UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
SUIZA FOODS CORPORATION	)	Civil Action No. 99-CV-130
	)	
d/b/a Louis Trauth Dairy,	)	
Land O' Sun Dairy, and	)	Filed: April 29, 1999
Flav-O-Rich Dairy, and	)	
	)	
BROUGHTON FOODS COMPANY,	)	
	)	
d/b/a Southern Belle Dairy	)	
	)	
Defendants.	)	

COMPETITIVE IMPACT STATEMENT

Plaintiff, the United States of America, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

Plaintiff filed a civil antitrust Complaint on March 18, 1999, in United States District Court for the Eastern District of Kentucky, London Division, alleging that the proposed acquisition of Broughton Foods Company ("Broughton") by Suiza Foods Corporation ("Suiza") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. The Complaint alleges that Suiza and Broughton compete head-to-head to sell milk to school districts, and that in 55 of those school districts located in South Central Kentucky, the acquisition is likely to substantially lessen competition in the sale of school milk, and that therefore school districts and students would likely pay higher school milk prices or experience lower school milk quality and service.

The prayer for relief seeks: (a) an adjudication that the proposed transaction described in the Complaint would violate Section 7 of the Clayton Act; (b) preliminary and permanent injunctive relief preventing the consummation of the transaction; (c) an award to the United States of the costs of this action; and (d) such other relief as is proper.

After this suit was filed, a proposed settlement was reached that permits Suiza to complete its acquisition of Broughton, yet preserves competition in the South Central Kentucky school districts where the transaction raises significant competitive concerns. A Stipulation and proposed Final Judgment embodying the settlement have been filed with the Court.

The proposed Final Judgment orders Suiza to divest the entire Southern Belle Dairy plant based in Pulaski County, Kentucky, and all related assets. Unless the plaintiff grants a time extension, Suiza must divest the Southern Belle Dairy and related assets within six (6) months after the filing of the Complaint in this action or within five (5) business days after notice of entry of the Final Judgment, whichever is later. If Suiza does not divest the Southern Belle Dairy and related assets within the divestiture period, the Court, upon plaintiff's application, is to appoint a trustee to sell the assets. The proposed Final Judgment also requires that, until the divestiture mandated by the Final Judgment has been accomplished, Suiza and Broughton shall take all steps necessary to maintain and operate the Southern Belle Dairy as an active competitor, such that the sale and marketing of its products shall be conducted separate from, and in competition with, all of Suiza's products, maintain sufficient management and staffing, and maintain the Southern Belle Dairy in operable condition at current capacity configurations.

The plaintiff and the defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. THE ALLEGED VIOLATIONS

A. The Defendants

Suiza, a large nationwide operator of milk processing plants, is a Delaware corporation headquartered in Dallas, Texas. Suiza had sales of approximately $1.8 billion in 1997. Using the Flav-O-Rich, PET and Trauth names, Suiza distributes its products to Kentucky grocery stores, convenience stores, schools, and institutions from its dairies located in London and Newport, Kentucky; and Bristol and Kingsport, Tennessee.

Broughton is an Ohio corporation with its headquarters in Marietta, Ohio. Broughton had sales of approximately $87.2 million in 1997. In Kentucky, Broughton, using the Southern Belle and Broughton's names, distributes its products to grocery stores, convenience stores, independent distributors, schools, and institutions from its dairies in Somerset, Kentucky and Marietta, Ohio.

B. Description of the Events Giving Rise to the Alleged Violations

On September 10, 1998, Suiza and Broughton entered into an agreement and plan of merger, pursuant to which Suiza intends to purchase all of the stock of Broughton for $109.7 million and assume Broughton liabilities of $13 million. The statutory waiting period during which the firms were prohibited from completing their proposed acquisition expired March 19, 1999. 15 U.S.C. 18a(e)(2). The Complaint was filed on March 18, 1999, together with a Motion For Preliminary Injunction. On April 9, 1999, the defendants agreed to not complete their proposed

acquisition pending trial and the Motion For Preliminary Injunction was withdrawn. On April 29, 1999, the Stipulation and Proposed Final Judgment to resolve the suit was filed with the Court in London, Kentucky.

