada Dry products are distributed through the Coke and Pepsi systems. The company's two largest bottlers are COBO and CCE (Tr. 1891).

(2) Regional Direct-Store-Door Delivery Firms

103. Firms which sell their carbonated soft drinks in regions of the United States primarily through direct-store-door delivery include Double Cola USA ("Double Cola") (Tr. 34-35); Barq's Inc. ("Barq's") (Tr. 417, 422-23); Monarch & Dad's (Tr. 1390-91); Carolina Beverage Company-Cheerwine (Tr. 384); Big Red (RX 462-D-E); A.J. Canfield (outside of Chicago, warehouse delivery and beer distributors are used) (Tr. 1786); and Frank's Beverages (Triple Cola brand is warehouse-delivered) (Tr. 3312-13, 3315).

(3) Shasta Beverages ("Shasta")

104. Shasta manufactures its own concentrate in Hayward, California which is then shipped to eleven bottling and canning plants located throughout the United States (Tr. 3166).

105. Shasta products are distributed exclusively through a warehouse delivery system (Tr. 3167, 3187).

(4) Local And Regional Warehouse-Delivered Brands

106. Firms which sell their carbonated soft drinks locally and regionally primarily through warehouse delivery systems include: Faygo (Tr. 3163, 3183); Vess (Tr. 1098, 3184); C&C Cola (Tr. 3319, 3589, 3998); Triple Cola (Tr. 3314-15, 3358).

(5) Private Label Products

107. Private label soft drinks include those manufactured by Safeway (Cragmont) (Tr. 3717, 3756-58) and Waldbaum's (Tr. 3996).

(6) Boutique Firms And Firms With Niche Products

108. So-called "boutique" firms and firms producing "niche" products include original New York Seltzer (Tr. 3440-41); Jolt (Tr. 3465); Soho (Tr. 4066); Snapple (Tr. 3527-28); and Orangina (Tr. 496, 506). These products appeal to a limited population. For example, Jolt contains twice the caffeine of Coca-Cola and Pepsi-Cola (Tr. 3465).

c. *Industry Perceptions Of Competition Between Branded, Private Label And Warehouse Firms And Beverages Other Than Carbonated Soft Drinks*

(1) Concentrate Companies

(a) *Coca-Cola*

109. An outline entitled "Competitive Characteristics" was prepared by Coca-Cola when it considered an acquisition entry into the mid-premium (warehouse) brands tier of the carbonated soft drink industry. The competitive characteristics of the three tiers of the carbonated soft drink industry were described as follows:

COMPETITIVE CHARACTERISTICS

- * NATIONAL BRANDS
 - * HEAVY ADVERTISING CONSUMER PROMOTION
 - * PRICE AT OR NEAR TOP OF SPECTRUM
 - * PRICE IS BASIS-POINT FOR OTHER BRANDS/SYSTEMS
 - * BROAD NATIONAL PENETRATION
 - * FRANCHISED, BOTTLER DISTRIBUTION
- * TARGETS
 - MID-PREMIUM BRANDS
 - * MODERATE, GENERALLY SEASONAL, ADVERTISING & CONSUMER PROMOTION
 - * PRICED BETWEEN NATIONAL & PRICE BRANDS
 - * WIDE PRODUCT LINE - I.E., MULTIPLE FLAVORS
 - * WAREHOUSE DISTRIBUTION, LIMITED AVAILABILITY
 - * CHARACTERIZED BY SHASTA/FAYGO
- * PRICE BRANDS

- * LITTLE OR NO ADVERTISING, CONSUMER PROMOTION
- * PRICE, WIDE PRODUCT (FLAVOR) SELECTION SOLE MARKETING EFFORT
- * GENERALLY RESTRICTED AVAILABILITY
- * CHARACTERIZED BY PRIVATE, CONTROLLED LABELS

(CX 267-E; RX 69-E). The "National Brands" were identified in this document as including only Coke, Pepsi, 7-Up, RC and Dr Pepper (CX 267-P; RX 69-F).

110. Mr. John D. Carew, Jr., vice president of planning for CCE, recommended in 1987 that Coca-Cola introduce a Fanta Cola so that it would have a brand which competed with the Shasta and Faygo brands. Because of the price difference between Shasta and Faygo colas and Coca-Cola classic, he was not concerned that the colas would take business from Coca-Cola except at the fringes (Tr. 243-45; CX 221-F).

111. A Coca-Cola document entitled "Cherry Coke Fountain Orientation" contains a competitive classification chart which appears to place brands and flavors that are closest to its "Coca-Cola" brand near it, and the brands and flavors that are unlike "Coca-Cola" away from it. Dr Pepper is next to cherry Coca-Cola, Pepsi and Coke -- with the "sugar cola," noting that they are "mainstream" and "major advertised brands." "Store brands," the "specialty" items and "sugar flavors" are at the other end of the scale:

COMPETITIVE CLASSIFICATION

C	P	C	D	7	S	G	M	M	S	R	B	G
o	e	h	r		p	i	o	e	u	o	l	r
k	p	e		U	r	n	u	l	n	o	a	a
e	s	r	P	p	i	g	n	l	k	t	c	p
.	i	r	e	.	t	e	t	o	i		k	e
.	.	y	p	.	e	r	a		s	B		.
.	.		p	.	.	i		Y	t	e	C	.
.	.	C	e	.	.	A	n	e	.	e	h	.
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Sugar colas
Major advertised brands
Mainstream

Sugar flavors
Store brands
Specialty

Despite the competitive spectrum which this document reveals, its author concluded that cherry Coca-Cola “has potential to attract users from all other soft drink segments” (CX 124-P).

112. Coca-Cola does not consider the prices of other beverages such as coffee, tea, milk, bottled water or powdered drinks when it establishes its concentrate and syrup prices (CX 751-F; CX 754-E-F).

113. Documents in the record establish that when it prices its concentrate and syrup, Coca-Cola looks mainly to the prices of branded products produced by PepsiCo, Dr Pepper, Seven Up, Crush, and Sunkist (CX 76; CX 79; CX 91; CX 92; CX 93; CX 98-C-E; CX 98-J-K; CX 100; CX 101-J-M; CX 102; CX 249-Z-1). However, there are areas of the country where regional brands, warehouse brands, and private label brands are important (Tr. 715-18, 1049-50, 2653-54). In fact, one Coca-Cola document notes that “control labels are a factor in every market” (CX 263-F).

114. Although Coca-Cola also markets Minute Maid juices, Hi-C fruit drinks, and Five Alive juices in its Foods Division, there is no communication or business relationship between the two groups (CX 749-C, D).

(b) *Cadbury Schweppes*

115. Stephen R. Wilson, former president of Cadbury Schweppes, testified that when its prices for carbonated soft drinks were established, the concentrate companies he was concerned about were those which sold branded soft drinks. As to other beverages, he testified:

You know, I think once in awhile, like every two or three years, we might ask ourselves, what is the cost of a soft drink versus or the price of a soft drink to the consumer as compared to a cup of coffee or a glass of juice. Really on a real tactical pricing basis we looked at other soft drink concentrates. That’s all that really mattered

(Tr. 1910-11).

(c) *Dr Pepper*

116. Dr Pepper does not monitor the prices of products other than carbonated soft drinks (Tr. 2469) and as to these products, it

compares its concentrate prices with those of other companies producing branded products, *i.e.*, Coca-Cola, PepsiCo, Seven Up, Royal Crown, Cadbury Schweppes and A&W (CX 391-99; CX 404-07; CX 410-12; CX 414-16; CX 418; CX 420; CX 429; CX 430).

(d) *PepsiCo*

117. When PepsiCo sets its concentrate prices, it looks primarily at the branded concentrate prices of Coca-Cola, Dr Pepper, Seven Up, A&W, and Cadbury Schweppes. It also monitors the retail prices of finished products produced by these companies (Tr. 1480-81; 1504-07).

118. Mr. Weatherup, PepsiCo's president, testified at the hearing that he monitored numerous private label companies (Tr. 1508-15). However, he also testified at his deposition:

"Question: Do you look at private label in local markets as much as you look at the national brands in local markets?

"Answer: Again, it would depend on what is taking place in that market.

"Question: Does PepsiCo normally look at the retail prices of the national brand products in local markets throughout the country?

"Answer: Yes.

"Question: What about private label, to what extent does it also, I'm trying to get a sense, do you also look at private label in every market or only where there is a particular need?

"Answer: In some markets you have huge private label businesses. In other markets you have small private label businesses. Where they are small you don't waste your time and energy looking at them unless some special circumstances arises; whereas you normally would be inclined to look at the national players consistently because they are always there.

"Question: What do you mean by small, what would be a small, what would be sort of small?

"Answer: Private label share?

"Question: Yes.

"Answer: Less than 4, 5 percent.

"Question: This would be for an individual private label company in its local market?

"Answer: Right"

(Tr. 1513-14).

(e) *Seven Up*

119. Seven Up does not track the prices of any beverage other than carbonated soft drinks (Tr. 2124) and when it was owned by Philip Morris, did not look at the prices of warehouse or private label companies in setting its concentrate prices (Tr. 292-93). Today, it looks at private label prices "generally," and not a great deal at Shasta's prices. It does not purchase Scantrak data for private label or warehouse brands (Tr. 2125, 2137).

(f) *Procter & Gamble - Crush*

120. When Procter & Gamble owned Crush, it did not look at the prices of private label or warehouse brands, including Shasta and Faygo, when setting the price at which the Crush concentrate would be sold (Tr. 382-83), and it did not get routine reports or do financial analyses of other beverages with respect to its sale of Crush concentrate. Although Procter & Gamble manufactured and distributed Folgers coffee and Citrus Hill Juice, Crush employees did not consult with Procter & Gamble people involved with Folgers or Citrus Hill when establishing the prices at which the Crush concentrate would be sold (Tr. 382-83).

(g) *Barq's*

121. Barq's can charge more for its branded concentrate than non-branded concentrate. John Koerner III, its president, explained:

Q. What enables Barq's to charge 92 cents per case and these other manufacturers to charge a dime a case?

A. Barq's sells at the retail level. A non-branded thing, there is no inducement for a consumer to buy it except price. People that choose Barq's generally choose to pay a higher price for a product that they feel comfortable with, that they can hold in their hand and won't feel like a jerk, that tastes good, that is properly marketed, that given (sic) them a thirst-quenching, ego-boosting experience.

(Tr. 450).

(2) *Bottlers*

122. At his 1986 deposition, Richard Hiller, then a Coca-Cola employee, testified that its company-owned bottlers did not price carbonated soft drinks in response to beverages such as coffee, tea, fruit juice or powdered drinks (CX 751-N-P).

123. Employees of other bottlers gave similar testimony (Tr. 593, 705-06, 759, 923, 926, 1023-24, 1061, 1105-06, 1130, 1186, 1246-47, 3233).

124. CCBME, when it was owned by Procter & Gamble, looked at private label prices only semi-annually, and even then, the private label pricing did not have the same importance as the prices of Coke, Pepsi, and RC (Tr. 385).

Whether or not the private label increased their volume in the short term wasn't too terribly important to us and if it continued over time, we began to feel we were losing share, it would become important, but if a private label were going to increase its volume because of a weekend sale and it didn't significantly cut into our volume, then that wasn't going to be a major point of concern.

(Tr. 387).

125. Bottlers consider and react mainly to prices of the Coke and Pepsi bottlers in their areas when setting the prices of their branded carbonated soft drinks (Tr. 704, 758, 856, 1022, 1104-05, 1186, 1246).

126. Bottlers do not consider the prices of non-carbonated soft drink beverages, or of private label and warehouse-delivered carbonated soft drinks, when setting the prices of their branded carbonated soft drinks (Tr. 593, 705-06, 759, 923, 926, 1023-24, 1061, 1105-06, 1130, 1186, 1246-47).

127. When it owned bottlers, Dr Pepper did not regularly monitor private label, and noted private label prices only if they dropped excessively and remained low for a couple of months (Tr. 1311-12, 1316-17). The prices of private label pepper-type drinks do not affect the prices of Dr Pepper (Tr. 1317).

128. Bart Brodtkin, who distributes some carbonated soft drinks through his Avalon warehouse and branded carbonated soft drinks through direct-store-door delivery in Southern California, testified:

Q. Now, what companies or what products do you look at in helping you to determine what your own prices should be for carbonated soft drink products?

A. For the majority of my trademarks, which are carbonated products, I really look at only two companies to determine my strategy, that being the Pepsi-Cola bottler and the Coca-Cola bottler.

Q. Do you look at beverages other than carbonated soft drink products to determine what your pricing strategy or prices should be?

A. As pertains to carbonated products, I do not.

Q. And as pertains to carbonated soft drink products, do you look at private label products to determine what your prices or pricing strategy should be?

A. I do not.

Q. Are you familiar with the company Shasta?

A. Yes.

Q. Is that a warehouse-delivered product?

A. Yes.

Q. Do you look at Shasta to determine what your pricing, prices or pricing strategy should be?

A. I do not.

Q. To what extent do you look at the prices of other beverages and for what purpose?

A. All beverages obviously to some extent compete against each other in terms of the consumer's purchase, but those products outside of the products of the Coca-Cola bottler and of the Pepsi-Cola bottler tend to be an insignificant impact as pertains to pricing of the majority of our products in our portfolio.

(Tr. 856-59).

129. Mr. Trebilcock, president of Mid Continent Bottlers, Inc., and Mr. Stanford Frank, president of Frank's Beverage, echoed Mr. Brodtkin's testimony (Tr. 1103-06, 3341-42).

*d. The Prices Of Branded, Warehouse-Delivered,
And Private Label Carbonated Soft Drinks*

130. Carbonated soft drinks are priced according to their method of distribution. Most expensive are the direct-store-door delivered brands. Warehouse-delivered brands are less expensive and private label products are the cheapest (Tr. 92-93, 831-32, 1107, 2167; CX 267-E).

131. Witnesses familiar with the industry testified that the price gap between direct-store-door delivered brands and private label brands is generally 10 to 40% (Tr. 831-32, 1165 (35%), 89, 694 (.99 - 1.09 for Pepsi two liter and .39 to .69-.79 for store brand), 1021 (branded 6-pack on promotion: 1.39 to 1.49 and 2-liter: .99; private label everyday --cheaper when on promotion --: 6-pack is .99 and 2-liter is .69), 3356 (2-liter Coke: 1.39 to 1.49, on promotion: .49 to .99, Triple lists at .79 and is promoted at .59 to .69). 924 (branded 2 liter is .99; private label 2-liter is .69 to .89), 610 (promoted 2 liter is .99 to 1.19 and promoted six pack is 1.29 to 1.39; Shasta 2 liter would be 20 to 30 cents lower; 6-pack would be about 40 cents lower), 590, 4002 (even if Coke is on promotion and private label is not), 1317 (10 to 20 cents per unit for flavors).

132. In 1984 Coca-Cola found that, on average, private and control labels pegged their net prices to those of the national brands

an average of 29% lower, while Shasta/Faygo net prices were about 20% below the national brands (CX 267-A).

133. For the period 1981 to 1983, Coca-Cola measured differences in the price between national brands (defined as Coke, Pepsi, 7-Up, RC and Dr Pepper) with Shasta/Faygo and private/control for 6 pack cans and 2-liter sizes.

Price Gap - 1981 to 1983

<u>6-pack</u>	<u>1981</u>	<u>Gap</u>	<u>1982</u>	<u>Gap</u>	<u>1983</u>	<u>Gap</u>
	<u>Price</u>		<u>Price</u>		<u>Price</u>	
National	1.59		1.59		1.57	
Shasta	1.29	.30	1.23	.35	1.19	.38
Private Label	1.10	.49	1.05	.53	1.03	.54

<u>2-liter</u>	<u>1981</u>	<u>Gap</u>	<u>1982</u>	<u>Gap</u>	<u>1983</u>	<u>Gap</u>
	<u>Price</u>		<u>Price</u>		<u>Price</u>	
National	1.08		1.08		1.04	
Shasta	0.90	.18	0.87	.21	0.86	.18
Private Label	0.84	.24	0.78	.30	0.74	.30

(Source: CX 267-P).

134. For the period 1981 to 1983, the percentage in the gap variance, viewed as a discount from the national brands, was as follows:

Price Gap as a Percentage: 1981-1983

<u>6-pack</u>	<u>1981</u>	<u>1982</u>	<u>1983</u>
	<u>Gap%</u>	<u>Gap%</u>	<u>Gap%</u>
National Brands	--	--	--
Shasta/Faygo	19%	22%	24%
Private Label	31%	34%	34%

<u>2-liter</u>	<u>1981</u>	<u>1982</u>	<u>1983</u>
	<u>Gap%</u>	<u>Gap%</u>	<u>Gap%</u>
National Brands	--	--	--
Shasta/Faygo	17%	19%	17%
Private Label	22%	28%	29%

(Source: CX 267-P).

135. An analysis of the average case price differences for several bottler groups was performed in 1988, comparing Fanta, Shasta, Faygo, controlled label and Coca-Cola classic in 34 geographic areas (CX 263-S-Y). The average case price difference between Classic and the highest priced control label products was []. Branded flavor lines were priced above control labels at an average price difference of [] a case (CX 263-F).

136. If private label carbonated soft drinks are promoted at a substantial discount from branded soft drinks, they begin to have an effect on the latter's pricing. When a "monster promotion" (Tr. 3588) was held by Kroger in Cincinnati, a Pepsi bottler in that city testified that when Kroger priced its 2-liter Big K brand at 39 cents:

they jumped to about a 15, 17 share for a period of time. They ran that promotion for almost a year.

Q. So that's a jump of about 10 Nielsen share points?

A. In that store.

(Tr. 3229).

137. Waldbaum's, a grocery chain located in metropolitan New York (Tr. 3995), prices private label carbonated soft drinks during a hot promotion at a 40% discount from branded soft drinks (Tr. 4052-54).

138. Faygo, a warehouse-delivered brand, has been given away on occasion (Tr. 638-39), and aggressive deals such as this by warehouse and private label brand do create problems for Coca-Cola, as Mr. Edward Hiller, its senior vice president for development, testified:

Q. Do you worry about Royal Crown?

A. Yes, we do.

Q. Do you worry about Shasta?

A. Yes, we do.

Q. Do you put Shasta in the same category as Pepsi and Royal Crown?

A. Some of that mid-pricing area, regional brands, private label, Faygo, you know, people like that, they maneuver around in that mid-price area. And we don't like to get too far afield of them, either. And they give us problems from time to time with dealing and with our capacity problems and that sort of thing. And from time to time they can get very aggressive with deals, so we have to be mindful of that.

(CX 751-L-M).

139. Canfield, which distributes branded carbonated soft drinks in Chicago, finds that it competes on occasion with private label products, but not on a long-term basis (Tr. 1799).

140. If branded products were not promoted for a period of six months, industry witnesses agreed that a shift to private label products would occur (Tr. 1133, 1255, 2301, 2399-2400, 3549-50, 3719, 3729).

141. Mr. Edwin Epstein, Coca-Cola's retailing expert, testified:

Q. In your opinion, Mr. Epstein, do warehouse-delivered soft drink brands constrain the prices of store-door-delivered brands, soft drink brands?

A. Constrain? I would say so, yes.

(Tr. 3611).

142. On the other hand:

Q. You testified in response to a question by counsel at the very end of the direct examination that you believe that private label constrained the prices of branded carbonated soft drink products. Do you recall that subject being discussed?

A. Yes.

(Tr. 3636).

Q. And my question is whether you gave the following testimony on March 12th, 1990:

Question: What is the cross-price elasticity of demand between warehouse-delivered soft drink products and national brands of soft drink products?

Answer: You will have to ask the research director that one. That's a little bit out of my expertise.

Question: As you have used the term "competition" you don't really know what the cross-price elasticity of demand is between warehouse-delivered soft drinks and national brands?

Answer: Whether it is one percent-one percent or one percent-ten percent switch, I have no way of knowing.

Q. Was that your testimony, Mr. Epstein?

A. Yes.

(Tr. 3642-43).

*e. Differences Between Branded, Private Label, And
Warehouse-Delivered Carbonated Soft Drinks*

143. Consumers believe that there is a quality difference between national brand and private label carbonated soft drinks and because of that belief, branded soft drinks have a much greater consumer appeal than do private label soft drinks (Tr. 3633-36). A PepsiCo study showed that:

The people who bought private label tended to circulate in that universe and not trade up to branded products and the people who bought branded soft drinks tended not to move down to private label. They just circulated in those two universes and didn't cross over much, which is one reason I think why private label has stayed relatively constant. It hasn't grown.

Thus, brand switching by consumers is generally limited to branded products (Tr. 1911-12).

144. Mr. Tom Tyler, president of Tyler Beverages, testified about his indifference to the pricing of private label and warehouse brands:

Q. Do you look at the sales and prices of Shasta and Faygo?

A. No.

Q. Why not?

A. I don't consider it a direct competitor.

Q. Why is it not a direct competitor?

A. Because it is my belief that when the shopper goes to the market that they have a preset idea in their mind, the woman shopper or the male shopper, that they have it preset that they are going to buy a major brand, and they may buy a private label brand, but I don't think they can substitute a private label brand for a major brand soft drink.

Q. Do you consider Shasta and Faygo to be in the same grouping as private labels?

A. I consider it a private label brand.

(Tr. 1185-87).

145. The perceived differences in quality apparently account for the fact that branded carbonated soft drinks have brand loyalty (Tr. 205). This phenomenon has decreased recently, and consumers readily switch between national brands if prices differ significantly; however, there is little evidence of such switching between branded and private label products (Tr. 1021-22, 1911-12, 1940-41), at least until the price differences are very large.

146. Since consumers perceive differences between branded and private label soft drinks, retailers offer both (Tr. 3758, 4019), although private label products may be sold in a different area of the supermarket than branded ones (Tr. 858-59, 3187-89).

147. In some cases, concentrate firms that have flavor restrictions are unconcerned about warehouse delivered or private label products produced by their bottlers (Tr. 1857-58).

f. The Pricing of Carbonated Soft Drinks

(1) The Price Elasticity of Demand

148. Dr. Hilke, complaint counsel's expert economist, testified that the test for determining the correct product market is whether a collusive arrangement could profitably raise prices by a small but significant amount for an extended period of time (Justice Department Merger Guidelines ("DOJ Guidelines"), Sections 2.0 and 2.11) (Tr. 2529-48).

149. The ideal price evidence in a product market test is cross price elasticity (Tr. 2548) and the general approach in this test is to determine whether a 5% increase in the price of the product sold by the merging parties may be constrained by other products. If they are, the other products belong in the product market along with the products of merging firms (DOJ Guidelines, Section 2.11).

150. Because of the concept of derived demand, Dr. Hilke testified that a 5% increase in the price of concentrate, which is an input product for carbonated soft drinks, if fully passed on, translates to an increase of 0.5% at the carbonated soft drink level:

Q. Are you familiar with the concept of derived demand?

A. Yes. Derived demand refers to the notion that in any particular industry, its products may not be directly sold to consumers, but may rather pass through another stage of processing before they actually get to the consumer level, so in the instance of soft drink concentrates, those concentrates go through additional stages of processing and distribution, marketing and so forth before they get to consumers. So the demand for concentrate is essentially derived from the consumer demand of carbonated soft drinks.

Q. How would you apply the 5 percent Guidelines test in the carbonated soft drink industry in which the proposed acquisition is at the concentrate level but that consumers are purchasing finished product at the carbonated soft drink level?

A. Well, to undertake that type of exercise, one would have to make an inquiry as to the relationship between the price of concentrate and the price that consumers

pay for the downstream product. The evidence that I have seen to date suggests that the price of the concentrate constitutes roughly 10 percent of the ultimate consumer price of carbonated soft drinks, so, therefore, to translate a 5 percent test at the concentrate level into a price test you would be looking at a half of a percent price change in the ultimate consumer product, assuming that the entire concentrate price were passed on to consumers.

Q. If the Guidelines product market test were being applied at the carbonated soft drink level, are you saying that a half of 1 percent price test would be the test rather than a 5 percent test?

A. That would be the translation between the two. If you were doing a case at a different level, there would be basically a different industry which you would be looking at.

(Tr. 2545-46).

Dr. Lynk agreed with Dr. Hilke:

Q. Do you have any information as to what a 5 percent price increase at the concentrate level would translate into at the consumer level?

A. Only the rough estimates that I had heard earlier. To the extent that the net price of concentrate constitutes something on the order of 10 percent or so of what's been referred to as the floor cost of carbonated soft drinks, just working through the simple numbers, anyway, 5 percent increase there at the concentrate level would be something along the order of a half a percentage point difference at the finished product level.

(Tr. 2740).

(2) Price Interaction Between Direct-Store-Door-Delivered
Carbonated Soft Drinks And Private Label Or
Warehouse-Delivered Soft Drinks

151. There is little price interaction between direct-store-door-delivered carbonated soft drinks and private label or warehouse-delivered soft drinks.

152. Mr. Michael Skinner of Shasta testified that increasing the price difference between his warehouse-delivered brands and direct-store-door delivered brands was not profitable (Tr. 3198-3201), that he saw little response by Pepsi or Coca-Cola to Shasta's prices (Tr. 3201), and that he experiences price pressure from private label brands only in certain areas of the country.

153. The president of Double-Cola believes that private label products compete primarily with warehouse brands (Tr. 93).

154. When Procter & Gamble owned Coke-Mideast Bottling Company, it did an elasticity analysis, comparing warehouse-delivered brands and Coca-Cola products. It found that an acceptable spread between Coke products and Big K's private label products was between 80 and 100%:

[W]e had found that there was a spread, 2-liter was a sensitive size to this and there was a spread between Coca-Cola 2-liter and, say, Big K 2-liter and that we shouldn't get too far above. If we got too far above that, the consumer's normal preference for Coca-Cola would begin to diminish.

If you take it to the ridiculous level and say if we were selling a bottle of 2-liter for \$5 and Big K was selling it for 50 cents, consumers would tend to opt for the 50 cents even though they may have preferred Coke.

On the other hand, if the Coke was for sale for 99 cents and Big K was for sale for 95 cents, Big K didn't sell almost at all because the spread was so small, consumers would virtually all opt for Coca-Cola.

(Tr. 386-87).

155. Mr. Edwin Epstein, Coca-Cola's expert on retailing, testified that when he was with Hills Foods, lowering the price of its private label carbonated soft drinks did not generate a profit (Tr. 3636-38) and he recalled that Kroger's promotional pricing on its private label soft drinks at half their normal price was not profitable (Tr. 3638-42).

156. According to Mr. Aaron Malinsky, formerly of Waldbaum's, the retail price of Coca-Cola could be increased successfully by 10% without being constrained by private label brands (Tr. 4060-63) and some bottlers suggested that a 10% increase in the price of their brands of carbonated soft drinks would be profitable if the Coke, Pepsi, and third bottler all raised their prices, and nothing else changed (Tr. 708, 759, 860, 927, 1025, 1108, 1803, 1318). Other bottlers concluded that the prices of all of the national branded carbonated soft drinks could increase by as much as 20 to 30% before sales of private label, warehouse-delivered, or other beverages might make the increase unprofitable (Tr. 708, 759, 860, 1071-72, 1108, 1318, 1803-04).

157. Bottlers who market both direct-store-door delivered and warehouse-delivered carbonated soft drinks experience limited price interaction between these products (Tr. 819-20, 860, 1100, 1107-08, 3345, 3347, 1801-04).

158. In the areas where carbonated soft drink bottlers have been convicted of fixing prices, warehouse-delivered and private label firms which, as far as this record shows, were not involved in the conspiracies, did not expand during the period when the conspiracies were in effect (Tr. 3181-82, 3756-57). The Nielsen share of all private label brands in the Baltimore-Washington area for the period 1981-1985 dropped from 13.7 to 9.7, a decrease of 29% (RX 91-A (R)). The price fixing conviction involving General Cinema Beverages, a Pepsi bottler, was for the period October 1984 through July 1985 (CX 799-A-G).

(3) Boutique Soft Drink Firms

159. So-called “boutique” firms such as Jolt, Original New York Seltzer, Soho, Sundance and Snapple have had no effect on the prices of branded concentrate or branded carbonated soft drinks (Tr. 99, 169, 320, 408, 679-80, 685, 768, 878, 928, 1111-12, 1244, 1325, 3993).

(4) Other Beverages

160. Factors that affect the price of beer, milk, and juices do not affect the price of carbonated soft drinks and factors that affect the price of carbonated soft drinks do not affect the prices of other beverages (Tr. 4216-17). The retail prices of different beverages can move in different directions at the same time (Tr. 2561-71, 4057, 4216; 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).

g. Expert Testimony

161. After reviewing the record and considering the Justice Department’s Merger Guidelines (“DOJ Guidelines”), Dr. Hilke testified that the relevant product market in this case is national branded, direct-store-door delivered carbonated soft drinks, produced by so-called “tier one” firms. The industry also includes two other levels of competition: “tier two,” firms, which sell warehouse brands which are not private label, and “tier three” firms which sell private label soft drinks. A separate category is so-called “niche products” which appeal to a limited number of consumers (Tr. 2549-51).

162. Dr. Hilke's conclusion is supported by:

- a. Mr. Carew's testimony and that of other industry members that warehouse and private label brands have little competitive interaction with or impact on their business.
- b. Testimony that tier one firms could probably profitably raise prices.
- c. The limited access of private label firms to vending machines and fountains.
- d. The limited access to chains by private label firms which are tied to particular chain warehouse brands and are not direct-store-door delivered.
- e. The significant price gap between tier one and private label and warehouse soft drinks which suggests that a five percent price increase in tier one brands could not be undermined or defeated by firms in the other tiers (Tr. 2552-57).

I. The Relevant Geographic Market

1. Concentrate

163. The parties agree that one relevant geographic market is the nation taken as a whole (CPF 1320; RPF 184) but Coca-Cola disagrees with complaint counsel's argument that local metropolitan areas that are aligned with advertising areas of dominant influence ("ADIs") and supermarket buying areas are also relevant geographic markets (CPF 1327).

164. All of the manufacturers of concentrate for nationally advertised brands sell it nationwide (Tr. 2627-28; RX 43-D; RX 103-C). Coca-Cola, PepsiCo, Seven Up, Dr Pepper, Royal Crown, A&W, Barq's and Cadbury Schweppes, (CX 781-B; RX 86-A), sell it to their bottlers at a uniform price including freight (Tr. 480-81, 1302-03, 1472-73, 1562-63, 1929, 2088, 3051; RX 630-Z-91-93; RX 638-Z-55-57; RX 643-Z-13, Z-16).

165. No legal or regulatory barriers prohibit concentrate from being shipped nationwide, and transportation costs as a percentage of value of concentrate sales are less than one percent (Tr. 2628, 2753). Thus, concentrate is, with some exceptions, generally shipped nationwide from a single plant (Tr. 22, 123, 393-94, 480, 1562, 1929,

2015, 2088, 2138-39, 2199-2200, 3051, 3162-66, 3375-76; CX 176-Y; RX 54-D).

166. While manufacturers prohibit transshipping of concentrate, bottlers with multiple plants transfer concentrate between plants (CX 175-A). Furthermore, Coca-Cola sells its fountain syrup, which accounts for [] of its sales, through wholesalers who do not have exclusive territories (Tr. 3079-81; RX 644-M-N; CX 781-C). Also, Dr Pepper does not franchise its fountain sales and sells syrup wherever it pleases (Tr. 2451).

2. The Finished Product

167. Concentrate firms give marketing support, which may be referred to as investment spending, promotional support, discretionary support, marketing funds, or cooperation funds, to bottlers (Tr. 78-79, 104, 840, 1229, 2085, 2129, 2346, 2456; CX 749-F-G; CX 752-G, H; 776-Z-7).

168. Concentrate firms often make marketing support available in local areas (Tr. 467, 1093, 2079, 2129-30, 2455, 2477-79; CX 22-Z-112-114, Z-128; CX 749-F-G; CX 752-G-H; CX 776-G; CX 776-V; CX 776-Z-1; CX 776-Z-3; CX 776-Z-7-Z-8, Z-10).

169. Concentrate firms provide different levels of support by area on a per case basis over time.

a. Coca-Cola regularly provides support for bottlers through advertising cooperation agreements in which it reimburses or grants credits to bottlers that advertise and promote its brands, and it has procedures in place to provide this support for individual areas (CX 41-A-1; CX 42-A-K; CX 45-A-C). Coca-Cola supports bottlers at a higher rate per gallon in territories where the likelihood of return is greatest. Factors that influence the greater likelihood of a return on the investment dollars spent include bottler abilities; the economic environment in which the funds will be spent; and the number and strength of competitors (CX 753-G, H).

b. A&W negotiates marketing support with each bottler, and its level of support varies from region to region and bottler to bottler. The variation of support on a per case basis varied as much as \$0.14 between Dallas and Houston in 1986. During this time, A&W sold its concentrate at [] cents per case equivalent (Source: CX 781-U).

c. Dr Pepper determines the level of its promotional support to bottlers market by market (Tr. 2456, 2478-79) and it normally provided more funds on a per case basis to bottlers in more highly developed markets, unless it was trying to develop its brand in a less developed area (Tr. 1300, 1307-08).

d. PepsiCo's marketing programs change from time to time and from bottler to bottler (RX 630, pp. 122-123), and a study it conducted with respect to variations in funding support to bottlers found a range of difference of 3 cents per case over a multi-year period (Tr. 1939-40).

e. Seven Up Company gives bottlers brand development funds based on opportunities in the market and the potential for growing the brand. Funds allocated to its bottlers may be different from one market to another and from one bottler to another (Tr. 2129-30). The variance in funding support ranges from 8 to 10 cents per case from the highest to the lowest (Tr. 2131). Its average per case concentrate price in 1988 was [] per case (Source: CX 781).

f. Cadbury Schweppes bottlers receive different funding on a per case basis in a given year (Tr. 1939).

170. One reason for the variation in marketing support for bottlers may be that some do not take advantage of, or fully participate in, programs which offer cooperative advertising and require the recipients to contribute funds to the program (Tr. 1301, 2477).

171. Programs which are offered on a non-cooperative basis may take into account the difference in cost for the services which are rendered by the bottler (Tr. 2130, 2478; CX 753-G-H; RX 643-Z-134), including reducing wholesale prices, introducing a new package, converting fountain accounts equipment, or buying a feature ad or shelf space from a retailer, etc. (Tr. 3060-61, 3271; RX 630-Z-95; RX 645-Z-45-51).

172. Bottlers that have operations throughout the United States allocate the funds received from parent companies to different areas depending on local competitive conditions (Tr. 1443-44, 2351-52) and local bottlers set their prices after considering competitive conditions in their area (Tr. 1295-96, 1442-43, 1497, 3968; CX 690-B-H). Consequently, bottlers' wholesale prices vary in different areas of the country (source: CX 263-S-Y), as do retail prices (Tr. 950, 1295-96, 1496-97, 4020-22; CX 777-A-K).

173. Preferences for particular carbonated soft drinks vary from region to region. For example Dr Pepper's "heartland" is the

Southwest (Tr. 1307-08, 2160); cream soda is more popular in the northeast than in other sections of the country (Tr. 2067). Market shares for different flavors and different types of soda and different packaging differ by area (RX 101-I; CX 24-Z-6, Z-8; CX 466-A).

174. Concentrate firms with small national market shares have high market shares in local areas (Tr. 49, 51-52, 6321, 1098, 1374, 1787, 1795-96, 1953-54, 3361).

3. Expert Testimony

175. Dr. Hilke testified that industrial organization standards and the DOJ Guidelines recognize that local relevant geographic markets may exist in the same industry along with a national relevant geographic market (Tr. 2576-77) and he found that in this case there are a number of documents which reveal:

possibilities and incentives for a potential collusive group to charge . . . different prices within different areas of the United States even within the context of a national geographic market.

(Tr. 2578).

176. The evidence which led him to assume the existence of local markets includes:

a. Legal restrictions imposed by tier 1 firms through exclusive franchise agreements which prevent arbitrage from one territory to another (Tr. 2579).

b. Area specific discounts offered by concentrate firms that make arbitrage of discounts difficult (Tr. 2580).

c. Testimony of Mr. Turner, chairman of Dr Pepper Bottling Co. of Texas, disclosing that the level of promotions provided by Dr Pepper differed substantially in different areas of the country (Tr. 2582-83).

d. Differences in bottler profitability (Tr. 2583).

e. Different promotional programs offered by concentrate companies in different areas on a per case basis (Tr. 2583-84).

177. Dr. Hilke concluded that:

the evidence I have seen is consistent with the possibility of having local markets [which may be] an important adjustment factor in some sense for a national

collusive group because the structure of the concentrate market is not the same in all areas

(Tr. 2587).

178. The boundaries of the local relevant geographic markets, according to Dr. Hilke, are co-extensive with ADIs, or areas served by a common set of television stations.

179. Dr. Hilke's conclusion is not supported by convincing record evidence; in fact, he stated only that the evidence "suggests" that the areas he chose are "potentially separable" geographic markets (Tr. 2581).

180. Dr. Lynk agreed that the market for finished beverages might be regional or even local (Tr. 2755-57) but concluded that variations in concentrate companies' participation in marketing aids at the wholesale level do not suggest that there are local markets for concentrate (Tr. 2578-79, 2582, 2631, 2755-56).

181. Applying the Elzinga-Hogarty test (*see Elzinga-Hogarty, The Problem of Geographic Market Delineation in AntiMerger Suits*, 18 Antitrust Bull. 45 (1973)), which looks at the proportion of consumption of a product within an area that is made up of production that originated in that area and which also determines the amount of product produced in the area that is sent outside the area, Dr. Lynk concluded that the relevant geographic market for concentrate is nationwide. In his deposition in this case, Dr. Hilke agreed that an Elzinga-Hogarty analysis would lead to the conclusion that the appropriate geographic market for concentrate was national (Tr. 2758-59).

182. Assuming that Coca-Cola decided to raise its concentrate prices in San Antonio, Dr. Lynk testified that:

The Coca-Cola bottler, if we were defining [sic] it simply to that, I assume would be unable to get any concentrate with the same flavors certainly that it was getting from Coca-Cola. . . . The other bottlers, of course, serving San Antonio would be unimplicated by any of those Coca-Cola contracts and they, of course, would have the opportunity to search for other sources of concentrate. And those sources, of course, are beyond the perimeter of San Antonio

(Tr. 2760).

183. Although concentrate can be used only to produce finished carbonated soft drinks, the area of concern raised by the proposed acquisition is the increased concentration at the concentrate, not the

bottling, level, and analysis of the relevant geographic market must take this into account.

184. Doing so, I must agree with Dr. Lynk that the relevant geographic market is nationwide, for this is the area to which bottlers may turn for their concentrate purchases.

185. Thus, if some concentrate firms raised prices in local geographic areas, other firms could not be prevented from shipping concentrate or finished product into those areas. For example, Iowa Beverage, a contract packer for Canfield, ships as far as 500 miles and Canfield itself has shipped finished product from Chicago nationwide (Tr. 1804-05, 1824, 1826-27, 1849).

186. Even if I were to accept the theory that local geographic markets for concentrate exist, the record made by complaint counsel does not support the conclusion that the areas chosen by them (local metropolitan areas that are aligned with ADIs and supermarket buying areas) are, in fact, local markets, for there is no evidence that the boundaries of the ADIs (or buying areas) coincide with areas where concentrate prices are uniform, or that there are significant concentrate price differences between each of the ADIs or buying areas. Furthermore, complaint counsel have not done an Elzinga-Hogarty analysis of the concentrate shipping patterns within the ADIs or buying areas. Therefore, I have adopted no proposed findings regarding concentration in local geographic areas.

J. Industry Structure, Performance And Concentration

1. Competition Between Coca-Cola And Dr Pepper

187. Many industry witnesses testified that Dr Pepper is a unique carbonated soft drink (Tr. 166, 992, 1214, 3353, 1925, 2029-39, 2200, 2229-30, 2241, 2439-40, 2494, 3073-74, 3117, 3244, 3268), that it is not a cola (Tr. 255, 721, 794, 1054, 1165, 1353, 1705, 2029-30, 2200, 2250, 2299, 2494, 3073, 3117), that it has a narrow, but loyal, customer base (Tr. 3074, 3244; RX 631-Z-101; RX 640-J-K, Z-68) and that it is a niche product (Tr. 992, 1926, 2029-30, 2251, 3117, 3244; RX-643-Z-44).

