~~**FILED UNDER SEAL**~~**[*]**
No. 04-6318

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA &
COMMONWEALTH OF KENTUCKY

Plaintiffs-Appellants,

v.

DAIRY FARMERS OF AMERICA, INC. &
SOUTHERN BELLE DAIRY CO., LLC,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY, LONDON DIVISION
(Honorable Karl S. Forester)

FINAL
BRIEF FOR THE APPELLANTS UNITED STATES OF AMERICA AND COMMONWEALTH OF KENTUCKY

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REQUEST FOR ORAL ARGUMENT

This appeal arises out of a government antitrust suit brought to protect competition in the provision of milk to public schools in Kentucky and Tennessee. The government believes that oral argument will contribute to a better understanding of the issues in the case.

Additionally, the government, in a motion filed contemporaneously with its proof brief, asked the Court to expedite oral argument pursuant to Sixth Circuit Rule 34(b). On January 5, 2005, the motion was granted.

JURISDICTIONAL STATEMENT

Plaintiffs-appellants, the United States of America and the Commonwealth of Kentucky, appeal from the final judgment of the United States District Court for the Eastern District of Kentucky. The district court had jurisdiction pursuant to 15 U.S.C. §§ 25, 26 and 28 U.S.C. §§ 1331, 1337, 1345. The court granted defendants' motions for summary judgment and entered final judgment on August 31, 2004. Opinion and Order ("Op."), R-159, JA 77; Judgment, R-160, JA 76.[1] The appellants filed a timely notice of appeal on October 28, 2004. Notice of Appeal, R-175, JA 93. This Court's jurisdiction rests on 15 U.S.C. § 29(a) and 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the district court erred in granting summary judgment for defendants without ruling on the government's claim that Dairy Farmers of America, Inc. violated the federal antitrust laws by acquiring a partial ownership interest in Southern Belle Dairy Co., LLC, pursuant to an arrangement whose terms remained in effect until modified by the defendants on the day before they moved for summary judgment.

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[1] In this brief, "R-" followed by a number refers to the district court docket entry number, and JA refers to the joint appendix.

2. Whether the district court erred in holding—without permitting the government additional discovery—that the government failed to raise a triable issue of fact as to the anticompetitive potential of the acquisition under the terms of an agreement modified by the defendants after the close of discovery.

STATEMENT OF THE CASE

On April 24, 2003, the United States and Kentucky ("the government") filed suit against Dairy Farmers of America, Inc. ("DFA") and Southern Belle Dairy Co., LLC ("Southern Belle"), alleging that DFA's acquisition of a partial interest in Southern Belle violated Section 7 of the Clayton Act, 15 U.S.C. § 18.[2] Compl., R-1, JA 36. The complaint alleged that the acquisition threatened to lessen competition in school milk markets in Kentucky and Tennessee because DFA already had a partial ownership in National Dairy Holdings, LP ("NDH"), which wholly owned the competing Flav-O-Rich dairy. Am. Compl. ¶¶ 7-10, 32-34, at 3-4, 10, R-65, JA 38-39, 45. The government sought an injunction requiring divestiture of DFA's interests in Southern Belle and permitting school districts to rescind milk supply contracts entered into with defendants after the acquisition.

[2] Section 7 of the Clayton Act bars acquisitions "where in any line of commerce . . . in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18.

Am. Comp. ¶ 40(a), (b), (e), at 13-14, R-65, JA 48-49.

On July 20, 2004, after the close of discovery, defendants filed separate motions for summary judgment.[3] DFA simultaneously filed a document—executed on July 19 but retroactive to July 14—modifying the agreement that governs the relationship between DFA and Southern Belle.[4] In its July 27, 2004 opposition, the government requested discovery related to the modifications under Rule 56(f) of the Federal Rules of Civil Procedure.[5] The district court did not expressly rule on the government's discovery request, but granted the defendants' motions and entered judgment on August 31, 2004. Op. 15, R-159, JA 91; Judgment, R-160, JA 76.

STATEMENT OF THE FACTS

This government antitrust case challenges an acquisition that threatens competition in the sale of milk to Kentucky and Tennessee school districts. Defendant DFA, the nation's largest dairy farmer cooperative, and its long-time

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[3] Motion for Summary Judgment by Defendant DFA, R-95, JA 165; Motion for Summary Judgment by Defendant Southern Belle, R-100, JA 168.

[4] *See* Second Amended and Restated Limited Liability Co. Agreement of Southern Belle Dairy Co., LLC ("Revised Southern Belle Agreement"), Statement of Material Facts Not in Dispute by Defendant DFA, tab 9, R-99, JA 814.

[5] Plaintiffs' Opposition to DFA's Motion for Summary Judgment and Reply to DFA's Opposition to Plaintiffs' Motion for Partial Summary Judgment ("Opp.") 33, R-105, JA 889.

business ally, Robert Allen, acquired the Southern Belle dairy in Somerset, Kentucky. DFA already had an ownership interest in the Flav-O-Rich dairy in London, Kentucky. The acquisition eliminated all independent competition in over 40 school districts, and it substantially lessened competition in almost 50 other districts.

A. The Affected School Milk Markets

The school districts purchase milk in half-pint cartons through a sealed bid process and award one year contracts to the lowest bidder.[6] Because there is a separate competition for each school district, the sale of milk to each district constitutes a separate market. Scott Report 13-15, JA 1166-68. Southern Belle and Flav-O-Rich are the only bidders in more than 40 school districts; they are two of three bidders in almost 50 more school districts.[7]

The school districts have no practical alternatives to purchasing milk from these suppliers, and high barriers to entry prevent new competition from

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[6] Expert Report of Frank A. Scott ("Scott Report") 6, Plaintiffs' Counterstatement to Defendant DFA's Statement of Material Facts Not in Dispute ("Counterstatement"), ex. 36, R-108, JA 1151; Expert Report of John P. Johnson ("Johnson Report") 12, Counterstatement, ex. 37, R-108, JA 1212.