C. Anticompetitive Consequences of the Proposed Transaction

The Complaint alleges that the sale of school milk constitutes a relevant product market and a line of interstate commerce. Milk is a product that has special nutritional characteristics and no practical substitutes, and dairies sell milk to schools with special services, including storage coolers, daily or every-other-day delivery to each school, limited hours delivery, constant rotation of old milk and replacement of expired milk. Moreover, school districts must provide milk in order to receive substantial funds under federal school meal subsidy programs. The Complaint defines the sale of milk together with its delivery services as the product "school milk." There are no other products that school districts would substitute for school milk in the event of a small but significant price increase. If the price of school milk rose by a small but significant amount, school districts would be forced to pay the increase.

The Complaint alleges that the relevant geographic market in which to assess the competitive effects of the proposed acquisition is a 39-county area of Kentucky ("South Central Kentucky"), and narrower markets contained therein, including each of the 55 listed school districts likely to be affected by the acquisition ("South Central Kentucky School Districts"). As a practical matter, South Central

Kentucky School Districts would be unable to turn to additional school milk producers not currently bidding or not currently intending to bid for school milk contracts within South Central Kentucky School Districts to supply them with school milk if the price of school milk were to increase by a small but significant amount.

The Complaint alleges that Suiza's proposed acquisition of Broughton would lessen competition substantially in the sale of school milk in each of the South Central Kentucky School Districts. In 32 of the listed school districts, only two competitors would likely remain after the acquisition. Because dairies bid on each school milk contract separately, where the acquisition would reduce the number of bidders on these contracts from three to two, the likelihood that the remaining bidders will bid less aggressively against each other on both price and service terms is significantly increased.

In 23 of the listed school districts, the effect of the proposed acquisition would be to establish a monopoly. In these counties, the proposed acquisition would give the post-acquisition firm the power unilaterally to raise prices or to decrease the level or quality of service provided to these school districts.

The Complaint also alleges that entry by other dairies or distributors would not be timely, likely or sufficient to deter any anticompetitive effect caused by the acquisition. Dairies or distributors would be unlikely to decide that it has become

profitable to compete for this low margin, low volume, seasonal business as a result of a small but significant increase in school milk prices.

The Complaint also alleges, in support of its allegations concerning relevant product market, likely competitive effects, and entry, the existence of an admitted school milk bid-rigging conspiracy between Southern Belle Dairy and Flav-O-Rich Dairy continuing from the late 1970s through 1989, in 23 of the 39 counties likely to be affected by the acquisition. Although the dairies involved in the conspiracy were later purchased by Broughton (Southern Belle) and Suiza (Flav-O-Rich), the history of school milk bid rigging in South Central Kentucky indicates that school milk markets there are conducive to collusion. The proposed acquisition would likely increase the danger of tacit or overt collusion in those school districts where the acquisition would reduce the number of competing firms from three to two, and in districts with no remaining competition, the proposed acquisition would recreate the harmful effects of the criminal bid-rigging conspiracy.

For all of these reasons, plaintiff concludes that the proposed transaction is likely to lessen competition substantially in the sale of school milk in South Central Kentucky, and result in increased prices and/or reduced quality and services, all in violation of Section 7 of the Clayton Act.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment would preserve existing competition in the sale of school milk in South Central Kentucky. It requires the divestiture of all of the

Southern Belle Dairy operation. This relief maintains the level of competition that existed premerger and ensures that the affected markets will suffer no reduction in competition as a result of the merger, and the South Central Kentucky School Districts will continue to have alternatives to Suiza/Flav-O-Rich in purchasing school milk.

Unless plaintiff grants an extension of time, the divestiture must be completed within six (6) months after the filing of the Complaint in this matter or within five (5) business days after notice of entry of this Final Judgment by the Court, whichever is later. The proposed Final Judgment also requires that, until the divestiture mandated by the Final Judgment has been accomplished, Suiza and Broughton shall take all steps necessary to maintain and operate the Southern Belle Dairy as an active competitor, such that the sale and marketing of its products shall be conducted separate from, and in competition with, all of Suiza's products; maintain sufficient management and staffing, and maintain the Southern Belle Dairy in operable condition at current capacity configurations.

The divestiture must be to a purchaser or purchasers acceptable to the plaintiff in its sole discretion. Unless plaintiff otherwise consents in writing, the divestiture shall include all the assets of the Southern Belle Dairy being divested, and shall be accomplished in such a way as to satisfy plaintiff, in its sole discretion, that such assets can and will be used as a viable, ongoing business. In addition, the purchaser must intend in good faith to continue the operations of the Southern Belle

Dairy business that were in place prior to the filing of the Complaint, unless any significant change in the operations planned by a purchaser is accepted by the plaintiff in its sole discretion. This provision is intended to ensure that the business to be divested remains competitive with Suiza in South Central Kentucky.