188. Analysis of list concentrate prices shows that those for Dr Pepper were higher than Coca-Cola's and Pepsi Cola's and, on occasion, were increased by amounts greater than 5 percent more than concentrate price increases by Coca-Cola and PepsiCo (RX 150-N).

189. An analysis by Coca-Cola of Dr Pepper's business strategy reported: [] (RX 115-Z-3; *see also* RX 150-N).

190. Mr. True Knowles, executive vice president of Dr Pepper, testified that its soft drinks are sold at higher retail prices than Coca-Cola (Tr. 2495-96). On the other hand, Mr. Trebilcock, a Dr Pepper bottler, claimed that he must offer Dr Pepper at the same promoted prices as his other brands (Tr. 1166) and Mr. Turner, a Dr Pepper bottler, said that Dr Pepper is competitively priced at or below Coke and Pepsi in Dallas and Houston (Tr. 1310-11).

191. Mr. Clements, CEO of Dr Pepper, testified that Coca-Cola was not a direct competitor; instead, the acquisition of Dr Pepper would amount to "an extension and broadening of Coca-Cola's base" (Tr. 2258, 2263); however, Coca-Cola's answer admitted that it competed with Dr Pepper (Ans. paragraph 9) and Mr. Clements testified in a prior proceeding that Coca-Cola and Dr Pepper were competitors:

Q. Did you in 1975 give the following testimony in connection with the bottler cases before the Federal Trade Commission?

... "Question: Just while it is fresh in His Honor's mind, because he is talking about competitive products, does Dr Pepper compete with Coca-Cola?

"Answer: You bet.

"Question: Compete with Pepsi-Cola?

"Answer: Yes, Sir.

"Question: Compete with Royal Crown?

"Answer: Yes, Sir."

[Q.] You did give that testimony?

A. Yes, and I went on to say it competes with everything.

Q. I understand, but you did give that testimony?

A. Yes, and I still say that.

(Tr. 2263-64).

192. Coca-Cola documents also support the conclusion that it competes with Dr Pepper:

a. In Coca-Cola's 1985 annual business plan, its competition was described as:

Pepsi USA
Philip Morris
Procter & Gamble
Dr Pepper
Royal Crown

(CX 16-Z-22).

b. In Coca-Cola's 1988 operational business plan, the only carbonated soft drink firms referred to were Pepsi-Cola USA, Seven Up Company, Royal Crown Company, Dr Pepper Company, Procter & Gamble and R.J. Reynolds (CX 21-A-Z-49).

c. In a 1986 document, Coca-Cola listed four brands, including Dr Pepper, that it believed were capable of growing (CX 58-I), and in a 1983 "strategic analysis," observed that pricing pressure in the United States cola market would require increased market funding by Dr Pepper (CX 237-K).

d. In a January, 1988, memo regarding an anticipated fountain price increase, questions were raised only about the reactions of PepsiCo and Dr Pepper (CX 107-A-B).

193. Consumers may choose between Dr Pepper and Coca-Cola in 23% of the fountain outlets which carry both products (CX 79-I) and Coca-Cola's actions regarding Dr Pepper sales in fountains carrying Coca-Cola reveal that they do compete, for Coca-Cola has given fountains incentives to deny Dr Pepper access because:

our standard lease provides the dealer with the option of dispensing one non-cola product from competitive soft drink companies.
Dr Pepper has used this to their advantage in gaining outlet availability without incurring capital costs. As a result, our revenue is negatively impacted at the outlet level.

(Coca-Cola's "Attack Business Plan," CX 137-F; *see also* CX 137-I, M, P).

194. Coca-Cola views Dr Pepper as a significant competitor in the Coca-Cola "heartland," the South and Southwest, (CX 28-Z-95-96). For example, Coca-Cola's consumer research department situation review stated:

a. "Dr Pepper is a strong competitor in Coke but not Pepsi heartland" (CX 28-Z-99); and

b. "Dr Pepper is a greater threat in Coke heartland than Pepsi heartland" (CX 28-D).

195. Jim Turner, the nation's largest independent Dr Pepper bottler, doing business in Dallas, Fort Worth, Waco and Houston, Texas, testified:

Q. With respect to Dallas-Fort Worth, can you compare the level of or intensity of competition between RC on the one hand and Coke and Pepsi versus, on the other hand, Dr Pepper and Coke and Pepsi?

A. The -- I would say that the level of competition is greater between Dr Pepper and Coke and Pepsi than it is [between] Royal Crown and [Coke and Pepsi in] that market.

Q. Why do you have that opinion?

A. Because Royal Crown is such a low share brand and Dr Pepper is a higher share brand and we're all three competing for a lot of the same consumers.

Q. . . . How are your prices determined?

A. To a large degree on what Coca-Cola pricing is and to a large degree on what we think the pricing has to be to drive the kind of sales volume that we need to have.

Q. What brands or flavors or companies' products do you look at to determine or help you determine what your own product prices should be?

A. Coca-Cola and Pepsi-Cola, for Dr Pepper

(Tr. 1308-11).

196. Carlos Ippolito, a Dr Pepper distributor in Galveston, Texas, and Tom Tyler, president of Tyler Beverages in Tyler, Texas, agreed that Coca-Cola and Dr Pepper are competitors in their areas (Tr. 1193, 3111-12).

197. Over the years, Coca-Cola has, unsuccessfully, attempted to introduce a pepper flavor soft drink to compete with Dr Pepper (Tr. 217-18, 2202, 2258, 3244; CX 368-E). It also introduced cherry Coca-Cola (CX 219-D), which Dr Pepper viewed as a competitive threat:

Coca-Cola is using the introduction of cherry Coke to compete directly against Dr Pepper in the fountain segment of the soft drink industry

(CX 544-A-B) (*see also* CX 524-A, C, D, H).

198. Other industry members believed that cherry Coca-Cola might affect Dr Pepper (CX 720-C; CX 722-A; 778-A-F, G-P).

199. Coca-Cola's introduction of diet Coke in July 1982 (Tr.211), according to a Dr Pepper memorandum "can hit Dr Pepper in a number of vulnerable areas" (CX 389-A), and, in fact, Sugar Free Dr Pepper was affected by Diet Coke (CX 353-M, N).

200. Coca-Cola and Dr Pepper monitor each other's activities (CX 16-Z-22; CX 23-F; CX 58-I; CX 202-A-12; CX 131-B-D; CX 336-A; CX 345-P-Q; CX 364-J-N; CX 372-Q, S; CX 384-G-H; CX 464-A-G; CX 458-A-B), and Dr Pepper's pricing strategy "is to be competitive with Coca-Cola" (Mr. True Knowles, chief operating

officer of Dr Pepper, speaking at a 1984 meeting of its marketing committee (CX 450-Z-43)).

201. Competitive interaction analyses, which show the extent to which households switch between brands of carbonated soft drinks, show that Coca-Cola interacts with Dr Pepper (CX 274-E, "O," U, Y, Z-7, Z-23).

202. Finally, Mr. John Carew, vice president of planning for Coca-Cola Enterprises ("CCE"), testified in a December 8, 1989 deposition that he called Dr Pepper "parasitic" in a memorandum he wrote when he was with Coca-Cola USA because it took business away from Coca-Cola (Tr. 241-43).

2. Coca-Cola's And PepsiCo's Bottler Operations

203. Over half of Coca-Cola's sales are generated by bottlers in which it has an ownership interest (Tr. 2339). Some of the bottlers in which respondent has an ownership interest are:

a. The Coca-Cola Bottling Company of New York ("Coke - New York"), in which respondent has a 53% ownership interest (Tr. 3261). Five of the six Coke - New York directors are employed directly by respondent; the sixth director is the president and CEO of Coke - New York (Tr. 3262).

b. CCE, in which respondent has a 49% ownership interest (Tr. 2335).

c. Others are listed at CX 12, page 19; CX 22-Z-20; and Respondent's In Camera Pre-Hearing Memorandum, page 7.

204. Coca-Cola created CCE in November 1986 (Tr. 2330, 2334-35). Donald Keough is currently chairman and chief executive officer of Coca-Cola as well as chairman of the board of CCE (Tr. 2332, 2340). Brian Dyson, the president of Coca-Cola USA in 1986, became president and chief executive officer of CCE in October 1986, before it went public (Tr. 2330). Other persons that are officers or directors of Coca-Cola are also on the CCE board (Tr. 2340-41). The current chief operating officer of CCE is Jim Stevens (Tr. 2334).

205. CCE has the franchise to bottle and sell Coca-Cola's products in approximately 45% of the United States (Tr. 2338; CX 12-T). CCE also holds the franchise for other soft drinks. Brands of

carbonated soft drinks licensed to CCE for production and sale include Dr Pepper, Canada Dry, Schweppes, A&W, Barq's and Squirt (Tr. 2344). CCE does not produce and sell brands of Royal Crown Cola Company, PepsiCo or Seven Up Company (Tr. 2345). CCE's sales, at wholesale, are approximately \$4 billion. Approximately 90% of CCE's sales are of Coca-Cola's products (Tr. 2338, 2398).

206. Approximately 50% of all of PepsiCo products are bottled and distributed by PepsiCo's company-owned bottling operations (Tr. 1454). These are referred to as COBO, for company-owned bottling operations (Tr. 1436). Through its COBO division, PepsiCo bottles and distributes for Dr Pepper, A&W, Cadbury Schweppes, Seven Up, Sunkist, Barq's and others (Tr. 1455-56). Approximately 92% to 94% of COBO sales are products of PepsiCo (Tr. 1456-57).

207. Many industry members believe that parent companies have an incentive to promote their own brands in company-owned bottlers (Tr. 873, 1336-37, 2174-76) and there is some evidence that this has occurred or might occur (Tr. 241-43; CX 56-Z-176; CX 227-F; CX 262-B; CX 294-B; CX 350-J; RX 353-F).

3. The Vigor Of Competition In The Industry

208. Many witnesses in this proceeding agreed that price and other forms of competition in the soft drink business were intense in 1986, that competition had increased in the decade prior to 1986, and that competition increased from 1986 to 1990 (Tr. 111, 246, 292-93, 387-88, 546-47, 692, 711, 768-69, 947-50, 1059-60, 1064-65, 1125, 1206-09, 1249, 1340-41, 1369-70, 1383, 1396, 1559-60, 1700, 1810, 1872-73, 1918-19, 1966-67, 2086-87, 2132-34, 2199, 2313-14, 2387-88, 2416, 2488, 3048-49, 3077, 3109, 3130-31, 3141, 3172-73, 3218, 3268-69, 3390, 3550, 3691, 3956, 4001, 4010, 4113, 4194-95, 4205; RX 631-Z-35).

209. Driven by Coca-Cola and PepsiCo, price competition is fierce and increasing (Tr. 111, 246, 294, 546-47, 769, 945-50, 1060, 1125, 1206-08, 1340-41, 1559-60, 1918-19, 2087, 2132-34, 2387, 2416, 2488, 3048-51, 3077, 3109, 3173, 3218, 3390, 3691, 4113, 4194-95, 4205; RX 199-Z-6-Z-7; RX 471-P-Q; RX 631-Z-29-Z-30, Z-35, Z-40-Z-41) particularly at the wholesale level (Tr. 111-12, 387-88, 546-47, 652-53, 880, 950-51, 956, 1249-50, 3129, 3141-42). Price competition at the concentrate level is not as intense (F. 33).

210. The net revenue for Coca-Cola concentrate dropped 37% in real terms from 1976 to 1986 (RX 62-A; CX 798-F-G) and price increases by other concentrate producers during the past five years failed to keep pace with inflation (Tr. 1560, 2488, 2495; RX 630-I). Wholesale fountain syrup prices have also declined in real terms (RX 61-A; RX 590-C, G-H; RX 646-Z-25; CX 296-Z-24-26; CX 297-B; CX 798-E-F). Prices have declined dramatically at the retail level as well (Tr. 111, 171, 294, 628, 711, 879, 958-59, 961 (*in camera*), 1060, 1126, 1485, 1492-93, 1560, 1810-11, 1967-68, 2087, 2132-33, 2300, 2388, 3049, 3110, 3177, 3217, 3269, 3343-44, 3999-4000; RX 236-D; RX 630; RX 639-Z-46-47; RX 646-Z-26-27).

211. According to A.C. Nielsen, on a national basis the average retail price per case for all soft drinks (adjusted for inflation) declined 33% between 1975 and 1988. From 1975 to 1985, the decline was 24.4% (RX 83-A; CX 798-"O"-P; *see also* CX 108-B). Similarly, MRCA Diary Panel data show that average retail prices (adjusted for inflation) declined nation-wide by 19.5% between 1978 and 1985 (RX 584-Z-21). Nielsen data also show that average retail prices (adjusted for inflation) for all products of each of the major companies declined substantially in the years prior to the proposed acquisition. From 1978 to 1985, Coca-Cola prices declined 14.6%, PepsiCo prices dropped 15.9% and 7-Up prices fell 16.8% (RX 81-A; CX 798-N). During the same period, average retail prices for Dr Pepper products declined 11.1%. (*Id.*).

212. The overall decline in average retail prices for the products of Coca-Cola, PepsiCo, Dr Pepper and Seven Up has continued in the years following the abandonment of the proposed transaction. By 1988, the average retail price for Coca-Cola products on an inflation-adjusted basis, had dropped 24.9% from 1978 levels; PepsiCo products' retail prices had fallen 25.6%; and 7-Up retail prices had declined 26.2%. From 1978 to 1988, the decline in inflation-adjusted retail prices for, Dr Pepper products was 23.5% (RX 81-A; CX 798-N; *see also* CX 802-A, G; CX 803-J).

213. Most packaged soft drinks are sold to consumers at a discount (Tr. 80-82, 467-68, 609, 629-30, 710, 958, 1065, 1106-07, 1263, 1560, 1618-19, 3049, 3178, 3355, 4000; RX 631-Z-32, Z-137; RX 646-Z-27-28), and ad feature activity for all carbonated soft drinks increased [] from 1982 to 1985 (RX 92-B; CX 798-RS; *see also* CX 108-B); from 1982 to 1987 ad feature activity increased by [] (RX 92-B; CX 798-R-S).

214. Many new carbonated soft drinks have been introduced in the past ten years (Tr. 1136, 1195, 1968-73, 3234-35, 4187-89; RX 199-Z-7; RX 589-Z-27-33). During this period, Coca-Cola introduced diet Coke (Tr. 211-12), Coca-Cola classic, cherry Coca-Cola (RX 5-Z-45), regular and diet Minute Maid soft drinks, diet cherry Coca-Cola, reformulated versions of Tab and Fresca (RX 584-Z-24-25), caffeine free Coca-Cola, Tab, and nutrasweet versions of diet Coke and diet Sprite (Tr. 211-12, 215, 246; RX 584-Z-24-25; RX 644-Z-22-23).

215. In the past ten years, PepsiCo has introduced Pepsi Free, Slice and diet Slice, regular and diet Mandarin orange Slice, Apple Slice, Cherry Cola Slice, cherry Pepsi, and Mug root beer (Tr. 1552; RX 630-Z-142, Z-147).

216. Other soft drink firms have introduced new products in the past several years: Royal Crown (Tr. 270, 1657-58); Seven Up (Tr. 3063-64); A&W (Tr. 2069-70); Cadbury Schweppes (Tr. 1915); New Era (Tr. 3417-18).

217. Competition in the industry also occurs in packaging (Tr. 466, 475-76, 479-80, 687, 1685-86, 2135; RX 29-D; RX 469-S; CX 348-L; CX 350-E; CX 439-A), and industry members compete aggressively to achieve maximum availability of their product in all possible outlets (Tr. 251-52, 563, 565-66, 613, 763, 773, 1200-02, 3058-59, 3276-78, 3688, 3700-01, 4011, 4106; RX 638-Z-97).

218. The retail grocery trade is extremely competitive (Tr. 3336; RX 193-B; RX 220-A), and space in a chain store's advertising supplement is limited; chains must decide which products in general, and which soft drink brands in particular, will best suit their own competitive purposes (Tr. 287, 740-41, 1585-86, 3723, 3725-29, 3748-49, 3753-54; RX 193-B; RX 220-A; RX 227-K-L).

219. Soft drink firms at the concentrate level, or the bottler level, or both, continuously compete for feature advertisements in chain supermarket newspaper ads (Tr. 609, 655-60, 788-93, 974-75, 1228, 1511-13, 1564, 1682, 1856-57, 2077-79, 3061, 3178, 3240-41, 3590, 3951; RX 562; RX 569; RX 592-610; CX 780).

220. Media expenditures for advertising reflect the increasing competition among soft drink firms. Total media spending by soft drink companies increased from \$269.9 million in 1979 to \$451.6 million in 1984, an increase of 67.3% (RX 584-Z-31). Measured in Gross Rating Points ("GRPs"), television advertising for all soft drinks increased modestly from 84,159 GRPs in 1981 to 84,477

GRPs in 1985, but Coca-Cola's GRPs during this period increased 42.0%, from 23,316 GRPs to 33,101 GRPs (RX 584-Z-31-Z-32). Within the same time, PepsiCo's GRPs increased 27.5%, from 20,309 GRPs to 25,902 GRPS. (*Id.*).

4. Sales Breakdown By Channel Of Distribution

221. Coca-Cola estimates the sales breakdown of total soft drink sales, by channel of distribution, as follows:

1. Bottle/Can
 - Take Home
 - Vending
 - Manual
 - Total Bottle/Can
2. Cup/Fountain
 - Total Cup/Fountain

(Source: CX 27-G (1988)).

5. National Concentration Resulting From Proposed Acquisition - All Channels

a. *Tier 1 HHIs*

222. Had the proposed acquisition by Coca-Cola of Dr Pepper taken place, tier 1 concentration and concentration increases, as measured by the Herfindahl-Hirschmann Index ("HHI") would have been for the year 1986:

Pre-acquisition	HHI: 3128.5
Post-acquisition	HHI: 3572.2
HHI increase:	443.7

(CX 784-A).

b. *All Concentrate HHIs*

223. Had the proposed acquisition by respondent of Dr Pepper Company taken place, concentration and concentration increases, as measured by the HHI for all concentrate would have been for the year 1986:

Pre-acquisition HHI:	2565.6
Post-acquisition HHI:	2929.2
HHI increase:	363.6

(CX 784-A).

6. National Concentration Resulting From Proposed
Acquisition Plus PepsiCo's Proposed
Acquisition Of Seven Up - All Channels

a. *Tier 1 HHIs*

224. Had the proposed acquisitions by (a) Coca-Cola of Dr Pepper and (b) PepsiCo of Seven Up taken place, tier 1 concentration and concentration increases, as measured by the HHI would have been for the year 1986:

Pre-acquisition HHI	- 3128.5
Post-acquisition HHI	- 3986.5
HHI increase	- 858.0

(CX 784-B).

b. *All Concentrate HHIs*

225. Had the proposed acquisition by (a) Coca-Cola of Dr Pepper and (b) PepsiCo, Inc. of Seven Up taken place, concentration and concentration increases, as measured by the HHI would have been for the year 1986:

Pre-acquisition HHI	- 2565.6
Post-acquisition HHI	- 3242.1
HHI increase	- 676.6

(CX 784-B).

226. For the calendar years 1983 through 1988, market shares of the leading firms in the carbonated soft drink industry, as a percentage of sales of all carbonated soft drinks were as follows:

Initial Decision

117 F.T.C.

year	<u>Share of all concentrate market by firm - 1983-1988</u>							
	<u>4-firm</u>	<u>Coke</u>	<u>Pepsi</u>	<u>Dr P</u>	<u>7 Up</u>	<u>RC</u>	<u>C-S</u>	<u>A&W</u>
1983	78.4%	36.4	28.5	6.4	7.1	3.6	0.6	0.9
1984	78.5	37.8	29.2	4.7	6.8	3.1	0.6	0.9
1985	79.7	38.9	30.1	4.8	5.9	3.1	0.5	0.8
1986	79.7	39.6	30.4	4.6	5.1	3.3	2.5	0.7
1987								
1988								

(NOTE: Dr Pepper and Seven Up merged in late 1986. Computations assume single firm for 1987 and 1988. For 1983, Dr Pepper share includes Canada Dry.)

(Source: CX 781-A-B).

227. Coca-Cola's estimates of the industry's concentration, done in 1986, are virtually identical to the estimates computed by complaint counsel.

<u>Coca-Cola's February - 1986 estimates</u>			<u>4-firm</u>
Coke	38.3		78.2%
Pepsi	29.3		
Dr Pepper	4.5		
Seven Up	6.1		
RJ Reynolds	5.0		
Royal Crown	3.4		
All other	13.4		

(Source: CX 86-N).

7. Shares Of Warehouse-Delivered And Private Label Products

228. For 1986, the following are the shares of total concentrate sales of firms whose carbonated soft drinks are warehouse-delivered or private label:

<u>Share of Warehouse/Private Label Firms - 1986</u>	
<u>year 1986:</u>	<u>National share</u>
Shasta	1.1
Faygo	0.6
C&C Cola	0.2
Winn Dixie	0.2
Safeway	0.2
Kroger	0.2
Cotton Club	0.1
A&P	0.0

(Source: CX 781-B. Shasta market share derived from company supplied data; all others are Maxwell share estimates.)

229. The following is a comparison of the Nielsen share with the overall share for Shasta, for the period 1983 through 1988:

Comparison of Nielsen share and overall share:
For Shasta

<u>year</u>	<u>overall</u> <u>share</u>	<u>Nielsen</u> <u>share</u>	<u>Nielsen</u> <u>overstatement</u>
1983	1.1	2.0	82%
1984	0.9	1.8	100%
1985	0.8	1.6	100%
1986	1.1	1.5	36%
1987		1.3	
1988		1.2	

(Source: CX 781-A-B; CX 798-Z-56).

230. The following is a comparison of the aggregate Nielsen share with the aggregate overall share for private label brands, for the period 1983 through 1988.

Aggregate Private Label Estimates

<u>year</u>	<u>Nielsen</u> <u>share</u>	<u>Nielsen</u> <u>overstatement</u>	<u>est overall</u>
1983		82%	
1984		100%	
1985		100%	
1986		36%	
1987			
1988			

(Sources: CX 798-Z-51; CX 781-A-B; CX 798-Z-56).

8. National Concentration - Vending Channel

231. Only estimates are available for shares in the vending channel of distribution. Sales through vending flow from the bottle/can segments, and cannot be separately measured by concentrate companies (*see* CX 162-M).

232. Coca-Cola's estimates of the 1982 share in the vending channel, for all carbonated soft drinks, are:

Initial Decision

117 F.T.C.

Vending Channel-Respondent's 1982 Estimates

Coke	45%
Pepsi	32%
All other	23%

(CX 55-X, Y, Z-1).

233. PepsiCo estimates of the 1986 share in the vending channel, for all carbonated soft drinks, are:

Vending Channel - PepsiCo 1986 Estimates

Coke -
Pepsi -
All other -

The "all other" category includes RC, Dr Pepper And Seven Up. These three firms are estimated by PepsiCo, Inc. to have a combined share of 7% (RX 237-V, Z-25).

9. National Concentration - Fountain Channel

234. Coca-Cola's estimates of the shares in the fountain channel, for all carbonated soft drinks made in February 1986, are:

Fountain Channel - Respondent's 1986 Estimates

Coca-Cola USA	57.6%	4-firm
Pepsi USA	25.0	92.9%
Dr Pepper Co.	6.3	
Seven Up Co.	4.0	
Sunkist	0.7	
Royal Crown	0.7	

(CX 86-"O").

235. Coca-Cola's estimates of the share in the fountain channel for the period 1980 to 1987, for all carbonated soft drinks, are:

year	<u>Fountain Channel - Respondent's Estimates</u>					
	<u>CCUSA</u>	<u>PCUSA</u>	<u>Dr P</u>	<u>7 Up</u>	<u>All other</u>	<u>2-firm</u>
1980						
1981						
1982						
1983	56.3	23.5				79.8
1984	56.4	24.6				81.0
1985	57.5	25.1	6.3	4.0	7.1	82.6
1986	58.9	26.1				85.0
1987	59.4	27.8				87.2

(Source: CX 22-J; CX 26-U. "All other" derived. Dr Pepper 1985 figure taken from the February 1986 estimates contained in CX 86-"O").

236. Another version of Coca-Cola's estimates of the fountain channel shares for all carbonated soft drinks appears in the record at RX 584-Z-159:

Fountain Channel - Coca-Cola's Estimates

<u>year</u>	<u>CCUSA</u>	<u>PCUSA</u>	<u>7UP</u>	<u>DR P</u>	<u>RC</u>	<u>4-firm</u>
1976	59.1%	17.4%	8.3%	5.2%	1.2%	90.0%
1977	59.5	17.1	7.7	5.6	1.2	89.9
1978	59.0	18.1	7.2	5.7	1.3	90.0
1979	57.6	19.6	6.2	6.9	1.7	90.3
1980	57.5	20.6	5.6	5.7	1.5	89.4
1981	57.7	21.2	5.0	5.4	1.1	89.3
1982	56.9	21.9	4.7	5.3	1.0	88.8
1983	56.3	21.8	4.6	5.3	0.8	87.4
1984	55.5	24.2	4.5	5.3	0.7	89.5
1985	56.8	24.4	4.0	5.9	0.7	91.0

(Source: RX 584-Z-159).

237. Dr Pepper estimates the fountain channel shares, as a percentage of all carbonated soft drink sales, for 1989, as follows:

Fountain Channel - Dr Pepper Estimates - 1989

Coke	-	60%	<u>4-firm</u>
Pepsi	-	20%	94%
Dr Pepper	-	10%	
Seven Up	-	4%	

(Source: Tr. 2444-45).

238. Coca-Cola's 1990 estimates for the fountain channel shares, as a percentage of the sales of all carbonated soft drinks, for respondent and PepsiCo are:

Fountain Channel - Coca-Cola's Estimates - 1990

Coca-Cola	58 - 60%
PepsiCo	28%

(Source: Tr. 3078-79).

10. National Concentration - Nielsen Channel

239. A.C. Nielsen Company ("Nielsen") market research data ("Nielsen data") report the share of sales of brands of packaged, finished carbonated soft drinks made by the retail trade monitored by Nielsen in the areas being audited by Nielsen ("Nielsen audit areas") for concentrate companies that license their brands of carbonated soft drinks or sell carbonated soft drinks (CX 798-A). In some cases, Nielsen data also report the share of sales, in the aggregate, for

companies with controlled brands of carbonated soft drinks. Nielsen share data are computed on the basis of a universe consisting of the aggregate of all packaged, carbonated soft drink brands sold by the retail trade monitored by Nielsen in the particular Nielsen audit area (CX 798-A).

240. The volume distribution of carbonated soft drinks in stores measured by Nielsen is as follows:

Supermarkets over \$2 million in sales	77.2%
Independents under \$2 million in sales	14.9%
Chains under \$2 million in sales	7.9%

(Source: CX 27-L).

241. The following table reflects the average annual share of total packaged carbonated soft drinks sold in retail outlets in the United States accounted for by packaged carbonated soft drinks for the firms listed. The data, measured by A.C. Nielsen Company, reflect sales in the take-home channel only (CX 798-A, Z-57).

<u>year</u>	<u>National Nielsen Shares</u>					<u>concentration</u>	
	<u>firms</u>		<u>7 Up</u>	<u>Dr P</u>	<u>RC</u>	<u>4-firm</u>	<u>2-firm</u>
	<u>Coke</u>	<u>Pepsi</u>					
1956							
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1986							
1987							
1988							

(NOTE: Dr Pepper figures exclude brands sold under the Canada Dry label.)

(Source: CX 798-Q, Z-57. See CX 169-B).

242. Nielsen shares understate the shares of firms like Coca-Cola and Dr Pepper that have significant sales in the take-home and cold drink channels of distribution (Tr. 1463-64). This is because Coca-Cola and Dr Pepper are each significant in the cold drink channel. PepsiCo's share in Nielsen slightly overstates its actual share, because it is not as significant in the cold drink channel as Coke and Dr Pepper relative to their take-home shares.

Nielsen Share v. Actual Share

<u>Respondent</u>	<u>Actual</u>	<u>Nielsen</u>	<u>Understatement</u>
1983	36.4%		
1984	37.8		
1985	38.9		
1986	39.6		
1987			
1988			
<u>Dr Pepper</u>	<u>Actual</u>	<u>Nielsen</u>	<u>Understatement</u>
1983			
1984	4.7%		
1985	4.8		
1986	4.6		
1987			
1988			
<u>PepsiCo</u>	<u>Actual</u>	<u>Nielsen</u>	<u>Overstatement</u>
1983	28.5%		
1984	29.2		
1985	30.1		
1986	30.4		
1987			
1988			

(Source: CX 798-Z-57; CX 781-A-B. See CX 58-Z-39).

K. *Entry Conditions*

1. Concentrate Production

243. Soft drink concentrate and the ingredients to make it are available from "flavor houses," *i.e.*, companies that specialize in flavoring and producing concentrate (Tr. 128, 458, 1420, 3371-72, 3378, 3383-85). Dozens of flavor houses can formulate and manufacture concentrates, syrups and flavor extracts for carbonated soft drinks on a contract basis (Tr. 449-50, 3303-06, 3373-74, 3397-98,

3439-40, 3469-71, 3533; CX 177-Z-44-Z-47) and soft drink firms can develop their own concentrate (Tr. 1420, 4071).

244. Several soft drink firms rely on flavor houses for concentrate: Frank's (Tr. 3303-05); Sunkist (General Cinema) (Tr. 128-29, 907, 1927-28); Snapple (Tr. 3532); Sundance (Tr. 3397-98); Jolt Cola (Tr. 3470-71); Original New York Seltzer (Tr. 3439-41); Soho (Tr. 4081-82); Royal Island (Westinghouse Beverage) (Tr. 889).

245. Using flavor houses to develop and manufacture concentrate requires no capital investment (Tr. 3445, 3531-32, 3470-71).

246. Supermarket chains can obtain concentrate for their private label brands from contract packers such as Shasta (Tr. 3168), or Iowa Beverage Manufacturers (Tr. 1783-84, 1818-19, 1854) or flavor houses (Tr. 3068-69, 3388-90, 3469-70).

247. Existing concentrate firms can also provide concentrate to other firms: Dr Pepper/Seven Up (Tr. 1928-29, 1930, 3068), Barq's, Shasta, and Cheerwine (Tr. 481, 2015, 3167).

248. Production and packaging of concentrate is neither difficult nor capital intensive (Tr. 123, 445, 1821). Barq's paid \$800,000 to purchase and renovate its concentrate manufacturing and warehouse facility (Tr. 443, 481). In 1986, Original New York Seltzer, with sales of 8,472,041 cases, purchased a 46% interest in a concentrate manufacturing facility for several hundred thousand dollars (Tr. 3445-47), and the capital cost for a new concentrate plant designed to produce 1,000,000 gallons of concentrate annually was about \$1.2 million in 1986 (CX 177-Z-87-Z-95).

249. There is excess capacity to manufacture concentrate, and production can be, and often is, performed on a contract basis (Tr. 394-95, 481, 1783-84, 1847-49, 2076-77, 2088-89, 3167, 3380, 3384, 3440, 3472-73; RX 631-Z-3-Z-4). Sundance, Original New York Seltzer, Snapple, Jolt, and Soho all obtained concentrate to enter into the soft drink business without any initial investment (Tr. 3397-98, 3440, 3445-46, 3469-71, 3530-31, 4082-83). Flavor houses also have the capacity to expand concentrate manufacture easily (Tr. 3376-78).

2. Fountain Syrup Production

250. Since fountain syrup is manufactured by adding water and sweetener to concentrate (Tr. 21-22), companies that make bottle/can concentrate can make concentrate for fountain syrup (Tr. 3084).

251. A facility in New Jersey produces fountain syrup for Dr Pepper Company on a contract basis (RX 588-K, R), and Coca-Cola uses a bottler in St. Paul, Minnesota to manufacture fountain syrup on a contract basis (CX 194-Q). The best selling orange fountain soft drink in 1986 was McDonald's private label orange (CX 177-Z-39). Today, its fountain syrup is manufactured by Quaker Oats. In the past, McDonald's used private label flavor houses (Tr. 3083).

252. Packaging of fountain syrup is not expensive. In 1982, Coca-Cola introduced bag-in-the-box or "BIB," a plastic bag housed in a corrugated box (CX 174-E). A large scale 4,000,000 gallon BIB line in 1986 would cost only approximately \$100,000 (CX 177-Z-103).

3. Bottled And Canned Soft Drink Production

253. Many franchised bottlers, contract packers, packaging cooperatives, and breweries across the nation are involved in contract packing either as packers, customers or both (Tr. 40-41, 126-27, 551, 810-11, 938-41, 1058-59, 1087, 1133, 1280, 1983-84; RX 448-A-Q; RX 489-B-D; RX 525-A-C; RX 611-E; RX 631-X; RX 642-Z-120-Z-121).

254. Bottles and cans are frequently shipped several hundred miles (Tr. 125, 551, 811, 939-41, 1849, 1854, 3104-05, 3402-03, 3416-17, 3442-45, 3448-49, 3534-35, 4093-94; RX 645-Z-19): Iowa Beverage, Canfield's contract packing company, ships its product as far as 500 miles (Tr. 1849). In fact, after Canfield's diet chocolate fudge soft drink was praised in a national newspaper and retailers nationwide clamored for it, Canfield shipped it from Chicago to as far away as Texas, Florida and Washington State (Tr. 1804-05, 1824, 1826-27).

255. Significant excess packaging capacity exists in the industry (Tr. 896, 1133-34, 3332; RX 236-G; RX 638-Z-77) and new entrants have taken advantage of this fact by relying on contract canners (Tr. 2089, 3473-74, 3476-78, 3534-35, 4086-94; RX 467-C-D; RX 489-A-B).

256. Breweries are also available to manufacture soft drinks (Tr. 551, 3400-01, 4085-87; RX 467-C-D; RX 509-C).

4. Distribution

257. The major concentrate firms do not use warehouse distribution to deliver their mainstream products to bottlers (Tr. 277-78, 1523-24, 1662-65, 2057, 2061-65, 2143, 2245, 2370).

258. Mr. Bart Brodtkin, who store-door delivers for Seven Up and Royal Crown, explained the advantages and disadvantages of direct-store-door v. warehouse delivery:

A. Probably the two shouldn't even be considered in the same discussion. There is really no comparability. Direct-store-door is without doubt a far more superior method of distribution. As a bottler, the only reason to be in warehouse distribution is the potential for some level of incremental earnings because there are clear-cut efficiencies and weaknesses in products moving through that system as compared to the direct-store-door.

Q. What are the benefits of having, as far as the products are concerned, of having it moved through a direct-store-door system?

A. Soft drinks are clearly a major impulse purchase. The area of total availability is a critical aspect of the success of any soft drink trademark. Via direct-store-door distribution in the major supermarket category we have the opportunity to meet anywhere from three to five times a week with our major customers. We are delivering product to those customers directly to their individual stores anywhere from three to five times a week, and we are in the store merchandising both the shelf and the displays up to seven days a week, sometimes as many as twice per day, and that is just the food store sector of the business.

Warehouse delivery traditionally only can compete in that sector that I have just mentioned because it is only the supermarket chains that have their own systems in place that can take product from a central warehouse and deliver to their own individual stores

(Tr. 833).

259. One of the drawbacks of warehouse distribution is that it does not give access to the vending and fountain channels (Tr. 435, 834, 1187, 1663, 1959, 2063, 3185, 3187, 3190, 3759; RX 352-Z-50).

260. Firms using warehouse distribution in retail chains face problems which do not exist when direct-store-door delivery is used. These include: difficulty in selling a full product line (Tr. 1666); disinclination of food brokers who are associated with warehouse delivery to promote brands (Tr. 28, 434, 505, 842, 1671, 1905, 2064, 2065); problems with in-store promotions (Tr. 65, 836, 1671, 2064-65); and, difficulty in responding to in-store price promotions of direct-store-door delivered brands (Tr. 389).

261. Firms that use both methods of delivery recognize the inadequacy of warehouse delivery. Double Cola used warehouse delivery in Memphis a few years ago but found it unsatisfactory (Tr.

63-66). Barq's tried using food brokers in warehouse distribution but lost so much money that it abandoned this method of distribution (Tr. 434-35). Cheerwine would consider using warehouse distribution only as a last resort (Tr. 1959-60).

262. Beer distributors offer no adequate substitute for direct-store-door delivery. In many states, legal restrictions prevent beer distributors from marketing soft drinks effectively (Tr. 61-62, 432-33, 1414-15, 1668, 1794-95, 4056; RX 522-Q). In some states they are prohibited from selling beer on credit and they are unfamiliar with the credit practices in the soft drink industry (Tr. 59, 433, 1414-15). Beer distributors do not usually service accounts that sell carbonated soft drinks (Tr. 58, 3513-14), do not have ready access to vending and fountain accounts (Tr. 61-62, 433, 756, 1794, 1895, 3459, 3506, 3513; RX 352-Z-48) and lack knowledge of promotional practices used in the carbonated soft drink industry (Tr. 1415-16). Finally, beer distributors tend to focus their efforts on beer, which is more profitable than soft drinks (Tr. 589, 1012, 1414).

263. Several brewers who have developed carbonated soft drinks have had unsatisfactory experiences with, or have not used beer distributors to deliver their products: Anheuser-Busch (Tr. 1410-11, 1413); Stroh (Tr. 3403-04, 3408); and Miller (Tr. 27677).

264. Even though Mr. Alan Miller of Original New York Seltzer uses beer distributors, he recognizes their limitations:

Q. Is there any limitation on the outlets that these beer distributors can get to if they are properly motivated, properly compensated and properly educated as to the importance of widespread availability?

A. Should they have a limitation? No, they should not have a limitation.

Q. Is your major problem in dealing with these people motivating them and teaching them the widespread availability is the key to success?

A. It is more than that. It is more than that. It is not just motivation. It is economics also. For a beer wholesaler to drop off a few cases of New York Seltzer at a place where they are not dropping off beer is expensive for them. If you want to use Coca-Cola as an example, when Coca-Cola makes a delivery, it is delivering enough Coca-Cola to pay for that delivery; whereas if a beer wholesaler were to stop at a mom-and-pop store with five cases of New York Seltzer and no beer, then it wouldn't pay for the delivery.

So, on the one hand we tell the beer wholesalers that it is still in their best interest to make the small stops, to help promote the product. The availability is very important, but the battle is they don't want to make those small stops. So it is a problem right now. It is a limitation. They don't want to make those small stops.

(Tr. 3453-54). *See also* Tr. 3459 with respect to fountain accounts other small firms which use or have used them have found beer distributors not wholly satisfactory (Tr. 57-63, 433, 1961, 1792-93, 3506, 3513-14, 3555-56).

265. The larger firms that use beer distributors do not rely on them for the bulk of their distribution (Tr. 753, 1101, 1644, 1668-71, 2067).

266. As is evident from the above discussion, distribution is the key ingredient in obtaining entry into the carbonated soft drink industry. As Mr. Shanks, president of Double Cola, testified:

This is not a production ball game. It is a marketing and distribution-driven industry. And that is where the difficulty lies. It is easy to get one's product produced, but it is very difficult to get it distributed.

(Tr. 29-30, 54).

5. Flavor Restrictions

267. Concentrate companies prohibit their bottlers through "flavor restrictions" from producing and distributing the same flavor on behalf of other concentrate companies (Tr. 41). These flavor restrictions are often enforced (F. 46). Consequently, concentrate firms that rely on Coca-Cola and PepsiCo bottlers to carry their products could not introduce a new cola product through these systems (Tr. 1396-97, 1898, 2073), and a concentrate firm needs a cola if it is to have a meaningful chance at effective entry (Tr. 286-87, 850, 1095-96). For example, when Procter & Gamble considered options for entry into soft drinks, it realized that if it was going to be a serious contender of Coca-Cola and PepsiCo it must introduce a cola:

An important focus of new product development is inventing a cola which reflects consumers' desire for a product which has a lighter taste and is less syrupy sweet -- the key negatives consumers associate with current colas. While we can succeed without a cola, long-term, we want to compete in the cola subcategory to maximize our volume. Coke/Pepsi offer virtually identical products, so there is an opportunity for segmentation. A smaller (2 - 5% share brand), targeted entry could compete for a specific cola occasion.

(RX 409-E).

268. Philip Morris also recognized the importance of a cola:

Since the acquisition of The Seven Up Company, our assignment objective has been to build the Soft Drink business of the Company into a viable third competitor with COKE and PEPSI.