[7] Scott Report 19-20, JA 1172-73; Second Supplemental Report of Frank A. Scott at Second Supplemental Exhibit 1, Counterstatement, ex. 42, R-108, JA 1261-63.

emerging.[8] Many of the districts are remote from major population centers, and the road network—much of it in hilly terrain—constrains route structures and increases delivery costs. Scott Report 6, JA 1159. Dairies and dairy distributors find it most cost effective to establish routes combining the frequent deliveries required by schools with commercial deliveries, and so they tend to bid on school contracts in areas where they have existing commercial accounts.[9] They are unlikely to bid on contracts with school districts in areas where they lack commercial customers.[10] Grocery chains and food service distributors, like Sysco, are not set up to provide the services required by schools and have never bid for the milk contracts in the districts affected by the acquisition.[11] Nor can the school districts substitute other beverages for milk because they would lose large federal school subsidies. Scott Report 7, 12-13, JA 1160, 1165-66. Thus, schools would continue to buy milk even if there were a "fairly large" increase in the price. Scott Report 12-13, JA 1165-66.

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[8] Scott Report 38-40, JA 1191-93; Johnson Report 15-18, JA 1228-31.

[9] Scott Report 11, 20-21 JA 1164, 1173-74; Johnson Report 8-10, JA 1221-23.

[10] Scott Report 3, 6, 11, 20-22, JA 1156, 1159, 1164, 1173-75; Johnson Report 3 n.4 , 8-10, JA 1216, 1221-23; Declaration of Rick Fehr 1-2, Counterstatement, ex. 48, R-108, JA 1271-72.

[11] Scott Report 22-23, JA 1175-76; Declaration of Mike Nosewicz 1, Counterstatement, ex. 55, R-108, JA 1276.

B. Prior Efforts to Eliminate Competition between Southern Belle and Flav-O-Rich

From the late 1970's until 1989, Southern Belle and Flav-O-Rich engaged in unlawful bid-rigging, eliminating competition between themselves to supply milk to many school districts. Both firms were ultimately convicted of criminal violations of Section 1 of the Sherman Act, 15 U.S.C. § 1.[12] Maurice Binder, a former Flav-O-Rich manager who was also convicted, explained the scheme: "I was to keep what accounts that I had, and [Southern Belle's sales manager] was to keep what he had. And we would protect each other in the bidding process."[13] By allocating customers between themselves, Southern Belle and Flav-O-Rich were able to increase the price of school milk significantly.[14] They continued to profit from the arrangement over the years it was in effect because the increased prices did not attract additional firms to bid for the school milk contracts nor did it alter the purchasing practices of the school districts. *See* Scott Report 31-32, JA 1184-

[12] *United States v. Southern Belle Dairy Co.*, [1988-1996 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 45,092, at 44,599 (E.D. Ky., Nov. 13, 1992); *United States v. Flav-O-Rich, Inc.*, [1988-1996 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 45,092, at 44,605 (N.D. Ga. Dec. 22, 1992).

[13] Deposition of G. Maurice Binder ("Binder Dep.") (Dec. 17, 2003) 14, Counterstatement, ex. 41, R-108, JA 1248.

[14] Deposition of David A. Geisler ("Geisler Dep.") (June 17, 2004) 212, Plaintiffs' Statement of Undisputed Facts for its Motion for Partial Summary Judgment on DFA's "Control" Affirmative Defense ("Statement"), ex. E, R-84, JA 316; Binder Dep. 28, JA 1254; Scott Report 7 n.1, 31-32, JA 1160, 1184-85.

85.

In 1999, Flav-O-Rich's then-owner, Suiza Foods Corporation ("Suiza"), tried to acquire Southern Belle's then-owner, Broughton Foods Company. Scott Report 8, JA 1161. The United States challenged the acquisition under Section 7 of the Clayton Act, 15 U.S.C. § 18,[15] and the case ended with a consent decree that required Suiza to divest Southern Belle.[16]

C. DFA's Acquisition of Interests in Southern Belle and Flav-O-Rich

Beginning in 2001, DFA acquired ownership interests in both Southern Belle and Flav-O-Rich. DFA acquired a 50% interest in each dairy, pursuant to agreements placing the remaining 50% ownership interests, along with management authority, in the hands of close business allies: Robert Allen at Southern Belle and Allen Meyer at Flav-O-Rich.

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[15] *United States v. Suiza Foods Corp., et al.*, No. 99-CV-130 (E.D. Ky. Mar. 18, 1999); Plaintiff United States' Motion and Memorandum in Support thereof for Partial Summary Judgment as to Defendant Dairy Farmers of America's Estoppel and Waiver Affirmative Defenses ("Estoppel Motion"), ex. 5 (the *Suiza* complaint), R-24, JA 95.

[16] Estoppel Motion, ex. 6 (the *Suiza* final judgment), R-24, JA 114; *United States v. Suiza Foods Corp. and Broughton Foods Co., Proposed Final Judgment and Competitive Impact Statement*, 64 Fed. Reg. 26,782, 26,788 (May 17, 1999) ("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."); *see also* Scott Report 8, JA 1161.

1. Flav-O-Rich. In 2001, DFA acquired a 50% interest in Flav-O-Rich when National Dairy Holdings, LP ("NDH")—a partnership in which DFA and Allen Meyer have equal shares—bought the dairy.[17] Op. 2, JA 78. Under the management agreement, DFA's 50% voting interest gave it veto authority over a host of significant NDH/Flav-O-Rich decisions.[18] Moreover, DFA's partner,

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[17] Originally, Allen Meyer shared his 50% interest in NDH with two other individuals. Op. 2, JA 78. At the time the complaint was filed, each individual had contributed $5 million, and DFA had contributed $15 million. Sixth Amendment of the Amended and Restated Agreement of Limited Partnership of NDH at NDH(DOJ)-113, Counterstatement, ex. 31, R-108, JA 1144. Because NDH was intended to acquire many dairies, DFA and its affiliates supplied it with over $400 million in capital. *Id.* at NDH(DOJ)-114-15, JA 1145-46; Deposition of David Meyer (Mar. 18, 2004) 12-16, Statement, ex. I, R-84, JA 343-47. When the two other individuals sold out to DFA—at triple their investment—Allen Meyer became DFA's sole partner. Op. 2, JA 78; Deposition of Gerald Bos ("Bos Dep.") (Mar. 19, 2004) 262-63, 265, Statement, ex. D, R-84, JA 308-09, 310.