If defendants fail to divest the Southern Belle Dairy within the time period specified in the Final Judgment, the Court, upon plaintiff's application, is to appoint a trustee nominated by plaintiff to effect the divestiture. If a trustee is appointed, the proposed Final Judgment provides that defendants will pay all costs and expenses of the trustee and any professionals and agents retained by the trustee. The compensation paid to the trustee and any persons retained by the trustee shall be both reasonable in light of the value of the Southern Belle Dairy, and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished. After appointment, the trustee will file monthly reports with the plaintiff, defendants and the Court, setting forth the trustee's efforts to accomplish the divestiture ordered under the proposed Final Judgment. If the trustee has not accomplished the divestiture within six (6) months after its appointment, the trustee shall promptly file with the Court a report setting forth (1) the trustee's efforts to accomplish the required divestiture, (2) the reasons, in the trustee's judgment, why the required divestiture has not been accomplished and (3) the trustee's recommendations. At

the same time the trustee will furnish such report to the plaintiff and defendants, who will each have the right to be heard and to make additional recommendations.

The relief in the proposed Final Judgment is intended to remedy only the likely anticompetitive effects of Suiza's proposed acquisition of Broughton in South Central Kentucky. Nothing in this Final Judgment is intended to limit the plaintiff's ability to investigate or to bring actions, where appropriate, challenging other past or future activities of the defendants.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The plaintiff and the defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the plaintiff has not withdrawn its consent. The APPA

conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the plaintiff written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register. The plaintiff will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the response of the plaintiff will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

Craig W. Conrath
Chief, Merger Task Force
Antitrust Division
United States Department of Justice
1401 H Street, NW; Suite 4000
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and that the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

Plaintiff considered, as an alternative to the proposed Final Judgment, a full trial on the merits of its Complaint against the defendants. Plaintiff is satisfied, however, that the divestiture contained in the proposed Final Judgment will preserve competition in the sale of school milk in South Central Kentucky as it was prior to the proposed acquisition, and that the proposed Final Judgment would achieve all the relief the government would have obtained through litigation, but merely avoids the time and expense of a trial.

VII. STANDARD OF REVIEW UNDER THE APPA FOR PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty (60) day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." In making that determination, the Court may consider --

> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered and any other considerations bearing upon the adequacy of such judgment;
>
> (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e).

As the United States Court of Appeals for the D.C. Circuit held, this statute permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient and whether the decree may positively harm third parties. See United States v. Microsoft, 56 F.3d 1448, 1461-62 (D.C. Cir. 1995).

In conducting this inquiry, " [t]he Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process."[1] Rather,

> [a]bsent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. ¶ 61,508, at 71,980 (W.D. Mo. 1977).

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[1] 119 Cong. Rec. 24598 (1973). See United States v. Gillette Co., 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. See H.R. Rep. 93-1463, 93rd Cong. 2d Sess. 8-9 (1974), reprinted in U.S.C.C.A.N. 6535, 6538.

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." United States v. BNS, Inc., 858 F.2d 456, 462 (9th Cir. 1988), citing United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981); see also Microsoft, 56 F.3d at 1460-62. Precedent requires that

> the balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interest." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[2]

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its

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[2] Bechtel, 648 F.2d at 666 (citations omitted) (emphasis added); see BNS, 858 F.2d at 463; United States v. National Broadcasting Co., 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); Gillette, 406 F. Supp. at 716. See also Microsoft, 56 F.3d at 1461 (whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'") (citations omitted).

own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' "[3]

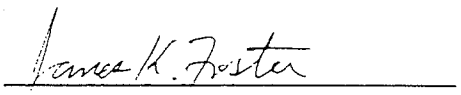
The relief obtained in this case is strong and effective relief that should fully address the competitive harm posed by the proposed transaction.

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the plaintiff in formulating the proposed Final Judgment.

Dated: April 28, 1999

Respectfully submitted,



James K. Foster

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[3] United States v. American Tel. and Tel. Co., 552 F. Supp. 131, 151 (D.D.C. 1982), aff'd. sub nom. Maryland v. United States, 460 U.S. 1001 (1983), quoting Gillette, 406 F. Supp. at 716 (citations omitted); United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619, 622 (W.D. Ky. 1985).

Certificate of Service

I, James K. Foster, hereby certify that, on April 28, 1999, I caused the foregoing document to be served on defendants Suiza Foods Corporation and Broughton Foods Company, by facsimile and first-class mail, postage prepaid, to:

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