Without a viable cola brand it is doubtful that most 'third bottlers,' in a market can build long-term volume and profits against COKE and PEPSI competitive pressure.

(RX 353-B).

269. Small concentrate firms have experienced difficulties because of flavor restrictions. Double Cola cannot get distribution through bottlers that market a cola (Tr. 41-48). Barq's, a seller of root beer concentrate, has had increasing difficulty in getting distribution through Coca-Cola and PepsiCo bottlers (Tr. 425-28), and Monarch is unable to market a cola under its own label because it cannot distribute it through bottlers that carry Coke or Pepsi (Tr. 1376, 1396-97). It has also had problems in expanding its distribution of Dad's Root Beer because of flavor restrictions (Tr. 1383-84). Mr. Greenberg of Snapple testified:

Q. You mentioned that you don't use any soft drink bottlers. Is that simply because they're unavailable?

A. They're unavailable, correct. We'd love to use them.

Q. Is that because of flavor restriction clauses?

A. It's because they have competitive flavors in their contracts with whoever they've got contracts with.

(Tr. 3556).

270. Even the major concentrate firms have been blocked by flavor restrictions: Coca-Cola (Tr. 199-200; CX 56-Z-210; CX 154-K; CX 176-Z-5-6; CX 226-X; CX 262-B; CX 279-B); PepsiCo. (Tr. 198-99; CX 176-Z-5; CX 224-H; CX 281-N; CX 774; CX 775); Philip Morris-Seven Up (Tr. 237, 1113-22, 1248, 2182-83, 2198; RX 353-Q); Dr Pepper (prior to 1962, when Coca-Cola and PepsiCo bottlers were prohibited from carrying Dr Pepper) (Tr. 2242-43; CX 60) (*see also* Tr. 2441, 2460-61; CX 489-A; CX 490-C); Cadbury Schweppes (Tr. 1896-99); A&W (Tr. 2073-75).

271. After Philip Morris acquired Seven Up and introduced Like Cola, Coca-Cola saw the cola flavor restrictions that it faced as seriously hampering Philip Morris' entry effort:

The 7-Up bottler system, because of cola exclusive cross franchising with Pepsi and RC bottlers, restricts availability for Like. Seven Up has tried to alter this

restriction by breaking into the RC system. . . . The legal effort was lost. . . . But this was only the first attempt. Seven Up says it will continue “legal tilts” to find a way to distribute Like where cola exclusives now limit it. . . . If “legal tilts” fail to achieve national distribution for Like, Seven Up will try the merger option. . . . RC is the obvious solution. . . . If Seven Up succeeds in setting aside or changing the principal of one cola brand per bottler, it will be a major threat to us.

(CX 220-B; CX 228-B).

6. Entry Using Existing Bottlers

272. Both Procter & Gamble and Philip Morris realized the difficulty of entering the carbonated soft drink industry through existing bottlers:

Procter & Gamble’s Crush Products Strategic Plan concluded:
Nothing else we do will succeed unless we are able to design, field and expand a distribution system for our products. The bottler system is not a viable alternative. Bottlers singlemindedly focus on their flagship brands, which limits the success of other items and blocks the introduction of new products. If we do not develop a new distribution system, we will be forced out of the soft drink category.

(RX 409-C).

. . . . The growing domination of Coke and Pepsi supports our decision to exit the bottler system and pursue the development of an alternate delivery system.

(RX 409-F).

Philip Morris saw no opportunity by way of the bottler system for new flavor entry, or expansion:

7UP’s third bottler network, lacks the brand lineup, organizational capability, and financial strength to compete with COKE and PEPSI. This not only limits our ability to develop into a viable third major franchise force in the industry, it also endangers the long-term success/life of 7UP and Diet 7UP.

(RX 353-E, K).

The 7UP Company’s ability to launch major, profitable new brands through 7Up bottlers is questionable. . . .

(Tr. 289; Rx 353-Q).

273. Starting a bottler system of their own is not a realistic alternative for firms that do not have adequate distribution (Tr. 67, 1119-20, 1678, 1796-97).

7. Retail Advertising

274. Most carbonated soft drinks are sold at a discount in retail stores and are often advertised at that price (Tr. 82, 467, 880, 915, 609, 1684) on “best food day,” the day on which shoppers patronize stores in the greatest number (Tr. 744, 4355; CX 813-A-Z-44).

275. Carbonated soft drinks are often a primary feature in ads which retail stores place in newspapers in the same location each week. The soft drinks are usually placed in special displays in a prominent location when they are advertised (Tr. 86, 741, 916-18, 4346-48). The best display location is at the end of an aisle (Tr. 4005, 4052).

276. Access to the feature cycle is often obtained through the use of calendar marketing agreements, or CMAs. A CMA is an agreement by a retail store to advertise and promote soft drinks throughout a designated period on specific weeks (Tr. 3631-32, 3721, 3724). The store decides the period of time and the type of feature activity provided (Tr. 3241, 3742; RX 641-Z-87-88).

277. While CMAs may be available to any bottler which seeks one (Tr. 3723, 3746), they must be paid for, and bottlers which can better afford such payments, which may consist of cash, discounts at the time of delivery or volume rebates (Tr. 84, 287-88, 3721), have greater access to the feature cycle.

278. For example, a Seven Up memorandum discussed the cost of access to a feature cycle and concluded:

The cost to us on a cents-per-case basis of a flat ad payment (*i.e.*, \$10m/feature is prohibitive against the number of cases we sell (8% share) vs. Coke and Pepsi lineup (30% share)

(RX 353-H).

279. Coca-Cola negotiates CMAs directly with supermarket chains on behalf of several bottlers when the supermarkets have stores in the territories of more than one bottler. Because these CRAs commit the stores to feature Coca-Cola products, they necessarily limit other bottlers, availability to the feature cycle (CX 187-C-D; CX 188-A, F; CX 189-D; CX 190-A, F, L; CX 191-A; CX 192-C, H, L, “O”, R).

280. Nothing prevents smaller bottlers from entering into CMAs with chain retailers but Coca-Cola’s and PepsiCo’s share of market means that their bottler’s products will enjoy more feature activity

(Tr. 84, 287, 601, 697, 746, 1096, 1674, 1683). For example, Mr. Malinsky, of Waidbaum's, a regional New York chain retailer, testified:

Q. And Coca-Cola is typically being featured how many time a year in your stores, Mr. Malinsky?

A. I would say a Coca-Cola brand is probably on feature every other week.

Q. And what about Pepsi-Cola products?

A. Every other week.

Q. So you have either Coca-Cola or Pepsi-Cola product on feature?

A. As a main feature.

Q. Every time as a main feature?

A. Yes.

(Tr. 4036-37).

281. Waldbaum's features the products of the Coke bottler and the Pepsi bottler as often as it does because the Coke and Pepsi bottlers pay for it:

Q. And in 1989 on a monthly basis, did Waldbaum's, in fact, have some sort of incentive program with almost every carbonated soft drink supplier?

A. Pretty much so, yes.

Q. And did you control the volumes and the shelf space and the display space of the feature ads at Waldbaum's in response to those incentive programs?

A. We controlled them with the vendor based on the program we prepared.

Q. In general, were you getting more incentive, more allowances from the Coca-Cola bottler and the Pepsi-Cola bottler than the other brands?

A. Absolutely.

(Tr. 4007-08).

282. Concentrate firms whose bottlers do not enjoy large market shares may have difficulty obtaining access to feature ads (Double Cola, Tr. 82, 86); (Mid Continent, Tr. 1119-20); (Seven Up):

The grocery trade will generally not run 7Up/Diet 7Up solo features (8% share) when they have the choice of running Coke and Pepsi full line features.

(RX 353-H).

283. Even concentrate firms whose products are distributed by Coke bottlers do not necessarily have their products in the feature cycle. The president of Barq's, whose products are bottled in substantial degree by Coke bottlers, explained:

Q. You mentioned that Barq's is distributed by Coke bottlers. When such bottlers run a feature, is Barq's included on those features?

A. Usually not.

Q. How does that affect Barq's sales?

A. Dramatically. If you are not part of, in this day and age, if you are not part of the promotional activity, most of the sales in supermarkets are now sold on promotion, so if you are not part of that promotion, you are basically not participating in the sales.

(Tr. 467).

8. Introduction Of New Products

284. Coca-Cola and PepsiCo have, on occasion, introduced imitative products to deter new entry (Tr. 289, 372, 1395-97, 1899-1900; CX 700-B).

285. After Philip Morris introduced Like (caffeine-free cola) in April 1982 (CX 57-H) both Coca-Cola and PepsiCo introduced caffeine-free colas (Tr. 215; CX 57-I).

286. The president of Cadbury-Schweppes testified that Like cola failed. PepsiCo and Coca-Cola:

quickly developed their own caffeine-free versions and had those to offer consumers in the event the caffeine-free caught on, which apparently it did. But they also met them at the price line, and wherever Like was rolling, was being introduced and Philip Morris was enticing with lower prices to get people to buy the product, Coke and Pepsi met them at the price at the lower price level.

(Tr. 1899-1900).

287. Coca-Cola's and PepsiCo's response to Like was not ignored by industry members and consultants. Mr. Armstrong, of Monarch, testified:

Q. Have you ever considered distributing a cola?

A. No.

Q. Why not?

A. Well, I like my life. It is too difficult. It is really not practical. You can ask Philip Morris. It is a very, very competitive market.

Q. If you decided to distribute a cola, would you be able to distribute it through your Pepsi, and Coke bottlers?

A. No.

(Tr. 1395-97).

288. An internal Seven Up document stated:

COKE and PEPSI WILL TAKE WHATEVER ACTIONS ARE NECESSARY TO LIMIT OUR SUCCESS -- No question that each of them are out to beat the other -- and grow by picking up volume from independent franchise companies like 7UP. Also, they will react aggressively to any new competitor. Three examples are:

A. Response to LIKE introduction... (CX 742-D; RX 353-F.)

While it is always possible, introduction of a new product/flavor with an unknown trademark seems unlikely to be successful - advertising just does not play a big enough role in the industry vs. price to motivate our bottlers and the consumer to buy and try the brand long-term. This, coupled with the demonstrated capability of COKE and PEPSI to respond to successful new product concepts, raises serious all new product launch risks.

(RX 353-Z-4; CX 742) (*See also* RX 555).

9. Other Factors

289. Other factors which may have an effect on entry are the significant amount of money which is required for successful entry (Tr. 283-84; CX 57-J), the time it takes to achieve national distribution even for a company such as Coca-Cola (Tr. 210-12) or Dr Pepper (Tr. 2244, 2463; CX 108-S), the importance of trademark equity (Tr. 231-32, 2070; CX 227-E; CX 721-K), and the limited opportunities in the vending and fountain segments (Tr. 69-72, 474, 1395, 1696; CX 312-N, "O"; RX 237-T-U).

10. Unsuccessful Entry Attempts

290. In addition to the facts discussed above, the history of entry attempts into the carbonated soft drink industry establishes that, despite the relative ease of obtaining a toehold in the market, entry of a concentrate company or companies with an eventual market share equal to that of Dr Pepper would be unlikely.

a. *Philip Morris/7 Up - Like*

291. Philip Morris introduced Like Cola, a caffeine-free cola, in 1982. The only other caffeine-free, sugared cola at that time was Royal Crown's RC 100 (Tr. 270).

292. Like was introduced through Philip Morris' Seven Up Bottlers which did not have a cola, and did well in test marketing and initial rollouts (Tr. 271).

293. Shortly after Like's introduction, Coca-Cola and PepsiCo introduced caffeine-free colas (Tr. 281, 1117-18; CX 228-C).

294. Although it spent a great deal of money to introduce Like (Tr. 282, 825-26, 1114-15), Philip Morris achieved distribution only to 50% of the United States' population (Tr. 272, 2143). Like failed (Tr. 281).

295. Philip Morris blamed the failure of Like Cola in large measure on the rapid response to its introduction by PepsiCo and respondent:

Like Cola when it was introduced had a unique selling proposition and that was that it was a caffeine-free cola. When Coke and Pepsi launched caffeine-free products of their own, they, in essence, usurped the unique selling proposition of Like and with the strong acceptance of their trademarks eliminated a need for the consumer to go from Coke and Pepsi to a new trademark. . . .

(Tr. 281).

b. *Procter & Gamble - Crush*

296. Procter & Gamble ("P&G") acquired Crush International in late 1982 to attempt a serious and substantial entry into the carbonated soft drink industry (Tr. 324-26, 327, 340, 348). Crush International had the Crush and Hires Root Beer brands. In 1983 Crush's Nielsen share was approximately 1.3% (Tr. 342, CX 781-A). P&G was experienced in warehouse delivery through its grocery and food business (Tr. 333-34). In July 1983, it acquired a Coca-Cola bottler to learn about direct-store-door delivery (Tr. 326, 327).

297. Flavor exclusivity clauses prevented P&G from introducing a new flavor which it had developed through the bottler system (Tr. 377-78) and its attempt to obtain distribution for Crush and Hires through vending machines in Alabama failed, as did its attempts to achieve effective distribution outside metropolitan areas even when they were served by a warehouse (Tr. 354-55). P&G's success in obtaining distribution in Los Angeles was limited (Tr. 360).

298. Crush and Hires declined under P&G's warehouse delivery system. Crush International's share of all carbonated soft drinks was 1.4% in 1986; it dropped to [] in 1988 (CX 781-B). Procter &

Gamble never realized a profit on its Crush and Hires business (Tr. 368, 1888) and it sold Crush and Hires to Cadbury Schweppes, Inc., in 1989 (Tr. 1888).

c. General Cinema/R.J. Reynolds/ Cadbury Schweppes - Sunkist

299. Sunkist orange soda was created in 1978 by General Cinema Corporation, a large PepsiCo bottler. Sunkist was sold to R.J. Reynolds in October 1984 which sold it to Cadbury Schweppes in 1986 (Tr. 1886; CX 177-H).

300. General Cinema established distribution through either Coke or Pepsi bottlers, depending on which was strongest in a particular market. After Coca-Cola and PepsiCo introduced orange sodas, many of their bottlers dropped Sunkist (Tr. 1902).

301. Sunkist was forced into much weaker bottlers, and, in some cases, was unable to find a replacement bottler (Tr. 1902). In those cases where Sunkist could not find another bottler, it often used distributors which were unable to obtain access to vending and all retail outlets. The results were, in the words of Stephen Wilson, former president of Cadbury Schweppes, "disastrous." In Houston, Sunkist lost 98% of its sales in the first year after moving from Lupton Coke to a distributor (Tr. 1905).

302. When Cadbury Schweppes acquired Sunkist, it offered coexistence with Minute Maid and Slice to arrest the decline of Sunkist (Tr. 1906). As of November, 1989, Cadbury had been unable to relicense any of the bottlers that had dropped Sunkist (Tr. 1874, 1878-79, 1904). Sunkist's share of the carbonated soft drink market was 1% for the period 1986-1988. Its case sales declined during this period (CX 781-B, R-T).

d. General Cinema - Trim

303. General Cinema Corporation developed and introduced Trim, a carbonated soft drink that was test marketed in 1984 (CX 177-H). Trim, a product which was intended to be perceived by consumers as a cola, was distributed through food brokers and warehouse distributors because General Cinema concluded that it could not be distributed through the bottling system. Trim failed (CX 230-A, I; CX 232-D, F, G; Respondent's Answers and Objections to

Complaint Counsel's Request For Admissions - Second Set, filed January 18, 1990).

e. *Quaker Oats - Refresh*

304. In 1987, Quaker Oats considered entering the carbonated soft drink industry with a 25% juice-added product called Refresh (CX 707-A-E).

305. Refresh was introduced into three test markets in 1987 and was distributed to retail outlets using food brokers (CX 717-N; CX 718-B). Consumers expected Refresh to taste like a soft drink and were disappointed by its taste (CX 718-A, C). Only 160,100 cases of Refresh were sold between July 1, 1987 and June 30, 1988. It was taken off the market in 1988 (RX 508-B).

f. *Orangina*

306. Orangina USA is a subsidiary of Pernod Ricard, S.A. of Paris, France, and sells "Orangina," an orange juice based natural carbonated soft drink (Tr. 506; CX 177-P). Orangina had been the leading soft drink in France, and is the number two selling soft drink behind Coca-Cola in that country (Tr. 496).

307. To increase sales and become a national brand with national distribution, Orangina undertook a repositioning of the product in 1986 (Tr. 497, 509-10). The company changed its packaging, lowered its price and attempted to have the product distributed through direct-store-door soft drink bottlers whenever possible (Tr. 510-11).

308. Orangina's goal was to obtain a 1% share of market, but, because of limited distribution, the attempt was unsuccessful (Tr. 535). Orangina could not gain access to bottlers (Tr. 524-27). Mr. O'Donnell, former president of Orangina, testified that: "We had a great product and couldn't get it to the system" (Tr. 528).

g. *Anheuser-Busch - Zeltzer-Seltzer*

309. Anheuser-Busch, the largest brewer in the United States, has 960 beer distributors (Tr. 1418). In 1985, it formed the Beverage Group to provide diversification for Anheuser-Busch and its beer distributors (Tr. 1406, 1419).

310. In January 1987, Anheuser-Busch introduced Zeltzer-Seltzer, a flavored soda, and at one time, used 400 to 500 beer distributors to sell it (Tr. 1406, 1409-10, 1422).

311. Because beer distributors were less interested in nonbeer products, lacked expertise in their marketing, and were hampered, in some cases, by state regulation, Anheuser-Busch encountered serious problems with the distribution of Zeltzer-Seltzer (Tr. 1413-17). The Beverage Group was disbanded and Zeltzer-Seltzer was sold in July, 1988 (Tr. 1410, 1413).

h. *Dr Pepper - Seven Up Gold*

312. In the late 1970's, Dr Pepper Company initiated Project Y in an effort to develop a clear, non-colored, cola (Tr. 2459). Initial tests of Product Y generated high levels of consumer acceptance (CX 495-B). Product Y was designed to avoid the appearance of being a cola or a lemon-lime so that it could be distributed through the bottler system (CX 493-C).

313. By May 1984, Dr Pepper put Project Y on indefinite hold. One of the reasons was: "The cost of entry into the soft drink industry is extremely high" (CX 497-A-B; *see also* Tr. 2460).

314. After the 1986 merger of Seven Up Company and Dr Pepper Company, Project Y in 1988 was introduced by Seven Up Company under the name Seven Up Gold (Tr. 2459-61). In March 1988, Ira Herbert, president of Coca-Cola USA, described the introduction of Seven Up Gold as:

a calculated move on the part of 7Up to introduce a cola into the market without running into the problems of contract exclusivity on the part of both Coca-Cola and Pepsi bottlers. . . . I suggest that we keep a very close watch on what happens in the market. I would also see if there is any way we can convince our bottlers, who are also 7Up bottlers, that this product could have a negative impact on Coca-Cola. [Emphasis in original.]

(CX 229-A).

315. Seven Up Gold failed and it is being phased out (Tr. 2164, 2461).

i. Dr Pepper

316. In its early days, many bottlers believed that brand Dr Pepper was more like a cola than the unique drink the company said it was. Coca-Cola and PepsiCo took the position that it was a cola and told their bottlers that they could not accept a franchise for its production. This made it more difficult to obtain distribution through Coca-Cola and PepsiCo bottlers (Tr. 2234).

317. Because it could not obtain distribution through bottlers, Dr Pepper “in desperation,” tried warehouse distribution (Tr. 2234). This attempt failed (Tr. 2235-38) and Mr. Clements, former president of Dr Pepper, learned that:

if you want to develop a consumer franchise and if you want to develop an equity in that market, that we could not do it anyway except the store-door delivery.

(Tr. 2238).

318. In the 1960’s, two things happened that enabled Dr Pepper Company to expand its distribution through bottlers with direct-store-door delivery. The first involved a proposed FDA rule defining a cola that would include brand Dr Pepper. Although the president and the chairman of Dr Pepper Company thought it was a good idea, Mr. Clements disagreed and got the FDA to define cola so that Dr Pepper would be excluded from the definition (Tr. 2239-41).

319. Second, in a trademark infringement case brought by PepsiCo against Dr Pepper, Dr Pepper countered and claimed that PepsiCo was keeping brand Dr Pepper out of its distribution system. The court ruled that Dr Pepper was not a cola (Tr. 2242-43; CX 365-A-L; CX 366-A-H).

320. The suit opened up PepsiCo and Coca-Cola bottlers to Dr Pepper and its sales rose immediately (Tr. 2243).

11. Recent New Entrants

321. Coca-Cola points to the recent entry of several companies or products within the carbonated soft drink business as proof of ease of entry. These include Sunkist, American Natural Beverage, Stroh, Original New York Seltzer, cherry Seven Up, cherry Coke, Fresca, and A&W cream soda (RPF 550-58).

322. Some of the new products probably achieved success because they capitalized on existing brand identification (*e.g.*, cherry Coca-Cola), but the difficulty of significant new entry is evident. A 1987 Dr Pepper document noted that:

of the 130 soft drink brands introduced since 1970, only one has achieved the market share of Dr Pepper. . . . The other 129 soft drink brands . . . represent an average market share of only 0.3% each.

(RX 112-L).

12. Expert Testimony

323. The above description of entry barriers and entry attempts in the carbonated soft drink industry amply supports Dr. Hilke's testimony that barriers, lags and risk factors in the carbonated soft drink industry are high. The most significant is probably franchise exclusivity which bars new tier 1 entrants from use of the bottler system to distribute their products. Fast follower responses (use of imitative products to bar entry) and first mover advantages (the difficulty of convincing consumers to switch from existing to new products), also deter entry (Tr. 2800-02).

324. Other deterrents include sunk (nonrecoverable) costs for advertising and distribution and long development time for a new product which may exceed two years (Tr. 2602-03). Dr. Hilke pointed to record evidence which documents these entry barriers: Dr Pepper's unsuccessful attempt to obtain distribution through warehouses and its eventual success only after it obtained distribution through bottlers (Tr. 2604), P&G's failure to develop the Crush and Hires brands, and Philip Morris' failure with Like (Tr. 2605-06).

325. Dr. Hilke concluded:

So that the whole combination of these things makes it seem unlikely that someone outside through entry would be able to constrain the type of price increase we are talking about within the relevant time period.

Q. What about the possibility that incumbent firms may be able to expand and thereby defeat a price increase?

A. That is certainly a possibility. What we are trying to come to grips with here is a collusive group that includes the firms in tier 1. So firms may have an incentive to cheat but that is something which has to be dealt with under the

collusive agreement. So incumbent firms in the product market definition and in our entry concern are already part of the collusive group to begin with.

Q. Should we be concerned about the ability of firms not in the relevant product market such as those in tiers 2 and tiers 3 to expand and possibly defeat a price increase of the firms in tier 1?

A. Well, that's a fundamental part of the inquiry that we are involved in. And the evidence, both in testimony and in the documents, indicates that if the tier 1 firms collectively increase their prices by 5 percent on concentrate, that it is unlikely that price increase would prove to be unprofitable within the relevant time period. That's basically the nature of the inquiry and the test which should be applied.

(Tr. 2607-08).

L. Likely Effects Of The Proposed Transaction

1. Elimination Of Dr Pepper As An Independent Competitor

326. The proposed transaction, if consummated, would have eliminated Dr Pepper as a significant competitor of Coca-Cola.

2. Collusion

a. Coca-Cola's And PepsiCo's Interest In Obtaining Higher Prices For Their Concentrate

327. Concentrate firms generally announce their proposed price increases at about the same time each year, usually in the first quarter. The trade press, including Jesse Meyer's Green Sheets, is a source of information concerning concentrate prices, and industry members read and rely on the Green Sheets (Tr. 91, 461-62, 2121-22, 2466-68; CX 241-A-B; CX 242-A-B; RX 639-Z-6).

328. Coca-Cola and PepsiCo are particularly concerned about each other's probable responses to price changes initiated by one of them, and signal each other about prices, as revealed in a Coca-Cola memorandum concerning 1987 price plans:

John Farrell and I discussed your request that we consider CCUSA options and contingency plans should PCUSA not follow a pricing move. Attached are three possible scenarios and some suggested ways to respond.

In going through the exercise, I came to the following conclusions:

1. There is a real risk that PCUSA won't follow ALL of our proposed increase.

A number of factors make this more likely than in the past:

[Emphasis in original.]

. . . new management in key positions in PC Foodservice add a degree of uncertainty.

In short, at this time a PCUSA decision may be as heavily influenced by emotional factors as by financial considerations.

(CX 105-A).

329. In another memorandum discussing a Coca-Cola price increase, the question was asked:

Do you think P.C. will follow? P.C. has the same cost pressures. Historically, they always have.

(CX 107-A).

The same question was posed regarding Dr Pepper's reaction (CX 107-B).

330. In another memorandum, Mr. Carew discussed PepsiCo's increasing deals and feature advertising in the take-home segment and suggested that Coca-Cola: [](CX 108-T).

331. Coca-Cola executives have analyzed public statements by their PepsiCo counterparts in an attempt to divine its future price policy. For example, after PepsiCo's chairman made a speech, a Coca-Cola memorandum reported:

Calloway states that for soft drinks, pricing will not be a major factor in 1988 since the competition [referring to Coca-Cola] does not seem to want a price increase.

(CX 106-A).

332. In 1989, Coca-Cola suggested that it would like to see carbonated soft drink prices increase. Ira Herbert, president of Coca-Cola USA, in October 1989, told an interviewer in a statement published in Beverage World that:

I think relief is coming. I don't know how significant that relief will be, but the fact of the matter is that margins have eroded and at some point in time these margins are going to have to be restored.

(CX 110-D).

333. Two months later, in December 1989, at an industrywide meeting attended by Mr. Herbert (RX 941-A-E), Roger Enrico of PepsiCo argued that the "mindless pursuit of market share" was not a profitable strategy, and stated that PepsiCo preferred to focus on profits:

Slower overall industry growth, mixed results on the profit line -- all of this in an industry that doubled itself in the '50s and '60s. Redoubled in the '70s. And re-redoubled in the '80s.

It's enough to make us all wonder. And it raises an 8-billion case question: What's thrown the industry off the strong trendline we've climbed for so many years?

* * * *

Success in our business hinges on a delicate managerial balancing act -- a fine orchestrating of marketing, sales, pricing, purchasing, distribution, manufacturing and merchandising to deliver both volume and profit growth. What's thrown our engine of success out of tune is that something has finally moved the pendulum far enough to knock the delicate managerial balance out of whack.

And that 'something' -- the thing that caused the imbalance -- is the mindless pursuit of market share to the exclusion of all else. . . .

But when you filter the whole of business reality solely through the mesh of market share, you don't get a true picture of the balance that drives success, the balance between volume, share and profit.

(RX 391-Z-45-Z-46).

334. Mr. Dyson, president of CCE, testified:

Q. Have you personally announced to the public that CCE is interested in increasing the prices of its carbonated soft drink products? And have you made such an announcement in 1989?

A. Yes. I think the specific statement that I would have made will have said that we will seek a greater price realization and more specifically said that we would seek appropriate price increases on a market by market basis, where we believed it was reasonable to do so.

(Tr. 2385).

*b. Concentrate Firms' Use Of Bottlers To Obtain
Information About Competitive Activities*

335. Concentrate companies conduct regular periodic reviews of their bottlers' activities, including sales performance, promotional activity, potential new product introductions, marketing support, and other competitive activities (Tr. 74, 1538-43, 1916-18, 2077-78, 2126-29, 2483).

336. During these discussions, bottlers may learn of their franchisors, anticipated marketing, advertising, and promotional programs (Tr. 75-79, 476, 748, 845-47, 1092, 1605-06, 1917, 2484; CX 428-A) and franchisors may obtain information from their bottlers about the marketing, advertising, and promotional programs

of other concentrate companies (Tr. 76-79, 749-51, 844-48, 1092-93, 1918, 2084, 2127-28, 2484-86; CX 520-A).

337. Coca-Cola negotiates CMA's on behalf of its bottlers in areas where supermarkets have outlet locations covering the territories of more than one bottler. Where Coca-Cola bottlers carry brands of other concentrate firms, Coca-Cola negotiates CMA's for the brands of its competitors, such as Dr Pepper. In the process, it may obtain access to sensitive information about its competitors' market activities (CX 189-B; CX 190-N, S).

338. When P&G acquired Coca-Cola Bottling Company of the Mid-East, Coca-Cola sued to block the transaction. Mr. Currie of P&G testified that:

the real philosophical objection Coke had was they objected to a competitor which had the potential of being a significant competitor having what in their view was undue access to sensitive information about their business, promotion plans, techniques, technologies and that was certainly a significant part of their objection.

(Tr. 330).

339. The case was settled when Procter & Gamble agreed to respect the confidentiality of Coca-Cola's business by building a "Chinese Wall" around the bottler's officers, prohibiting them from having contact or exchange of documents with Crush management. Mr. Currie explained:

It was kind of interesting because at that time the president of Crush would go around actually calling on bottlers and making major selling presentations, but he wasn't allowed to call on me. It was handy.

* * *

Q. Do you have an understanding as to why the Chinese wall, I believe you called it, had to be erected?

A. Well, I mean, Coke certainly had these concerns about the protection of reasonable trade secrets and sensitive information regarding their business. I think Procter & Gamble viewed that as not an unreasonable concern. We would have had a similar concern in a similar situation. And it was frankly at that point our intention to be a very good Coca-Cola bottler.

(Tr. 330-31).

340. Since CCE officials and PepsiCo's COBO officials meet with officials of other firms whose concentrate they bottle, the possibility of the transfer of competitive information to Coca-Cola and PepsiCo is real. CCE and COBO bottle concentrate for Barq's,

Dr Pepper, A&W, Cadbury Schweppes, Seven Up, and others (Tr. 1538-42, 1891, 1916, 2190-93, 2385-87).

341. COBO bottles Dr Pepper products, and Mr. Craig Weatherup, president of PepsiCo, has met with True Knowles and other Dr Pepper officials (Tr. 1435-36, 1539, 2191-92). While PepsiCo and Coca-Cola officials have not up to now discussed business with each other (Tr. 1542-43), if the proposed acquisition had been consummated, PepsiCo -- through COBO as a Dr Pepper bottler -- would have common business interests with Coca-Cola, for, although Mr. Weatherup testified that if the acquisition had been consummated PepsiCo and Coca-Cola officials would not deal with each other regarding Dr Pepper, he conceded:

Q. Well, if the Coca-Cola Company owns the Dr Pepper Company, would not people in the organization of the Dr Pepper Company be connected with the Coca-Cola Company?

A. Certainly, yes, they would.

Q. Would the Coca-Cola Company's acquisition of Dr Pepper have led to performance agreements between the Coca-Cola Company and PepsiCo in connection with Pepsi Company's bottling of the Dr Pepper brands?

A. I would assume so.

(Tr. 1543-44).

*c. Constraints On Concentrate And Finished
Soft Drink Price Increases*

342. Competition in the carbonated soft drink industry is intense (F. 208-220) and is due, in part, to the power which retailers exercise over bottlers. For example, a 1985 Coca-Cola review of the Cincinnati area noted that the "major chains seem to be in the driver's seat in promoting soft drinks -- that is, they have succeeded in getting the major soft drink suppliers to discount vigorously. . . ." (RX 27-C). [] (RX 471-Q). Moreover, testimony in this case revealed that retailers decide which soft drinks are sold in their stores (Tr. 654, 2147, 3573), and which brands are featured (Tr. 161, 655, 846, 2146 (*in camera*); RX 198-A; RX 645-Z-65) and displayed (Tr. 161, 654-55, 2146 (*in camera*), 3573; RX 276-A; RX 528-A; RX 645-Z-19). Retailers also decide how much shelf space to allocate to different brands (Tr. 161, 855, 3572-73; RX 642-Z-167; RX 645-Z-27), and what price to charge for carbonated soft drinks (Tr. 161, 2147, 3573).

343. The power of retailers over their suppliers is recognized in the industry. Mr. Edwin Epstein, president of Retailing Insights, Inc., a chain retailing consultant, testified as to retailing in general;

The power of the retailer today is very substantial. It's one of the issues that is talked about all the time. The transfer of power from the manufacturer to the retailer is a subject on which I've spoke many times

(Tr. 3574). (*See also* Tr. 1103, 1166; RX 276-A).

344. An internal PepsiCo report discussing the trade environment in 1989 observed: [] (RX 220-A).

345. Retailers can discipline carbonated soft drink suppliers by cutting back on, or giving less desirable shelf space to, a bottler's products (Tr. 3575-78, 4007-10; RX 331-A), or by refusing to feature a bottler's product (RX 163-Y; RX 331-A). Dominick's, the second largest supermarket chain in Chicago, locked Coca-Cola out of all feature activity for no less than five consecutive weeks (RX 161-M), and a supermarket chain in Pittsburgh refused to feature PepsiCo products due to noncompetitive pricing (RX 190-C). Major chains in the Indianapolis area terminated ads for PepsiCo products in response to announced price increases (RX 207-A, "O"). A New Mexico convenience store chain shut PepsiCo out of its 1988 ad schedule because of non-competitive offers by the chain's Pepsi supplier (RX 263-A). Winn-Dixie has refused to run any Pepsi ads in the state of Kentucky because a local bottler sought to impose a deposit requirement for the cases it used (RX 294-B). A supermarket chain in New Mexico dropped an ad for Coca-Cola products and substituted one for PepsiCo products due to service problems with the local Coca-Cola bottler (RX 311-A). And, Farm Fresh, a major supermarket chain in the Norfolk, Virginia, area showed its dissatisfaction with the promotional pricing activities of its Coca-Cola and Pepsi suppliers by canceling all Coca-Cola and Pepsi feature ads early in 1987 (RX 198-A).

346. Concentrate suppliers want good relations with their bottlers and prefer to avoid action which their bottlers oppose (RX 236-D; RX 630-Z-7-8). PepsiCo has, on occasion, rescinded or delayed concentrate price increases to assuage the concern of its bottlers (RX 235, pp 69-71, 74-75; RX 630-Z-5-6). Generally, however, concentrate firms increase their prices without regard to specific bottler complaints (RX 630-Z-6; RX 643-Z-15; CX 753-K-L).

d. Expert Testimony

347. Dr. Lynk testified that, based upon a series of regression analyses of industry concentration (as measured by the HHI) and output (as measured by the Maxwell Reports) for the period 1966 to 1988, output of finished soft drinks has increased as concentration at the concentrate level of the soft drink industry has increased (Tr. 2770-71, 2772-73; RX 576-A, B, C). As estimated by Maxwell, total soft drink output increased from 3302 million cases in 1966 to 7072 million cases in 1985 -- an increase of 114.2% in 20 years (RX 578). During the same period, per capita consumption increased from 19.1 gallons per year to 40.8 gallons -- an increase of 113.6% (RX 55-B; CX 798-D). From 1976 to 1985 alone, total output increased 44.6% (RX 78; RX 646-Z-28). In the same period, Coca-Cola's output increased 54.5%. (*Id.*) By 1988, total output had grown 53.1% over 1976 levels, and 126.8% over production levels in 1966. (*Id.*)

348. Dr. Lynk also concluded that there is no statistically significant correlation between increasing concentration in the industry as a whole (as measured by the HHI), and the price of finished carbonated soft drinks (as recorded by A.C. Nielsen) (Tr. 2765-69, 2771-73; RX 576-A, B, C). Similarly, increased concentration at the local level has not adversely affected prices for finished soft drinks (Tr. 2789-2803; RX 582-A). Although complaint counsel have run regression analyses of the factors affecting price and output in the carbonated soft drink industry, they did not offer them into the record (Tr. 4316-18). Dr. Hilke's conclusion from the charts he did present was that something fairly complex was going on in the carbonated soft drink industry that could not be explained solely by reference to HHI indices (Tr. 4258-60).

349. Finally, Dr. Lynk argued that the profitability of the leading soft drink firms, as reflected in their stock values, implies that the chances of collusion or the exercise of market power (which, if defined as the ability to raise prices or reduce output, Coca-Cola does not enjoy in any event (Tr. 2756-57, 2759-60, 2774-82, 2859-60)) have not improved over time with the increase in concentration in the soft drink industry (Tr. 2773-82; RX 583-C-H).

350. Despite Dr. Lynk's skepticism about the link between concentration and the prices or output of bottled soft drinks, Dr. Hilke testified that opportunities for collusion exist in the carbonated soft drink industry because a hypothetical leader of a collusive group

would look to information in the trade press such as price surveys, which he believes are used by concentrate companies to set their prices.

351. The proposed acquisition would also, Dr. Hilke believes, set up linkages for the exchange or monitoring of price information that did not previously exist, including a linkage between the two largest incumbent firms, PepsiCo and Coca-Cola (Tr. 2605-10).

3. The Third Bottler Network

352. The use of the phrase “third bottler network,” whose existence Coca-Cola denies (RPF 373-82), is used in this decision as a convenient reference to bottlers which do not bottle Coca-Cola or PepsiCo soft drinks. It does not imply that a formal network of such bottlers exists.

353. The number of local bottling operations either owned by Coke or Pepsi, or in which they have a substantial equity interest, has been increasing:

a. For PepsiCo approximately 50% of the sales of all its products are bottled and distributed by the COBO operation. PepsiCo’s acquisition of its bottlers has been increasing over the years (Tr. 1454).

b. Approximately 43% of the sales of Coca-Cola’s bottle/can products are through CCE, and there are additional sales through other bottlers in which it has an ownership interest. The proportion of the United States population served by a Coke bottler in which Coca-Cola USA has an equity interest is now well over 50% (Tr. 2338-40).

354. Since the 1960’s it has been Dr Pepper’s policy to award franchises to the best bottler in a particular area (Tr. 151-52, 606, 2172, 2249-50; RX 117-A). As a result of this policy, 40% of Dr Pepper is bottled by Coca-Cola bottlers, 40% by PepsiCo bottlers, 10% by RC bottlers and 10% by other bottlers (Tr. 2178-79).

355. The Dr Pepper bottling contract provides that upon a change in ownership of only 10% of a bottling company, the franchisor (Dr Pepper) must approve the reissuance of the franchise license to the new ownership group (Tr. 2186-87, 2380; CX 199-C). Ownership changes at the bottler level of 10% or greater may occur for a variety of reasons. Even a simple refinancing triggers the transfer approval clause, because it is considered an ownership change (Tr. 1141,

1145-46, 1160). Coca-Cola considers Dr Pepper's ownership change clause as equivalent to a right of first refusal (Tr. 2380).

356. Coca-Cola recognizes that bottlers continually change hands and has a policy of "channeling" new and aggressive bottlers into its system (CX 294-D-E). Consolidation in the Coke system through transfers of ownership were:

<u>year</u>	<u>franchises</u>	<u>population</u>	<u>gallons</u>
1980	13	5.2%	6.6%
1981	30	21.5%	15.4
1982	44	21.2	16.5
1983	36	7.1	7.1
1984	18	3.3	3.4

(CX 16-S).

357. The 10% clause in the Dr Pepper bottler contract, which Coca-Cola would have inherited, would have allowed Coca-Cola to refuse the Dr Pepper franchise to a non-Coke bottler (Tr. 2186, 2380; CX 199-C). Coca-Cola planning documents reveal that it was considering integrating Dr Pepper franchisees into its system, and estimated that if it did so, the percentage of Dr Pepper volume in the PepsiCo system would be reduced by 5%, and that the "All other" [third bottler network] volume would be reduced from 32% to 26%. Coca-Cola's share would go from 38% to 45% (CX 81-F-H; CX 86-G, H; CX 87-Z-2-Z-23).

358. In the last 5 years, Dr Pepper has approved at least 20 Dr Pepper franchisees that were neither Coke nor Pepsi bottlers; these included independent Dr Pepper bottlers, with Dr Pepper as their lead brand, and Royal Crown bottlers (Tr. 2181, 2183-85).

359. Mr. Trebilcock of Mid Continent testified that he could not imagine Coca-Cola, if it owned Dr Pepper, allowing the transfer of a Dr Pepper franchise to a competitor of CCE (Tr. 1145-46) and P&G, as a Coca-Cola bottler, anticipated that the proposed acquisition of Dr Pepper would mean that P&G might also receive a Dr Pepper franchise (Tr. 32).