[18] For example, DFA could veto decisions to make a contract, a capital expenditure or investment, to incur debt in excess of $50,000, to distribute profits, to sell the company, to appoint officers, or to implement "any increase in the initial compensation or performance-based bonuses to be paid" to the individual partners. Dairy Management LLC Limited Liability Company Agreement ¶¶ 3.2(b), (c), 3.3(d), at 6-8, 11-12, Counterstatement, ex. 29, R-108, JA 1095-97, 1100-01; *see also* Report of Edward B. Rock 12-13, Counterstatement, ex. 1, R-108, 12-13, JA 942-943.

In April 2004, DFA's veto power was limited to major capital expenditures and dissolution, sale, or merger of NDH. Dairy Management LLC First Amended and Restated Limited Liability Company Agreement ¶ 4.3, at 21-24, Statement, ex. R, R-84, JA 565-68. DFA remains as a practical matter NDH's sole source of financing. Deposition of Edward B. Rock ("Rock Dep.") 93-95, Counterstatement, ex. 2, R-108, JA 1040-42; National Dairy Holdings, LP: Second Amended and Restated Agreement of Limited Partnership NDH4-309-10, Statement, ex. N, R-84, JA 435-36.

Allen Meyer, manages NDH and, through it, Flav-O-Rich. Op. 2, JA 78. Meyer has participated in three other joint ventures with DFA—one of which enabled him to turn a "several hundred thousand" dollar investment into a gain of "[a]bout 70 million."[19] DFA and Meyer continue to discuss the possibility of additional ventures in the future.[20]

2. Southern Belle. In late 2001, NDH reached an agreement to acquire Southern Belle, with DFA providing the financing.[21] That deal, which would have given NDH full ownership of both Southern Belle and Flav-O-Rich, was ultimately abandoned, apparently because of antitrust concerns.[22]

In February 2002, DFA and Robert Allen acquired Southern Belle for $18.7 million.[23] Under the agreement, DFA obtained a 50% voting interest in Southern

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[19] Deposition of Allen Meyer ("Allen Meyer Dep.") (April 16, 2004) 32-34, 37-38, 42, Statement, ex. H, R-84, JA 332-37; Deposition of Gary Hanman ("Hanman 2004 Dep.") (April 14, 2004) 25, Statement, ex. F, R-84, JA 323.

[20] Hanman 2004 Dep. 116, JA 326; Allen Meyer Dep. 99, JA 340.

[21] Rock Report 15-16, JA 945-46; Scott Report 8, JA 1161.

[22] Rock Report 16, JA 946; Scott Report 8, JA 1161.

[23] Allen's participation is through the Allen Family Limited Partnership, which he controls. In this brief, "Allen" refers to the individual or this partnership.

Belle, along with veto power over a wide range of management decisions.[24] In addition, DFA was assigned "sole power and responsibility" for raw milk procurement. Original Southern Belle Agreement ¶ 3.2(b), at 7-8, JA 466-67.

Robert Allen, who assumed day-to-day management authority over Southern Belle under the agreement with DFA, had previously been an advisor to DFA's board. Op. 2, JA 78; Hanman 2004 Dep. 23, JA 322. As DFA CEO Gary Hanman explained, Allen is a friend with whom DFA has had a "perfect" relationship through the years.[25] Allen contributed $1 million, in return for a 50% voting equity interest in Southern Belle; DFA contributed the remaining $17.7 million in return for its 50% voting interest, preferred interests, and debt.[26] Allen had previously participated in another joint venture with DFA, which afforded him a $21.7 million profit on a $1 million investment, and he continues to discuss the

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[24] DFA's approval was required to sell or liquidate the company, to change its capitalization, to incur any indebtedness in excess of $150,000, to make any contract in excess of $150,000, to make any capital expenditure or investment in excess of $150,000, to take any action which would cause the company spend in excess of $250,000 in any calendar year, to select and remove officers, or to determine their compensation. Revised and Restated Limited Liability Company Agreement of Southern Belle Dairy Co., LLC ("Original Southern Belle Agreement") ¶¶ 3.2(b), 3.3(a), (d), (e) at 7-8, 10, 12-13, Statement, ex. O, R-84, JA 466-67, 469, 471-72; *see also* Rock Report 17-18, JA 947-48.

[25] Deposition of Gary Hanman ("Hanman 2002 Dep.") (July 16, 2002) 204, Counterstatement, ex. 5, R-108, JA 1061.

[26] Op. 1-2, JA 77-78; Bos Dep. 68, JA 307; Rock Report 16, JA 946.

possibility of additional joint ventures with DFA.[27] DFA also gave Allen a put option entitling him to sell his interests to DFA after three years, at a price sufficient to recover his contributions. Original Southern Belle Agreement ¶ 8.5, at 28, JA 487.

3. Anticompetitive Effects. The government offered the evidence of two expert witnesses to show that DFA's interests in Southern Belle and Flav-O-Rich threaten competition. Professor Frank Scott, of the economics department of the University of Kentucky, and Professor Edward Rock, a corporate governance expert at the University of Pennsylvania's Wharton School of Business, concluded that the managers of Southern Belle and NDH/Flav-O-Rich are likely to act essentially as if the dairies had merged completely, reducing competitive bidding or allocating school districts to eliminate competition between them.[28]

Professor Scott explained that it is in DFA's interest to reduce or eliminate competition between Flav-O-Rich and Southern Belle. DFA receives 50% of the profit, no matter which dairy supplies a particular school district, and so it would

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[27] Hanman 2004 Dep. 22-23, JA 321-22; Deposition of Robert Allen ("Allen Dep.") (Mar. 9, 2004) 14, 17, 184-85, Statement, ex. A, R-84, JA 299, 300-02; Purchase Agreement 2, Statement, ex. P, R-84, JA 513; *see also* Rock Report 6, JA 936.

[28] Scott Report 4, 43-49. JA 1157, 1196-1202; Rock Report 4-5, 20-24, JA 934-35, 950-54; Rock Dep. 97, JA 1044.

not benefit from one dairy's efforts to increase sales at the expense of the other. Such competition between the dairies would simply drive down prices and profits, thereby reducing DFA's returns. Scott Report 43-44, JA 1196-97.

Professor Rock testified that DFA's partners, Allen Meyer and Robert Allen, have a strong incentive to manage NDH/Flav-O-Rich and Southern Belle in a manner that furthers DFA's interest in suppressing competition. DFA, Allen, and Meyer all "profit[ ] from the elimination of competition between NDH and Southern Belle." Rock Dep. 97, JA 1044.[29] Moreover, Allen and Meyer have profited from lucrative joint ventures with DFA in the past and have the prospect of doing so in the future. These arrangements "create[] an incredibly strong incentive on the part of the people who are able to get such deals to keep DFA happy." Rock Dep. 70, JA 1035.[30] "By installing joint venture partners who have proved their loyalty, who have economic incentives to achieve the high price outcome and to further DFA's interests, and who have an expectation of future profitable joint ventures with DFA, DFA has made it extremely unlikely that any competition will break out among its group of dairies." Rock Report 4, JA 934.

Accordingly, Professor Rock observed, it was unlikely that DFA would ever

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[29] *See also* Rock Report 20-21, JA 950-51.

[30] *See also* Rock Report 19, 22-23, 29, JA 949, 952-53, 959; Scott Report 46-47, JA 1199-1200.

need to use the powers it reserved when it acquired its ownership interests in the dairies to enforce its will. Rock Dep. 97, JA 1044; Rock Report 23, JA 953. Those powers, however, included the right to veto virtually any significant decision—including decisions affecting the compensation of Allen and Meyer. *See supra* notes 18 & 24.[31] DFA also had absolute authority over Southern Belle's milk procurement,[32] and DFA and its affiliates are the primary financier of both dairies.[33]

Professor Scott explained that DFA's arrangements were likely to lead to anticompetitive effects comparable to the effects of the unlawful Southern Belle/Flav-O-Rich bid-rigging conspiracy prosecuted criminally by the government.[34] Moreover, his regression analysis of school bidding data from the

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[31] The original governance arrangements for the Southern Belle joint venture were in effect from February 2002 to July 2004, and for NDH joint venture from April 2001 to April 2004. *See supra* pp. 8-9 & note 18, *see infra* pp. 14-15.

[32] Original Southern Belle Agreement ¶ 3.2(b), at 7-8, JA 466-67.

[33] Secured Line of Credit Note, Counterstatement, ex. 25, R-108, JA 1073; David Meyer Dep. 12-16, Statement, ex. I, R-84, JA 343-47; National Dairy Holdings, LP: Second Amended and Restated Agreement of Limited Partnership NDH4-309-10, Statement, ex. N., R-84, JA 435-36.

[34] Scott Report 4, 43-44, 48-49, JA 1157, 1196-97, 1201-02. Similarly, the school milk prices were significantly higher where Southern Belle did not compete due to its debarment from serving school districts with milk contracts exceeding $100,000 for the 1998-99, 1999-2000, and 2000-2001 school years. Scott Report 33-36, JA 1186-89.

years before and after the Southern Belle acquisition suggested that these anticompetitive effects have already occurred. Rebuttal Report of Frank A. Scott ("Scott Rebuttal Report") 1-3, Counterstatement, ex. 33, R-108, JA 1148-50. Before the acquisition, prices in districts where Southern Belle and Flav-O-Rich were the only bidders on school milk contracts were not significantly different from prices in other districts with only two bidders. *Id.* at 2, JA 1149. After the acquisition, however, districts receiving bids only from Southern Belle and Flav-O-Rich paid more than other districts with only two bidders. *Id.* "Despite the parties' clear incentives not to change their behavior," Professor Scott concluded, "my analysis of the bidding data provides results that are consistent with significant anticompetitive effects from the transaction. Prices in school districts where only Southern Belle and Flav-O-Rich bid were almost 0.9¢ higher [about 5%] in 2002 after the transaction than in other districts and in other years." *Id.* at 1, JA 1148.

D. Summary Judgment

On July 20, 2004, DFA moved for summary judgment, arguing that its acquisition of a partial ownership interest in Southern Belle did not threaten competition because it did not afford DFA control over Southern Belle's

management decisions with respect to school milk sales.[35] DFA and Robert Allen had modified their agreement the day before DFA filed its motion. Revised Southern Belle Agreement 11-12, 44, JA 824-25, 858. The changes, which were retroactive to July 14, converted DFA's 50% voting equity interest in Southern Belle into a non-voting interest entitling DFA to 50% of the profit. *Id*. The revisions also eliminated DFA's formal veto power, its milk procurement responsibility, and Allen's put option. *Id.* DFA asserted in its summary judgment motion that the original arrangement was lawful, but argued that the changes strengthened its defense. DFA Mem. 1-2, JA 671-72. Southern Belle also moved for summary judgment, arguing that its presence was not necessary to achieve effective relief even if the government prevailed on the merits.[36]

The government responded that it had presented ample evidence to raise a triable issue of fact with respect to its claim that DFA's acquisition of a partial ownership interest in Southern Belle threatened competition.[37] In particular, the

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[35] Defendant DFA's Memorandum in Support of Its Motion for Summary Judgment ("DFA Mem.") 1, R-97, JA 671

[36] Defendant Southern Belle Dairy Co., LLC's Memorandum in Support of Its Motion for Summary Judgment ("SB Mem.") 9-11, R-102, JA 180-82.

[37] Opp., R-105, JA 889. The government also explained that, whether or not Southern Belle violated Section 7 of the Clayton Act, it should not be dismissed because its participation might be necessary to effective relief. Plaintiffs' Opposition to Defendant Southern Belle Dairy Co., LLC's Motion for Summary Judgment 8-10, R-103, JA 192-94. In particular, Southern Belle's participation

government pointed to its evidence that the acquisition created incentives and opportunities to reduce competition;[38] that the acquisition appeared to have raised milk prices to some school districts already;[39] and that DFA had the power to exercise control over Flav-O-Rich and Southern Belle.[40] The government argued that it was entitled to go to trial to prove that the acquisition and accompanying arrangements, which were in effect for over two years, violated the Clayton Act and justified relief to restore competition. Opp. 31-33, JA 924-26. The revisions to the agreement under which Robert Allen operates Southern Belle did not constitute an adequate remedy, the government explained, and should not affect the court's ruling. *Id.* At a minimum, the government noted, it should be allowed an opportunity for discovery with respect to the revisions.[41]

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would be relevant to an order permitting school districts to rescind existing contracts with Southern Belle. *Id.*

[38] Opp. 4-20, R-105, JA 897-913.