360. Third network bottlers testified that if the proposed acquisition of Dr Pepper had been consummated and if Coca-Cola transferred Dr Pepper franchises from them to the Coca-Cola system, such a transfer would have affected their business adversely because of the importance of the Dr Pepper franchise:

a. Tom Tyler, president of Tyler Beverages, is a Dr Pepper bottler in Tyler, Texas who also carries 7Up, RC Cola, Big Red, A&W, Canada Dry, Sunkist and Squirt (Tr. 1174, 1209). Most of his sales are Dr Pepper and without that brand he would find it difficult to survive (Tr. 1180-81, 1192-93) because the market shares of Seven Up and Royal Crown would not make up the loss from Dr Pepper (Tr. 1192-93, 1226).

b. William Sutton, president of Seven Up Bottling Company of Topeka, Kansas, testified it would be very difficult to survive if he lost Dr Pepper because it accounts for one third of his company's business (Tr. 1240-41).

c. Jim Turner, chairman and president of Dr Pepper Bottling Company of Texas, has the Dr Pepper franchise in Dallas, Fort Worth, and Houston (Tr. 1278-80). He carries 12% of all Dr Pepper products, and when he was asked to suppose he did not have Dr Pepper, he testified: "I don't want to think about Dr Pepper not being there. . . ." (Tr. 1283, 1355).

M. *The Proposed Order*

1. Complaint Counsel's Proposed Order

361. Complaint counsel's proposed order includes the following provision:

It is ordered, That respondent The Coca-Cola Company, for a period of ten (10) years from the date this order becomes final, shall not acquire, directly or indirectly, without the prior approval of the Commission:

A. The whole or any part of the stock, share capital or equity interest of any company or firm:

1. Engaged in the manufacture and sale of branded concentrate or syrup;
2. Engaged in the franchising or licensing of any brand, name or trademark used in connection with the production, marketing or sale of branded concentrate, syrup or carbonated soft drinks; or
3. Holding an exclusive franchise or license of any branded concentrate company other than a company or firm that holds exclusive franchises or licenses solely of respondent.

B. Any franchise, license, brand, label, name or trademark associated with the production, sale or distribution of concentrate, syrup or carbonated soft drinks.

362. Complaint counsel seek this prior approval order even though the proposed acquisition was not consummated and even though the Commission's Bureau of Competition concluded in its Memorandum in Support of Complaint Counsel's Response to Respondent's Motion to Dismiss, p. 11 (April 21, 1987):

A prior approval order is not appropriate in this matter and the reporting procedures already available under the Hart-Scott-Rodino Antitrust Improvements Act will provide the Commission with adequate notice of most potentially anticompetitive acquisitions proposed by respondent. * * * The goal of divestiture to a viable, independent competitor has effectively been accomplished through abandonment of the challenged acquisition of Dr Pepper and its subsequent sale to the investment group headed by Hicks & Haas. The adequacy of the Hart-Scott-Rodino reporting and waiting requirements, as well as recent developments in the soft drink and concentrate industries, render prior approval an unnecessary remedy.

The memorandum also stated with respect to vertical acquisitions:

The imposition of a prior approval requirement would deter potential efficiency-enhancing acquisitions and is thus not in the public interest.

Id. at 10.

363. Complaint counsel's proposed order does not contain a *de minimis* clause. Staff Bulletin 88-01, which establishes policy on prior approval clauses in Section 7 orders states that a prior approval clause in a proposed order may contain a *de minimis* exception (CX 574-A).

2. The Effects of Complaint Counsel's Proposed Order

364. PepsiCo, Coca-Cola's leading competitor, has a history of growth by acquisition. At various times, PepsiCo has acquired Mountain Dew, Mug Root Beer and Flavette, attempted to acquire Seven Up (and succeeded with respect to Seven Up outside the United States) and considered acquiring Sunkist, Canada Dry, Cadbury Schweppes, Crush International, Dr Pepper and Vernors (Tr. 1589-90; RX 630-Z-70-Z-71, Z-78-Z-79; Z-150). Mr. Frederick Meils, formerly executive vice president of the Pepsi-Cola Company and currently executive vice president of Pepsi International, stated that PepsiCo intends to keep all of its options open with respect to future acquisitions of concentrate companies (RX 630-Z-76). Mr.

Weatherup, president of the PepsiCola Company, testified PepsiCo would be interested in acquiring Seven Up if the economics were right (Tr. 1465). Acquisitions of concentrate companies or bottlers may create efficiencies (F. 35). Requiring Coca-Cola to seek the Commission's prior approval of any future acquisitions of any concentrate company or bottler might impede Coca-Cola's capacity to compete effectively with PepsiCo and might embolden PepsiCo to aggressively seek other concentrate companies to exploit Coca-Cola's inability to respond.

365. When soft drink concentrate companies are sold, they are typically sold through a bid process. Thomas Pirko, who has been involved in many purchases and sales of concentrate businesses including among others the purchase of Hansens, the potential purchase of Snapple, and an attempted purchase of Crush and Hires (Tr. 4197-98), testified that these transactions "involved a company that was represented by an investment banker that has worked very hard to create an auction situation" (Tr. 4198-99), and he would recommend to any client looking to sell a concentrate company to use a bid or auction procedure because that would achieve the highest sales price (Tr. 4199).

366. When Dr Pepper was put up for sale, there was a "bidding process," and there were other bids submitted along with Coca-Cola's (Tr. 2222-23). Dr Pepper's owners hired Goldman Sachs to sell off Dr Pepper and develop offers for the company (Tr. 2223-24). Procter & Gamble hired Goldman Sachs to seek bids on Crush International (Tr. 1945).

367. Mr. Stephen R. Wilson, former president of Cadbury Schweppes, testified that the existence of a requirement to get prior approval for an acquisition from the Federal Trade Commission would make a seller "skittish" about a bid from a prospective purchaser burdened by such a requirement (Tr. 1946). In Mr. Wilson's opinion, had Cadbury Schweppes had to obtain prior approval to acquire Crush, Procter & Gamble would have discontinued its bid (*id.*). If Mr. Pirko received a bid that was subject to Commission "prior approval," Mr. Pirko testified: "[I] would run to my attorney, find out what that meant, since I'm not real certain.... I would ask him if it would interfere with our getting the highest price and getting it quickly and whether or not it really meant any complications. . . ." (Tr. 4200). If he were told that there was no guarantee

of Federal Trade Commission approval and that the average time to get approval was four or five months, Mr. Pirko replied:

I would call up buyer number 2 and use buyer number 1's price as a stocking [sic] horse, use it as a lead price and try to convince buyer number 2 of the fact that I've got a hot prospect who has evaluated the company at this price and you better take your shot now, but I would [eventually] go to the second buyer

(Tr. 4201).

368. Obtaining prior approval from the Commission to complete an acquisition covered by a consent decree might take three and a half months (Tr. 3764-65; RX 573-A-B, F-H).

369. Mr. Dyson testified that Coca-Cola needs to be free to make acquisitions of interests in concentrate companies to protect the integrity of its bottling system in the United States. It undertook the acquisition of Dr Pepper in part because Dr Pepper was important to the welfare of many Coca-Cola bottlers and Coca-Cola feared what might happen to those bottlers if Dr Pepper were acquired by undesirable purchasers who would harm the brand, and derivatively, the Coca-Cola bottlers (RX 638-Z-26-Z-28). For example, CCE was formed because two very large bottlers came up for sale and Coca-Cola felt compelled to purchase them to keep them from falling into the hands of an undesirable purchaser (Tr. 190-91, 2335; RX 638-Z-102-Z-105).

370. Between 1985 and 1990, at least 23 bottlers were acquired by concentrate manufacturers. The Commission challenged one, PepsiCo's acquisition of General Cinema's bottling operations (RX 629-I-Z-43).

371. After the Commission filed the administrative complaint in this proceeding, Hicks & Haas, which controlled A&W, led investment groups which acquired both Dr Pepper and Seven Up and subsequently merged Seven Up into Dr Pepper. The investment group which acquired Dr Pepper included Schweppes, which continued to hold an interest in the merged Dr Pepper/Seven Up Company. In addition, after the Commission filed the instant administrative complaint, Cadbury Schweppes acquired the carbonated soft drink business of R.J. Reynolds, (Canada Dry and Sunkist) and the carbonated soft drink business of Procter & Gamble (Crush, Hires, and Sundrop) and A&W acquired Squirt and Vernors. The Commission did not investigate any of these acquisitions beyond receiving the initial Hart-Scott-Rodino filings and the Commission

did not file any administrative complaint as to any of these acquisitions (Tr. 2071; RX 629-A-G).

3. The Commission's Treatment Of The Proposed PepsiCo-Seven Up Acquisition

372. On January 24, 1986, PepsiCo announced that it had reached an agreement in principle to acquire Seven Up from Philip Morris, Inc. Four days later each of these companies filed premerger notification and report forms in compliance with the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("H-S-R") and the Commission initiated an investigation of the proposed acquisition (RX 572-A). At that point in time, PepsiCo and 7-Up had respective market shares of 26.9% and 5.3% as the Commission then viewed the market involved (RX 626-I).

373. On February 21, 1986, Coca-Cola announced that it had reached an agreement in principle with the shareholders of DP Holdings, Inc. to acquire all the outstanding capital stock of DP Holdings, an entity which then owned all the outstanding capital stock of Dr Pepper. Coca-Cola and DP Holdings then filed premerger notification and report forms as required by H-S-R on February 25, 1986, and February 26, 1986, respectively, and the Commission commenced an investigation of the proposed acquisition. The respective market shares then controlled by Coca-Cola and Dr Pepper were approximately 34.8% and 4.2% as the Commission then viewed the market involved (RX 626-I).

374. On June 20, 1986, the Commission authorized the Bureau of Competition to seek preliminary injunctive relief that would prevent the consummation of the proposed mergers and to file administrative complaints against Coca-Cola and PepsiCo (RX 572-D). On June 23, 1986, prior to the commencement of any of the actions authorized by the Commission, Philip Morris announced its decision to terminate the agreement that it had with PepsiCo to sell PepsiCo the Seven Up Company (RX 572-E; RX 630-Z-31-Z-32).

375. The following day the Commission filed suit against Coca-Cola in the United States District Court for the District of Columbia to preliminarily enjoin Coca-Cola from consummating its proposed acquisition of Dr Pepper pending the result of an administrative proceeding concerning the same (RX 572-E). The administrative complaint that is the subject of the present proceeding was subse-

quently issued on July 15, 1986 (RX 572-E). The Commission did not initiate any proceeding with respect to Pepsi's contemporaneous attempt to acquire the Seven Up Company (RX 572-E). On July 31, 1986, the District Court issued the injunction requested by the Commission. *FTC v. The Coca-Cola Co.*, 641 F. Supp. 1128 (D.D.C. 1986), *vacated as moot*, 829 F.2d 191 (D.C. Cir. 1987). Five days later the shareholders of DP Holdings announced that with Coca-Cola's consent they had elected to terminate their agreement to sell Coca-Cola's all of DP Holdings' outstanding capital stock (RX 572-E). Immediately thereafter, DP Holdings sold Dr Pepper to Hicks & Haas, an independent third party (RX 376-A). These developments eliminated any reasonable possibility that Coca-Cola would acquire Dr Pepper, but the Commission refused on August 9, 1988 to dismiss the administrative complaint pending against Coca-Cola. Order Denying Respondent's Motion for Dismissal of the Complaint, The Coca-Cola Co., Docket No. 9207 (Aug. 9, 1988).

376. Since 1981 the Commission has authorized the Bureau of Competition to seek preliminary injunctive relief enjoining the consummation of proposed acquisitions in 41 matters (RX 575-B). Administrative complaints, however, were ultimately issued in only 18 of these matters (RX 575-B). In each of the remaining 23 matters the contested transaction was abandoned prior to the commencement of the relevant preliminary injunction hearing and such hearing was never held (RX 575-B). Conversely, the Commission issued an administrative complaint against at least one party in each of the 8 matters where the contested transaction was not terminated until subsequent to the taking of testimony in the relevant preliminary injunction hearing. In the remaining ten matters where administrative complaints were issued, the transactions were not abandoned (RX 575-B, D).

III. CONCLUSIONS OF LAW

A. *The Relevant Product Market*

The parties agree that one relevant product market in this case is all concentrate used in the sale of all carbonated soft drinks. Coca-Cola disagrees with the narrower market proposed by complaint counsel -- branded concentrate used to produce branded carbonated soft drinks (F. 67), and complaint counsel dispute the much broader

market proposed by Coca-Cola -- the manufacture and sale of all potable liquids (F. 65).

There is some competitive interaction between carbonated soft drinks and other beverages, and it cannot be ignored, for there appears to be a generally shared industry perception that the long-term growth in per capita soft drink consumption has been at the expense of other beverages (F. 49).

Other indications of some interaction in Coca-Cola's broader proposed market is the occasional monitoring of other beverages by soft drink firms (F. 56-58) and the limited price sensitivity between soft drinks and other beverages (F. 59-63).

Despite these considerations, the all potables market is not one which can be looked to with any confidence in an analysis of the probable competitive consequences of the proposed acquisition, for despite the long term impact of carbonated soft drinks on other beverages, this record reveals that products which are not soft drinks have little impact on the day-to-day competitive activities of a firm like Coca-Cola which does not consider the prices of other beverages when it sets its concentrate prices or, when acting as a bottler, its finished product prices (F. 112, 122). Other concentrate firms and bottlers take the same approach to pricing (F. 115, 116, 119, 120, 128).

Dr. Lynk's testimony is consistent with my conclusion for, although he proposed an all potables market, he could not testify that particular products such as beer, coffee, and bottled water were in the same market as carbonated soft drinks (F. 66); in fact, consideration of the reasonable interchangeability of use or the cross-elasticity of demand between branded concentrate and other possible substitutes for it such as other beverages or unbranded concentrate, leads to the conclusion that complaint counsel's narrow market should be used to analyze the proposed acquisition.

The Department of Justice's Merger Guidelines, 4 CCH Trade Reg. Rep. paragraph 13,103 (June 14, 1984) ("DOJ Guidelines"), explain how cross-elasticity of demand, which "measures the sensitivity of the demand for one product to a small change in the price of a second product," Olin Corp., FTC Dkt. 9196, slip opinion at 4 (June 13, 1990), may be used to define a product market or markets:

[T]he Department will begin with each product (narrowly defined) produced or sold by each merging firm and ask what would happen if a hypothetical monopolist of that product imposed a 'small but significant and non-transitory' increase in price.

If the price increase would cause so many buyers to shift to other products that a hypothetical monopolist would not find it profitable to impose such an increase in price, then the Department will add to the product group the product that is the next-best substitute for the merging firm's product and ask the same question again. This process will continue until a group of products is identified for which a hypothetical monopolist could profitably impose a 'small but significant and non-transitory' increase in price. The Department generally will consider the relevant product market to be the smallest group of products that satisfies this test.

DOJ Guidelines, Section 2.11.

Complaint counsel's proposed relevant product market consists of so-called "tier one" firms which sell branded carbonated soft drinks nationwide through direct-store-door delivery. The major firms in this tier include Coca-Cola, Dr Pepper, PepsiCo, Seven Up, Royal Crown, Cadbury Schweppes and A&W (F. 81-102). Other branded concentrated firms in this tier include those which sell their products regionally, including Double Cola, Barq's, Cheerwine, Big Red, Frank's and Canfield (F. 103).

Tier two firms are those, such as Shasta, which do not franchise their brands, but sell carbonated soft drinks through warehouse distribution (F. 104-06). Tier three firms include retail grocery chains that sell private label carbonated soft drinks under their own label or a control label (F. 107). "Boutique" firms, which do not clearly fit in any of these categories, produce "niche" products appealing to a limited population (F. 108).

If the producers of branded concentrate could collusively and profitably raise prices by a small but significant amount over an extended period of time it would tend to show that branded concentrate is a product market because:

If readily available alternatives [such as unbranded concentrate] were, in the aggregate sufficiently attractive to enough buyers, an attempt to raise prices would not prove profitable, and the tentatively identified product group would prove to be too narrow.

DOJ Guidelines, Section 2.11.

The "small but significant and nontransitory" price used in the DOJ Guidelines is 5% (F. 149).

The demand for branded concentrate is derived from the demand for finished carbonated soft drinks. Since the cost of concentrate represents approximately 10% of the grocery store promoted price of the finished product, a 5% concentrate price increase, if fully passed

on to the consumer, would result in a 0.5% price increase for the finished product (F. 150).

Several industry participants testified that retailers of branded carbonated soft drinks could profitably sustain a price increase much greater than 10% (which translates to 100% at the concentrate level) (F. 156). Coca-Cola complains that such anecdotal evidence does not constitute rigorous proof of the cross-price elasticity of demand between branded and unbranded concentrate or other beverages, but I find that it offers some insight into the price interaction of these products.

A more serious challenge to the cross-price elasticity test is posed by evidence that between 1984 and 1985, Coca-Cola increased its concentrate prices by [] while Dr Pepper increased its concentrate prices [] (F. 188-189), which, if one accepts the 5% test, tends to support the claim that Dr Pepper and Coca-Cola are not in the same relevant product market.

Complaint counsels explanation of why the 5% test should not apply to Dr Pepper's pricing is not wholly convincing (Reply to Respondent's Proposed Findings, p. 41), but the fact is that Dr Pepper and Coca-Cola are direct competitors (F. 187-202); indeed, Coca-Cola's claim that these soft drinks do not compete is inconsistent with its argument that beverages such as milk and coffee compete with soft drinks (RPF 39, 101).

Furthermore, failure to present direct evidence of cross-price elasticity is not a fatal defect, for the Commission and the Department of Justice recognize that circumstantial evidence of pricing relationships may be relied upon as a proxy for direct proof of cross-price elasticity. The DOJ Guidelines, Section 2.12, state that "Although direct evidence of the likely effect of a future price increase may sometimes be available, it usually will be necessary for the Department to infer the likely effect of a price increase. . . ." Inferences of product substitutability can be derived from:

[1] Evidence of buyers' perceptions that the products are or are not substitutes

[2] Differences in the price movements of the products or similarities in price movements over a period of years

[3] Similarities or differences between the products in customary usage, design, physical composition, and other technical characteristics; and

[4] Evidence of sellers' perceptions that the products are or are not substitutes

[*Id.*]

The Commission agrees that industry and consumer perceptions and experience should be considered in any product market analysis:

[T]he existence of separate product markets may be evidenced by: the persistence of sizeable price disparities for equivalent amounts of different products; the presence of sufficiently distinctive characteristics which render a product suitable only for a specialized use; the preference of a number of purchasers who traditionally use only a particular kind of product for a distinct use; or the judgment of purchasers or sellers as to whether products are in fact competitive. In addition, where firms routinely study the business decisions of other firms, including their pricing decisions, such evidence may reflect a single product market.

Federal Trade Commission Statement Concerning Horizontal Mergers, 2 CCH Trade Reg. Rep. paragraph 13,200, at 20,905 (June 14, 1982) ("FTC Merger Statement"). *See also* Olin, at 5:

The identification of a product market, however, does not necessarily hinge on numerical calculation and proof of demand elasticity, the search for which is often fruitless because of the difficulty of measuring elasticities.

Circumstantial, and convincing, evidence of the low cross-price elasticity of demand between branded concentrate and unbranded concentrate, and between branded concentrate and other beverages includes:

1. The persistent and varying price gap (up to 40%) between branded and unbranded products (F. 131-35). *See B.F. Goodrich Co.*, 110 FTC at 207, 290 (1988) ("persistent price differences" a "surrogate" for direct evidence of elasticity); *Grand Union Co.*, 102 FTC 812, 1041 (1983) (whether price disparity between products persists over time relevant to market definition); FTC Merger Statement at 20,905; DOJ Guidelines Section 2.12; *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

2. The judgment of purchasers and sellers that branded and unbranded carbonated soft drinks do not compete in any meaningful sense (F. 109-129). *See* FTC Merger Statement (the existence of separate product markets may be inferred from "the judgment of purchasers or sellers as to whether products are in fact competitive");

B.F. Goodrich Co., 110 FTC at 290 (“industry firm perceptions” are “surrogates” for direct evidence of elasticity); *Grand Union Co.*, 102 FTC at 1041 (“the extent to which consumers consider various categories of sellers . . . as substitutes”).

The major industry players recognize the significant differences between branded product and unbranded and warehouse distributed products: Coca-Cola (F. 109-114); Cadbury Schweppes (F. 115); Dr Pepper (F. 116); PepsiCo (F. 117-118); Seven Up (F. 119). Less significant producers and bottlers share this view of industry competition (F. 120-129).

3. The perception of consumers that branded and unbranded soft drinks have different attributes (F. 143-146). *See Columbia Metal Culvert v. Kaiser Aluminum*, 579 F.2d 20, 30 (3rd. Cir.), *cert. denied*, 439 U.S. 876 (1978) (“perceptions . . . of consumers . . . are most salient in the determination of market boundaries.”)

Coca-Cola’s claim that unbranded product and other beverages compete with branded product is based on the argument; that, at some unspecified but extreme difference in price or if advertising ceased for an extended period of time (F. 136, 138, 140), consumers might switch from one product category to another, but this does not establish the existence of an all potables market. *Times Picayune Pub. Co. v. United States*, 345 U.S. 594, 612 n.31 (1953):

For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn; in technical terms, products whose “cross-elasticities of demand” are small.

In *Pillsbury Co.*, 93 FTC 966 (1979), the Commission stated:

Respondent argues that such broad price sensitivity between pizza and other foods exists. . . . As support, it cites the testimony of a grocer that when meat prices rose in 1973 and 1974, sales of meat went down and sales of frozen pizza rose correspondingly. We are not sure what the import of this information is since we do not understand Respondent to argue that “meat” and frozen prepared pizza are in the same market. In any event, this testimony tells us little since it does not specify the amount of increase in meat prices, or the extent of responding increases in pizza sales.

Id. at 1031, n.9.

Finally, Coca-Cola argues that since complaint counsel propose a branded concentrate market, they cannot rely on evidence relating

to the finished product (Reply Memorandum, pp. 26-27). I disagree, for the demand for concentrate is derived from the demand for the finished product (F. 150).

In conclusion, the most appropriate market for analyzing the probable consequences of the proposed acquisition is branded concentrate used to produce branded carbonated soft drinks.

B. *The Relevant Geographic Market*

In antitrust cases, the area within which the effects of challenged activities are analyzed is the "area in which the seller operates and to which buyers can practicably turn for supplies." *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961); *FTC v. Foodtown Stores*, 539 F.2d 1339, 1344 (4th Cir. 1976); *Midcon Corp.*, 5 CCH Trade Reg. Rep. paragraph 22,708 at 22,380 (FTC, July 20, 1989).

Because transportation costs are so small, concentrate can be, and is, shipped nationwide from one concentrate plant (F. 165). Thus, the area within which purchasers of concentrate can turn for supplies is nationwide.

Concentrate firms often make marketing support available to bottlers in one area which is not available in other areas (F. 168-169). Whether this practice results in consistent and significant discrimination in the price of concentrate between areas of the industry, as complaint counsel contend, *see General Foods Corp.*, 103 FTC 204, 351 (1984), is not clear, for bottlers may refuse to participate in cooperative advertising programs (F.170), and bottlers which do participate in such programs may have to render services before they can obtain marketing support (F. 171).

The existence of exclusive territories does not dictate the conclusion that the market for concentrate is less than national, for these restrictions do not prohibit the shipment of other concentrate to competing bottlers (F. 182). Furthermore, bottlers with multiple plants transfer concentrate between plants, and there are no exclusive territories for fountain syrup, which accounts for, in the case of Coca-Cola, almost [] of its sales (F. 166).

Even at the bottler level, purchasers of the finished product may be able to range far afield for competing product. For example, Iowa Beverage, Canfield's contract packer, ships its soft drinks as far as 500-miles from its plant, and Canfield has actually shipped its soft drinks nationwide from its Chicago plant (F. 254).

This evidence establishes that the relevant geographic market for concentrate is nationwide. *See Pillsbury, Inc.*, 93 FTC 966, 1030 (1979):

The test for measuring geographic market is where consumers (in this case retailers) can practicably turn for an alternative source of supply. Here the record is clear that frozen pizza manufacturers could sell virtually throughout the United States from a single plant with no significant cost disadvantage. Thus, the power of any given group of sellers serving a city or region at a given time to raise prices is limited by the capacity of virtually all other domestic manufacturers to compete on practically an even footing in that city or region -- an economic situation which requires a finding of a national market. . . .

See also General Foods Corp., 103 FTC 204, 348-51 (1984); *United States v. Hammermill Paper Co.*, 429 F. Supp. 1271, 1278-79 (W.D. Pa. 1977).

Even if I were to accept complaint counsel's argument that there are local markets for concentrate, they have not produced the kind of evidence which is necessary to determine the boundaries of those markets with any certainty. A widely accepted method of defining those boundaries is the Elzinga-Hogarty test, which has been described as one of the few constructive analytical procedures that has been advanced for determining relevant geographic markets. Under this test, "a particular area qualifies as a relevant geographic market if two conditions are met: (1) very little of the total production in that area is exported; and (2) consumers in that area are consuming goods primarily produced there." *General Foods*, 103 FTC at 232-33.

If the Elzinga-Hogarty test were applied at the bottler level, one would undoubtedly conclude that there are local or regional markets for the finished product (F. 180) because most soft drinks are probably produced and consumed in small areas of the country. This concession, however, does not aid complaint counsel, for (1) concentrate, the product with which this case is concerned, is shipped nationwide and (2) there is no evidence in this record of any Elzinga-Hogarty or other economically rational analysis which establishes that the local areas chosen by complaint counsel (F. 186) actually are areas that encompass the primary demand and supply forces which determine price. *General Foods*, 103 FTC at 216; *see also Consul Ltd. v. Transco Energy Co.*, 1986-2 CCH Trade Cas. paragraph 67,347 at 61,797:

while the [relevant geographic] market may not be measurable in “metes and bounds,” see *Times-Picayune Publishing*, 345 U.S. at 611, it should be demonstrable in other than purely hypothetical terms.

C. The Likely Effects Of The Proposed Acquisition

If the proposed acquisition of Dr Pepper by Coca-Cola had been consummated, the result would have been the elimination of a significant, successful competitor (F. 187-202, 360, 369) and a post-merger HHI in the branded concentrate market of 3572, or an increase of 443 (F. 222). In the all concentrate market, the HHI would have increased by 363, to an HHI of 2929 (F. 223). According to the DOJ Guidelines, Section 3.11(c):

Post-Merger HHI Above 1800. Markets in this region generally are considered to be highly concentrated. Additional concentration resulting from mergers is a matter of significant competitive concern. The Department is unlikely, however, to challenge mergers producing an increase in the HHI of less than 50 points. The Department is likely to challenge mergers in this region that produce an increase in the HHI of more than 50 points, unless the Department concludes, on the basis of the post-merger HHI, the increase in the HHI, and the presence or absence of the factors discussed in Sections 3.2, 3.3, 3.4, and 3.5 that the merger is not likely substantially to lessen competition. However, if the increase in the HHI exceeds 100 and the post-merger HHI substantially exceeds 1800, only in extraordinary cases will such factors establish that the merger is not likely substantially to lessen competition.

The FTC Merger Statement, 4 CCH paragraph 13,200 at 20,901, recognizes that the courts and the enforcement agencies “have traditionally looked to market share data and derivative concentration ratios as the principal indication of market power,” but it concludes that recent research and a decade of practical experience “justifies some revision of market share benchmarks and greater consideration of evidence beyond mere market share when such evidence is available and in a reliable form.”

Nevertheless, the FTC Merger Statement concedes the overriding importance of market shares:

Where all of the non-market share evidence consistently points in the same direction, its value will be high. Such evidence will be of even greater significance where the market shares are in the low to moderate range. On the other hand, if the anti-competitive potential of a merger is large, as predicted by the combined market

shares of the merging parties, other non-market share factors may appropriately be given less weight. . . .

Id. at 20903.

The importance of market share in predicting the consequences of a merger cannot be overemphasized. Judge Posner of the Seventh Circuit believes that the strict approach of the Supreme Court in the 1960s should not be forsaken despite such cases as *United States v. General Dynamics*, 415 U.S. 486 (1974) and *United States v. Citizens Southern Nat'l Bank*, 422 U.S. 86 (1975).

According to him, these cases:

show that market share figures are not always decisive in a Section 7 case, but it can be argued that the cases themselves carve only limited exceptions to the broad holdings of some of the merger decisions of the 1960s.

Hospital Corp. of America v. FTC, 807 F.2d 1381, 1385-86 (7th Cir. 1986).

Concentration figures answer the ultimate question in a Section 7 case, that is:

whether the challenged acquisition is likely to facilitate collusion. In this perspective the acquisition of a competitor has no economic significance of itself; the worry is that it may enable the acquiring firm to cooperate (or cooperate better) with other leading competitors or reducing or limiting output, thereby pushing up the market price.

Hospital Corp., 807 F.2d at 1386.

The HHI in the relevant market or in the broader all concentrate market prior to the proposed acquisition was extremely high. The proposed acquisition would have increased the HHI significantly; such an increase creates a presumption of illegality. *See B.F. Goodrich*, 110 FTC 207 (1988), where the relevant market was only moderately concentrated according to the DOJ Guidelines. *Id.* at 313, 314. Nevertheless, according to the Commission, the concentration data:

are well above those that created a presumption of illegality in *United States v. General Dynamics* and *Weyerhaeuser*. In short, the concentration data create a relatively strong presumption of anticompetitive effects . . . and relatively strong evidence from other factors is needed to rebut that presumption.

Id. at 314.

The high concentration in the branded concentrate market suggests that collusion would have been relatively easy pre-acquisition and the proposed acquisition would have increased the ability of the firms in the market to agree on tactics for increasing prices or reducing pressure on prices.

The incentive to increase the price of concentrate is high and the market leaders, Coca-Cola and PepsiCo, recognize their mutual interdependence and have signaled each other about their pricing concerns (F. 328-334). Their concerns are, of course, with the low margins in the industry. Coca-Cola's president stated in *Beverage World* that:

I think relief is coming. I don't know how significant that relief will be, but the fact of the matter is that margins have eroded and at some point in time these margins are going to have to be restored

(F. 332).

Thus, this is an industry where firms recognize that collusion would be profitable and the proposed acquisition, by increasing concentration in the sale of a product whose demand is relatively inelastic (F. 151-62), would have increased the opportunities for collusion. See *FTC v. Elders Grain, Inc.*, 868 F.2d 901 (7th Cir. 1989).

The supply of industrial dry corn was already highly concentrated before the acquisition, with only six firms of any significance. The acquisition has reduced that number to five. This will make it easier for leading members of the industry to collude on price and output without committing a detectable violation of Section 1 of the Sherman Act or Section 5 of the FTC Act, both of which forbid price fixing.

Id. at 905.

The incentive to collude is evident, and the opportunity for collusion is provided by information which is available from the Green Sheets (F. 327) and from bottlers which are often owned by concentrate firms (F. 335-41). Coca-Cola denies that bottler information would enhance collusive behavior, but its attempt to block the acquisition of a Coca-Cola bottler belies its claim (F.338). Another effect of the proposed acquisition might be the transfer of Dr Pepper franchises from third bottlers (F. 352-59) and the consequent

reduction of the competitive viability of some of those bottlers (F. 360).

Coca-Cola suggests that the high concentration in the relevant markets does not reflect a true picture of an industry which is highly price and promotional-competitive (F. 208-20) and which cannot dictate the price of the finished product to purchasers (F. 342-46). It cannot be denied that the output of finished soft drinks has increased as concentration at the concentrate level has increased (F. 347), and there seems to be no statistically significant correlation between increasing concentration in the industry as a whole and the price of finished carbonated soft drinks (F. 348). However, the price of concentrate, with which this proceeding is concerned, has increased over the past several years at a greater rate than the increase in inflation (F. 23) and overall profits of the major firms have increased (F. 24).

These facts suggest that there will be a great incentive in the future to mitigate the effects of such competition as exists, and I cannot accept past competitive activity as a prediction of future industry conduct.

Finally, I reject as speculative Coca-Cola's claim that the proposed acquisition would have increased efficiency and overall industry competition (RPF 570-90).

D. Entry Conditions

The high concentration in the relevant markets prior to the proposed acquisition and the significant increase in concentration which would have resulted from the acquisition would be of no concern if there were no barriers to entry into these markets, for the sustained exercise of market power would not have been possible. *See B.F. Goodrich*, 110 FTC at 296, n.63.

Absolute barriers to entry are rare, and a standard has developed which analyzes entry in terms of the time it might take "for a motivated outsider to effect entry." *Olin Corp.*, at 23. The DOJ Guidelines, Section 3.3, employ a two year standard.

Barriers to entry are generally considered to be additional long run costs that are incurred by an entrant but that were not incurred by incumbent firms. *Echlin Mfg. Co.*, 105 FTC 410, 485 (1985). As a practical matter, however, the courts and the Commission define barriers as any market condition which increases "the length of time

required for new entry to take place, by making the production process a complex one which requires substantial time to organize efficiently.” R. Posner, *Antitrust Law: An Economic Perspective* 56 (1976).

Entry into most markets is not impossible. That is true with respect to carbonated soft drink concentrate; however, entry analysis looks not at whether some entry has occurred, but whether meaningful entry has been, and can be, successful. *Coca-Cola Bottling Co. of New York*, 93 FTC 110, 210, n.13 (1979):

While it may be that anyone with an acre of land, a bathtub, and clean feet can make wine, profitable entry on a scale sufficient to provide meaningful competition for the industry leaders appears to be a considerably more difficult proposition, the dimensions of which are not entirely clear from the record. It is entry of the latter sort with which we must be principally concerned in evaluating the state of competition in an industry.

Entry into carbonated soft drink concentrate production and into the production of finished soft drinks is not difficult (F. 243-56), and there have been several new products developed by incumbents as well as several new entrants into the industry in the past few years (F. 321). Additionally, some so-called “boutique” firms have entered, and may capture some share of the carbonated soft drink market (F. 108).

However, these entrants provide no potential price restraining competition to the leaders in the most significant relevant market -- branded concentrate. In this market, there are substantial barriers or impediments to entry. These include the need for direct-store-door delivery, for which warehouse distribution is no substitute (F. 257-66), flavor restrictions which effectively prohibit bottlers from accepting franchises from new entrants (F. 267-73), the success of the major concentrate companies in capturing the majority of feature ads (F. 274-83), the introduction of new products by entrenched firms (F. 284-88), the time and money required to attain adequate penetration of the market, the importance of trademark equity, and the limited opportunities in the vending and fountain segments of the industry (F. 289).

The existence of these barriers and impediments is amply illustrated by the failure of highly-motivated, well-financed firms to attain successful entry into the branded concentrate market. These firms include Philip Morris-7 Up (F. 291-95); P&G (F. 296-98);

General Cinema (F. 299-303); Quaker Oats (F. 304-05); Orangina (F. 306-08); Anheuser-Busch (F. 309-11); and Dr Pepper (F. 312-20).

The evidence of entry barriers and failed entry attempts supports Dr. Hilke's conclusion that no firm could, through entry into the branded concentrate market, constrain the potential price increases which might result from the enhanced opportunity for collusion which would have been caused by the proposed acquisition. Since incumbent firms would be part of any collusive arrangement regarding price or production, they would not, by definition, defeat that arrangement by increasing production (F. 325).

E. *The Proposed Order*

Once the Commission finds that a respondent has violated a law which it administers, it has wide discretion to fashion a remedy which will prevent future violations. *Jacobs Siegel Co. v. FTC*, 327 U.S. 608, 611 (1946): one such remedy in merger cases is the imposition of a prior approval requirement. *Yamaha Motor Co. v. FTC*, 657 F.2d 971, 984-85 (8th Cir. 1981), *cert. denied*, 456 U.S. 915, 985-86 (1982); *Abex Corp v. FTC*, 420 F.2d 928 (6th Cir.), *cert. denied*, 400 U.S. 865 (1970); *Hospital Corp. of America*, 106 FTC 361, 513-14 (1985); *Ekco Products Co.*, 65 FTC 1163, 1216, 1222 (1964).

Coca-Cola does not dispute the Commission's right to impose a prior approval clause in appropriate circumstances, but it argues here that the clause sought in complaint counsel's proposed order goes beyond the remedy sought in the complaint, that its entry would place it at a competitive disadvantage vis-a-vis its competitors, and that it is being proposed to punish Coca-Cola for exercising its statutory right to judicial review of the Commission's opposition to the proposed acquisition.

As to the last argument, Coca-Cola contrasts the Commission's approach in this case with its failure to proceed against PepsiCo for its proposed acquisition of Seven Up (F. 372-75), and it appears, for there is no other explanation for its action, that the Commission's inconsistent treatment of the Coca-Cola and PepsiCo proposed acquisitions was intended to punish Coca-Cola for forcing the Commission to seek judicial relief (F. 376).

I do not reject the proposed order for this reason, but for a much more convincing reason: the Bureau of Competition's concurrence

with Coca-Cola's motion to dismiss because of the lack of public interest in obtaining a prior approval order (F. 362).

Complaint counsel recognize in their findings the efficiencies which have been realized in the past several years by the reduction in the number of bottlers (CPF 196-212), and the Commission has challenged only one of twenty-three bottler acquisitions which have occurred in the past five years. Concentrate firm acquisitions have also been ignored (F. 370-71).

Given these facts, I cannot justify entry of the remedy sought for:

it is industry market structure and market conditions, not whether a "knowing and deliberate violation" or a "likelihood of repeated unlawful conduct" has been shown as AMI asserts, that determines the appropriateness of imposing a prior approval requirement in a particular case.

American Medical International, Inc., 104 FTC 1, 224 (1984).

In conclusion, complaint counsel assume, contrary to the evidence, that all acquisitions in the concentrate and bottling industry would be anticompetitive, *AMI*, 104 FTC at 225. My analysis of the record and the Bureau's own position before trial was held ("recent developments in the soft drink and concentrate industries, render prior approval an unnecessary remedy") (F. 362) support the conclusion that it would not be in the public interest to saddle Coca-Cola with an unnecessary and potentially disruptive prior approval order which might place it on an "unequal footing with its principal competitors" *AMI*, 104 FTC at 226.

Since a prior approval order is the only remedy proposed by complaint counsel, I will enter no order despite my conclusion that the proposed acquisition would have violated Section 7 of the Clayton Act and Section 5 of the FTC Act if it had been consummated.

F. Summary

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding, and over Coca-Cola.
2. This proceeding is in the public interest.
3. At all times relevant herein, Coca-Cola has been, and is, engaged in commerce as commerce is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and its business is in or

affects commerce as commerce is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

4. The most appropriate relevant market in which the effects of the proposed acquisition should be assessed is the manufacture and sale of branded concentrate and syrup used in the production of branded carbonated soft drinks; another is the manufacture and sale of all concentrate and syrup used to produce carbonated soft drinks.

5. The section of the country in which it is appropriate to assess the effects of the proposed acquisition is the nation as a whole.

6. The relevant markets are highly concentrated and the proposed acquisition would have significantly increased concentration in those markets.

7. Entry into the relevant markets is difficult, risky, and time consuming.

8. Expansion by fringe firms in the relevant markets is extremely unlikely.

9. The effect of the proposed acquisition, if consummated, may be substantially to lessen competition in the relevant markets, 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:

- (a) Elimination of Dr Pepper Company as a substantial, independent competitive force in the relevant markets;
- (b) Increasing the likelihood of, or facilitating, collusion;
- (c) Increasing the difficulty of entry; and
- (d) Raising the costs and reducing the competitiveness of other firms in the relevant markets.

10. All of the above 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.

11. The agreement between Coca-Cola and DP Holdings, Inc. to acquire the Dr Pepper Company was in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 5. *See Rhinechem Corp.*, 93 FTC 233 (1979).

12. An order requiring Coca-Cola to obtain the prior approval of the Commission before acquiring any other concentrate or bottling company is not in the public interest. Since the Commission seeks no other remedy, no cease and desist order will be entered.

OPINION OF THE COMMISSION

BY OWEN, *Commissioner*:

I. INTRODUCTION

This case involves a prospective combination of The Coca-Cola Company ("Coca-Cola") and the Dr Pepper Company ("Dr Pepper"), which was enjoined before consummation.¹ Both companies make soft drink concentrates and syrups that are used by bottlers to produce carbonated soft drinks for sale to consumers.² In 1986, when Coca-Cola had the largest market share among soft drink concentrate producers, and Dr Pepper was the fourth largest producer, IDFF paragraph 226, Coca-Cola entered into an agreement whereby Coca-Cola was to acquire all of the stock in DP Holdings, Inc.³ ("DP Holdings"), which owned 100% of the stock of Dr Pepper, for a total consideration of approximately \$470 million. IDFF paragraph 9.

The Commission filed an administrative complaint pursuant to Section 5(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45(b), and Section 11 of the Clayton Act, 15 U.S.C. 21, alleging that Coca-Cola's acquisition of Dr Pepper would, if consummated, violate Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the FTC Act, 15 U.S.C. 45. The complaint further alleged that the agreement itself constituted a separate violation of Section 5 of the FTC Act.

¹ The following abbreviations are used in this opinion:

ID	Initial Decision (page no.)
IDFF	Initial Decision Findings of Fact. (Paragraph no.)
AD	Brief of Counsel Supporting the Complaint in Support of Appeal from Initial Decision
ABCA	Answering Brief of Appellee and Cross-Appellant The Coca-Cola Company
ATr.	Transcript of Oral Argument before the Federal Trade Commission (June 6, 1991)
RBCA	Reply Brief of Appellee and Cross-Appellant The Coca-Cola Company
RBCC	Reply Brief of Counsel Supporting the Complaint

² Concentrate is sold by producers, such as Coca-Cola and PepsiCo, to bottlers, which combine the concentrate with carbonated water and sweetener, and package the resulting soft drinks in cans or bottles for sale to consumers. (Some concentrate, such as for "diet" drinks, is sold premixed with sweeteners.) Neither Coca-Cola nor Dr Pepper is a bottler, although Coca-Cola has ownership interests in bottlers. IDFF paragraph 203. Syrup, which is made by adding water and sweetener to concentrate, is sold to fountain wholesalers. The wholesalers distribute the syrup to retail outlets, which combine it with carbonated water to produce soft drinks for soda fountains or certain types of vending equipment.

³ DP Holdings, Inc., a Delaware corporation, was a holding company created as a vehicle for an earlier leveraged buy out of Dr Pepper. IDFF paragraph 5.

The administrative law judge ("ALJ") who tried the case concluded that the proposed acquisition was likely to substantially lessen competition in the national markets for branded soft drink concentrate and for all soft drink concentrate. However, he declined to issue an order against Coca-Cola on the ground that an order was not in the public interest. Commission complaint counsel appealed, and Coca-Cola cross-appealed the findings of violations of the FTC and Clayton Acts. Having considered the parties' briefs and arguments, and the record as a whole, we affirm the finding of violations of the FTC and Clayton Acts, and reverse the conclusion that a prior approval order should not be entered against Coca-Cola.⁴

II. HISTORY OF THE PROCEEDING

Coca-Cola's efforts to acquire Dr Pepper occurred at the same time that PepsiCo, Inc. sought to acquire the Seven-Up Company (another concentrate manufacturer) from Philip Morris, Inc.⁵ The Commission investigated both transactions simultaneously, and on June 20, 1986, authorized its staff to seek injunctive relief against both on June 23, Philip Morris announced that it was terminating its acquisition agreement with PepsiCo. On June 24, the Commission filed suit in federal district court, seeking a preliminary injunction against Coca-Cola's impending acquisition pursuant to Section 13(b) of the FTC Act, 15 U.S.C. 53(b).⁶ On July 15, 1986, while the district court action was pending, the Commission issued an administrative complaint against Coca-Cola.⁷ See IDFF paragraphs 7-11, 372-75.

In the injunction proceeding, the district court found that the Commission had made a sufficient preliminary showing that the acquisition was likely to substantially lessen competition in the market for carbonated soft drink concentrates. Accordingly, on July

⁴ We adopt the findings of fact in the ALJ's Initial Decision to the extent that they are not inconsistent with this opinion.

⁵ Coca-Cola has stated that its proposed acquisition of Dr Pepper was a "defensive" maneuver spurred by PepsiCo's plan to acquire Seven-Up. ATr. at 61. See IDFF paragraph 10.

⁶ In lieu of a temporary restraining order, the parties agreed to defer implementing their acquisition agreement pending a ruling on the Commission's application for a preliminary injunction. See *FTC v. Coca-Cola Co.*, 641 F. Supp. 1128, 1129 n.2 (D.D.C. 1986), *vacated as moot*, 829 F.2d 191 (D.C. Cir. 1987) (per curiam).

⁷ The Commission did not file an injunctive action or administrative complaint against PepsiCo because of the earlier abandonment of PepsiCo's acquisition (see *infra* Part III.B.).

31, 1986, the district court issued a preliminary injunction against the transaction.⁸

On August 5, 1986, the shareholders of DP Holdings announced their desire to terminate the purchase agreement, and later sold Dr Pepper to an investment group headed by Hicks & Haas.⁹ Coca-Cola then moved to dismiss the Commission's pending administrative complaint, asserting that the costs of litigation outweighed the likely benefits of any remedial order that might result. The Commission denied the motion on the ground that if the Commission ultimately found that the proposed acquisition violated the law, its cancellation by DP Holdings did not eliminate the need for prospective relief. *See* Order Denying Respondent's Motion for Dismissal of the Complaint (Aug. 9, 1988); IDFF paragraph 12.

The administrative case was tried in 1990 before Administrative Law Judge Lewis F. Parker. On November 30, 1990, ALJ Parker issued his opinion, finding that branded concentrate used to produce branded carbonated soft drinks was the most appropriate relevant market in which to assess the effects of the acquisition (ID 99), and that all concentrate and syrup used to produce carbonated soft drinks also constituted a relevant market (ID 107).¹⁰ He found that the relevant geographic market was the nation as a whole (ID 99); that there were substantial barriers or impediments to entry into branded soft drink concentrate (ID 105), making entry difficult, risky and time-consuming (ID 108); and that expansion by fringe firms was extremely unlikely (ID 105-106, 108). The ALJ found that the relevant markets were highly concentrated, and that the proposed acquisition would substantially increase that concentration (ID 102).

The ALJ found that the acquisition would:

- (1) Eliminate Dr Pepper as a substantial, independent competitive force in the relevant markets;
- (2) Increase the likelihood of or facilitate collusion;
- (3) Increase the difficulty of entry; and
- (4) Raise the costs and reduce the competitiveness of other firms in the relevant markets.

⁸ 641 F. Supp. at 1141.

⁹ After this action, Coca-Cola withdrew its pending appeal of the preliminary injunction and successfully petitioned the court of appeals to vacate the district court's order on grounds of mootness. *FTC v. Coca-Cola Co.*, 829 F.2d 191.

¹⁰ The ALJ rejected Coca-Cola's assertion that the relevant market consisted of all beverages. *See* IDFF paragraphs 49-66, 160; ID 93-94.

ID 108. These factors, according to the ALJ, all “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.” *Id.*

The ALJ concluded that the effect of the acquisition, if consummated, may be substantially to lessen competition in the relevant markets, in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act. He further found that the acquisition agreement between Coca-Cola and DP Holdings violated Section 5 of the FTC Act. *Id.* Despite these conclusions, the ALJ declined to issue an order against Coca-Cola, reasoning that an order requiring respondent to obtain the prior approval from the Commission before acquiring any other concentrate or bottling company would not be in the public interest. ID 107. This conclusion was based on the ALJ’s evaluation of the record, and on the Bureau of Competition’s earlier concurrence with Coca-Cola’s 1986 motion to dismiss the complaint on public interest grounds. ID 106.

For the reasons set forth below, we affirm ALJ Parker’s finding of law violations, and reverse his decision against entry of an order; however, we decline to enter, in its entirety, the order sought by complaint counsel.

III. THE COMMISSION’S AUTHORITY TO PROSECUTE THIS ACTION

Coca-Cola contends that the ALJ erred by rejecting four challenges to the Commission’s authority to prosecute this action. First, Coca-Cola argues that the ALJ should have dismissed paragraphs 11 and 13 of the complaint (alleging that the proposed acquisition would violate the Clayton and FTC Acts) on the ground that the acquisition was never consummated. ABCA at 86-89. Second, respondent asserts that the ALJ erred in finding that the purchase agreement violated Section 5 of the FTC Act. ABCA at 92-96. Third, Coca-Cola argues that the ALJ should have dismissed the entire complaint as moot. ABCA at 91 n.44. Finally, respondent contends that the ALJ should have dismissed the complaint on the ground that prosecution of the administrative action was vindictive, arbitrary and capricious, and therefore violated the Due Process Clause of the Fifth Amendment to the United States Constitution. ABCA at 96-102. We find Coca-Cola’s arguments to be without merit.

*A. The Commission's Authority to Conduct
Administrative Proceedings Concerning an
Acquisition Enjoined Prior to Consummation*

1. The Commission's statutory jurisdiction over acts alleged
in paragraphs 11 and 13 of the complaint

Paragraph 11 of the complaint alleged that "[t]he 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." Paragraph 13 of the complaint similarly alleged that the proposed acquisition "would, if consummated, violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45." Coca-Cola contends that these paragraphs articulate only "threatened" violations of the Clayton and FTC Acts. ABCA at 89. The Commission's suit for a preliminary injunction under Section 13(b) of the FTC Act prevented the parties from consummating the acquisition before the Commission issued its administrative complaint. Coca-Cola argues that because the acquisition was not fully consummated, it did not violate Section 5 or Section 7 (ABCA at 88-89). Coca-Cola further argues that the Commission lacked jurisdiction to adjudicate the lawfulness of the enjoined acquisition because its jurisdiction allegedly does not reach prospective law violations (ABCA at 87-89, 91-92). Finally, it argues that, even if the Commission initially had jurisdiction, that jurisdiction lapsed when the parties announced their intention to abandon the transaction (after the district court issued a preliminary injunction against it) (RBCA at 51 n.36).

The ALJ rejected these arguments and refused to dismiss the charges in paragraphs 11 and 13. *See* Order Denying Respondent's Motion to Dismiss the Complaint (Mar. 13, 1990). For the reasons below, we agree with the ALJ that complaint paragraphs 11 and 13 stated charges that were within the Commission's jurisdiction.

It is important to identify the nature of the conduct at issue here and the consequences of respondent's arguments. Coca-Cola challenges the Commission's jurisdiction over "possible future violations" of the Clayton Act (ABCA at 87-89, 91-92), as if the acquisition of Dr Pepper were some remote hypothetical. In fact, Coca-Cola and DP Holdings had agreed on all details of the acquisition; had filed statutorily required notices of their transaction; had contractually committed themselves to going forward unless the

government obtained an injunction (and, even then, they were bound to use “their best efforts to have any such . . . injunction lifted” (*see infra* p. 15, note 26)); and persisted in their transaction after the Commission notified them of its objections and of its intention to seek an injunction if forced to do so. In other words, a federal court injunction was the only barrier to full consummation. Far from being a “possible future violation,” the acquisition was certain, absent government intervention.¹¹

Moreover, the consequence of Coca-Cola’s argument is that once the Commission obtained a preliminary injunction under Section 13(b) of the FTC Act, it would lose jurisdiction to conduct administrative adjudications of the lawfulness of unconsummated acquisitions or other impending violations of law.¹² The preliminary injunction would then have to be dissolved, both because Section 13(b) limits a preliminary injunction to a maximum of 20 days unless the Commission issues an administrative complaint within that period,¹³ and because the Commission, lacking jurisdiction, presumably could no longer show any prospect of success on the ultimate merits. The parties would then be free to revive their transaction, forcing the Commission to go to court once again. Such a wasteful duplication of agency efforts and drain on judicial resources could hardly be what Congress envisioned for the Commission’s enforcement practices.

We have previously rejected an argument virtually identical to Coca-Cola’s:

¹¹ Coca-Cola’s argument that only fully consummated transactions violate Section 7 of the Clayton Act ignores the courts’ flexible construction of “acquire” in Section 7 to reach transactions that fall short of being consummated acquisitions. *See, e.g., McTamney v. Stolt Tankers & Terminals (Holdings), S.A.*, 678 F. Supp. 118, 120 (E.D. Pa. 1987); *United States v. Columbia Pictures Corp.*, 189 F. Supp. 153, 181-83 (S.D.N.Y. 1109-0). It also ignores the probabilistic focus of Section 7, which was intended to “arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation.” S. Rep. No. 698, 63rd Cong., 2d Sess. 1 (1914); *see also Hospital Corp. of Am. v. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987) (“HCA”).

¹² The consequences of respondent’s argument are not limited to acquisitions; the same result would occur if the Commission sought to preliminarily enjoin other unlawful conduct that is imminent but not yet implemented. While respondent suggests that the Commission might retain the ability to challenge unconsummated mergers by attacking the legality of some acquisition agreements (but not the Coca-Cola/Dr Pepper agreement, *see infra* Part III.A.2.) such an alternative may be unavailable in other contexts, *e.g.*, when a person is about to engage in a deceptive practice.

¹³ An administrative complaint may be dispensed with only where the Commission seeks a permanent court injunction under the last proviso of Section 13(b). (Coca-Cola’s argument that the Commission could abandon administrative adjudications in favor of federal court litigation to obtain a permanent injunction is discussed *infra*.)

The Commission's subject-matter jurisdiction depends on the nature of the alleged illegal conduct, and not on whether it is ongoing at any particular point during the trial. To hold otherwise would mean that a Commission law enforcement action could be brought to a halt at any time . . . by an abandonment, even a temporary one, of the challenged conduct. [V]oluntary cessation of unlawful activity is not a basis for halting a law enforcement action.

Warner Communications, Inc., 105 FTC 342 (1985).¹⁴ The Commission's adjudicative jurisdiction is thus similar to a federal district court's jurisdiction to judge the legality of, and enjoin, a challenged practice; such jurisdiction does not evaporate simply because a defendant has abandoned the practice. *See, e.g., R.C. Bigelow, Inc. v. Unilever, N.V.*, 867 F.2d 102, 106 (2d Cir.) (suit to enjoin merger not mooted by abandonment of transaction), *cert. denied*, 493 U.S. 815 (1989); *see also City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1387 (5th Cir. 1980); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 448 (2d Cir. 1945).¹⁵

In addition to creating an untenable situation for law enforcement, Coca-Cola's argument that the Commission lacks jurisdiction over unconsummated acquisitions (or over any other imminent violation of a law enforced by the Commission) is legally defective. Respondent's argument is based on the particular tenses used in Section 11(b) of the Clayton Act, 15 U.S.C. 21(b), and Section 5(b) of the FTC Act, 15 U.S.C. 45(b). Section 11(b) authorizes the Commission to issue an administrative complaint when it has reason to believe that a person "is violating or has violated" certain sections of the Clayton Act (including Section 7). Section 5(b) authorizes an administrative complaint when the Commission has reason to believe that a person "has been or is using any unfair method of competition" Coca-Cola reads this language as permitting actions only against past or ongoing law violations, and not against imminent violations (ABCA at 87-89, 91-92).

¹⁴ After the Commission obtained a preliminary injunction against a proposed merger between Warner Communications and Polygram Records (*FTC v. Warner Communications, Inc.*, 742 F.2d 1156 (9th Cir. 1984)), the parties abandoned the transaction, and moved to dismiss the Commission's pending administrative complaint. The Commission denied the motion.

¹⁵ A case may, of course, be moot if there is no reasonable likelihood of recurrence. *W.T. Grant Co.*, 345 U.S. at 633. Respondent's mootness argument is discussed *infra* Part III.A.3.

Coca-Cola's focus on these sections is misplaced. Section 11(b) and Section 5(b) are "purely procedural." Adventist Health Sys./West, FTC Dkt. No. 9234, slip op. at 13 n.26 (Aug. 2, 1991). In contrast, the Commission's subject matter jurisdiction over this case is conferred by Section 5(a)(2) of the FTC Act and Section 11(a) of the Clayton Act. These sections respectively empower the Commission "to prevent" persons from using unfair methods of competition, and grant it "authority to enforce compliance" with the Clayton Act.¹⁶ They are forward-looking provisions that focus on preventing future illegal conduct rather than on punishing past wrongdoing. *See, e.g., FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); *FTC v. Cement Inst.*, 333 U.S. 683, 706 (1948).¹⁷ The Commission's action against an almost consummated acquisition is consistent with Congress' enactment of the FTC and Clayton Acts in order to halt potentially anticompetitive practices and mergers in their incipency. *See, e.g., FTC v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966); *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 597 (1957); *Grand Union Co. v. FTC*, 300 F.2d 92, 98-99 (2d Cir. 1962) (FTC Act "intended to be prophylactic: to stop in their incipency acts which when full blown would lead to monopoly or undue hindrance of competition"); and *see also supra* p. 6, note 11.

Seemingly oblivious to this broad statutory scheme, Coca-Cola's argument for an incapacitating limitation on the Commission's jurisdiction singles out two isolated phrases ("is violating or has violated" in Section 11(b) and "has been or is using" in Section 5(b)). Coca-Cola has not pointed to any legislative history indicating that the use of the present and past tenses in these procedural sections was intended to set a limit on the Commission's broad jurisdiction. Rather, at the time that the FTC and Clayton Acts were enacted, the Commission was less likely to have advance notice of planned, but unexecuted activities, and lacked any express powers to obtain preliminary relief. Accordingly, the language cited by Coca-Cola

¹⁶ Specifically, Section 5(a)(2) empowers and directs the Commission "to prevent persons, partnerships, or corporations. . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." (Emphasis supplied.) Section 11(a) vests the Commission with "authority to enforce compliance" with Sections 2, 3, 7, and 8 of the Clayton Act.

¹⁷ Given the prophylactic nature of Commission orders to cease and desist, it is less important to show that an activity has crossed the line from impending to actualized than it might be in the context of a proceeding designed to punish wrongdoing. *Cf. e.g., W.T. Grant Co.*, 345 U.S. at 633 (an injunction against future law violations can be granted "even without a showing of past wrongs"); *United States v. Oregon State Medical Society*, 343 U.S. 326, 333 (1952) ("All it takes to make the cause of action for relief by injunction is a real threat of future violation....")

may simply have reflected the assumption that the Commission ordinarily would be acting after the fact, rather than a deliberate restriction of the Commission's broad prophylactic powers.¹⁸

Subsequently, Section 13 of the FTC Act, 15 U.S.C. 53, added in 1938 (52 Stat. 115), and amended in 1973 (87 Stat. 592), and the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 90 Stat. 1383, 1390 (1976) ("the HSR Act") confirmed that the tenses in Sections 5(b) and 11(b) do not limit the Commission's jurisdiction. Section 13(a) authorizes the Commission to seek a preliminary injunction whenever a person "is engaged in, or is about to engage in" [emphasis added] false advertising of foods, drugs, devices, or cosmetics. Section 13(b) broadly empowers the Commission to seek a preliminary injunction against anyone who "is violating, or is about to violate" [emphasis added] any provision of law enforced by the Commission. Significantly, both parts of Section 13 assume that the Commission will issue and adjudicate an administrative complaint after a preliminary injunction is granted (*see supra* p. 7), and they make no distinction between impending and ongoing violations. These two sections -- enacted more than forty years apart -- consistently reinforce the Commission's jurisdiction to adjudicate the lawfulness of imminent, as well as past or present, violations of the laws that it enforces.¹⁹ *See Warner Communications, Inc.*, 105 FTC

¹⁸ Properly applied, the "plain meaning" doctrine supports the Commission's exercise of jurisdiction in the present case. In ascertaining the "plain meaning" of a statute, consideration cannot be limited merely "to the particular statutory language at issue, [but must also take into account] the language and design of the statute as a whole." *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988); accord, *United States Nat'l Bank of Oregon v. Independent Ins. Agents of Am., Inc.*, 113 S. Ct. 2173, 2182 (1993). Nevertheless, by isolating a few words and urging a literal interpretation, Coca-Cola appears to suggest that the Commission must limit its search for the plain meaning to these isolated phrases alone. Where a statute is clear and consistent on its face, and in its entirety, this approach might be sufficient. But where, as here, the "plain meaning" of isolated parts of a statute may be at variance with the entire statutory scheme and with Congress' ultimate intent, the "plain meaning" of such phrases must give way to an interpretation that comports with the overall statutory mandate. As the Supreme Court has noted:

Over and over we have stressed that "[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law and to its object and policy."

United States Nat'l Bank of Oregon, 113 S. Ct. at 2182 (quoting *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1849)). *See also United States v. Ron Pair Enterprises, Inc.* 489 U.S. 235, 242 (1989) ("The plain meaning of legislation should be conclusive, except in the 'rare case [in which] the literal application of the statute will produce a result demonstrably at odds with the intentions of its drafters.' *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). In such cases, the intention of the drafters, rather than the strict language, controls.").

¹⁹ Coca-Cola points to two letters commenting on legislation that led to enactment of Section 13(b), which express the Commission's desire for statutory authority to prevent the "continuance" or "continuation" of unlawful conduct. RBCA at 51 n.36 (citing 6 Kintner, *Legislative History of the*

at 342 (Section 13(b) “expressly contemplates adjudication of the merits of the legality of unconsummated mergers”).

Furthermore, Coca-Cola’s interpretation of the FTC and Clayton Acts is at odds with the statutory system that Congress has created for dealing with potentially anticompetitive mergers of a certain size. After giving the Commission the express power to seek preliminary injunctions against mergers and other anticompetitive practices, Congress later made that power (and the corresponding power of the Department of Justice under Section 15 of the Clayton Act) more effective by enacting the HSR Act, *supra*. The HSR Act added Section 7A of the Clayton Act, 15 U.S.C. 18a, which prohibits persons from making acquisitions over a certain size prior to giving detailed notice to the Commission and the Justice Department, and waiting for specified periods of time. The purpose of Section 7A was to facilitate the government’s ability to obtain preliminary injunctions prior to consummation, in recognition of how difficult it is to “unscramble” a completed combination, and to undo all of the adverse effects on competition once a business or its assets have changed hands. *See* S. Rep. No. 94-803, 94th Cong., 2d Sess. 61, 65 (1976).

We are not aware of anything in the HSR Act’s legislative history suggesting that Congress intended to authorize premerger injunctions only at the cost of eliminating administrative adjudications of their lawfulness. To the contrary, the HSR Act demonstrates that Congress intended for the Commission to exercise its jurisdiction over unconsummated but imminent acquisitions. Indeed, Section 7A(f) of the Clayton Act (part of the HSR Act) states: “If a proceeding is instituted or an action is filed by the Federal Trade Commission, alleging that a proposed acquisition violates [the FTC or Clayton Acts], or an action is filed by the United States [alleging a violation of the Clayton or Sherman Acts] . . .” [emphasis added], the agency’s motion for a preliminary injunction shall be promptly assigned to a district court judge. The reference to a “proceeding” by the Commission (as opposed to an “action” by the Commission or the Justice Department) can only be to an administrative proceeding. Section 7A(f) thus implicitly recognizes that the Commission is empowered to commence an administrative proceeding challenging a “proposed

Federal Antitrust Laws and Related Statutes 4962, 4982-83 (1983)). These letters are limited in the issues that they address and do not reach the question of whether the Commission’s powers are being limited to past or present law violations. In any event, they cannot override Section 13(b)’s clear authorization to proceed against persons who are “about to” violate laws enforced by the Commission.

acquisition," *i.e.*, before a merger is consummated, and to continue the proceeding after the acquisition has been preliminarily enjoined. This tacit recognition also exists in Section 7A(h), a confidentiality provision, which permits disclosure of premerger notification materials in administrative proceedings - presumably proceedings concerning the merger described in the HSR notice.

Coca-Cola suggests that the Commission has an alternative, *i.e.*, forgoing administrative proceedings in favor of preliminary and permanent injunctive relief in federal court under the last proviso in Section 13(b) (ABCA at 89 n.41).²⁰ This suggestion ignores the fact that the Commission was established for the express purpose of applying its expertise to mergers and unfair competitive practices. Congress "thought the assistance of an administrative body would be helpful in resolving such questions and indeed expected the FTC to take the leading role in enforcing the Clayton Act. . ." *HCA*, 807 F.2d at 1386.²¹ Although the Commission does seek permanent injunctions in appropriate cases, Coca-Cola's suggestion that the Commission routinely seek such injunctions instead of conducting administrative adjudication would be in derogation of the Commission's statutory responsibilities to explicate the FTC and Clayton Acts as they apply to mergers, and to fashion appropriate remedies for unlawful acquisitions.

In sum, Coca-Cola's argument depends on an excruciatingly literal reading of procedural portions of the FTC and Clayton Acts that squarely conflicts with more substantive sections and with Congress, broad remedial intent.²² It would also neuter the effective system established by Congress to give the Commission advance notice of impending acquisitions, so that it may seek a preliminary injunction against those that may be anticompetitive, and subsequently adjudicate their lawfulness. We reject respondent's argu-

²⁰ As an exception to the requirement that the Commission issue an administrative complaint after obtaining preliminary injunctive relief, Section 13(b) states: "Provided further, That in appropriate cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction."

²¹ See also, *e.g.*, *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239-40 (1972); *Cement Inst.*, 333 U.S. at 692-93; *Grand Union Co.*, 300 F.2d at 99 (Commission established "as an expert body to apply the imprecise standards of Section 5"); S. Rep. No. 597, 63d Cong., 2d Sess. 8-9 (1914).

²² The Supreme Court has rejected other overly literal readings of the FTC and Clayton Acts. For example, the Court has upheld broad fencing-in orders even though Section 5(b), if read literally, authorizes only orders against the specific violation charged in the Commission's complaint. *Ruberoide Co.*, 343 U.S. 473-74; *FTC v. Morton Salt Co.*, 334 U.S. 37, 51-52 (1948). In *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 335-49 (1963), the Court held that Section 7 of the Clayton Act applied to a merger between two banks, even though the express statutory language appeared literally to cover only a unilateral acquisition of stock.

ments and find that the Commission has jurisdiction to adjudicate the lawfulness of Coca-Cola's proposed acquisition of Dr Pepper.

2. The purchase agreement as a violation of Section 5
of the Federal Trade Commission Act

Even assuming *arguendo* that the Commission lacked jurisdiction over an unconsummated acquisition under paragraphs 11 and 13 of the complaint, the Commission has jurisdiction under complaint paragraph 12, which alleged that the acquisition agreement between Coca-Cola and DP Holdings violated Section 5 of the FTC Act. The ALJ upheld this count (ID 108). Coca-Cola contends, however, that this complaint allegation should have been dismissed because a "fail-safe," provision in the parties' contract allegedly eliminated the possibility of an anticompetitive purpose or anticompetitive effect (ABCA at 92-96).²³ We reject this argument and affirm the ALJ's finding.

It is well established that certain practices that do not violate the Sherman and Clayton Acts (15 U.S.C. 1, 12, *et. seq.*) may nonetheless be "unfair methods of competition" that violate Section 5 of the FTC Act. *See, e.g., FTC v. Brown Shoe Co.*, 384 U.S. at 321-22. This principle flows from the Commission's power to prevent practices which, although not violations of those antitrust laws, contravene the public policies behind them. *See, e.g., Sperry & Hutchinson Co.*, 405 U.S. at 239-44; *Atlantic-Refining Co. v. FTC*, 381 U.S. 357, 369 (1965). The Commission has applied this principle to mergers, holding that where an acquisition violates Section 7 of the Clayton Act, the company that agreed to sell the stock or assets has violated Section 5 of the FTC Act even though, as a selling company, it is not subject to Section 7. *Dean Foods Co.*, 70 FTC 1146, 1290-92 (1966). The Commission reasoned:

Since mergers which have the requisite effect upon competition are in violation of Section 7, it necessarily follows that an agreement to effect such a merger must conflict with the basic policies of the Clayton Act and therefore is in violation of Section 5 of the Federal Trade Commission Act. *Id.* at 1291 (emphasis added). *See also, e.g., Rhinechem Corp.*, 93 FTC 233 (1979); *Beatrice Foods Co.*, 67 FTC 473, 726 (1965). This principle applies with equal force to an acquiring party's agreement to make an anticompetitive acquisition. Accordingly, the ALJ correctly held that Coca-Cola's contractual agreement to purchase Dr Pepper -- an acquisition

²³ Although respondent did not characterize this as a jurisdictional attack, we discuss it here inasmuch as it relates to the Commission's jurisdiction over unconsummated mergers.

that had the tendency to substantially lessen competition -- violated Section 5, independent of any violation of the Clayton Act.²⁴

Coca-Cola does not dispute this underlying principle. *See ABCA* at 89 n.42. However, it asserts that if the acquisition in itself did not violate the Clayton or Sherman Acts because it was not consummated, the purchase agreement could not violate Section 5 of the FTC Act unless it “was undertaken with anticompetitive purposes” or “had anticompetitive effects.” *ABCA* at 93. Although we disagree with respondent’s legal premise, we need not address it at length because Coca-Cola has failed to establish the factual predicate for its argument.²⁵

The agreement between Coca-Cola and DP Holdings manifested, at a minimum, an intention to eliminate competition between them by eliminating Dr Pepper as an independent competing manufacturer of soft drink concentrate. The only alleged support for Coca-Cola’s contention that the acquisition agreement was not anticompetitive is a “fail-safe” provision in the agreement that required, as a condition precedent to the closing, that there be no outstanding injunction that would make consummation of the transaction illegal.²⁶ Coca-Cola

²⁴ The remainder of this discussion assumes (as we find below) that the acquisition, if consummated, would have lessened competition in violation of Section 7 of the Clayton Act.

²⁵ Respondent’s argument ignores established precedent holding that a showing of an actual anticompetitive effect is unnecessary to prove a violation of Section 5 because that section was designed to stop their incipency acts and practices that could lead to violations of the Sherman or Clayton Acts. *See supra* pp. 8-9; *see also Sperry & Hutchinson Co.*, 405 U.S. at 244 (“unfair competitive practices [are] not limited to those likely to have anticompetitive consequences after the manner of the antitrust laws”); *Dean Foods Co.*, 70 FTC at 1289-90 (rejecting claim that the acquired company was not liable under Section 5 absent proof of “an actual adverse effect on competition of the magnitude required by the Sherman Act”).

Coca-Cola (*ABCA* at 93) cites cases supposedly requiring a showing of an anticompetitive purpose or effect to find a violation of Section 5 where there is no violation of the Clayton or Sherman Acts: *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984); *Boise Cascade Corp. v. FTC*, 637 F.2d 573 (9th Cir. 1980); and *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920 (2d Cir. 1980), *cert. denied*, 450 U.S. 917 (1981). These cases are inapposite for several reasons, but the most salient distinction is that each involved independent conduct rather than agreements between competitors (as here) or other agreements.

²⁶ The relevant portion of Section 10.01 of the purchase agreement reads:

This agreement may be terminated at any time prior to the Closing:

(v) By either Sellers or Buyer in writing, without liability, if there shall be any order, writ, injunction or decree of any court or governmental or regulatory agency binding on Buyer and/or Sellers, which prohibits or restrains Buyer and/or Sellers from consummating the transactions contemplated hereby, provided that, Buyer and Sellers shall have used their best efforts to have any such order, writ, injunction or decree lifted and the same shall not have been lifted within sixty days after entry, by any such court or governmental or regulatory agency.

contends that this proviso belies any anticompetitive purpose in, or effect from, the acquisition agreement because the parties did not intend to complete the acquisition in the face of a court finding that the acquisition was illegal. ABCA at 94.

Coca-Cola's characterization of the nature of the "fail-safe" provision is flawed. It did not prevent an illegal acquisition, only one that had been enjoined by a court. The district court could have denied a preliminary injunction either because it thought the Commission lacked a sufficient likelihood of success on the merits, or because it thought the equities weighed against an injunction. Neither determination would constitute a finding that the acquisition was legal.²⁷ Under the "fail-safe" provision, had the district court ruled against the Commission, the parties could have completed (and presumably would have been contractually obligated to complete) the transaction, even if it were, in fact, illegal. Thus, the "fail-safe" provision is better characterized as a "stop-loss" provision, which would have allowed the parties to go their separate ways, without investing more time and money in the proposed acquisition, had a court enjoined the transaction. The "fail-safe" provision does not prove that there was no intent to proceed with an illegal transaction; if anything, it indicates that Coca-Cola and Dr Pepper were willing to proceed with the transaction without regard to its eventual legality if they could convince a court not to enjoin it.²⁸ Parties who attempt an acquisition that would substantially lessen competition, and force the Commission to litigate in federal district court to enjoin the transaction, cannot escape liability under Section 5, after their transaction is enjoined, by agreeing among themselves that they should have no further liability.

3. The parties' abandonment of the acquisition did not moot the administrative proceedings

²⁷ A federal district court does not conclusively determine the legality of an acquisition in a preliminary injunction proceeding. Thus, even if the court had denied a preliminary injunction on the merits, that would not have made the acquisition "legal," and the Commission ultimately could have found that the acquisition violated the FTC and Clayton Acts. *See, e.g., Simeon Management Corp. v. FTC*, 579 F.2d 1137, 1142 (9th Cir. 1978) (affirming final Commission order despite court's earlier denial of preliminary injunction based on its assessment that the Commission was not likely to succeed on the merits).

²⁸ Indeed, the agreement obligated the parties to use their "best efforts" to have any injunction lifted before they could cancel the acquisition (*see supra* note 26).

Coca-Cola alternately contends that when the parties abandoned the acquisition, the administrative case became moot and should have been dismissed. ABCA at 90-91; *cf. also* RBCA at 51 n. 36. The Commission and the ALJ previously rejected similar claims by respondent. *See* Order Denying Respondent's Motion for Dismissal of the Complaint (Aug. 9, 1988); Order Denying Respondent's Motion for Dismissal of the Complaint (March 16, 1990). Coca-Cola has not demonstrated that those decisions should be altered; and indeed, the very argument that Coca-Cola makes here has been squarely rejected by the United States Court of Appeals for the Second Circuit. *R.C. Bigelow*, 867 F.2d at 106 (suit to enjoin merger not mooted by abandonment of transaction).

It was established long ago that voluntary cessation of illegal activities, even if accomplished before the Commission issues a complaint, is not a defense. *See, e.g., Carter Prods. Co. v. FTC*, 323 F.2d 523, 531 (5th Cir. 1963); *C. Howard Hunt Pen Co. v. FTC*, 197 F.2d 273 (3d Cir. 1952); *FTC v. Wallace*, 75 F.2d 733, 738 (8th Cir. 1935). Similarly, abandonment of an acquisition does not moot the Commission's case, unless it is absolutely clear that the identical or "functionally-equivalent" merger cannot reasonably be expected to recur. *Warner Communications, Inc.*, 105 FTC at 343 (citing *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199 (1968), and *W.T. Grant Co.*; *accord, e.g., Midcon Corp.*, FTC Dkt. No. 9198, Order Denying Motion to Dismiss (Nov. 16, 1987); *Rhinechem Corp.* *See also supra* pp. 7-8. Demonstrating that a proceeding is moot because past conduct will not be repeated is the respondent's burden, and it is a heavy one. *W.T. Grant Co.*, 345 U.S. at 633; *Rubbermaid, Inc. v. FTC*, 575 F.2d 1169, 1173 (6th Cir. 1978).

Coca-Cola asserts that Warner Communications is distinguishable because the motion to dismiss preceded the trial there, and the Commission found that questions of fact remained as to the likelihood that violations could recur. Respondent asserts that in the instant proceeding, the ALJ found, after trial, that the sale of Dr Pepper to Hicks & Haas "eliminated any reasonable possibility" that Coca-Cola would acquire Dr Pepper. ABCA at 90 (quoting IDFF paragraph 375).²⁹

²⁹ The ALJ did not, however, retract his previous ruling that the case was not moot. Moreover, his ruling that a prior approval order was unnecessary did not mandate a conclusion that the case was moot, because mootness and the need for permanent relief are distinct concepts with different burdens of proof. *See TRW, Inc. v. FTC*, 647 F.2d 942, 954 (9th Cir. 1981).

We reject the ALJ's finding as unsupported by the record. In as much as DP Holdings no longer owns Dr Pepper, it would be correct to say that Coca-Cola could not again make the identical acquisition from the same owner. However, neither the ALJ nor Coca-Cola has pointed to any basis in the record for concluding that Hicks & Haas would not sell Dr Pepper, or that Coca-Cola would not try to buy it (or another competing concentrate maker) later.³⁰ To the contrary, the ALJ cited testimony by Brian Dyson, a Coca-Cola executive, "that Coca-Cola needs to be free to make acquisitions of interests in concentrate companies to protect the integrity of its bottling system in the United States." IDFF paragraph 369; *see also id.* at paragraph 204.³¹ At oral argument, after noting that the Dr Pepper acquisition was a defensive move against PepsiCo,³² Coca-Cola's counsel said that respondent may need to make defensive purchases in the future. ATr. 61-62. When asked at oral argument whether Coca-Cola had made a commitment not to acquire Dr Pepper, the answer was non-responsive, and certainly not a clear negative.³³

³⁰ For this reason, the court of appeals' vacation of the preliminary injunction on the ground of mootness in *FTC v. The Coca-Cola Co.*, No. 86-1764 (D.C. Cir. Mar. 24, 1987) (cited in ABCA at 90 n.43), is not dispositive here. The court's statement that the "original merger" would not be revived says nothing about the possibility of other acquisitions, including any new attempt by Coca-Cola to acquire Dr Pepper. That question was not before the district or appellate courts because their only responsibility was to consider the need for preliminary injunctive relief against the acquisition at hand.

³¹ Because Dr Pepper had few assets other than its trademark (IDFF paragraph 9), presumably its current owners could easily resell it. Coca-Cola's assertion (RBCA at 53 n.39) that it had no "history of making concentration acquisitions" is beside the point. The important question is whether Coca-Cola would seek to make future concentrate acquisitions. Coca-Cola does not disavow any interest in future acquisitions, implicitly admitting, when arguing against the imposition of an order requiring prior Commission approval for concentrate acquisitions, that it may want to make such acquisitions in the future. ABCA at 137.

³² The ALJ concluded that: "The Coca-Cola-Dr Pepper proposal was a defensive move to effect a blockage of the PepsiCo-Seven Up transaction, or if that transaction were allowed, to acquire Dr Pepper." IDFF paragraph 10 (citations omitted).

³³ The transcript contains the following exchange:

MR. SPIVACK [counsel for Coca-Cola]: . . . There is no evidence in this record that we [Coca-Cola] are still interested in buying Dr. Pepper. Our President was on the stand, why didn't you ask him? There is no evidence that we are still interested.

CHAIRMAN STEIGER: Is there any evidence that you have a commitment not to buy Dr Pepper?

MR. SPIVACK: We walked away. The deal has been abandoned. We walked away from it voluntarily. Let me make it very clear. You filed a Preliminary Injunction proceeding. The Judge issued a Preliminary Injunction on July 31st. On August 5th, we walked away from this deal.

Now, the contract is in the record. You can look at the contract. The contract gave Dr Pepper the right to walk away August 29th. The only way Dr Pepper could walk away prior to August 29th is with our permission. So, we agreed to abandon this acquisition. So, there is no evidence we are interested.

The transaction at issue was challenged because Coca-Cola attempted to acquire Dr Pepper, not because Coca-Cola attempted to acquire it from a particular seller. The record above shows that it is still quite possible for Coca-Cola to attempt to acquire Dr Pepper or another competing concentrate manufacturer; indeed, Coca-Cola emphatically refuses to rule it out.³⁴ Because the Commission cannot conclude that “there is no reasonable expectation that the wrong will be repeated,”³⁵ the proceedings against Coca-Cola were not mooted by the abandonment of the instant transaction and the sale of Dr Pepper to a third party.³⁶

*B. Coca-Cola's Assertion that Prosecution of the
Administrative Action was Vindictive, Arbitrary and
Capricious, Depriving Respondent of Due Process*

Coca-Cola concedes (ABCA at 99) that the Commission may properly proceed against one company engaged in an unlawful practice without necessarily pursuing competitors engaged in similar practices.³⁷ Nevertheless, Coca-Cola argues that by proceeding

And let me tell you something else. We offered this Commission in 1987, I came in and I said, “I’ll give you a consent decree that says any company over one percent, we’ll give you a decree so that if we buy a company over one percent, you can order us to divest it at any time within the next four months. We’ll buy it first. We will hold it separate. You can order us to divest in four months.”

We have got to be free to make the acquisition because they may have -- Pepsi Cola may go out and make a tender offer to somebody and the only way we can effectively deal with a tender offer is to buy it. Or somebody may try to buy one of our bottlers and it is going to kill our bottler system, we have to go in and buy it.

Then we’ll come in and we’ll take the risk. We could persuade you not to make us divest.

ATr. at 61-62 (emphasis added).