[39] *Id.* at 4 n.1, JA 897.

[40] *Id.* at 26, JA 919.

[41] *Id.* at 33, JA 926; Declaration of John D. Donaldson ("Donaldson Aff.") 1-3, Counterstatement, ex. 28, R-108, JA 1083-85. The government sought discovery to inquire into the origins and details of the revisions, as well as the existence and terms of any accompanying agreements or understandings. *Id.*

The defendants did not oppose the government's request for discovery.[42] Nonetheless, on August 31, 2004, the district court granted both defendants' motions for summary judgment, in a decision that focused exclusively on the revised arrangement. Op. 4-14, JA 80-90. The court did not address the lawfulness of the acquisition on the terms in effect from February 2002 until after the close of discovery, nor did it refer to the government's request for discovery related to the revisions.

The district court accepted, for purposes of summary judgment, the government's product and geographic markets. Op. 5, JA 81. The court acknowledged that proof of control is not required to establish a violation of Section 7 of the Clayton Act. Op. 7, JA 83. It also recognized that DFA has an incentive—like "[e]very investor"—to seek higher profits from its investments. Op. 12, JA 88. The key inquiry, it said, was whether the government had shown "some mechanism by which the alleged adverse effects in the sale of milk are likely to be brought about by DFA's acquisition of a non-operational interest in Southern Belle." Op. 13, JA 89.

The court ruled that the government's "'incentive and opportunity' theory

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[42] Defendant DFA's Reply to Plaintiffs' Opposition to DFA's Motion for Summary Judgment ("DFA Reply"), R-126, JA 1277; Defendant Southern Belle Dairy Co., LLC's Reply to Plaintiffs' Opposition to Defendant's Motion for Summary Judgment ("Southern Belle Reply"), R-127.

deals in 'ephemeral possibilities,' and does not establish a reasonable probability of diminished competition." Op. 14, JA 90. In the court's view, an anticompetitive effect was unlikely because DFA and its joint venture partners, Allen and Meyer, were not directly involved in the dairies' bids on school milk contracts. Op. 11-13, JA 87-89. The court did not discuss the econometric evidence that the price of school milk to districts where only Southern Belle and Flav-O-Rich bid had increased since the transaction, *see supra* pp. 13-14, nor did it discuss the government's expert testimony on the incentives of Meyer and Allen to minimize competition between the dairies, *see supra* pp. 11-13.

In granting Southern Belle's motion for summary judgment, the court did not determine whether Southern Belle's participation would be necessary to formulate effective relief if the government proved that DFA violated the Clayton Act. Rather, the court held that "Southern Belle's presence in this case is not required for complete relief, given that Defendant DFA has been found to be entitled to summary judgment on all claims brought against it." Op. 15, JA 91.[43]

[43] The court also concluded that Southern Belle was not an acquiring firm and thus was not liable under Section 7. Op. 14-15, JA 90-91.

SUMMARY OF ARGUMENT

There is no acceptable basis for the district court's unexplained failure to address the government's claim that DFA's acquisition of an ownership interest in Southern Belle, on the terms in effect until the eve of the defendants' summary judgment motions, violated Section 7 of the Clayton Act. The revised deal, on which the district court based its decision, falls far short of the relief sought by the government and plainly does not moot its claim to a remedy for the anticompetitive effects of the arrangement in effect for more than two years.

Moreover, even though the government was improperly denied an opportunity for discovery relating to the revisions, its evidence was more than sufficient to raise a triable issue of fact on the anticompetitive potential of the modified arrangement. The government presented the testimony of expert witnesses explaining that DFA has a strong interest in avoiding competition between the dairies in which it has invested, and that DFA's partners, Allen and Meyer, have a strong incentive to further DFA's interests in managing Southern Belle and Flav-O-Rich. Accordingly, the judgment for DFA—and the judgment in favor of Southern Belle, which was based on the DFA judgment—should be vacated and the case should be remanded for trial.

STANDARD OF REVIEW

The district court's grant of summary judgment is reviewed *de novo*. *Lewis v. Philip Morris Inc.*, 355 F.3d 515, 523 (6th Cir.), *cert. denied*, 125 S. Ct. 61 (2004). Summary judgment may be granted only if there is no genuine issue of material fact. *Id.* The Court "must view the evidence, all facts, and any inferences that may be drawn from the facts in the light most favorable to the nonmoving party," in this case, the government. *Id.* The denial of discovery under Rule 56(f) of the Federal Rules of Civil Procedure is reviewed for an abuse of discretion. *Glen Eden Hosp., Inc. v. Blue Cross and Blue Shield of Mich., Inc.*, 740 F.2d 423, 428 (6th Cir. 1984).

ARGUMENT

I. THE DISTRICT COURT ERRED IN NOT SENDING THE GOVERNMENT'S CLAIM WITH RESPECT TO THE ORIGINAL SOUTHERN BELLE DEAL TO TRIAL

A. The Government Was Entitled to a Remedy for the Anticompetitive Effects of the Original Deal

Courts are obliged to decide claims properly before them. As Chief Justice Marshall said: "Questions may occur which we would gladly avoid; but we cannot avoid them." *Cohens v. Virginia*, 19 U.S. 264, 404 (1821). The government contends that DFA's acquisition of a partial ownership interest in Southern Belle—on terms that were in effect from February 26, 2002 to July 19,

2004—violated Section 7 of the Clayton Act, and it seeks a remedy for that violation that will restore competition. The district court, however, did not address the government's contention, focusing instead on the question of whether the revised arrangement violates the Clayton Act. The court's unexplained failure to address the government's allegation that the original deal violated the statute was error. *See Anchor Motor Freight, Inc. v. Int'l Bhd. of Teamsters*, 700 F.2d 1067, 1071 (6th Cir. 1983) (remand of summary judgment grant because the district court "misapprehended" plaintiff's claim and "failed to consider whether there was evidence of" plaintiff's theory of breach).