Coca-Cola later filed a motion to “correct” the transcript of the oral argument, requesting that the Commission change not respondent’s answer, but Chairman Steiger’s question. The Commission rejected the motion, finding that “review of the overall transcript of the hearing does not substantiate Counsel’s claim that the context [of the question and answer] supports this change.” Decision and Order Denying Respondent Coca-Cola’s Motion to Correct the Transcript of Oral Argument (Oct. 17, 1991).

³⁴ In assessing mootness, the Commission may properly consider the need to prevent other future anticompetitive acquisitions. See, e.g., *TRW, Inc. v. FTC*, 647 F.2d at 953 (“the concern is with repeated violations of the same law, and not merely with repetition of the same offensive conduct”). This is not the same as assuming that any future acquisitions by respondent will be anticompetitive (RBCA at 53 n.39).

³⁵ *W.T. Grant Co.*, 345 U.S. at 633.

³⁶ Cf. *R.C. Bigelow*, 867 F.2d at 106 (“narrowly drawn affidavits containing disclaimers only of present intention to resume allegedly unlawful” merger insufficient to meet defendants’ “heavy burden in order to render the case moot.”).

³⁷ See, e.g., *FTC v. Universal-Rundle Corp.*, 387 U.S. 244 (1967); *Moog Indus., Inc. v. FTC*, 355 U.S. 411 (1958).

against Coca-Cola, but not against PepsiCo, even though both companies' proposed acquisitions would have had similar effects on competition, the Commission arbitrarily and capriciously placed Coca-Cola in a worse position than its competitor (ABCA at 98-100). Moreover, it contends that the Commission's actions in filing and prosecuting an administrative complaint were motivated by a vindictive, and therefore unconstitutional, desire to "penalize" respondent "because Coca-Cola exercised its statutory right to judicial review of the Commission's opposition to Coca-Cola's proposed acquisition of Dr Pepper" (ABCA at 96, 100-02).

Coca-Cola challenges the Commission's selective prosecution policy, an area where the courts traditionally have given the government "'broad discretion'." *Wayte v. United States*, 470 U.S. 598, 607 (1985) (quoting *United States v. Goodwin*, 457 U.S. 368, 380 n.11 (1982)). Acknowledging that the decision to prosecute is "particularly ill-suited to judicial review," the Supreme Court has noted among the types of factors that the government is best-suited to analyze are: "the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan . . ." *Id.* The government's prosecutorial discretion is "not 'unfettered'" and may not be "'deliberately based upon an unjustifiable standard. . . ' including the exercise of protected statutory and constitutional rights . . ." *Id.* at 608 (citations omitted). The burden on the complaining party is to show both that the complained of policy "had a discriminatory effect" and was "motivated by a discriminatory purpose." *Id.* Coca-Cola has failed to meet this burden.

In the first instance, Coca-Cola's discriminatory enforcement claim depends on its erroneous assertion that "no material fact" distinguished its proposed acquisition from the PepsiCo merger (ABCA at 99). On June 20, 1986, the Commission determined that it had reason to believe that the combination of Coca-Cola and Dr Pepper might violate the Clayton Act and the FTC Act, and authorized its staff to seek a preliminary injunction pending the issuance and resolution of an adjudicative complaint against the transaction.³⁸

³⁸ Coca-Cola asserts that, on this date, the Commission also authorized the Bureau of Competition to "file" an administrative complaint against both transactions (ABCA at 97, citing IDFF paragraph 374). Coca-Cola and the ALJ are mistaken. The Commission issued its administrative complaint against Coca-Cola on July 15, 1986, ID at 2, three weeks after PepsiCo abandoned its proposed acquisition of Seven-Up. IDFF paragraphs 11, 375.

On the same day, the Commission took the identical action against PepsiCo's proposed acquisition of Seven-Up. Pursuant to standard Commission practice, Commission staff informed Coca-Cola and PepsiCo that the Commission had authorized staff to seek a preliminary injunction, if the parties still intended to proceed with the transactions. *Cf.* IDFF paragraph 374, ABCA at 99, n.47. Thus, up to that point, the Commission treated both Coca-Cola and PepsiCo identically, and both received the same "last clear chance" to abandon their respective transactions without Commission action.

On June 23, 1986, the parties announced the abandonment of PepsiCo's acquisition of Seven-Up. IDFF paragraph 374. In contrast, Coca-Cola indicated that it intended to proceed with its acquisition of Dr Pepper, unless the Commission obtained an injunction against it; indeed, the parties were contractually committed to going forward unless the Commission obtained an injunction.³⁹ Therefore, even assuming that PepsiCo's proposed acquisition was just as likely as Coca-Cola's to violate the FTC and Clayton Acts, the two companies behaved in materially different ways after the Commission informed them of its reason to believe that their actions were unlawful. The question, then, is whether the Commission's determination to treat differently companies behaving in disparate manners is arbitrary and capricious.

As Coca-Cola has documented (ABCA at 100-01; IDFF paragraph 376), the Commission's recent practice generally has been to forgo taking further action against companies that -- like PepsiCo -- abandon their acquisitions after the Commission informs them of its reason to believe that the acquisition would violate the FTC or Clayton Acts, but before a hearing on a preliminary injunction. By giving companies an incentive to terminate anticompetitive acquisitions promptly, thereby avoiding district court litigation to enjoin such mergers, this practice facilitates Commission enforcement by conserving its scarce human and financial resources.⁴⁰ Conversely,

³⁹ In addition to Section 10.01, as previously noted, Section 4.02 of the purchase agreement between Dr Pepper and Coca-Cola obligated Coca-Cola to use its best efforts to obtain government approval of the transaction. CX3V. Coca-Cola could not unilaterally abandon the transaction until August 29, 1986, CX3Z-14, or until 60 days after a court issued an injunction precluding consummation of the transaction. *See supra* p. 15, note 26. When the Commission first announced its intention to challenge the acquisition, neither of these conditions had been met.

⁴⁰ *Cf. United States v. Saade*, 652 F.2d 1126, 1136 (1st Cir. 1981) (pointing to Government's "effort to husband its limited prosecutorial resources" as legitimate rationale for selective prosecution). In *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), the Court emphasized the right of the prosecution to proceed in the most aggressive fashion, without offering the wrongdoer a less onerous alternative. In

by proceeding against companies that -- like Coca-Cola -- persevere in their acquisition efforts until enjoined, the Commission may deter other companies from persisting after they have received a warning.⁴¹ The practice also permits the Commission to concentrate its resources on the most determined violators. Moreover, once the Commission has invested substantial time and effort to obtain a preliminary injunction, continuing with an administrative proceeding, even if the parties subsequently abandon the merger, serves a useful purpose. If the complaint allegations are proven, and the Commission issues an order requiring respondent to obtain the Commission's approval before making a similar acquisition, the Commission can avoid the need to relitigate the same issues with the law violator concerning a future acquisition. These rationales - deterrence of unlawful conduct and conservation of prosecutorial resources - are legitimate reasons for maintaining enforcement proceedings against Coca-Cola and similarly situated companies.⁴²

The discussion above shows that the Commission issued an administrative complaint against Coca-Cola not to punish it, but pursuant to a policy designed to maximize the Commission's enforcement resources and deter unlawful conduct.⁴³ The cases on which Coca-Cola relies for its "punitive prosecution" argument, such as *North Carolina v. Pearce*, 395 U.S. 711, 723-26 (1969), and *Blackledge v. Perry*, 417 U.S. 21, 25-29 (1974), are therefore inapposite. Those cases involved criminal defendants who successfully appealed their sentences, only to receive harsher sentences upon

the instant case, the Commission could have chosen to proceed with its preliminary injunction suit and adjudicative proceedings without offering Coca-Cola a warning and opportunity to abandon its plans without liability.

⁴¹ See, e.g., *Wayte*, 470 U.S. at 613; *Saade*, 652 F.2d at 1136. The alternative - discontinuing enforcement proceedings if a transaction is abandoned, no matter how late in the game - would reduce this deterrent effect. The other alternative proceeding against all companies - would unduly burden the Commission's resources. Coca-Cola's situation is unusual in that two competitors proposed similar acquisitions almost simultaneously, and PepsiCo's withdrawal meant that only Coca-Cola was subject to an administrative proceeding and resulting order. However, had the Commission deviated from its standard practice by proceeding against PepsiCo, this might have resulted in accusations that the Commission was treating PepsiCo arbitrarily.

⁴² See, e.g., *Wayte*, 470 U.S. at 612-13; *United States v. Taylor*, 693 F.2d 919, 923 (9th Cir. 1982); *Saade*, 652 F.2d at 1136 & n.14. Cf. also *Bordenkircher v. Hayes*, 434 U.S. at 364-65 (prosecutor's desire to induce a guilty plea is permissible basis for indictment on more serious charges than were proposed in exchange for guilty plea).

⁴³ Contrary to Coca-Cola's assertion, the ALJ has not affirmatively "found" that Coca-Cola was being penalized, and he did not characterize Coca-Cola's conduct as "electing to exercise its statutory right to judicial review" (ABCA at 99, 100). See ID 106.

retrial, under circumstances suggesting that the defendants were being vindictively punished for seeking judicial review. Central to those decisions was the fact that the defendants were penalized for doing “what the law plainly allows [them] to do,” *i.e.*, exercising their appeal rights.⁴⁴

Coca-Cola can hardly be said to have been exercising its right to appeal or to other forms of “judicial review,” for which it allegedly received discriminatory treatment. Coca-Cola did not seek judicial “review” of any governmental activity. Rather, it was the Commission, not Coca-Cola, which had to seek relief from a court. Coca-Cola persisted in attempting to consummate an acquisition after it was put on notice that the Commission had determined that there was reason to believe that the acquisition was unlawful. Thus, a more appropriate comparison is to the draft resister in *Wayte*, who persevered in his refusal to register for the draft even after the government advised him that he was violating the law, and gave him the opportunity to abandon his unlawful conduct before prosecuting him. The Supreme Court held that the government’s prosecution did not impermissibly single him out or punish him for exercising his constitutional rights. *Id.* at 609-14.⁴⁵

Therefore, for the reasons above, we reject Coca-Cola’s arguments.

IV. MERGER ANALYSIS

Section 7 of the Clayton Act prohibits mergers or acquisitions that may substantially lessen competition in any line of commerce in any section of the country. 15 U.S.C. 18. In merger law, the ultimate issue is whether the challenged acquisition will likely hurt consumers

⁴⁴ In *Pearce*, the Court noted that the state had offered no reason or justification for an increased sentence “beyond the naked power to impose it”, quoting the trial judge who had observed that the state’s silence as to its motives led to an inescapable conclusion that the petitioner was being punished for exercising post-conviction appeal rights. 395 U.S. at 726. In the instant case, the Commission’s policy is justified by factors that the *Wayte* court observed are legitimately within the government’s expertise to evaluate - enforcement priorities and policies, and deterrence of illegal behavior.

⁴⁵ Furthermore, *Pearce* and similar cases involved defendants who were sentenced to longer prison terms than had been deemed appropriate for their crimes. In contrast, Coca-Cola was subjected only to an administrative complaint and trial, during which it had full opportunity to pursue its defense and perhaps be vindicated. Moreover, as Coca-Cola acknowledges (*see* ABCA at 101 and RX 574-A), the Commission ordinarily issues a ten-year prior approval order against respondents that agree to consent orders, as well as against respondents that litigate against the Commission. *Compare, e.g., Monsanto Corp.*, FTC Dkt. No. C-3458 (Sept. 1, 1993), with *Olin Corp.*, 113 FTC 400 (1990), *aff’d*, 986 F.2d 1295 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 1051 (1994).

either through unilateral anticompetitive effects or “by making it easier for the firms in the market to collude, expressly or tacitly, and thereby force prices above, or farther above the competitive level [T]he worry is that [the acquisition] may enable the acquiring firm to cooperate (or cooperate better) with other leading competitors on reducing or limiting output, thereby pushing up the market price.” *HCA*, 807 F.2d at 1386.

To make this determination, the Commission must undertake its Section 7 analysis first by defining the relevant line(s) of commerce or product market(s) that may be affected by the acquisition, and second, by defining the relevant section(s) of the country or geographic market(s) in which any effects may be realized. The inquiry concludes with an assessment of the acquisition’s likely impact upon competition in the identified market(s) and with a consideration of any defenses or justifications for the acquisition that may be advanced by the parties.

A. *The Relevant Product Market*

1. Introduction

As already noted, the first step in merger analysis is to determine the relevant product market(s). *See, e.g., E.I. du Pont de Nemours & Co.*, 353 U.S. at 593. Because the ultimate issue is whether competition may be lessened, a relevant market must be economically meaningful, *i.e.*, one in which market power may be exercised. Such markets have been described as “any grouping of sales whose sellers, if unified by a hypothetical cartel or merger, could raise prices significantly above the competitive level.” *H.J., Inc. v. International Tel. & Tel. Corp.*, 867 F.2d 1531, 1537 (8th Cir. 1989) (quoting P. Areeda & H. Hovenkamp, Antitrust Law paragraph 518.1 (1987 Supp.)); *see also* Owens-Illinois, Inc., FTC Dkt. No. 9212, slip op. at 4 (Feb. 26, 1992); U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, reprinted in 4 Trade Reg. Rep. (CCH) paragraph 13,104 (Apr. 2, 1992) (“Merger Guidelines”), Section 0.1.

The issue before us is whether concentrate⁴⁶ used to make the major national and regional premium brands of carbonated soft drinks - the market urged by complaint counsel (*see infra* note 79)

⁴⁶ *See supra* p. 1, note 2, for definitions of concentrate and syrup. This opinion will generally use “concentrate” as a shorthand reference to both concentrate and syrup.

and found by the ALJ (ID 99) (hereinafter “branded concentrate”) - is a relevant product market in which to assess the effects of the acquisition.⁴⁷ Coca-Cola argues that the ALJ made two fundamental errors in defining the product market: (1) he misapplied or unduly relied upon a “5% test” to determine the relevant market (ABCA at 29); and (2) he ignored “overwhelming” evidence of competition between branded and other carbonated soft drinks (ABCA at 37). For the reasons below, we reject these contentions and affirm the ALJ’s findings.

2. The methodology for defining relevant product markets

Product markets may be defined either by “the reasonable interchangeability of use or the cross-elasticity of demand.” *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).⁴⁸ These two approaches are different techniques that attempt to answer the same question: which products do consumers treat as sufficiently good substitutes for one another that the products should be considered for merger analysis purposes as being in the same market?

Consistent with Commission practice, and relevant decisional law,⁴⁹ the ALJ (ID 94 -96) sought to delineate relevant, economically meaningful markets by applying the methodology of the version of the merger guidelines that was generally used by both enforcement agencies at the time of his decision. *United States Department of Justice Merger Guidelines*, reprinted in 4 Trade Reg. Rep. (CCH) paragraph 13, 103 (June 14, 1984) (“1984 Guidelines”), Section

⁴⁷ The ALJ found that all concentrate and syrup used to make carbonated soft drinks is also a relevant product market (IDFF paragraph 67, ID 107). Because our holding concerning the market for branded concentrate is dispositive of this case, it is not necessary for us to review the finding of an “all concentrate” market or to consider the acquisition’s effects in such a market.

Coca-Cola, while arguing that the relevant product market includes at least all carbonated soft drinks, appears to have abandoned its claim before the ALJ that the relevant product market consists of all beverages. In any event, based on the record before us, we affirm the ALJ’s conclusion that “the all potables market is not one which can be looked to with any confidence in an analysis of the probable competitive consequences of the proposed acquisition.” ID 94; See IDFF 50-66, 112-129; ID 93-94.

⁴⁸ Cross-elasticity of demand is defined as the percentage change in the quantity sold of product B, associated with a one percent change in the price of product A, holding product B’s price constant. A high value indicates that the products are good substitutes, and presumably in the same market, although there may be interpretation difficulties, particularly when prices may already reflect the exercise of market power. See F.M. Scherer & D. Ross, *Industrial Market Structure and Economic Performance* (“hereinafter Scherer & Ross”) 75-76 (3d ed. 1990).

⁴⁹ See, e.g., *Olin Corp.*, 113 FTC at 595.

2.11. The result is the same under the new 1992 Merger Guidelines, Section 1.11, which use the same basic methodology.⁵⁰

This approach begins with the goods or services in question (which constitute a provisional market), and then asks what would happen if a hypothetical monopolist that was the sole producer imposed a “small but significant and nontransitory” price increase in the provisional market.⁵¹ If, “in response to the price increase, the reduction in sales of the product would be large enough that a hypothetical monopolist would not find it profitable to impose such an increase in price,” Merger Guidelines, Section 1.11, then the provisional market is too small (*i.e.*, it is not an economically meaningful market), and the analysis is repeated by adding the next best substitute product. This continues until the point is reached at which the hypothetical monopolist could profitably increase prices. *Accord*, 1984 Guidelines, Section 2.11. This test is often referred to as the “5% test” because a “small but significant and nontransitory” price increase is generally taken, in the first instance, to be five percent. Merger Guidelines, Section 1.11; 1984 Guidelines, Section 2.11.⁵²

In defining product markets, the Merger Guidelines’ 5% test does not reduce the range of evidence that may be considered or preclude evaluation of other data regarding cross-elasticity of demand. Thus, the 5% test merely provides an analytical framework that attempts to organize and quantify evidence of consumer substitution patterns. The Commission has recognized that “direct evidence of the consequences of an hypothesized future price increase will rarely be available” and that “all relevant evidence” should be considered.

⁵⁰ The Merger Guidelines “update the Merger Guidelines issued by the U.S. Department of Justice in 1984 and the Statement of Federal Trade Commission Concerning Horizontal Mergers issued in 1982.” Merger Guidelines, Section 0. n.4. The 1992 Merger Guidelines preserve the “sound frameworks for antitrust analysis of mergers” contained in earlier guidelines and statements, make “improvements . . . to reflect advances in legal and economic thinking . . . and also clarify certain aspects of the Merger Guidelines that proved to be ambiguous or were interpreted by observers in ways that were inconsistent with the actual policy of the agencies.” Statement Accompanying Release of *Revised Merger Guidelines*, reprinted in 4 Trade Reg. Rep. (CCH) paragraph 13,104 (Apr. 2, 1992).

⁵¹ The 1984 Guidelines postulated a price increase lasting for one year, which the 1992 Merger Guidelines changed to the “foreseeable future.” The difference is not material in this case.

⁵² The Guidelines make clear that price increases other than 5% can be used in appropriate circumstances, and our shorthand references to a “5% test” are not meant to suggest that such variations are precluded. Merger Guidelines, Section 1.11; 1984 Guidelines, Section 2.11. The ALJ did not confine his discussion to a possible 5% price increase (IDFF paragraphs 150-156).

Merger Guidelines Section 1.11.⁵³ The Commission appreciates both the utility of using cross-elasticity of demand, and the difficulty of calculating such elasticities (*Olin Corp.*, 113 FTC at 595 (citing 1984 Guidelines); *B.A.T. Indus., Ltd.*, 104 FTC 852, 931 (1984); *see also* Merger Guidelines, Section 1.11), and the Commission therefore considers all available relevant evidence in delineating relevant markets. *Olin Corp.*, 113 FTC at 594-95.

This approach is thus consistent with the analytic framework used by the courts. For example, in *Brown Shoe Co. v. United States*, 370 U.S. at 325, the Supreme Court stated that “[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.” However, because of the difficulty in calculating and interpreting the actual cross-elasticity of demand, the courts have relied on evidence of reasonable interchangeability of use, including such factors as differences in price or price movements, *United States v. Aluminum Co. of Am.*, 377 U.S. 271, 276-77 (1964); *United States v. Archer-Daniels-Midland Co.*, 866 F.2d 242, 246 (8th Cir. 1988), *cert. denied*, 493 U.S. 809 (1989); quality differences, *FTC v. Warner Communications Inc.*, 742 F.2d 1156, 1163 (9th Cir. 1984) (*per curiam*); *A.G. Spaulding & Bros. v. FTC*, 301 F.2d 585 (3d Cir. 1962); *United States v. Times Mirror Co.*, 274 F. Supp. 606, 617 (C.D. Cal. 1967), *aff’d*, 390 U.S. 712, *reh’g denied*, 391 U.S. 971 (1968); and the existence of separate customer groups for separate products, *United States v. Waste Management, Inc.*, 743 F.2d 976, 980 (2d Cir. 1984); *United States v. Rockford Memorial Corp.*, 717 F.Supp. 1251, 1260 (N.D. Ill. 1989), *aff’d*, 898 F.2d 1278 (7th Cir.), *cert. denied*, 498 U.S. 920 (1990).

Coca-Cola asserts that the ALJ relied too heavily on the 5% test, and that the test yielded misleading results because a 5% increase in the price of concentrate amounts to an insignificant 0.5% increase in the price of soft drinks (because concentrate accounts for only 10%

⁵³ The Merger Guidelines identify some types of evidence that the Commission may take into account (although not exclusively) in analyzing market definitions:

- (1) evidence that buyers have shifted or have considered shifting purchases between products in response to relative changes in price or other competitive variables;
- (2) evidence that sellers base business decisions on the prospect of buyer substitution between products in response to relative changes in price or other competitive variables;
- (3) the influence of downstream competition faced by buyers in their output markets; and
- (4) the timing and costs of switching products.

of the cost of a soft drink). ABCA at 31-32; *see* IDFF paragraph 150. We reject these arguments for several reasons.

First, Coca-Cola's argument misperceives the purpose and function of the 5% test. The 5% test is designed, in part, to determine whether purchasers of a relevant product would likely shift to a competing product in the event that sellers of the proposed relevant product attempted to exercise market power. Where the relevant product is a raw material or a semi-finished good, the test looks at the likely reaction of manufacturers or finishers who are acquiring the product as an input into the final finished product, not at the response of ultimate consumers to price changes in the final finished product.⁵⁴ The record here suggests that branded concentrate is an economically meaningful area of competition within which demand responses by buyers would be insufficient to defeat an exercise of market power.

Second, the ALJ plainly did not rely exclusively on the 5% test with respect to the price of concentrate. Even assuming that Coca-Cola's argument is correct and that a test with a larger price increase for concentrate is necessary, an argument that we do not concede, the ALJ found evidence showing that concentrate producers could safely impose even a 100% increase in the price of concentrate. *See, e.g.*, IDFF paragraphs 149, 151-58, ID 95, 97. As Coca-Cola's argument acknowledges, such an increase in concentrate prices, if fully passed on to consumers, would result in a 10% price increase in the finished product, and even a 10% increase in the price of branded carbonated soft drinks would not likely cause sufficient substitution. *Id.* The ALJ's findings are thus based, in adequate part, on an analysis that meets even the test proposed by Coca-Cola.

Third, the ALJ's findings are well grounded in other evidence relevant to product market determinations. Thus, he relied on evidence concerning the varying channels of distribution to consumers and methods of distribution to retailers for carbonated soft drinks, IDFF paragraphs 68-80; industry perceptions of the degrees of competition between different categories of carbonated soft drinks, IDFF paragraphs 109-29; price differences between branded and other carbonated soft drinks, IDFF paragraphs 130-42; differences in consumers' perception of the quality of different categories of

⁵⁴ The 1984 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 2.11 (footnote omitted). This sentence is repeated in Section 1.11 of the 1992 Merger Guidelines.

carbonated soft drinks, IDFF paragraphs 143-46; historical evidence of price interaction between different categories of carbonated soft drinks, IDFF paragraphs 151-55, 157-59; opinions of market participants about the relationship between prices of different categories of carbonated soft drinks, IDFF paragraph 156; and expert economic testimony, IDFF paragraphs 161-62.

In adopting the ALJ's findings as our own (*see supra* note 4), we thus reject Coca-Cola's argument that his methodology was not consistent with established precedent and was applied erroneously.⁵⁵ However, before turning to a discussion of the ALJ's determination that branded concentrate used to make branded carbonated soft drinks is a relevant market, we highlight some aspects of the ALJ's observation that the concentrate industry and the carbonated soft drink industry "are essentially two different industries which are interrelated." IDFF paragraph 33.

3. The concentrate and carbonated soft drink industries

Concentrate is an intermediate product that has no use, except as an ingredient in carbonated soft drinks. Demand for particular concentrates thus depends on demand for the finished product, the carbonated soft drink, that is made from the concentrate. Thus, manufacturers of concentrate promote the sale of concentrate by promoting the finished product, and not the concentrate itself.

Moreover, all concentrates and carbonated soft drinks are not identical; they are "differentiated products."⁵⁶ While they are differentiated in obvious ways, for example, by the flavor they impart to the finished product (*e.g.*, cola, lemon-lime, orange, etc.), and the manner in which the manufacturer captures that flavor (*e.g.*, the taste of Coca-Cola versus RC Cola), they are also differentiated in more subtle ways. For example, they are differentiated by the image that advertising (or the lack thereof) projects to consumers (*see* IDFF paragraphs 25-28, 143-45, Berry Tr. 691-92), and by the channels of distribution to consumers (*e.g.*, the grocery store or "take-home" channel (cans and bottles to be consumed later), and the "cold drink" channel (chilled soft drinks usually sold for immediate consumption, dispensed by vending machines, convenience stores, and restaurants))

⁵⁵ Coca-Cola's argument that a 5% test would exclude Dr Pepper from the relevant market is discussed *infra* note 77.

⁵⁶ For a general discussion of differentiated products, *see* Scherer & Ross, ch. 16.

(*see* IDFF paragraph 68). Finally, carbonated soft drinks may also be differentiated by the services that the manufacturer (usually the bottler) provides to retailers. Some bottlers provide retailers with "warehouse delivery," *i.e.*, delivery to the retailer's central warehouse, whereas others provide "direct-store-door delivery" ("DSD"), also called "store-door delivery," in which bottlers' employees deliver soft drinks directly to the store, stock the retailer's shelves, and rotate stock (*see* IDFF paragraphs 74-76, 79).⁵⁷

Against this background, an examination of all of the characteristics of concentrates and finished products shows that they are divided into three distinct categories: major national and regional brands; "warehouse" brands; and private label products.⁵⁸ The major national and regional brands that comprise the first group are characterized by heavy advertising to promote a particular image; wide availability in both the take-home and cold drink channels of distribution; store-door delivery; and services to retailers in the cold drink channel.⁵⁹ IDFF paragraphs 25, 29, 77, 81-103, 109, 257. For convenience, we adopt the ALJ's short-hand reference to these as "branded concentrate."⁶⁰ *See* ID 93-99.

The remaining concentrates and their related carbonated soft drinks consist of those that have brand names, but use warehouse distribution ("warehouse brands"), such as Shasta and Faygo (*see* IDFF paragraphs 79-80, 104-06, 161), and private label products,

⁵⁷ Similarly, in the cold drink channel, some bottlers provide dispensing equipment, such as vending machines, fountain equipment, and visi-coolers. Hughes Tr. 760, Connor Tr. 1027-29, Tyler Tr. 1187, Greenberg Tr. 3543-45.

⁵⁸ Dr. Hilke, complaint counsel's expert economist, similarly divided the market into three "tiers," with "tier one" being the major national (but not most regional) brands, "tier two" the warehouse brands, and "tier three" the private label brands. *See* IDFF paragraph 161; Hilke Tr. 2549-52, 2647-48; CX 784A. A Coca-Cola document recognized three analogous segments: national brands, mid-premium brands, and price brands. *See* IDFF paragraph 109.

⁵⁹ These services contribute to the widespread availability of branded soft drinks because they are important to retailers lacking warehouses; they also facilitate retailers' responses to consumer demand and competitive conditions, and provide greater profits to retailers. *See* IDFF paragraphs 258-61; Epstein Tr. 3618-20.

⁶⁰ "Branded concentrates" thus refer to concentrates made by the major national brands - Coca-Cola, PepsiCo, Dr Pepper, Seven-Up, Royal Crown, A&W, and Cadbury Schweppes (*see* IDFF paragraphs 81-102) - and to the regional brands - such as Barq's, Big Red, and Canfields - that, within their area of distribution, are sold to consumers at prices that are comparable to the national brands and that are marked by heavy advertising; wide availability in both the take-home and cold drink channels of distribution; store-door delivery; and services to retailers in the cold drink channel. *See* IDFF paragraph 103; ID 95. The regional brands excluded from this market definition generally lack significant advertising, store-door delivery and broad regional consumer recognition. Such regional brands are more appropriately considered warehouse brands or private label soft drinks.

such as Safeway's Cragmont, that are sold by particular store chains (*see* IDFF paragraph 107). Warehouse brands are available mainly in chain supermarkets; are generally not available in the "cold drink" distribution channel; are less heavily advertised than branded products; and are less expensive than branded soft drinks. *See* IDFF paragraphs 79, 109, 130, 259; Brodkin Tr. 833-34; Cross Tr. 1663; Tyler Tr. 1187. The private label products are also not usually available in the cold drink channel. *See* IDFF paragraphs 79-80, 109, 161. They use little or no advertising and are even less expensive than warehouse brands (IDFF paragraphs 109, 130). For convenience, this opinion will refer to these "warehouse brands" and private label products collectively as "unbranded" or "nonbranded" products (*see* IDFF paragraph 121; ID 97).⁶¹ The general absence of these products from the cold drink channel (which accounted for a substantial share of total carbonated soft drink sales in 1988 (IDFF paragraph 69)) significantly limits the ability of manufacturers of unbranded products to compete with branded products.

4. Branded concentrate as a relevant market

As we have already indicated, branded concentrates comprise the product market alleged by complaint counsel and found by the ALJ, while Coca-Cola argues that the market must be defined broadly enough to include at least the concentrates for all carbonated soft drinks. Of course, the mere recognition that the products, differentiating characteristics (*see supra* Part IV.3.) enable us to classify concentrate into three distinct categories does not in itself answer the question whether branded concentrate constitutes a relevant product market for purposes of Section 7. But for the reasons discussed below, we agree with the ALJ that branded concentrate is the relevant product market in this case.⁶² Our agreement with the ALJ is

⁶¹ We find it unnecessary to determine whether the unbranded concentrates, together or separately, constitute one or more relevant product markets.

⁶² The Commission and the courts do not always divide premium and lower-priced products into separate markets. Such divisions depend upon the facts in each case - the ultimate question always being whether the identified market is one that makes practical economic sense. *See, e.g., Syufy Enters. v. Am. Multicinema, Inc.*, 793 F.2d 990, 994-95 (9th Cir. 1986), *cert. denied*, 479 U.S. 1031, 1034 (1987) (industry-anticipated top-grossing films are separate market from other first-run movies); *Ansell Inc. v. Schmid Labs.*, 757 F.Supp. 467, 475-76 (D.N.J.) (applying Merger Guidelines framework), *aff'd without published opinion*, 941 F.2d 1200 (3d Cir. 1991); *Beatrice Foods Co.*, 101 FTC 733, 801-04 (1983) (chilled, ready-to-serve orange juice is separate market from canned orange juice and frozen concentrate orange juice).

grounded in our determination that branded concentrate is an economically meaningful line of commerce within the meaning of Section 7 and the analytical framework set out in the Merger Guidelines.

a. Product recognition

As a threshold matter, we note that a market defined by branded concentrate is consistent with the perceptions of all concentrate manufacturers, soft drink bottlers, and consumers. The record, including Coca-Cola's own documents, shows that manufacturers of concentrate regard branded products as being in a separate product market from unbranded products. *See* IDFF 109-22, 153, ID 97-98. Bottlers of soft drinks similarly recognize a distinction. *See* IDFF paragraphs 122-29. Consumers also believe that branded carbonated soft drinks are superior in quality to nonbranded drinks. Those who buy branded products ordinarily do not buy unbranded products, and vice versa. IDFF paragraphs 143-45. In supermarkets where both branded and nonbranded products are available, the price of branded products is almost always substantially higher than that of the nonbranded products in the same flavor. IDFF paragraphs 30-31. Consumers plainly perceive that branded and unbranded products are in separate markets.⁶³

b. Product substitution

Coca-Cola argues, however, that the ALJ simply ignored "overwhelming" evidence of "competition" between branded and unbranded carbonated soft drinks, particularly testimony by industry members that the two competed (ABCA 37, 40-41). However, such testimony reflects competition only in the most literal sense of that word. Most consumers face budgetary constraints that limit all of their purchasing decisions, and, in this sense, all products must "compete" with one another for the consumer's attention and dollars.

⁶³ Coca-Cola argues that the so-called "switching studies" show that all carbonated soft drinks are appropriately placed in the same relevant market. ABCA at 43-45. The switching studies were discussed at some length by the experts for both Coca-Cola and complaint counsel (*see* Lynk Tr. 2742-45, 3028-33; Hilke Tr. 2676-83, 4279-82), but they are of little use to us because they do not isolate and measure consumer switching among soft drinks in response to price changes - a highly relevant issue for our purposes.

Therefore, asserting that two products “compete” with each other is not sufficient to define a relevant market. *See infra* note 66.

Antitrust law is concerned with the ability of a group of firms to exercise market power. The relevant question is whether, in response to anticompetitive price increases, enough customers would switch to alternate products to make a small but significant price increase in the product at issue (here, branded concentrate) unprofitable. *See, e.g., Aluminum Co. of Am.*, 377 U.S. at 275; *Ansell Inc.*, 757 F.Supp. at 475-76.

(1) Substitution by bottlers

Bottlers cannot substitute nonbranded for branded concentrate to make branded soft drinks. No matter how much the price of branded concentrate rises, a Coca-Cola bottler, for example, could not substitute Faygo or Cragmont cola concentrate and sell that mixture as Coca-Cola. *See* IDFF paragraph 45.

Coca-Cola notes that concentrate and soft drink producers could engage in supply or production substitution, producing and selling more unbranded soft drinks and fewer branded soft drinks, and thereby increase the market share of unbranded products. ABCA at 48-49. However, this would not be a profitable strategy in response to a small increase in the price of branded carbonated soft drinks, unless sufficient numbers of consumers accept the substitute, *i.e.*, unless the cross-elasticity of demand between branded and unbranded carbonated soft drinks is sufficiently high.

Thus, although the market we are here considering is branded concentrate, an intermediate product, to address Coca-Cola’s objections to this market definition, we must consider the possibility of substitution in the downstream market. Because the demand for concentrate depends wholly upon the demand for the finished carbonated soft drink made from the concentrate, a price increase by branded concentrate manufacturers can be made unprofitable to the manufacturers only if a sufficient number of consumers of carbonated soft drinks switch to unbranded soft drinks.

Therefore, in evaluating the readiness with which bottlers will substitute unbranded concentrate for branded concentrate, it is necessary -- and appropriate -- to consider the prices at which consumers will substitute finished products, *i.e.*, unbranded carbonated soft drinks for branded carbonated soft drinks. *See also* IDFF

paragraphs 20 (discussing “derived demand” in the concentrate industry), 149. We now turn to this issue.

(2) Substitution by consumers

For evidence on pricing, we examine the “take-home” channel of distribution (*see infra* p. 49), in which branded, warehouse, and private label soft drinks are all available to consumers. However, we note that because unbranded carbonated soft drinks are generally absent from the cold drink channel, which has a substantial portion of the carbonated soft drink market (*see infra* p. 44), examination of the take-home channel will systematically overstate the competitive strength of unbranded carbonated soft drinks. Thus, if nonbranded carbonated soft drinks are found to have only a small or an insignificant effect on the prices of branded carbonated soft drinks in the take-home distribution channel, they will necessarily have an insignificant effect in the overall market.

There is ample testimony in the record showing that pricing decisions of makers of branded products are seldom affected by the prices of unbranded carbonated soft drinks. IDFF paragraphs 113, 115-21, 124-29, 144; ID 97-98. This evidence indicates that the witnesses and their companies believe that unbranded products are unlikely to take significant business from branded products.⁶⁴

Coca-Cola contends, however, that this conclusion ignores testimony by executives of some concentrate companies, and by some bottlers that they did consider the prices of unbranded soft drinks (ABCA at 40-42). To the contrary, as the ALJ found, even when unbranded prices were considered, they were monitored much less frequently, or only in some locations, and the consistent and dominant influence on the pricing of branded products was the price of other branded products. *See, e.g.*, IDFF paragraphs 113, 115, 118, 119, 124, 125, 127.

The ALJ further found that there was little price interaction between branded and unbranded soft drinks. IDFF paragraph 151. His findings were based on, *inter alia*, an elasticity study performed for a Coca-Cola bottler showing that consumers did not switch to unbranded products unless the price spread was quite large, such as

⁶⁴ See also IDFF paragraph 110 (Coca-Cola executive stated that his company’s introduction of a mid-priced cola brand (Fanta) to compete with Faygo and Shasta would not take business from Coca-Cola except at the fringes); IDFF paragraph 147.

an 80% to 100% differential (IDFF paragraph 154); testimony that a retailer did not encounter switching unless the price differences were similarly large (IDFF paragraph 156); testimony by other bottlers that there was little price interaction between branded and unbranded products (IDFF 156-57); and evidence that in areas where bottlers of branded soft drinks had engaged in illegal price fixing, the artificially elevated prices did not shift consumers to unbranded soft drinks (IDFF paragraphs 47-48, 158).⁶⁵

Coca-Cola also asserts that the ALJ ignored direct evidence of cross-elasticity of demand contained in testimony and documents showing that, in some locations, unbranded carbonated soft drinks increased their share of sales of all carbonated soft drinks when the price spread between unbranded and branded carbonated soft drinks increased. ABCA at 38-39. However, the evidence is insufficient to support Coca-Cola's conclusion. As long as the demand for unbranded soft drinks has some elasticity, a decline in the price of unbranded carbonated soft drinks will lead to an increase in the quantity demanded. This, in turn, will increase the unbranded products' seeming share of the combined sales even if there is no effect on the demand for branded products (*i.e.*, the sales volume of branded carbonated soft drinks remains constant).⁶⁶ Because this evidence does not show that the increased sales of nonbranded carbonated soft drinks resulted in fewer sales of branded soft drinks, it is not probative of the question of whether the cross-elasticity of demand between unbranded and branded carbonated soft drinks,

⁶⁵ Coca-Cola argues that "boutique" soft drinks (*see* IDFF paragraph 108) compete with branded soft drinks through packaging (ABCA at 41 n.19). Even if true, they had an insignificant effect on branded products' prices, a more relevant criterion here. *See* IDFF paragraph 159.

⁶⁶ The same results could be obtained by arbitrarily including any other grocery product (or even non-grocery product) in a "market" with branded carbonated soft drinks, and calculating their relative "market shares." As long as there is some elasticity of demand for the other product, when its price falls, its sales will increase, and its relative share of the total will increase. For example, if, during a given day, a store sells 90 pounds of oranges and 10 pounds of garlic, oranges have 90% of the total (90 divided by 100). If a temporary price reduction for garlic increases garlic sales to 20 pounds the next day, while orange sales remain constant, oranges' share of the total decreases to 82% (90 divided by 110), even though their actual sales were not affected by the garlic sale. Yet, we suspect that garlic and oranges compete with each other only in the sense that both must be purchased from money allocated for a household's food budget. Similarly, the mere fact that an increase in the price of branded carbonated soft drinks results in a decrease in their share of sales of all carbonated soft drinks is insufficient to support the conclusion that branded and unbranded carbonated soft drinks belong in the same market.

based on the record evidence here, is high enough to prevent branded products from constituting a relevant market.⁶⁷

Coca-Cola's argument that the ALJ disregarded other evidence that lowering the price of unbranded products affected sales of branded products (ABCA 39, 45-46) is equally flawed. The ALJ considered and rejected Coca-Cola's evidence, essentially because it involved price reductions that were substantially larger than the "small but significant" price differentials contemplated by the Merger Guidelines. *See* IDFF paragraphs 136-38, 140; ID 98. For example, Coca-Cola cited a period in Cincinnati in which the Kroger chain put 2-liter bottles of its private label Big K brand on sale for \$.39 a bottle, which increased Big K's share of carbonated soft drink sales. ABCA at 46, Gross Tr. 3225, 3229. However, that sale price was 40-50% below the typical promotional price of \$.69-.79 per 2-liter bottle for private label carbonated soft drinks. Kalil Tr. 924, Berry Tr. 694, Frank Tr. 3356, Connor Tr. 1021.⁶⁸ In the same vein, Coca-Cola cites testimony that sales of nonbranded carbonated soft drinks would increase if the makers of branded concentrate and soft drinks stopped promoting their products. ABCA at 40, 45-46. However, as complaint counsel point out, cessation of promotional activity translates directly into a price increase of 30-100% in the take-home channel.⁶⁹ RBCC at 41-42. Since concentrate manufacturers make payments to bottlers to advertise and promote the bottlers' products, if concentrate manufacturers ceased making these advertising and promotion payments, with no change in the price of concentrate, the

⁶⁷ Coca-Cola also claims that the prices of unbranded and branded soft drinks have trended together over time, and that this fact "confirms that branded soft drinks compete in the same relevant product market as private label and other warehouse-delivered soft drinks," ABCA at 38 (citing in part Olin Corp.). Common price trends may reflect nothing more than changes in the costs of common ingredients. Moreover, the issue here is not whether unbranded and branded carbonated soft drinks together constitute a relevant product (a determination that is unnecessary to the disposition of this case, *see supra* note 47); the issue is whether branded carbonated soft drinks can also make up a separate product market. The possibility that branded carbonated soft drinks might constrain the price of unbranded carbonated soft drinks -- contributing to related price trends would not necessarily imply that unbranded carbonated soft drinks constrain the price of branded carbonated soft drinks. *See Olin Corp.*, 113 FTC at 595-600, 602 (conclusion that two products form relevant product market does not preclude finding that one of them also constitutes a relevant market in its own right).