Section 7 of the Clayton Act provides that "[n]o person . . . *shall acquire*" stocks or assets where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly," 15 U.S.C. § 18 (emphasis added). If the government proves that DFA violated Section 7 when it acquired an interest in Southern Belle on the terms that were in effect for over two years, then the public is entitled to an appropriate equitable remedy for the anticompetitive effects of that unlawful conduct. The district court may take into account relevant changes in formulating the equitable remedy, but it "has the duty to compel action . . . that will, so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance." *United States v. United States*

Gypsum Co., 340 U.S. 76, 88 (1950); *see also Ford Motor Co. v. United States*, 405 U.S. 562, 573 & n.8 (1972).

Even if the district court had been correct in concluding that the revised deal does not independently violate Section 7—which it was not, *see infra* pp. 31-36—it would not follow that the revisions adequately remedy the original violation. *See United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 331, 334 (1961). The court made no finding that the post-complaint modifications eliminated the need for an equitable remedy, and they clearly did not. DFA remains in possession of the ownership interest it acquired illegally, and its long-time ally, Robert Allen, continues to manage Southern Belle. This arrangement is not an acceptable substitute for the complete divestiture justified by a violation of the Clayton Act and sought by the government. *Cf. du Pont*, 366 U.S. at 331-34 (holding that "divestiture only of voting rights" is an inadequate remedy and directing "complete divestiture" of defendants' partial interest); *California v. American Stores Co.*, 495 U.S. 271, 280-81 (1990) ("[I]n Government actions divestiture is the preferred remedy for an illegal merger or acquisition."); *Ford Motor Co.*, 405 U.S. at 573. Moreover, the modifications take no account of the government's request for an order allowing school districts "to terminate or rescind any contract to supply school milk entered into with defendants on or after

February 20, 2002. . . ."[44] Am. Compl. ¶ 40(e), at 14, R-65, JA 65; *Cf. Int'l Salt Co. v. United States*, 332 U.S. 392, 401 (1947) (relief must "pry open to competition a market that has been closed by defendants' illegal restraints").

If the court thought that the revisions somehow mooted the government's challenge to the original deal—an argument the defendants did not make—it was wrong. Even "voluntary cessation of the challenged conduct does not ordinarily moot a case unless 'subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not be reasonably expected to recur.'" *Ailor v. City of Maynardville, Tennessee*, 368 F.3d 587, 595-96 (6th Cir. 2004) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)); *see also Ammex, Inc. v. Cox*, 351 F.3d 697, 704 (6th Cir. 2003). Otherwise, "the courts would be compelled to leave '[t]he defendant . . . free to return to his old ways.'" *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)). "The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement." *W.T. Grant Co.*, 345 U.S. at 632. Thus, "[t]he heavy burden of demonstrating mootness rests on the party claiming mootness."

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[44] It is our understanding that many school districts referred to in ¶ 40(e) awarded milk contracts to Southern Belle based on bidding conducted prior to July 19, 2004, and that these contracts are now in effect.

Ammex, Inc., 351 F.3d at 705.

The district court made no finding on the likelihood of defendants reinstating the original deal, and the defendants did not even try to make it "absolutely clear," *Friends of the Earth*, 528 U.S. at 189, that they would not reinstate the arrangement to which they adhered for over two years and which they maintain is legal. Defendants have not argued that the revisions were prompted by factors independent of the government's enforcement action, and their revised deal expressly contemplates further changes, which could include a return to the old agreement. *See* Revised Southern Belle Agreement 41, JA 854.[45] Therefore, it was "incumbent" on the court "to examine" the government's claim that the original deal was unlawful and required a remedy. *Akers v. McGinnis*, 352 F.3d 1030, 1035 (6th Cir. 2003), *cert. denied*, 73 U.S.L.W. 3075 (Dec. 6, 2004).

The revised agreement represented a transparent effort to avoid a judgment of liability and a remedy undoing the effects of the unlawful acquisition. *Cf. United States v. Oregon State Med. Soc'y*, 343 U.S. 326, 333 (1952) ("It is the

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[45] Indeed, the Supreme Court has held that showings more persuasive than this fail to carry the "heavy burden," *Ammex, Inc.* 351 F.3d at 705, on the party asserting mootness. *See, e.g., W.T. Grant Co.*, 345 U.S. at 633 (defendants' post-complaint abandonment of interlocking directorates challenged under Section 8 of the Clayton Act and their disclaiming "any intention to revive them" do not moot case); *Concentrated Phosphate Export Ass'n*, 393 U.S. at 202-04 (dissolution of association challenged under Section 1 of the Sherman Act and defendants' own statement that further joint operations are uneconomical do not moot case).

duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption."). At a minimum, the judgment must be vacated and the case remanded for the district court to consider whether the government raised a triable issue of fact on its claim that the original deal violated the Clayton Act. *See Anchor Motor Freight*, 700 F.2d at 1071.

B. The Government Presented Ample Evidence to Create a Triable Issue of Fact on Whether the Original Southern Belle Acquisition Violated Section 7

DFA's acquisition of an ownership interest in Southern Belle effectively reduced the number of independent competitors for school milk contracts from two to one in more than 40 markets, and it reduced the number from three to two in almost 50 more. Scott Report 19-20, JA 1172-73. "No merger threatens to injure competition more than one that immediately changes a market from competitive to monopolized." 4 Phillip E. Areeda *et al.*, *Antitrust Law* ¶ 911, at 54-55 (rev. ed. 1998). Any "merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363 (1963). "Increases in concentration

above certain levels are thought to 'raise[] a likelihood of 'interdependent anticompetitive conduct.'" *FTC v. H. J. Heinz Co.*, 246 F.3d 708, 715-16 (D.C. Cir. 2001) (citation omitted). As a result, "no court has ever approved a merger to duopoly" where there are barriers to market entry. *Id.* at 717. Moreover, courts are particularly wary of mergers in markets with a history of collusion. *See Hosp. Corp. of America v. FTC*, 807 F.2d 1381, 1388 (7th Cir. 1986) (Posner, J.); *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 905 (7th Cir. 1989) (Posner, J.); *see also* 4 Areeda, *Antitrust Law* ¶ 917, at 90 (rev. ed. 1998) (any significant merger by firms involved in bid rigging should be presumptively unlawful). These principles make clear that the government raised a triable issue of fact with respect to the competitive consequences of DFA's acquisition, which effectively created monopolies or duopolies in scores of markets with a history of bid-rigging and high entry barriers.

There is no dispute that Section 7 of the Clayton Act applies to partial ownership interests. Indeed, "the entire range of corporate amalgamations" is "within the scope of § 7." *Philadelphia Nat'l Bank*, 374 U.S. at 342.[46] Thus, "[a] company need not acquire control of another company in order to violate" Section

[46] In particular, Section 7 applies to "any acquisition by one corporation of all or any part of the stock of another corporation. . . ." *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 592 (1957).

7. *Denver & Rio Grande W. R.R. v. United States*, 387 U.S. 485, 501 (1967).

"The lawfulness of an acquisition turns on [its] potential for creating, enhancing, or facilitating the exercise of market power—the ability of one or more firms to raise prices above competitive levels for a significant period of time." *United States v. Archer-Daniels-Midland Co.*, 866 F.2d 242, 246 (8th Cir. 1988). DFA's arrangements with its partner Robert Allen ensured that Southern Belle would not undercut DFA's interests by competing with NDH/Flav-O-Rich. Consequently, in light of DFA's prior acquisition of an ownership interest in Flav-O-Rich, DFA's acquisition of an ownership interest in Southern Belle was the practical equivalent of the merger between the two dairies that had been proposed and abandoned for antitrust reasons. *See supra* p. 7; *see also Cmty. Publishers, Inc. v. Donrey Corp.*, 892 F. Supp. 1146, 1167-72 (W.D. Ark. 1995), *aff'd sub nom. Cmty. Publishers, Inc. v. DR Partners*, 139 F.3d 1180 (8th Cir. 1998); 5 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1203d, at 285 (2d ed. 2003) ("[S]ubstantial partial acquisitions should be condemned whenever a controlling or full acquisition would be deemed to offend Clayton Act § 7"); *see also id.* ¶ 1203c, at 280-83.

DFA's 50% voting interest and veto power plainly gave it the ability to prevent Southern Belle from competing with Flav-O-Rich. DFA's right to veto

capital expenditures over $150,000 allowed it to restrict Southern Belle's ability to compete against NDH/Flav-O-Rich. Scott Report 46, JA 1199; Rock Report 21, JA 951. For example, DFA had the power to block purchases of equipment needed for school milk distribution, such as half-pint carton fillers. *Id.*, JA 951. Moreover, DFA had the ability to reward or punish the dairies and their managers. *Id.* at 23-24, JA 953-54. For instance, DFA could approve or disapprove bonuses and salary increases. *Id.* It could also veto the dairies' plans to distribute excess cash, incur indebtedness, or enter into contracts in excess of $150,000 in the case of Southern Belle and $50,000 in the case of NDH/Flav-O-Rich. *Id.* Furthermore, DFA's complete authority over Southern Belle's raw milk procurement gave it considerable power to affect the dairies' business. Original Southern Belle Agreement ¶ 3.2(b), at 7-8, JA 466-67; Rock Report 17, JA 947.

As Professor Rock explained, however, it was unlikely that DFA would even need to invoke those powers to ensure that Southern Belle and Flav-O-Rich did not undercut its interests by competing vigorously with each other. *See supra*, pp. 12-13. DFA replaced the dairies' top management with its carefully selected joint venture partners: Allen and Meyer, both of whom have profited handsomely from their ventures with DFA. In a 1997 deal with DFA, Allen turned an investment of less than $1 million into $22.7 million. *See supra* pp. 10-11. In a

1994-98 venture with DFA, Meyer made approximately $70 million on an investment of several hundred thousand dollars. Allen Meyer Dep. 32-34, 37-38, 42, JA 332-37; *see supra* p. 9. Allen and Meyer stand to profit from their cooperation with DFA's Southern Belle and Flav-O-Rich acquisitions as well. DFA provided all but a small fraction of the money for the ventures, but allocated half the profits and appreciation in the firms' value to its joint venture partners. And Allen and Meyer have discussed the prospect of future deals with DFA. Thus, as Professor Rock explained, because the reduction or elimination of competitive bidding "is in the interests of DFA, NDH, and Southern Belle, and because Meyer and Allen both hope for future joint venture opportunities with DFA, neither Meyer nor Allen have any economic incentive to compete vigorously with the other." Rock Report 22, JA 952; *see also id.* at 29, JA 959; Scott Report 46-49, JA 1199-1202.

Moreover, the econometric evidence suggests that the dairies' competitive vigor has already diminished. *See supra* pp. 13-14. Professor Scott's regression analysis of school bidding data showed a significant increase in the price of school milk to monopoly school districts—school districts for which Southern Belle and Flav-O-Rich are the only bidders. Scott Rebuttal Report 1-2, JA 1148-49.

This evidence was more than sufficient to preclude a grant of summary

judgment to the defendants. "To show that a merger is unlawful, a plaintiff need only prove that its effect '*may be* substantially to lessen competition.'" *California v. American Stores Co.*, 495 U.S. 271, 284 (1990) (emphasis in original) (citation omitted). "Congress used the words '*may be* substantially to lessen competition' . . . to indicate that its concern was with probabilities, not certainties." *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962) (emphasis in original) (citation omitted). "All that is necessary" is "an appreciable danger" of anticompetitive effects "in the future." *Hosp. Corp. of America*, 807 F.2d at 1389 (Posner, J.). The government need not show a "high probability" of anticompetitive effects because "the statute requires a prediction, and doubts are to be resolved against the transaction." *Elders Grain, Inc*., 868 F.2d at 906 (Posner, J.). The government's evidence demonstrated "an appreciable danger" of anticompetitive effects flowing from DFA's acquisition of an ownership interest in Southern Belle on the terms in effect from February 2002 until July 2004, and it was error, therefore, for the district court to grant summary judgment in favor of DFA.

II. THE GOVERNMENT OFFERED MORE THAN SUFFICIENT EVIDENCE TO RAISE A TRIABLE ISSUE OF FACT CONCERNING THE ANTICOMPETITIVE POTENTIAL OF THE REVISED DEAL

In explaining its holding that the government had failed to raise a triable issue of fact as to the anticompetitive potential of the revised deal, the district court acknowledged that "Section 7 forbids a stock or asset acquisition if it may substantially lessen competition," and that the acquisition of "control is not a prerequisite to a finding of a violation under Section 7. . . ." It also observed, correctly, that "[t]here must be some mechanism by which the alleged adverse effects in the sale of milk are likely to be brought about by DFA's acquisition of a non-operational interest in Southern Belle." Op. 5, 7, 13, JA 81, 83, 89. The court erred, however, in concluding that government had "not established a causal connection between DFA's acquisition and anticompetitive effects with respect to the sale of school milk. . . ." Op. 13-14, JA 89-90.