⁶⁸ Another example involved giving away private label carbonated soft drinks (IDFF paragraph 138, Koch Tr. 638-39) - hardly a realistic indication of cross-elasticity of demand.

⁶⁹ This range is based on testimony about the promotional prices of branded carbonated soft drinks compared to their regular shelf prices. Trebilcock Tr. 1165, Tyler Tr. 1189, Sutton Tr. 1263, Knowles Tr. 2504-05, Ippolito Tr. 3150-51. The vast majority of carbonated soft drinks in the take-home channel are sold at promotional prices (IDFF paragraph 213, Brodtkin Tr. 880, Kalil Tr. 915, Connor Tr. 1065), making the promotional prices the most relevant market prices for purposes of antitrust analysis.

real price of concentrate to the bottler would be increased. *See* IDFF paragraphs 25-28. Cessation of all promotional activity would be in part a direct price increase to bottlers who buy the concentrate, and in part an indirect price increase, because the advertising support that the concentrate manufacturer provided to bottlers would be lower even though the price of the concentrate remained the same.

Evidence of this nature merely goes to the point that some sort of large price increase would induce consumers to switch to less costly products, regardless of how close or distant they may be on the chain of substitutes.⁷⁰ However, the market response to these large price changes is not probative of whether producers could profitably increase prices by smaller amounts; in defining markets for antitrust purposes, it is the market response to a small but significant price increase that is relevant. Moreover, there is no evidence in the record that, when faced with deep price discounting by unbranded carbonated soft drinks, bottlers of branded carbonated soft drinks were forced to significantly lower their prices in order to maintain their sales volume. For example, there is testimony that Coca-Cola's sales were not affected by an 80-100% price spread between its products and Kroger's Big K. IDFF paragraphs 154, 155.⁷¹

In contrast to respondent's evidence involving soft drink price increases or decreases of 30 to 100%, complaint counsel asked a number of witnesses whether it would be profitable for all of the bottlers of branded carbonated soft drinks to simultaneously raise the

⁷⁰ *See, e.g., United States v. Aluminum Co. of Am.*, 148 F.2d 4161 426 (2d Cir. 1945); *The Cellophane Fallacy and the Justice Department's Guidelines for Horizontal Mergers*, 94 Yale L.J. 670, 676 (1985); Baker and Blumenthal, *The 1982 Guidelines and Preexisting Law*, 71 Calif. L. Rev. 311, 322 n.54, (1983).

⁷¹ Coca-Cola also contends that the ALJ ignored evidence that lowering the price of branded carbonated soft drinks took sales away from their unbranded counterparts (ABCA at: 38, 41, RBCA at 21-23). For example, Coca-Cola cited testimony by Mr. Skinner, Vice President of Shasta Beverages (a warehouse brand), that Shasta's marketing was affected as the prices of Coca-Cola and Pepsi-Cola approached Shasta's, and that Shasta responds to the marketing of those branded products. Skinner Tr. 3174-75, 3177-78.

Coca-Cola's factual predicate is questionable: in many areas, the record showed no clear correlation between the magnitude of the branded/private-label price differential and the private-label soft drinks' market share. *See* Complaint Counsel's Reply to Respondent's Proposed Finding 130 (derived from CX 263 I-0, S-Y). More fundamentally, Coca-Cola's evidence is not inconsistent with defining the relevant market as branded concentrate. The critical point is that manufacturers of branded carbonated soft drinks can raise their prices without regard to the response of Shasta or other unbranded products. For example, Mr. Skinner testified that Coca-Cola and PepsiCo do not generally respond to Shasta's pricing decisions. *See* IDFF paragraph 152; Skinner Tr. 3201; *see also* IDFF 11 154-55. This suggests that at the prices evidenced in the record, branded carbonated soft drinks are not constrained by warehouse brands and are a relevant product market.

price of branded carbonated soft drinks by 10%, everything else remaining constant.⁷² The uniform answer to this question was affirmative.⁷³ The fact that this increase is insufficient to shift demand to unbranded products indicates that branded carbonated soft drinks (and by extension, branded concentrate) constitute a relevant economic market.

Coca-Cola also argues that complaint counsel's question invited witnesses to assume that "everything else remaining constant" meant that "nothing would happen in response" to the price increase (RBCA at 25). In other words, respondent charges complaint counsel with "beg[ging] the question" by asking witnesses whether increasing prices of branded products would be profitable if it did not cause them to lose sales. RBCA at 25. There is no indication that the witnesses interpreted complaint counsel's question in the meaningless sense that Coca-Cola suggests.⁷⁴ Complaint counsel asked this same question of at least eight witnesses; the fact that respondent's counsel did not object or seek clarification of the witnesses' statements through cross-examination suggests that all present understood that the witnesses were being asked to assume that the prices (but not the volumes) of unbranded carbonated soft drinks would remain constant while branded prices increased.⁷⁵ Furthermore, when complaint counsel phrased the question differently, the answer was still the same.⁷⁶ Accordingly, we find this line of questioning to be

⁷² Such concerted action is equivalent to action by the Merger Guidelines' hypothetical monopolist. A 10% increase in the price of soft drinks is equivalent to a 100% increase in the price of concentrate. See *supra* p. 29.

⁷³ See IDFF paragraph 156, Berry Tr. 708, Hughes Tr. 759, Brodtkin Tr. 860, Kalil Tr. 927, Connor Tr. 1025, Trebilcock Tr. 1107-08, Turner Tr. 1318, and Westerman Tr. 1802-03. Some bottlers also testified that branded soft drink prices could increase by 20% or 30% before enough consumers would switch to unbranded soft drinks to make the increase unprofitable. See Connor Tr. 1071-72; Westerman Tr. 1803-04.

⁷⁴ Complaint counsel first established that in setting prices for branded carbonated soft drinks, bottlers do not consider or react competitively to the pricing of nonbranded carbonated soft drinks (see Berry Tr. 704-05; Hughes Tr. 758-59; Brodtkin Tr. 856-57; Kalil Tr. 924-26; Connor Tr. 1022-24; Trebilcock Tr. 1103-06; Turner Tr. 1311-14; Westerman Tr. 1797-99), then asked about the profitability of a 10% price increase in branded carbonated soft drinks.

⁷⁵ Indeed, the appropriate time for challenging the question was while the record was still open. Now, it is simply too late and the questions and answers must stand.

⁷⁶ Mr. Shanks (Tr. 98-99) was asked:

Q. Let me ask you the same question with respect to branded carbonated soft drink products and private label products, and that question is, do you have an opinion as to whether a fully passed on 10 percent price increase of concentrate, producing a 1 percent increase in the price of carbonated soft drinks, would be constrained by private label products if private label prices did not change?

A. I do not think they would constrain the prices.

probative of the degree of price elasticity between branded and nonbranded carbonated soft drinks, and that it is credible evidence that there is a separate market for branded carbonated soft drinks.

c. Other factors

Respondent's arguments on product market incorrectly assume that the ALJ relied primarily on the 5% test to define the relevant product market (*see supra* pp. 28-30). Based on that erroneous assumption, respondent further argues that consistent application of a 5% test would place Coca-Cola and Dr Pepper in different product markets.⁷⁷ However, as we have found, the ALJ relied on other evidence as well, including perceptions and business decisions of

Q. What about a 100 percent price increase of concentrate producing a fully passed on price increase of the carbonated soft drink level of 10 percent, do you have an opinion as to whether non-carbonated soft drink products would constrain such a price increase?

A. I don't think there would be a significant constraining effect.

Q. What about private label products at that 100 percent and 10 percent increase, do you have an opinion as to whether private label products would constrain the 10 percent price increase in the carbonated soft drink market?

A. I do not think that they would.

Mr. Tyler (Tr. 1190) was asked:

Q. Assuming that the private label brands, that their retail prices remained the same, and that Coke and Pepsi increased their retail prices, would it be profitable for you to increase your retail prices?

A. . . . I don't understand the question.

Q. Well, would you be able to, would private label brands constrain the major brands from an increase in price?

A. No, I don't think the private labels pricing has that much to do with the major brand products price.

⁷⁷ Coca-Cola claims that a 5% test cannot be used to exclude private label and other warehouse-delivered soft drinks from the relevant product market without necessarily excluding Dr Pepper as well. In support of this proposition, respondent cites a period when Dr Pepper's prices were higher than Coca-Cola's or PepsiCo's prices, and Dr Pepper increased its prices "by amounts greater than 5 percent more than the concentrate price increases by Coca-Cola and PepsiCo - without a loss of sales." ABCA at 35-36 (citing IDFF paragraph 188); Knowles Tr. 2455-56, 2495-96. However, at the same time that Dr Pepper increased its concentrate prices, it also increased its promotional allowances to bottlers, Knowles Tr. 2455-56; RX 150-D, suggesting that multiple factors influenced Dr Pepper's volume of sales. Furthermore, the document cited by Coca-Cola is contradicted by other evidence. Dr Pepper/Seven-Up's chief operating officer testified that the difference or range between the shelf price and promoted price of Coca-Cola or Pepsi, on one hand, versus Dr Pepper, on the other, would be "basically the same" where the two are handled by the same bottler. Knowles Tr. 2505. One Dr Pepper bottler stated that Dr Pepper must be offered at the same promoted prices as his other brands, and another said that Dr Pepper is competitively priced at or below Coke and Pepsi prices in his area. IDFF 190, citing Trebilcock Tr. 1166; Turner Tr. 1310-11. Moreover, the record shows that during some periods, Coca-Cola's concentrate prices increased by more than 5% over those for Pepsi-Cola (RX 150-N) - but respondent does not even suggest that those two products are in different markets. Finally, even though Dr Pepper's concentrate price was higher than Coca-Cola's, the total ingredient cost (concentrate plus sweetener) was approximately the same for the two brands because Dr Pepper required less sweetener (Gross Tr. 3247-48, 3255).

makers of concentrate and soft drinks, and evidence that price interaction between branded and unbranded soft drinks was limited. The ALJ relied on a similarly broad range of evidence to support his conclusion that Dr Pepper is in the same market as other branded soft drinks. For example, he found that Coca-Cola and Dr Pepper, and their respective bottlers, regarded the two products as significant competitors. IDFF paragraphs 192-97, 199, 202. Coca-Cola and PepsiCo took the price for Dr Pepper into consideration when setting their prices, and Dr Pepper similarly priced its products against Coca-Cola, Pepsi-Cola, and other branded carbonated soft drinks. IDFF paragraphs 113, 116, 117, 133, 192, 194, 195, 202. The weight of the evidence shows that the retail prices of Dr Pepper's soft drinks were comparable to those of Coca-Cola and Pepsi-Cola (*see* IDFF paragraph 190). Therefore, other evidence suggesting interchangeability of use (in addition to the 5% test) also undermines Coca-Cola's argument that Dr Pepper's and Coca-Cola's branded soft drinks were not in the same market.

For the reasons above, we find that the concentrate used to produce national and regional branded carbonated soft drinks that are store-delivered and widely available (and fully serviced) in the cold drink channel is the relevant product market in which to assess the effects of Coca-Cola's proposed acquisition of Dr Pepper. *See supra* notes 47, 61.

B. *The Relevant Geographic Market*

As with the relevant product market, determination of the relevant geographic market is a "necessary predicate" for analyzing an acquisition's effect on competition. *United States v. Marine Bancorporation*, 418 U.S. 602, 618 (1974); *Brown Shoe Co. v. United States*, 370 U.S. at 324; *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. at 593. Complaint counsel and Coca-Cola agree, and the ALJ found, that the United States is a relevant geographic market. IDFF paragraph 163. We agree that the record amply supports the existence of a nation-wide relevant geographic market.

However, complaint counsel appeal the ALJ's ruling (ID 99-100) that there are no local markets for concentrate within the national market. AB at 40. Complaint counsel argue that it is possible for producers of branded concentrate to price discriminate in local areas,

i.e., to charge higher prices for branded concentrate in certain geographic areas where there is less intensive competition, AB at 14, and that such local areas are separate relevant geographic markets. Merger Guidelines, Section 1.22. We do not reach the merits of complaint counsel's argument because the record lacks sufficient area-specific evidence to determine whether in particular local markets the effect of the acquisition may be to substantially lessen competition or to tend to create a monopoly.

C. *Effects of the Proposed Acquisition*

The policy that underlies Section 7 and the Merger Guidelines concerns mergers or acquisitions that might enable the resulting entity to collude with other firms in the market, or to engage in anticompetitive conduct on its own. *FTC v. PPG Industries, Inc.*, 798 F.2d 100, 1503 (D.C. Cir. 1986). *See also Cargill v. Monfort of Colorado*, 479 U.S. 104 (1986); *R.C. Bigelow*; *HCA*, 807 F.2d at 1386, 1387. As Judge Posner reasoned in *HCA* regarding coordinated conduct: "the worry is that it [the merger] may enable the acquiring firm to cooperate (or cooperate better) with other leading competitors on reducing or limiting output, thereby pushing up the market price." *Id.* at 1386. Similarly, the Merger Guidelines declare that the "unifying theme" of merger analysis is that "mergers should not be permitted to create or enhance market power or to facilitate its exercise." Section 0.1.⁷⁸

Having defined the relevant product and geographic markets, we now consider whether Coca-Cola's acquisition of Dr Pepper would increase concentration in the relevant product and geographic market sufficiently that the effect "may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. 18.

1. Market concentration

As the ALJ found, and as Coca-Cola has conceded, there is no dispute that the carbonated soft drink industry is highly concentrated. ID 101-103; RBCA at 4. The ALJ used the now standard Herfindahl-

⁷⁸ Market power is "the ability profitably to maintain prices above competitive levels for a significant period of time," or to "lessen competition on dimensions other than price, such as product quality, service, or innovation." Merger Guidelines at n.6; *Owens-Illinois*, slip op. at 4-5 (quoting 1984 Guidelines).

Hirschmann Index (“HHI”) to measure the levels of concentration prior to the proposed acquisition, and afterwards, assuming Coca-Cola had completed its acquisition of Dr Pepper. As noted by Judge Bork:

Market power or the lack of it is often measured by the HHI. The FTC and the Department of Justice, as well as most economists, consider the measure superior to such cruder measures as the four- or eight-firm concentration ratios which merely sum up the market shares of the largest four or eight firms. The HHI, by contrast, is calculated by squaring the individual market shares of all firms in the market and adding up the squares. This method, unlike the four- and eight-firm concentration ratios, shows higher market power as the disparity in size between firms increases and as the number of firms outside the first four or eight decreases.

PPG Industries, Inc., 798 F.2d at 1503. Thus, the HHI ranges from 10,000 in a pure monopoly to a number approaching zero in an atomistic market.

The following table shows the respective concentration levels for complaint counsel’s proposed market of Tier I concentrate firms in 1986:

1986 Concentration Levels of Tier I Firms

Pre-acquisition HHI	3,128.5
Post-acquisition HHI	3,572.2
Increase in HHI	443.7

IDFF paragraph 222.

Complaint counsel’s proposed market of Tier 1 concentrate firms is equivalent to our market of branded concentrate firms, minus regional DSD brands.⁷⁹ Because the regional branded concentrate firms have such a small share of the national market, their inclusion would reduce concentration levels in Table I only by minor amounts.

Using 1986 data, the combination of Coca-Cola and Dr Pepper would have controlled more than 42% of all branded carbonated soft drink sales, and even higher percentages of sales in the cold drink

⁷⁹ At trial complaint counsel urged a market consisting of branded concentrate, excluding any regional brands. Accordingly, complaint counsel’s expert excluded regional branded soft drinks in calculating the HHI. See CX 784A. However, the ALJ defined the relevant market to include certain regional branded soft drinks, and as already discussed, we agree with the ALJ’s market definition. While complaint counsel have urged us to affirm the ALJ’s determination, complaint counsel have continued to cite their expert’s numbers calculated without the regionals as the level of concentration. See AB at 9; RBCC at 23; IDFF paragraph 222.

channel, which consists primarily of branded soft drinks. *See* IDFF paragraphs 226-27, 232-37, and *supra* p. 34.

The ALJ found that the proposed acquisition's increase in already-high concentration levels created a presumption that the acquisition would have harmed competition (ID 101-03). We agree. The post-merger HHI substantially exceeds 1800, and the increase is well above the 100-point level that Section 1.51(c) of the Merger Guidelines regards as presumptively presenting potential significant competitive concern. Indeed, the post-acquisition levels of concentration in this market are far above those that the courts have held to establish a legal presumption of illegality.⁸⁰ *See, e.g., United States v. General Dynamics Corp.*, 415 U.S. 486, 496-97 (1974). We likewise have held that comparable increases in concentration raise serious competitive concerns. *See, e.g., Owens-Illinois*, slip op. at 27; *Olin Corp.*, 113 FTC at 610-11; *HCA*, 106 FTC at 487-88, 807 F.2d at 1386.⁸¹

2. The likelihood that the proposed acquisition
would have resulted in collusion and
other adverse effects on competition

⁸⁰ In this regard, we note that in PPG, a preliminary injunction case involving comparable concentration figures (a merger of firms with 30% and 23% market share resulting in an HHI increase from 1943 to 3295), the district court found "a virtual certainty that the acquisition will be held unlawful," and the Court of Appeals (per Judge Bork) opined that there "is no doubt that the pre- and post-acquisition HHI's and market shares found in this case entitle the Commission to some preliminary relief." *PPG*, 798 F.2d at 1503.

⁸¹ Even if all branded and nonbranded concentrate sales are included in calculating the level of market concentration, the concentration level in that broader market, and the change that would have been caused by Coca-Cola's acquisition of Dr Pepper, would still have been well above the level that the courts have held to be presumptively illegal and above the thresholds in the Merger Guidelines at which the enforcement agencies presume "that mergers . . . are likely to create or enhance market power or facilitate its exercise." Merger Guidelines Section 1.51(c).

The following table shows the market concentration in 1986 if all branded and nonbranded concentrate were included in the market, what that level of concentration would have been had Coca-Cola acquired Dr Pepper, and the increase in the level of concentration that would have been caused by that acquisition:

1986 Concentration Levels of all Producers of Concentrate

Pre-acquisition HHI	2,565.6
Post-acquisition HHI	2,929.2
Increase in HHI	363.6

While the level of, and increase in, concentration in this case is sufficient to create a presumption that the acquisition is illegal, *Philadelphia Nat'l. Bank*, 374 U.S. at 363, we do not rely solely on that statistical showing.⁸² Following the approach of Section 2 of the Merger Guidelines, we examine the acquisition in light of the other market factors to assess its potential adverse competitive effects. After this assessment, we examine whether entry is sufficiently easy that there need be no concern with potential adverse competitive effects.

The ALJ identified four ways in which the acquisition could have substantially lessened competition in the relevant market:

- (a) Eliminating Dr Pepper Company as a substantial, independent competitive force in the relevant market;
- (b) Increasing the likelihood of, or facilitating, collusion;
- (c) Increasing the difficulty of entry; and
- (d) Increasing the costs and reducing the competitiveness of other firms in the relevant market.

ID 101-04, 108. From this, the ALJ concluded that the acquisition would increase the likelihood that firms would increase prices and restrict output in the future. ID 108. For the reasons below, we agree.

*a. Eliminating Dr Pepper Company as a substantial,
independent competitive force in the relevant market*

The ALJ found that the acquisition would eliminate Dr Pepper as a substantial independent competitor to Coca-Cola (IDFF paragraph

⁸² Coca-Cola notes that courts have found that high market shares do not always indicate that an acquisition would violate the Clayton Act (ABCA at 10), and this proposition is certainly correct. However, the results in each case cited depended on the particular facts and market in question. Six of the cases cited turned on the absence of barriers or impediments to entry: *Echlin Mfg. Co.*, 105 FTC 410, 491-92 (1985); *Waste Management, Inc.*, 743 F.2d at 983; *Syufy Enters.*, 903 F.2d at 664-65 (9th Cir. 1990); *United States v. Calmar, Inc.*, 612 F.Supp. 1298, 1306 (D.N.J. 1985); *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 989 (D.C. Cir. 1990); *FTC v. Promodes S.A.*, 1989-2 Trade Cas. (CCH) paragraph 68, 688 at 61, 626 (N.D. Ga. Apr. 14, 1989). *United States v. Citizens & Southern Nat'l Bank*, 422 U.S. 86 (1974), involved the acquisition by Citizens & Southern National Bank ("Citizens") of banks in which it already held a 5% share, and which had always been operated as *de facto* branches of Citizens. *Id.* at 100. Therefore there was no effective competition between the acquired banks and Citizens, nor was any likely to develop. *Id.* at 121. In *United States v. Crowell, Collier, & Macmillan, Inc.*, 361 F.Supp. 983, 995 (S.D.N.Y. 1973), the .6% market share of the acquired firm was held to be *de minimis* given the structure of the market in question.

326). Respondent attacks this finding frontally, arguing that Dr Pepper is a “niche” product and a “marginal competitor,” “not a direct competitor” of Coca-Cola. ABCA at 16-17. This assertion is not supported by the record. Dr Pepper competes directly against Coca-Cola’s Mr. Pibb spicy pepper flavor. IDFF 3. More generally, Coca-Cola’s own documents show that respondent viewed, Dr Pepper as a significant competitor, a view that was consistent with testimony by bottlers and other industry members. For example, Coca-Cola’s 1985 annual business plan identified five competitors, one of which was Dr Pepper, CX 16-Z-22; Coca-Cola’s 1988 operational business plan identified only six competitors, one of which was Dr Pepper; bottlers Turner, Tr. 1308-11, Ippolito, Tr. 3111-12, and Tyler, Tr. 1193, all testified that Dr Pepper competed with Coca-Cola. *See* IDFF paragraphs 111, 191-202, and *supra* p. 41.⁸³

b. *Increasing the likelihood of, or facilitating, collusion*

In a market with a small number of competitors, decreasing the number of competitors is likely to reduce the difficulties and costs inherent in reaching and enforcing a collusive agreement to raise price or restrict output. Merger Guidelines, Section 2.0; *HCA*, 807 F.2d at 1387. Accordingly, eliminating Dr Pepper as a substantial independent competitor against Coca-Cola (and other branded concentrate companies) increases the likelihood of collusion.⁸⁴ Such collusion could manifest itself as a diminution in competition in the national market for branded concentrate, leading to higher nationwide prices for branded concentrate. *See* ID 103.

⁸³ In 1986, Dr Pepper was the fourth largest branded concentrate company, with approximately 4.6% of all carbonated sales. IDFF paragraph 226. Coca-Cola attempts to downplay the significance of that market share with statistics showing that “by 1987 sales of 129 new soft drink brands introduced since 1970 collectively accounted for 38.7 percent of all carbonated soft drink sales” ABCA at 51. Many of those “new soft drink brands” are accounted for by products brought out by Coca-Cola, PepsiCo, and the other major branded concentrate producers as they diversified their brand line by the addition of diet and caffeine-free combinations. IDFF paragraph 214-16. The share of total sales accounted for by the largest concentrate producers rose steadily from 1970 through 1988. IDFF paragraph 241. By 1988, Dr Pepper had become the third largest branded concentrate company. IDFF paragraph 226. In contrast, a firm such as Original New York Seltzer, cited by Coca-Cola as an actual new entrant (ABCA at 64), began business in 1982, Miller Tr. 3438-39, and had sales of approximately 8.5 million cases, accounting for approximately 0.1% of all carbonated soft drink sales in 1986. CX. 784A. In 1989, New York Seltzer still had sales of approximately 8.5 million cases. Miller Tr. 3460.

⁸⁴ Given the strong market position of PepsiCo, the second largest seller of branded concentrate in the relevant geographic market, we do not believe that the acquisition of Dr Pepper would have significantly increased Coca-Cola’s ability to unilaterally exercise market power, *i.e.* to elevate price and suppress output. *See* Merger Guidelines, Section 2.2.

Furthermore, there is a history of price fixing of branded soft drinks at the bottler level (IDFF paragraph 47). Although we are here concerned with the possibility of collusion in the market for branded concentrate, the history of price fixing by bottlers suggests that there are local or regional soft drink markets that are conducive to collusion. It evinces the bottlers' perception that the number of competitive dimensions involved posed no insuperable obstacle to collusion.⁸⁵ This price fixing suggests that if a cartel of concentrate producers raised concentrate prices nationally, bottlers could successfully pass on the price increase in the form of higher soft drink prices.

Coca-Cola contends that monitoring a collusive agreement would be "virtually impossible" and that cheating on the collusive agreement would be easy, making participation by all bottlers necessary, but unlikely. ABCA at 79-81. Of course, with respect to bottlers owned by the concentrate companies, an increasing phenomenon, the argument is inapposite.⁸⁶ As long as bottlers lack an incentive to undermine an attempt to raise the price of branded soft drink concentrate -- either because the bottler is owned by a concentrate company, or because the bottler can successfully pass on any price increase -- there is no reason why concentrate companies could not be as successful in raising prices in the national market as the local bottlers were in the bottler price-fixing cases.

Coca-Cola additionally contends that differing degrees of vertical integration by concentrate firms create disincentives to collude, citing *B.F. Goodrich*, 110 FTC 207, 329-32 (1988). ABCA at 82-84. While we agree that varying degrees of vertical integration may create disincentives to collude, the results "will depend upon whether any given integrated firm on balance will benefit from or be harmed by collusion." *B.F. Goodrich*, 110 FTC at 330. Given their large market shares (*see* CX 784 and IDFF paragraph 226), the two largest branded concentrate companies Coca-Cola and PepsiCo - must participate in any collusive price agreement in order for it to succeed,

⁸⁵ "[T]erms of coordination may be imperfect and incomplete -- inasmuch as they omit some market participants, omit some dimensions of competition, omit some customers, yield elevated prices short of monopoly levels, or lapse into episodic price wars -- and still result in significant competitive harm." Merger Guidelines, Section 2.11

⁸⁶ IDFF paragraphs 2, 83, 353.

and have an obvious economic incentive to do so.⁸⁷ Each has ownership interests in bottlers that distribute approximately one-half of their carbonated soft drink sales, IDFF paragraphs 83, 353, and they are the only branded concentrate companies to have substantial ownership interests in bottlers. IDFF paragraphs 2, 83. Even though PepsiCo owns its bottlers outright, whereas Coca-Cola holds the bulk of its bottler investments as 49% ownership interests, the differences in vertical integration between the two may be less significant than the similarities and are not great enough to inhibit establishing a collusive price. Thus, Coca-Cola has not demonstrated how any such difference would affect firms' incentives to cooperate, or would interfere with their ability to detect and retaliate against cheating on a collusive scheme.

c. Increasing the difficulty of entry and increasing the costs and reducing the competitiveness of other firms in the relevant market.

The ALJ found that the proposed acquisition would have made entry into the market for branded concentrate more difficult, and that it would have increased the costs and reduced the competitiveness of other firms in the relevant market. ID 104-105, 109. We concur. Because both of these anticompetitive effects stem from the impact that the acquisition would have had on brand name soft drink bottlers, we discuss them together, and discuss entry more fully below.

For either a new or existing branded concentrate manufacturer to compete effectively, it needs soft drink bottlers that offer store-door delivery and have a minimum efficient scale of 8% to 15% of their local market. Koerner Tr. 430, Connor Tr. 1016, Cross Tr. 1678, Westerman Tr. 1791. As of 1985 (the last full year before the complaint was issued in this case), only two families of brands, Coca-Cola and Pepsi-Cola, had market shares of that size throughout the country; other branded concentrate makers had to use bottlers that also distributed other brands. *See infra* Part IV.C.3.

⁸⁷ ID 103. Indeed, the ALJ found that both desired to raise the price of concentrate and that they had engaged in price signalling. *Id.*; IDFF paragraphs 328-34.

In 1985, Dr Pepper had the fourth largest share of branded carbonated soft drink sales. IDFF paragraphs 241-43.⁸⁸ In some soft drink markets, Dr Pepper's sales were substantially above its national average, Slaughter Tr. 2160, allowing it to virtually support a local bottler by itself (*see also infra* p. 57, note 102). Dr Pepper's size thus made it an attractive brand for third bottlers that compete with Coke and Pepsi bottlers. While the Seven-Up and RC Cola families of brands had similar national market shares, Dr Pepper had a unique flavor, which made it especially attractive to third bottlers because it meant that they could carry Dr Pepper without concern that flavor restrictions would prevent them from distributing other brands of carbonated soft drinks.⁸⁹ IDFF paragraphs 269, 316-20.

Because Dr Pepper has the right to disapprove any transfer of a Dr Pepper franchise,⁹⁰ if Coca-Cola acquired Dr Pepper, Coca-Cola could steer those franchises to Coca-Cola bottlers that did not already bottle Dr Pepper.⁹¹ Such transfers would have been consistent with Coca-Cola's long-standing practice of not selling concentrate to more than one bottler in the same territory. Dyson Tr. 2367-68; *see also* IDFF 359. The ALJ found that this would weaken third bottlers that depend upon Dr Pepper for a significant share of their volume if those bottlers could not achieve minimum efficient scale for distribution without Dr Pepper. IDFF paragraph 360, ID 103-04. This would potentially raise the costs for those rivals of Coca-Cola and PepsiCo that lack their own bottler networks, as well as potentially raising the costs for and difficulty of entry by new producers of concentrate seeking store-door distribution to compete with established firms.

⁸⁸ In 1986, Dr Pepper ranked fifth in market share according to the Nielsen data, behind Coke, Pepsi, Seven-Up, and RC. IDFF paragraph 241. The Nielsen data understated Dr Pepper's actual share (IDFF paragraph 242), but even using those data, Dr Pepper's share exceeded RC's in 1985, 1987, and 1988. IDFF paragraph 241.

⁸⁹ A flavor restriction is a provision in the contract between a concentrate maker and its bottler that prohibits the bottler from producing another brand's version of the same flavors. IDFF paragraph 267. The effect of flavor restrictions is discussed in more detail *infra* pp. 57-60.

⁹⁰ Slaughter Tr. 2202-03; IDFF paragraph 355. Dr Pepper's approval rights are triggered by changes of ownership involving as little as 10% of a bottling company. IDFF 355.

⁹¹ Coca-Cola argues that it would not risk injury to its relationship with Dr Pepper bottlers by transferring Dr Pepper franchises from third bottlers to Coca-Cola bottlers. ABCA at 22-24. This argument borders on frivolous. About 40% of Dr Pepper products are already distributed by Coca-Cola bottlers, and these bottlers, of course, would not care about attempts to move Dr Pepper franchises to other Coca-Cola bottlers. As to the remaining 60%, as long as there is a Coca-Cola bottler to which the Dr Pepper franchise can be transferred, Coca-Cola has no reason to be concerned about its relations with the existing Dr Pepper franchise holder.

This effect on competition would be limited to the Dr Pepper franchises that are held by third bottlers (20% at the time of trial), IDFF paragraph 354, or that move to third bottlers in the future. Moreover, Dr Pepper sought to place its franchises with the strongest possible bottler in each market (*id.*), which meant that, even absent the acquisition, some franchises that became available might have been awarded to the local Coke or Pepsi bottler in preference to a third bottler. However, in the five years preceding the initial decision, 20 Dr Pepper franchises were awarded to third bottlers, ID paragraph 358, demonstrating that Dr Pepper franchises are still an important source of potential soft drink volume to third bottlers. Loss of this volume by third bottlers would have made it more difficult for those bottlers to attain efficient scale of operations and to be efficient distributors for new or existing competitors of Coca-Cola and Pepsi-Cola in branded concentrate.

d. *Coca-Cola's argument that increased concentration has not decreased competition in the market*

Coca-Cola asserts that over the decades, competition between Coca-Cola and PepsiCo has been vigorous, and that historical data show that price competition has remained vigorous even as concentration in the carbonated soft drink industry increased. ABCA at 77-79.

Looking at the historical data, several facts are indisputable. Over an extended period prior to the attempted acquisition, national concentration among carbonated soft drink concentrate firms increased. IDFF paragraph 241. Over this same period, carbonated soft drink consumption increased, IDFF paragraph 34; per-case operating profit from the sale of concentrate fell, IDFF paragraph 24; carbonated soft drink production costs fell, IDFF paragraphs 35-36; and packaged carbonated soft drink prices, adjusted for inflation, fell, IDFF paragraph 211. Coca-Cola attempts to use data on changes in output, prices, and profit margins, as well as other market factors reflective of competition, to disprove any causal relationship between increasing concentration and decreasing competition. ABCA at 12-16.

However, there are two problems with Coca-Cola's argument. First, the concern of Section 7 of the Clayton Act is with probable future performance of an industry after a merger, and while historical

performance can be important in predicting that probable future performance, the lack of previous anticompetitive effects does not rule out future anticompetitive effects after the merger in question is completed.⁹² Second, as complaint counsel point out, RBCC at 26-27, the data cited by Coca-Cola do not show what happened to economic profits,⁹³ or even total accounting profits, of major concentrate producers during the period when industry concentration increased.

There is little evidence in the record relevant to economic profits of branded concentrate producers. In the years prior to the attempted acquisition of Dr Pepper, Coca-Cola (as well as PepsiCo and Dr Pepper) reported increasing profits as industry concentration increased.⁹⁴ Dyson Tr. 2415, Weatherup Tr. 1448, Knowles Tr. 2455-56. However, increased accounting profits do not necessarily mean increased economic profits. There is simply no basis in the record in this case to determine whether or not the producers of branded concentrate were pricing competitively prior to the acquisition attempt in question.

We recognize that in many respects, in many parts of the country, the market for carbonated soft drinks was highly competitive through the time when the record closed in this case; we recognize further that there was a history of intense rivalry between Coca-Cola and PepsiCo (IDFF paragraph 209).⁹⁵ However, we cannot accept Coca-

⁹² We note that the period of increasing industry concentration is also the period when numerous bottlers of branded carbonated soft drinks engaged in price fixing. IDFF paragraph 47. This suggests that the entire industry may not be behaving competitively.

⁹³ For purposes of antitrust analysis, "economic profit," rather than "accounting profit," is the appropriate measure of firm performance. Economic profit accounts for the opportunity costs of all the assets that a firm uses in its business, while accounting profit reflects a firm's explicit historical expenditures. See W. Baumol & A. Blinder, *Economics: Principles and Policy*, 424-25 (2d ed. 1982); P.R. Gregory and R.J. Ruffin, *Essentials of Economics*, 96-100, 120 (1986); J. Hirshleifer, *Price Theory and Applications*, 176-79 (3d ed. 1984); D. Carlton & J. Perloff, *Modern Industrial Organization*, 361-68 (1990).

⁹⁴ Contrary to Coca-Cola's assertion (ABCA at 12 n.6), the price of concentrate increased faster than the rate of inflation over the years immediately preceding the administrative trial. See ID at 104. For example, between 1980 and 1986, the bottle/can price of Coke and Diet Coke concentrate increased by around 53%, while inflation as measured by the Consumer Price Index increased by around 32% (see RX 60A). Coca-Cola's reliance on RX 62 to argue that prices did not escalate is misplaced, because RX 62 relates to revenues to Coca-Cola, net of Coca-Cola's advertising and promotion expenses. (We do not, however, take the fact that Coca-Cola's prices were increasing faster than the rate of inflation during this period to mean that Coca-Cola was necessarily exercising market power.)

⁹⁵ See, e.g., IDFF paragraph 208; Shanks Tr. 111; Carew Tr. 246; Schmid Tr. 293-94; Currie Tr. 387-88. We would not, however, characterize as competitive those carbonated soft drink markets in which bottlers, including some Coca-Cola and Pepsi-Cola bottlers, engaged in price fixing.

Cola's contention that this competition would necessarily continue in the future regardless of the level of concentration.

In the past, Coca-Cola and PepsiCo were never required to take market share from each other; rather, they gained market share at the expense of other brands. IDFF paragraph 241; Kalil Tr. 947-48. However, as Coca-Cola and PepsiCo grow larger, it becomes more difficult to take market share from other brands, simply because the other brands have less market share to lose. Moreover, as those other concentrate companies market shares shrink, they have greater difficulty in obtaining efficient bottler, store-door distribution, because it is more difficult for their bottlers to reach the minimum efficient scale (*see infra* pp. 57ff.).

Thus, the incentives for Coca-Cola and PepsiCo change as their combined market share increases. It becomes harder for either of them to enlarge their market share without taking the share from the other, and their competitors become less able to mount a strong competitive challenge as their distribution systems become smaller and relatively less efficient. If the antitrust laws allowed Coca-Cola, and, by implication, PepsiCo, to increase market share by purchasing their major competitors, rather than competing for it, we have no assurance that they would continue to compete aggressively in the future -- particularly in an industry with a history of price fixing at one level. Furthermore, the ALJ's finding that both companies have signalled their desire to raise concentrate prices, possibly forgoing competition for market share (IDFF paragraphs 328-34; ID 103), underscores our conclusion that past price competition between Coca-Cola and PepsiCo would not necessarily have continued after the acquisition. Thus, respondent's arguments do not undermine the ALJ's findings that the proposed acquisition may have substantially lessened competition in violation of Section 7.

3. Ease of entry and other mitigating factors

In *United States v. Waste Management, Inc.*, 743 F.2d at 982, the Second Circuit observed that the Supreme Court:

has held that appraisal of the impact of a proposed merger upon competition must take into account potential competition from firms not presently active in the relevant product and geographic markets. *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 93 S.Ct. 1096, 35 L.Ed. 2d 475 (1973); *Federal Trade Commission v. Proctor & Gamble Co.*, 386 U.S. 568, 87 S.Ct. 1224, 18 L.Ed.2d 303 (1967);

United States v. Penn-Olin Chemical Co., 378 U.S. 158, 84 S.Ct. 1710, 12 L.Ed.2d 775 (1964).

We have likewise held that a “primary consideration in evaluating the likely competitive effects of a merger or acquisition is the ease or difficulty with which new competitors might enter the market in response to supracompetitive pricing.” *Owens-Illinois*, slip op. at 27-28.

If entry is “so easy that market participants, after the merger, could not profitably maintain a price increase above premerger levels,” then the merger is unlikely to lead to the exercise of market power. Merger Guidelines, Section 3.0. The reason is that absence of barriers or impediments to entry “makes it highly unlikely that a merger or acquisition will have anticompetitive effects, because any effort to extract supracompetitive prices and profits will induce new entry, which will reduce prices to competitive levels.” *B.F. Goodrich*, 110 FTC at 295-96. When a merger results in a firm with market power, “if prompt, effective entry is unlikely, customers may be exposed to sustained periods of anticompetitive harm.” *Owens-Illinois*, slip op. at 28. See *United States v. Baker Hughes, Inc.*, 908 F.2d 981 (D.C. Cir. 1990).

In this case, Coca-Cola argues that there are two sources for expansion of output to defeat any collusive pricing by branded concentrate producers: entry by new firms, and expansion by existing producers of nonbranded soft drinks.⁹⁶ ABCA at 84. Because the basic issues are the same for entry by firms not presently producing any concentrate and for entry by firms currently producing unbranded concentrate, we treat both sources of potential entry together.⁹⁷

The Commission traditionally has assessed ease of entry by looking for identifiable barriers or impediments that could foreclose entry or prevent expansion by existing smaller firms sufficient to

⁹⁶ Coca-Cola's position on entry may not be consistent with its reasons for seeking to buy Dr Pepper. Coca-Cola asserts that there are absolutely no barriers to entry. However, Coca-Cola has described its attempt to acquire Dr Pepper as a “defensive acquisition” because PepsiCo was seeking to acquire Seven-Up. ATr. 61; IDFF paragraph 10. If there are absolutely no barriers to entry, as Coca-Cola claims, one might ask why it could not have simply introduced new brands of carbonated soft drinks in response to PepsiCo, instead of offering to pay \$470 million for what was essentially the Dr Pepper trademark. IDFF paragraph 9.

⁹⁷ Under Section 1.32 of the Merger Guidelines, certain firms that participate in the market through supply-side response are included as participants in the market, and are therefore treated separately from other firms that may enter the market. In this case, following the Merger Guidelines' approach would result in the same conclusion.

forestall anticompetitive conduct within the relevant market. Impediments that could prevent entry include “any condition that necessarily delays entry into a market for a significant period of time and thus allows market power to be exercised in the interim.” *Echlin Mfg. Co.*, 105 FTC 410, 486 (1985). Barriers to entry are “additional long-run costs that must be incurred by an entrant relative to the long-run costs faced by incumbent firms.” *Id.* at 485 (citing G. Stigler, *The Organization of Industry* 67 (1968)); *accord, e.g., HCA*, 106 FTC at 491. Barriers or impediments need not be absolute; rather, they are assessed “in terms of the amount of time required for a motivated outsider to effect entry.” *Olin Corp.*, 113 FTC at 612; *Owens-Illinois*, slip op. at 28.

The Merger Guidelines use a comparable analytical approach, defining “easy entry” as entry that is “timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects of concern.” Section 3.0. To be “timely,” entry must take no more than two years to go from initial planning to a significant market impact. *Id.*, Section 3.2. To be “likely,” entry must be profitable at premerger prices, and a prospective new entrant must be able to obtain those premerger prices. To be “sufficient,” entry must be able to restore competitive pricing -- *i.e.*, it must be effective in offsetting any loss of competition due to the business combination in question.⁹⁸

A would-be entrant into the market for branded carbonated soft drink concentrate can create a flavor and obtain a supply of concentrate. IDFF paragraphs 244-48. However, the entrant must then find means to convert the concentrate into packaged soft drinks or fountain syrup, arrange to have its products distributed to stores, restaurants, and vending locations, and stimulate sufficient consumer demand to make producing the concentrate profitable. *See* IDFF paragraph 266. The ALJ found that barriers and impediments at the distribution stage prevented easy entry into the market for branded concentrate, so that new entry was not likely to constrain collusive price increases among the existing firms in the market. ID 105. As one witness stated: “It is easy to get one’s product produced, but it is very difficult to get it distributed.” IDFF paragraph 266.

Coca-Cola asserts that entry is easy, and that there has been virtually continuous new entry into the relevant markets (ABCA at

⁹⁸ While there is no predetermined market share that the new entrants must meet, they must obtain a sufficient share to offset any output restriction that follows the acquisition.

51). Respondent contends that “by 1987 the sales of 129 new soft drink brands introduced since 1970 collectively accounted for 38.7 percent of all carbonated soft drink sales.” ABCA at 51, citing IDFF paragraph 322.⁹⁹ However, many of these new “brands” are products developed by existing major concentrate companies, such as Coca-Cola’s Diet Coke, New Coke, and Cherry Coca-Cola, as well as caffeine-free variations of existing Coca-Cola products. See IDFF paragraphs 321-22; *cf.* also *id.*, paragraphs 214-16.

That Coca-Cola and PepsiCo can introduce new products does not show that new firms can thereby prevent anticompetitive price increases. Coca-Cola and PepsiCo already have established distribution arrangements with their bottler networks through which to market new products. Thus, they do not face the barriers and impediments to obtaining distribution that a new entrant would encounter. For example, Coca-Cola and PepsiCo do not face flavor restrictions which would prevent them from introducing a new diet or caffeine-free cola-flavored soft drink to their existing bottler network. A new entrant would have to find bottlers that do not currently handle a competing product with a flavor restriction that prevents handling the new product. As we discuss below, the record indicates that barriers and impediments to obtaining an effective bottling and distribution system prevent entry into the branded concentrate market from being timely, likely, or sufficient.

The most effective way to distribute branded carbonated soft drinks is through a network of soft drink bottlers that provides store-door delivery. IDFF paragraphs 258-61. Store-door delivery enables bottlers (and the retailers using them) to respond rapidly to competitors’ in-store price promotions and to consumer demand. IDFF paragraphs 258, 260. It also gives concentrate manufacturers and bottlers access to the cold drink and vending channels, and to retail outlets that lack their own warehouses. IDFF paragraphs 257-60. Warehouse delivery lacks these advantages. Moreover, concentrate manufacturers that rely on warehouse delivery have difficulty selling a full product line and adequately promoting their soft drinks. IDFF paragraphs 260, 261.

Coca-Cola asserts (ABCA at 68-70) that the ALJ’s product market definition caused him to ignore the advantages that warehouse delivery offers a new entrant, such as being able to sell its products

⁹⁹ Of those brands, the record evidence indicates that only one had achieved a market share as large as Dr Pepper’s; the rest had market shares averaging 0.3% each. IDFF paragraph 322.

at a lower price. Respondent, however, misses the point: warehouse-delivered soft drinks were excluded from the relevant product market because they cannot constrain the price of branded products. Thus, although a new entrant using warehouse delivery arguably could successfully sell a lower-priced carbonated soft drink, such brands have not been able to take market share away from, and constrain the prices of, branded products like Coca-Cola. *See supra* Part IV.A. As a bottler witness who provides store-door delivery stated, “Probably the two [methods of delivery] shouldn’t even be considered in the same discussion.” IDFF paragraph 258. Concentrate firms that used both methods stated that warehouse delivery was inadequate. IDFF paragraph 261; *see also* IDFF paragraphs 296-98, 317.¹⁰⁰

In addition to providing store-door delivery, to be fully effective, a bottler must be large enough to take advantage of various scale economies relating to the production, distribution, and marketing of carbonated soft drinks.¹⁰¹ A bottler needs at least 8% to 15% of the local market for carbonated soft drinks to achieve minimum efficient scale. Koerner Tr. 430; Connor Tr. 1016; Cross Tr. 1678; Westerman Tr. 1791. Only two concentrate firms have national market shares at that level or above: Coca-Cola and PepsiCo.¹⁰² IDFF paragraphs 227-28, 241. To obtain an efficient-sized bottler, every other concentrate manufacturer must use bottlers that also distribute other brands of carbonated soft drinks.

Most local markets for carbonated soft drinks have a Coca-Cola bottler, a Pepsi-Cola bottler, and a so-called “third bottler,” which carries various brands of soft drinks other than Coca-Cola or Pepsi-

¹⁰⁰ Dr Pepper’s experience demonstrates this. The company initially had to use warehouse distribution because it was considered a cola, and thus subject to flavor restrictions that prevented it from using Coca-Cola or Pepsi-Cola bottlers. Warehouse distribution was not effective, and Dr Pepper’s sales did not improve until Dr Pepper successfully challenged its designation as a cola and obtained access to those bottlers. *See* IDFF paragraphs 316-19. Additionally, Procter & Gamble, which already possessed expertise in warehouse distribution of food, did poorly when it attempted to distribute Crush and Hires Root Beer through warehouses. IDFF paragraphs 296-98

¹⁰¹ For example, a bottler realizes economies by producing a larger volume of soft drinks in a given bottling plant, which spreads the fixed production costs over a larger output. Carew Tr. 192-93; Weatherup Tr. 1486-87. By increasing the volume of soft drinks delivered to each store during a single stop, the bottler lowers the average per-unit delivery cost of the stop. Brodtkin Tr. 848-49. When a grocery store requires payment of a fixed amount from soft drink bottlers to participate in a store promotion, increasing the volume of soft drinks sold to that store reduces the average cost of the promotion per bottle or can sold. Berry Tr. 697. *Cf. also* IDFF paragraphs 278, 282.

¹⁰² Because soft drink market shares vary greatly from city to city, some brands of carbonated soft drinks other than Coke or Pepsi have more than 8-15% of a given local market. For example, in a few of its strongest markets, Dr Pepper has more than 15% of carbonated soft drink sales. AB Appendix B. However, the record contains few such instances.

Cola brands. IDFF paragraphs 37-40. Coke, Pepsi, and “third” bottlers, however, are frequently not available to new entrants into the market for concentrate because franchise agreements between bottlers and existing concentrate makers usually contain a so-called “flavor restriction,” which prohibits the bottler from handling another brand of the same flavor of soft drink as the concentrate manufacturer’s. IDFF paragraph 267. This means, for example, that a company seeking to market a branded cola-flavored concentrate could not use a Coca-Cola or Pepsi-Cola bottler, and could not use the third bottler if it already carries another branded cola.¹⁰³ See, e.g., IDFF paragraphs 267-69. These flavor restrictions pose a significant impediment¹⁰⁴ to a new entrant seeking to use existing bottlers to achieve minimum efficient scale.¹⁰⁵

Coca-Cola, however, characterizes flavor restrictions “as increasing competition in this market,” contending that flavor restrictions force a new entrant to compete with an existing concentrate manufacturer to obtain a contract with a bottler. ATr. at 35. We disagree. Without flavor restrictions, a new entrant must merely convince a prospective bottler that the new entrant’s flavor/brand will create incremental profits, increasing the bottler’s sales revenues more than the incremental costs associated with the new flavor/brand, while the bottler may continue selling all of its existing brands. Because flavor restrictions force the bottler to abandon an established flavor/brand that conflicts with the new entrant’s flavor/brand, the new entrant, when facing flavor restrictions, must convince a bottler that it can completely and profitably replace the sales of the existing flavor/brand, as well as providing the bottler with incremental new sales.

For concentrate manufacturers other than Coca-Cola or Pepsi, this may be an insurmountable obstacle to obtaining distribution, as

¹⁰³ Coca-Cola notes that the flavor restrictions do not apply to sales of cola fountain syrup. ABCA at 58. In fact, there are few opportunities for new entrants in the fountain segment of the market. Fountain equipment generally has only four different “spigots,” dispensing four different soft drink brands or flavors, and they are typically filled with Coca-Cola and Diet Coke (or Pepsi-Cola and Diet Pepsi), a lemon-lime flavor, and one other flavor. Koerner Tr. 473-74. The equipment is often loaned to the user by a bottler or concentrate company that then controls which brands can be placed in that equipment. Connor Tr. 1027-29, Tyler Tr. 1187-88.

¹⁰⁴ As noted *infra* pp. 59-60, a finding that flavor restrictions are an impediment to new entry does not constitute a finding that they are anticompetitive.

¹⁰⁵ These flavor restrictions suggest that the initial step in entry, *ie.*, developing a flavor, may not be as easy as it first appears, inasmuch as a new entrant may need to create a flavor that does not duplicate existing brands (and therefore avoids flavor restrictions), yet still has strong consumer appeal.

Philip Morris found out when it attempted to market Like Cola, the first decaffeinated cola-flavored carbonated soft drink. Although neither Coca-Cola nor PepsiCo offered a decaffeinated cola at that time, flavor restrictions prevented their bottlers from handling Like because it was a cola-flavored product.¹⁰⁶ *Cf.* IDFF paragraph 271. Moreover, if a new entrant successfully displaces another concentrate maker (other than Coca-Cola or Pepsi, of course), this merely results in substituting one brand of carbonated soft drink for another, without increasing the number of carbonated soft drinks available in the market.¹⁰⁷

Coca-Cola's second argument is that flavor restrictions increase competition by forcing the bottler to give its undivided loyalty to marketing one brand of each flavor. ATr. 35; ABCA at 60. This proposition is irrelevant because it only bears on whether flavor restrictions are an unreasonable restraint of trade, which is not at issue. It does not address whether these restrictions, given the economies of scale in the production and distribution of carbonated soft drinks, are a barrier or impediment to entry.¹⁰⁸ In any case, the decided weight of this record reflects the exclusionary effects of flavor restrictions vis-a-vis new entrants; Coca-Cola's arguments about procompetitive effects are largely theoretical and inadequately demonstrated.

¹⁰⁶ Coca-Cola argues that flavor restrictions are not onerous because Coca-Cola's apply only to cola-flavored soft drinks. ABCA at 58. However, that precludes new entrants, such as Philip Morris, from using Coca-Cola bottlers to compete with a new cola-flavored soft drink, which is the most popular flavor category (*see* IDFF paragraphs 31, 267). Moreover, if the Coca-Cola bottler also bottles another flavor, for instance root beer, for a different company that also has a flavor restriction, that restriction will preclude a new entrant from introducing a new root beer through that bottler, even though Coca-Cola has no flavor restriction on root beer.

¹⁰⁷ Coca-Cola argues that flavor restrictions do not prevent a bottler from distributing one brand of carbonated soft drink in one geographic area, and another brand in another geographic area. ABCA at 59. That is possible if the bottler serves an area wider than the franchise areas that it has been granted by particular concentrate manufacturers. However, new entrants nonetheless are foreclosed from part of the market; entry is impeded by the flavor restriction, even if it is not absolutely blocked.

¹⁰⁸ Coca-Cola cites A&W as an example of a firm that successfully entered the market despite flavor restrictions. ABCA at 59. A&W started in the restaurant business over 70 years ago; its root beer formula was developed in 1919. Lowenkron Tr. 2057-58. It entered the take-home channel in 1971. *Id.* at 2058. A&W has successfully expanded its product line from its root beer base and added new flavors. A&W's ability to obtain bottlers for the new products depended in large part on the fact that it marketed relatively unusual flavors, such as cream soda, grapefruit (Squirt), and Vernors (a uniquely flavored ginger ale), but no cola or lemon-lime. *See* Lowenkron Tr. 2071-73. Those flavors did not encounter flavor restrictions because bottlers handled no other product with the same flavor. Moreover, according to the record evidence, A&W has obtained only a relatively small market share. *See* IDFF paragraph 97, Lowenkron Tr. 2065-66.

According to Coca-Cola, there are some alternatives to using existing (but unavailable) bottlers. To avoid the obstacles created by flavor restrictions, a new entrant could create its own bottlers. However, such bottlers would need to achieve at least an 8-15% market share to realize the needed economies of scale. Creating a bottling network is not realistic. IDFF paragraph 273.

Alternately, Coca-Cola asserts that beer distributors have been successfully used by some companies, including major carbonated soft drink concentrate producers. ABCA at 64-67. The ALJ found that these companies do not rely on beer distributors for most of their distribution. IDFF paragraphs 264-65. The “successes” cited by Coca-Cola during the period covered by this record are limited to firms selling “niche” or “boutique products,” such as American Natural Beverage Co. (“Soho” brand), Unadulterated Food Products, Inc. (“Snapple” brand), and Original New York Seltzer. During this period, these companies sold small quantities of premium-priced products that could not constrain the price of branded carbonated soft drinks. *See* IDFF paragraphs 108, 159.¹⁰⁹ Moreover, witnesses from two of the companies stated that beer distributors were not very satisfactory.¹¹⁰ For most companies, using beer trucks to carry their soft drinks did not enable them to successfully compete with branded carbonated soft drinks.¹¹¹ *See* IDFF paragraphs 262-64. Indeed,

¹⁰⁹ These companies' sodas were sold at average retail prices ranging from \$2.19 to \$2.79 for a pack of four single-serving bottles, with promotional prices of \$1.99 for two of the brands. *See* Collier Tr. 4112, Greenberg Tr. 3554, Miller Tr. 3443. These prices are significantly higher than branded products' average of \$1.57 for a pack of six cans, and \$1.39 to \$1.49 on sale. IDFF paragraphs 131, 133. In 1988, after 11 years in business, American Natural Beverage had sales of \$20,000,000. Collier Tr. 4067. In 1990, after eight years in business, Snapple sold some 1.1 million cases of soft drinks, and it was distributed in only three regions, with 70-75% of its sales in the New York metropolitan area. Greenberg Tr. 3529, 3558. Original New York Seltzer sold 18,000,000 cases in 1987 and only 8,500,000 in 1989. Miller Tr. 3455, 3460. In contrast, more than 2.6 billion cases of Coca-Cola were sold in 1986. IDFF paragraph 27.

¹¹⁰ One witness testified that most beer distributors do not perform well for Snapple, and that Snapple would prefer to use soft drink bottlers as distributors, but cannot because of flavor restrictions. Greenberg Tr. 3555-56. A witness from Original New York Seltzer stated that the economics of the beer distributors that it uses limits their effectiveness as carbonated soft drink distributors. IDFF paragraph 264; Miller Tr. 3453-54.

¹¹¹ There are a number of reasons for the failure of “piggybacking” carbonated soft drinks on beer trucks. First, beer trucks do not stop at all locations where soft drinks are sold, limiting market penetration. Miller Tr. 3453-54. Second, beer distributors have restrictions on their credit-practices that are incompatible with the credit practices of carbonated soft drink bottlers. IDFF paragraph 262. Third, beer distributors see beer as their main profit source and are less willing to invest in the success of soft drink distribution. *Id.*

Although a beer distributor arguably could own a carbonated soft drink bottling facility and offer store-door distribution of carbonated soft drinks on a stand-alone basis, like any other bottler, it would have to obtain an 8-15% market share to achieve minimum efficient scale.

Anheuser-Busch, which has obvious expertise in beer distribution, attempted to introduce ZeltzerSeltzer, a flavored soda, through its beer distributors. These distributors were not successful, and Anheuser-Busch failed in its entry attempt. IDFF paragraphs 309-11.

In addition to substantial entry barriers, we find that several other related factors specific to this product market compound the difficulties confronting new entrants. As the ALJ found, these include new product introductions by Coca-Cola and Pepsi-Cola (IDFF paragraphs 284-95), and competition for retail promotional activity (IDFF paragraphs 274-83). Coca-Cola argues that these are merely signs of vigorous competition, and cannot be considered barriers to entry. ABCA at 53, 56. We do not find that new product introductions or competition for retail promotional activity are barriers to entry. Nonetheless, each of these factors is an aspect of competition that helps put the entry barriers into context.

In the case of new product introductions, the record shows that when new entrants develop and introduce new branded products, existing companies can overwhelm them by developing their own imitative products, which they can widely and rapidly distribute through their established bottler networks (IDFF paragraphs 284-88). For example, as previously noted, in 1982, Philip Morris introduced Like Cola, a caffeine-free cola, and had some initial success distributing it through Seven-Up bottlers. However, soon afterwards, Coca-Cola and Pepsi-Cola introduced their own caffeine-free colas. Like Cola failed. IDFF paragraphs 286-88, 291-95. The experience of Philip Morris demonstrates that, while a new entrant struggles to obtain effective distribution, Coca-Cola and PepsiCo have time to develop competing products before the new entrant can establish its brand. This makes the barrier of obtaining effective distribution that much more formidable to new entrants.

Competition for retail promotional activity in the take-home channel is an important aspect of competition for producers of branded concentrate and of branded carbonated soft drinks. In order to participate to a significant degree in retail promotions -- which make up a substantial part of branded soft drink sales -- a branded carbonated soft drink needs a local bottler with store-door distribution and large sales volume. IDFF paragraphs 274-83. This reinforces the need to obtain local bottler distribution, which is exactly the barrier to entry that the new entrant must overcome.

Even if an entrant can obtain satisfactory distribution, its entry would not likely be timely, as that term is used in the Merger Guidelines. The entry attempts by American Natural Beverage, Unadulterated Food Products, and Original New York Seltzer show that it takes longer than two years from the beginning of entry until there is any significant market impact (*see supra* p. 60, note 109). The creation of a viable distribution network for soft drinks is expensive and time consuming. *See* discussion *supra*; IDFF paragraphs 289, 294, 312-13, 324. Nor are difficulties in entering the market for branded concentrate limited to start-up companies. Major firms, including Philip Morris, Procter & Gamble, R.J. Reynolds, and Anheuser-Busch, have attempted to enter the market for branded concentrate and branded carbonated soft drinks, with little or no success. IDFF paragraphs 291-302, 309-11. Their difficulties were largely attributable to their inability to gain access within a reasonable period to a network of bottlers with minimum efficient scale. IDFF paragraphs 291-315; *see also id.*, paragraphs 316-20.¹¹²

In order to constrain a price increase by existing producers, we note that it is not sufficient that a new entrant be “successful” in the sense of being profitable. If new entrants cannot sufficiently expand output to prevent existing producers from raising prices, their entry will not be sufficient to prevent a cartel from raising prices. Industry conditions indicate that this is a likely scenario. If a new entrant is distributed through bottlers owned or controlled by Coca-Cola or PepsiCo, those bottlers will not likely permit the new entrant to undermine a cartel that includes Coca-Cola and PepsiCo. It is thus likely that even the small market shares that new entrants have obtained in the past overstate the actual competitive significance of any new entry.

Finally, the history of price fixing by bottlers suggests that at that level, the industry has not always been protected by competitive market forces. Consequently, analysis of conduct in the industry merits particular care.

¹¹² Even a regional firm with strong consumer acceptance within its geographic area faces the same difficulties in expanding into other geographic markets because of obstacles to obtaining efficient distribution in areas where it has not previously had consumer acceptance. For example, when the current owners of Barq's acquired the company in 1976, its root beer enjoyed a strong area of consumer preference in southern Louisiana and southern Mississippi. Koerner Tr. 416-19. Barq's expected that it could obtain national distribution within ten years, but by 1988, Barq's reached only 60-65% of the nation. Koerner Tr. 424

For the reasons above, we affirm the ALJ's finding that entry into the market for branded carbonated soft drink concentrate is difficult, and unlikely to overcome the proposed acquisition's adverse effects on competition in the market for branded concentrate.¹¹³ We find that the acquisition of Dr Pepper would have substantially lessened competition among producers of branded concentrate within the United States, in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act.

Additionally, for the reasons set out in this Part and *supra* Part III.A.2, we find that Coca-Cola's agreement with DP Holdings to acquire Dr Pepper was a separate violation of Section 5 of the FTC Act.

V. APPROPRIATE RELIEF

Complaint counsel sought an order requiring Coca-Cola to obtain prior Commission approval before respondent could acquire: (1) another firm that manufactured branded concentrate or syrup; or (2) another firm that bottled and distributed carbonated soft drinks and had the exclusive rights to distribute a branded carbonated soft drink that competes with Coca-Cola (IDFF paragraph 361). Although the ALJ found that the acquisition would probably have lessened competition substantially, he declined to issue an order against Coca-Cola (ID 106-07). We disagree with the ALJ on the need for an order, but we do not discern a need for an order as broad as that proposed by complaint counsel. Accordingly, our order does not apply to acquisitions of bottlers, unless they also market branded concentrate.

A. *The Appropriateness of Issuing Any Order*

1. The standards for issuing a prior approval order

The Commission has "wide discretion in its choice of a remedy," and "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611, 613 (1946). *See also FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952). The Commission has the authority to impose prior approval requirements in merger

¹¹³ The issues of efficiencies and firm failure were not raised and are therefore not before us.

cases. *Abex Corp. v. FTC*, 420 F.2d 928 (6th Cir. 1970), *cert. denied*, 400 U.S. 865 (1970).

Both complaint counsel (AB at 21) and Coca-Cola (ABCA at 130) agree that the appropriateness of a prior approval order should be determined under the holding in *American Medical International, Inc.*, 104 FTC 1, 224 (1984) (“AMI”), that:

[I]t is industry market structure and market conditions, not whether a ‘knowing and deliberate violation’ or a ‘likelihood of repeated unlawful conduct’ has been shown . . . that determines the appropriateness of imposing a prior approval requirement in a particular case.

However, they disagree on what market conditions would justify a prior approval order. Complaint counsel argue that prior approval is appropriate when “future acquisitions may be competitively problematic.” AB at 21 (citing *AMI*, 104 FTC at 224, and *HCA*, 106 FTC 361, 514). Coca-Cola contends that the standard is “whether acquisitions to be governed by a contemplated prior approval order would ‘be so manifestly anticompetitive as to warrant a prior approval remedy.’ ” ABCA at 130-31, n.68 (citing *HCA* at 515).

In the past, we have determined the appropriateness of prior approval requirements by considering industry structure and market conditions, and we thus agree with complaint counsel that the language from *HCA* urged by Coca-Cola is inapt. That language pertained to the standard for requiring prior approval for acquisitions of hospitals throughout the United States, *i.e.*, outside the local geographic market at issue. The scant evidence in the record indicated that competitive conditions varied greatly in other local geographic markets. Accordingly, there was insufficient evidence with respect to those other markets to determine whether industry structure and market conditions warranted a prior approval requirement.

Following *AMI*, *HCA*, and *B.F. Goodrich*, we look at industry structure and market conditions to determine whether a prior approval provision is warranted.¹¹⁴

¹¹⁴ If an acquisition would be objectionable under the antitrust laws, it is not a valid argument against requiring prior approval to say that it would make the acquisition less likely and thus diminish competition for the assets in question.

2. The ALJ's rejection of any order

At the conclusion of the trial, the ALJ determined that it would not be in the public interest to issue an order in this case, based on his analysis of the record and "the Bureau's own position before trial was held ('recent developments in the soft drink and concentrate industries, render prior approval an unnecessary remedy')" ID 107. While highlighting complaint counsels previous position as his primary reason, ID 106, the ALJ also stated that "complaint counsel assume, contrary to the evidence, that all acquisitions in the concentrate and bottling industry would be anticompetitive . . ." and expressed his belief that a prior approval order would unfairly disadvantage Coca-Cola vis-a-vis its competitors. ID 107. We reverse.

After the Commission obtained a preliminary injunction against the proposed acquisition, Dr Pepper's shareholders terminated their agreement with Coca-Cola and sold Dr Pepper to an investment group led by Hicks & Haas. Coca-Cola then moved to dismiss the administrative complaint on the ground that further proceedings were not in the public interest. *See supra* p. 3. The Bureau of Competition joined in the motion, asserting that a prior approval order was not necessary because premerger notification under Section 7A of the Clayton Act, 15 U.S.C. 18a, would provide the Commission with "adequate notice of most potentially anticompetitive acquisitions" by Coca-Cola, and because of "recent developments in the soft drink and concentrate industries." Memorandum in Support of Complaint Counsel's Response to Respondent's Motion to Dismiss (Apr. 21, 1987), quoted in IDFF paragraph 362.¹¹⁵

The Commission, however, disagreed with complaint counsel and refused to dismiss, stating, *inter alia*, that:

The abandonment of a merger does not automatically moot prospective relief In this proceeding, the Notice of Contemplated Relief includes, *inter alia*, a ten-year ban on Coca-Cola's acquisitions of the stock or assets of any entity engaged in the manufacture or sale of carbonated soft drinks or concentrate of carbonated soft drinks, except as may be approved by the Commission. We are not

¹¹⁵ The Bureau of Competition also contended that a requirement of prior approval before making vertical acquisitions (*i.e.*, of bottlers) was not in the public interest because it would deter acquisitions that enhanced efficiency. *Id.* Because we conclude, for other reasons (*see infra*), that an order covering acquisitions of bottlers is unnecessary, we do not address this contention. Nor do we reach or adopt the ALJ's findings concerning the presence and effects of efficiencies from bottler consolidations, *e.g.*, IDFF paragraphs 35 and 36.

persuaded that subsequent events have eliminated the need for some form of prior approval relief if a violation of law is established. Notwithstanding respondent's arguments to the contrary, continuation of this proceeding is therefore in the public interest.

Order Denying Respondent's Motion for Dismissal of the Complaint (Aug. 9, 1988) at 3.

Our August 1988 ruling rejected the parties' contention that the sale of Dr Pepper to another buyer automatically obviated the need for a prior approval order. It was therefore erroneous for the ALJ to reject an order based primarily on a position taken by the Bureau of Competition prior to our ruling. Moreover, other than alluding to the Bureau's April 1987 assertion that industry conditions had changed since the administrative complaint was filed in July 1986, the ALJ did not make any findings as to what those changes were, why they made a prior approval order unnecessary, or why he concluded that most acquisitions by Coca-Cola would not pose potential problems for competition. *See* ID 107. To the extent that his decision was based on his conclusion that Coca-Cola would not again attempt to acquire Dr Pepper, we have determined that he erred (*see supra* pp. 17-20).

Accordingly, under the applicable standards, we consider complaint counsel's argument that we impose a prior approval order on Coca-Cola in two different markets: (1) acquisitions of makers of branded concentrate and syrup; and (2) acquisitions of local bottlers of branded carbonated soft drinks.

B. The Need for the Order Proposed by Complaint Counsel

We find that complaint counsel have only satisfied us as to the need for the issuance of a prior approval order concerning acquisitions of manufacturers of branded concentrate and syrup.¹¹⁶ We do not further discuss complaint counsel's request for a prior approval order concerning acquisitions of local bottlers in the downstream market for branded carbonated soft drinks, in light of our inability, on

¹¹⁶ "Branded concentrate" has the same meaning as our definition of the relevant product market, *i.e.*, brand name concentrate used to make national and regional brand name carbonated soft drinks and syrup that are heavily promoted, widely available in the take-home and cold drink channels, and distributed by bottlers that provide store-door service or services to retailers in the cold drink channel.

this record, to reach determinations based on local geographic markets.¹¹⁷ See *supra* Part IV.B.¹¹⁸

Given, during the period covered by the record in this proceeding, the very high levels of concentration, the large market share held by Coca-Cola (*see supra* Part IV.C.1, and IDFF paragraphs 81, 222, 226),¹¹⁹ the likelihood of anticompetitive effects in this industry, and the barriers and impediments blocking entry, into this market, we are convinced that future acquisitions by respondent of branded concentrate firms whose market share in the United States is above a *de minimis* amount would likely raise competitive concerns. Our conviction is bolstered by the increase in industry concentration levels over time (*see, e.g.*, IDFF paragraphs 226, 241); the need for, and difficulty of, obtaining efficient local distribution of carbonated soft drinks; and the history of price fixing in the local distribution of branded carbonated soft drinks (*see supra* Part IV.C.2). Accordingly, both industry structure and market conditions evidenced in the record indicate that there is a significant likelihood that a future acquisition by Coca-Cola of a branded concentrate firm whose market share in the United States is above a *de minimis* amount would raise competitive concerns, and thus warrant imposition of a prior approval order.¹²⁰ Furthermore, this likelihood appears so great that the mere possibility that some acquisitions of branded concentrate firms by respondent might have a procompetitive effect does not outweigh the need for a prior approval order. In the event that such procompetitive effects outweigh the anticompetitive effects for any given transaction, the Commission can grant approval on a case-by-case basis.

We reject the argument that statutory premerger notification is an adequate substitute for a prior approval requirement. First, a prior approval obligation would give the Commission notice of acquisitions that may be competitively problematic even though they do not meet the HSR reporting threshold. See *HCA*, 106 FTC at 514-17; *cf.*

¹¹⁷ The fact that our order is limited to manufacturers of branded concentrate obviates many of the injuries feared by Coca-Cola (ABCA at 153-54), such as inability to make "defensive" acquisitions of most bottlers, or of major customers (such as restaurant chains) that also market their own private label fountain drinks.

¹¹⁸ Of course, the acquisition of a bottler that also produced branded concentrate would be covered by the prior approval requirements of our order.

¹¹⁹ The cited findings by the ALJ calculate respondent's share of the all-concentrate market, and therefore understate Coca-Cola's share of the branded concentrate market.

¹²⁰ Moreover, as we have found, we cannot rule out the prospect that respondent might seek to acquire Dr Pepper or another branded concentrate firm in the foreseeable future.

Louisiana-Pacific Corp., 112 FTC 547, 566 (1989). Second, prior approval shifts to Coca-Cola the burden of justifying a covered acquisition, which is appropriate given that respondent attempted to make an unlawful anticompetitive acquisition.¹²¹

Coca-Cola has urged, and complaint counsel have objected to, a provision in the order exempting from the prior approval requirements “acquisitions of companies with less than 1 percent of the national market for carbonated soft drink concentrate.” ABCA at 154-56; AB at 39-40. Coca-Cola argues that a *de minimis* provision would “minimize the need to seek prior approval in time sensitive acquisitions which do not raise antitrust concerns.” ABCA 155.

The Commission’s directive on the inclusion of prior approval clauses in Section 7 orders permits the inclusion of a *de minimis* exception, so long as prior notification is required for any excepted transaction that would not be reported pursuant to HSR rules. FTC Staff Bull. 88-01 (cited in RX 574A). To the extent that the Commission’s competitive concerns are otherwise met, the Commission in the past has made exceptions from prior approval provisions for certain *de minimis* acquisitions. See, e.g., *HCA*, 106 FTC at 524; *Central Soya Co., Inc.*, 113 FTC 786, 790 (1990).

Under the Merger Guidelines, where, as here, the market is highly concentrated, a merger producing an increase in the HHI of less than 50 points is “unlikely to have adverse competitive consequences and ordinarily require[s] no further analysis.” Section 1. 51 (c). In the present case, we have concluded that with respect to such a transaction, prior notification, either through an HSR filing or pursuant to an order, should be sufficient to protect the Commission’s interests. This would enable the Commission to examine the rare merger where the anticompetitive effects of the acquisition were not sufficiently reflected in the HHI increase of less than 50. The order therefore provides for a *de minimis* exception to prior approval with respect to any concern which has sales of less than 50 million, 192-ounce case equivalents¹²² in each of the three years preceding the acquisition.

¹²¹ See, e.g., *HCA*, 807 F.2d at 1393 (citing *FTC v. National Lead Co.*, 352 U.S. 419, 431 (1957) (“But ‘respondents must remember that those caught violating the Act must expect some fencing in.’”)).

¹²² The record suggests that the 192-ounce case equivalent is a standard industry measure of sales. See, e.g., CX 781B (*in camera*).

Based on sales data in the record, this would be roughly equivalent to an HHI increase of 50.¹²³

FINAL ORDER

This matter has been heard by the Commission upon the appeals of complaint counsel and respondent The Coca-Cola Company from the Initial Decision, and upon briefs and oral argument in support of, and in opposition to, the appeals. For the reasons stated in the accompanying Opinion, the Commission has determined to affirm in part, and to reverse in part, the Initial Decision. Accordingly, the Commission enters the following order.

I. DEFINITIONS

It is ordered, That for purposes of this order, the following definitions shall apply:

A. "*Coca-Cola*" means The Coca-Cola Company, a corporation organized under the laws of Delaware, with its headquarters located at One Coca-Cola Plaza, N.W., Atlanta, Georgia, and its directors, officers, agents, employees, and representatives, and its subsidiaries, divisions, affiliates, successors, and assigns. For purposes of this order, Coca-Cola Enterprises Inc. is a subsidiary or affiliate of Coca-Cola.

B. "*Concentrate*" means the base element, flavors, or essences mixed according to a formula which, when added to carbonated water and nutritive or non-nutritive sweetener, is a carbonated soft drink.

C. "*Syrup*" means the concentrate and nutritive or non-nutritive sweetener which, when added to carbonated water, is a carbonated soft drink.

D. "*Branded concentrate*" or "*branded syrup*" means concentrate or syrup used to produce carbonated soft drinks that are identified with any nationally or regionally recognized label, name, or trademark and that, in general, are heavily advertised, widely available in the take-home and cold drink channels, and distributed by bottlers

¹²³ The translation of an HHI increase of roughly 50 points--below which the Merger Guidelines indicate we are unlikely to have competitive concerns--into 192-ounce case equivalents is accomplished as follows. Coca-Cola had a 38.5% share of an all-concentrate market. IDFF 226. Using the 38.5% figure, an HHI increase of 50 points would be generated if Coca-Cola acquired a firm with a .65% market share. (Mathematically, the change in HHI is equal to $2 \times 38.5 \times .65 = 50.05$.) The record reflects a 1988 all-concentrate market of 7,538.8 million 192-ounce case equivalents, CX 781B (*in camera*), so that a .65% market share equals roughly 50 million 192-ounce case equivalents.

that provide store-door service or services to retailers in the cold drink channel. This definition does not include a label, name, or trademark associated solely with a single grocery or restaurant retailer, or with a generic flavor.

E. "*Branded carbonated soft drink*" means a drink made by combining carbonated water with branded syrup or with nutritive sweetener or non-nutritive sweetener and branded concentrate.

II.

It is ordered, That Coca-Cola, for a period of ten (10) years from the date this order becomes final, shall not acquire, directly or indirectly, without the prior approval of the Federal Trade Commission:

A. The whole or any part of the stock, share capital or equity interest of any company or firm:

1. Engaged in the manufacture and sale in the United States of branded concentrate or branded syrup; or

2. Engaged in the franchising or licensing of any brand, name, or trademark used in the United States in connection with the production, marketing, or sale of branded concentrate, branded syrup, or branded carbonated soft drinks;

B. Any brand, name or trademark associated with the production, sale or distribution of branded concentrate, branded syrup, or branded carbonated soft drinks in the United States.

Provided however, that this prior approval requirement shall not apply to any acquisition by Coca-Cola of only physical assets involved in the production, sale or distribution of concentrate, syrup, or carbonated soft drinks, or from acquiring a bottler of carbonated soft drinks, so long as the bottler is not engaged in the manufacture and sale of branded concentrate or branded syrup, or in the franchising or licensing of any brand, name, or trademark of any branded carbonated soft drinks.

Provided further, that so long as Coca-Cola provides advance notification to the Federal Trade Commission as required under this proviso, the prior approval requirement contained in this Section shall not apply to any acquisition by Coca-Cola of:

(1) Any company or firm where such company or firm has sales of less than 50 million, 192-ounce case equivalents in each of the three years preceding such acquisition; or

(2) Any brand, name, or trademark acquired from any person (as that term is defined in 16 CFR 801.1 (a)(1)) where (i) the sales of soft drinks bearing such brand, name or trademark, and (ii) the sales of soft drinks bearing any other brand, name, or trademark acquired from such person during the preceding twelve-month period, total less than 50 million, 192-ounce case equivalents in each of the three years preceding the most recent acquisition.

Advance notification shall be provided to the Federal Trade Commission under this proviso when Coca-Cola's Board of Directors or any individual or entity that is authorized to act on Coca-Cola's behalf in such acquisitions, authorizes issuance of a letter of intent or enters into an agreement to make an acquisition covered by this proviso, whichever is earlier.

The notification required by this proviso shall be the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended, and shall be prepared and transmitted in accordance with the requirements of that part. The notification required by this proviso shall apply to Coca-Cola and shall not apply to any party that Coca-Cola seeks to acquire. Coca-Cola shall comply with reasonable requests by the Commission staff for additional information within fifteen (15) days of service of such requests.

The notification required of Coca-Cola by this proviso shall not require additional notification by Coca-Cola to the Federal Trade Commission of any acquisition for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a, or for which prior approval by the Federal Trade Commission is required, and has been requested, pursuant to Section II of this order.

III.

It is further ordered, That, for the purposes of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice

to Coca-Cola made to its principal office, Coca-Cola shall permit any duly authorized representatives of the Federal Trade Commission:

A. During office hours and in the presence of counsel, to have access to, inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Coca-Cola relating to any matters contained in this order; and

B. Upon five days notice to Coca-Cola and without restraint or interference from Coca-Cola, to interview officers or employees of Coca-Cola, who may have counsel present, regarding such matters.

IV.

It is further ordered, That Coca-Cola shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the corporation such as dissolution, assignment or sale resulting in the emergence of a successor corporation; the creation, dissolution or sale of subsidiaries; or any other change that may affect compliance obligations arising out of this order.

Commissioner Azcuenaga and Commissioner Starek recused.

IN THE MATTER OF

COLLEGE FOOTBALL ASSOCIATION, ET AL.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION
OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9242. Complaint, Sept. 5, 1990 -- Final Order, June 16, 1994

This final order dismisses the complaint which alleged that the College Football Association (CFA) and Capital Cities/ABC, Inc. illegally restrained competition through agreements which gave ABC exclusive rights to televise certain college football games. The final order to dismiss was due to the Commission's lack of jurisdiction over CFA, citing its not-for-profit nature. Dismissal was also determined to be in the public interest.

Appearances

For the Commission: *Michael E. Antalics.*

For the respondents: *Michael Sibarinm, Winston & Strawn,* Washington, D.C. *Clyde A. Muchmore, Crowe & Dunlevy,* Oklahoma City, OK. *A. Douglas Melamed, James Carr, Randolph D. Moss and David P. Donovan,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, (15 U.S.C. 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the respondents named in the caption hereof have violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

RESPONDENTS

PARAGRAPH 1. Respondent College Football Association ("CFA") is an unincorporated association with its principal place of business at 6668 Gunpark Drive, Boulder, Colorado.

PAR. 2. CFA is an organization whose members include many of the nation's major college-football-playing institutions, and which,