Although the July 19 agreement converted DFA's shares in Southern Belle to non-voting shares—leaving DFA's partner, Robert Allen, with 100% of the voting shares and operational control—DFA's remaining ability to punish or reward Allen are sufficient to establish a reasonable likelihood that the acquisition has continuing anticompetitive effects. The revisions did not eliminate the most important source of the acquisition's anticompetitive effect: Allen's proven

loyalty to DFA and his powerful self-interest in continued cooperation with DFA. Allen has reaped substantial financial rewards from his past ventures with DFA, including one venture that earned him a profit of $21.7 million on an investment of less than $1 million. And DFA has given Allen 50% of the potential appreciation and 50% of the profit on the Southern Belle joint venture despite his relatively small contribution to the dairy's purchase price. The prospect that further cooperation with DFA will lead to more such deals gives him a powerful incentive not to alienate DFA.

Meyer at NDH/Flav-O-Rich has a comparable incentive to respect DFA's interest in maximizing profits by reducing or eliminating competition between Flav-O-Rich and Southern Belle. Meyer has also benefitted from previous successful joint ventures with DFA, one of which made him $70 million on an investment of several hundred thousand dollars. Like Allen at Southern Belle, Meyer enjoys a share of the profits and potential appreciation that is far out of proportion to his investment in NDH/Flav-O-Rich, thanks to DFA. The prospect of future ventures with DFA affords Meyer a strong incentive to manage Flav-O-Rich in a manner that serves DFA's interests in eliminating competition with Southern Belle. Moreover, Meyer and Allen understand that "[e]veryone profits" if Flav-O-Rich and Southern Belle do not compete with each other, Rock Dep. 97,

JA 1044; Rock Report 20-21, 23, JA 950-51, 953; Scott Report 48-49, JA 1201-02, because it enables them to enjoy higher prices and increased profits without fear of losing contracts to a competitor. *Cf. Hosp. Corp. of America*, 807 F.2d at 1388-89.

In any event, DFA can still punish Allen and Southern Belle if they ignore its interests. DFA and its affiliates are Southern Belle's financier, as they were under the original deal. Southern Belle could seek other financing arrangements, but, as Professor Rock explained, DFA's unwillingness to provide financing would signal to other potential lenders that the venture was in trouble. Rock Dep. 93-95, JA 1040-42. In addition, DFA can exercise significant leverage over Southern Belle by supplying it with raw milk on terms more favorable than it could obtain from other suppliers and by ceasing to do so if Southern Belle fails to act in DFA's interest.

Despite the evidence that there is an effective mechanism forestalling competition between Southern Belle and Flav-O-Rich, the district court cited nothing but the absence of proof that DFA or Allen is directly involved in preparing Southern Belle's bids for school milk contracts as support for its grant of summary judgment. Op. 11, JA 87. But Allen has operational control of

Southern Belle, and he can choose to become directly involved at any time.[47] Even if he has no occasion to do so, that fact would not negate the inference of likely anticompetitive effect. Senior executives usually do not handle day-to-day operations, but they set the policies for the managers who do. Allen has no need to take an active role in preparing bids for school districts in order to implement a policy of non-competition between Southern Belle and Flav-O-Rich. The only specific rationale cited by the district court, therefore, cannot justify its conclusion that the government failed to raise a triable issue of fact as to DFA's ability to prevent Southern Belle from competing with Flav-O-Rich.

The district court's reliance on *United States v. Tracinda Investment Corp.*, 477 F. Supp. 1093 (C.D. Cal. 1979), is misplaced. *See* Op. 9, 12-13, JA 85, 88-89. Unlike the acquisition in *Tracinda*, 477 F. Supp. at 1106, DFA's acquisition replaced the dairies' preexisting top management with carefully chosen and well-incentivized joint venture partners. Furthermore, in *Tracinda*, the court found that the defendant, which had acquired minority interests in two movie studios with market shares of 1.75-2.2% and 6.72-9.7%, had no incentive to "do anything that

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[47] It would not be surprising if DFA and Robert Allen avoided overt involvement in the bidding process while the investigation and litigation were pending. "Post-acquisition evidence that is subject to manipulation by the party seeking to use it is entitled to little or no weight." *Hosp. Corp. of America*, 807 F.2d at 1384; *see United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 504-05 (1974).

would competitively hurt either company." 477 F. Supp. at 1106. Where there are "hundreds of firms (even thousands) engaged in motion picture production" and "no barriers to entry," *id.* at 1108, eliminating competition between two of them will not allow them to raise price and increase their profits. In contrast, the markets in this case are highly concentrated, and there are barriers to entry. *See supra* pp. 4-5. As a result, an anticompetitive strategy that would have been foolhardy in *Tracinda* makes sense, as the history of efforts to restrict competition in these markets demonstrates.[48]

In concluding that the government's incentive theory deals only in "ephemeral possibilities," Op. 14, JA 90, the district court failed to recognize the well-established presumption that private parties will act on the incentives they face. *See, e.g., du Pont*, 366 U.S. at 332; *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988); *Matsushita Elec. Indus. Co., v. Zenith Radio Corp.*, 475 U.S. 574, 595-97 (1986). Thus, any attempt to predict the competitive consequences of an acquisition must take account of the parties' incentives. Here, the government presented evidence that the challenged acquisition created a strong

[48] The market in *Tracinda* lacked a history of collusion, an important consideration present here, which the district court failed even to mention. *See* 4 Phillip E. Areeda *et al.*, *Antitrust Law* ¶ 917, at 90 (rev. ed. 1998) (any significant merger by firms involved in bid rigging should be presumptively unlawful); *see also FTC v. Elders Grain, Inc.*, 868 F.2d 901, 905 (7th Cir. 1989) (Posner, J.).

incentive to reduce competition in school milk markets that are especially vulnerable to anticompetitive effects. As Professor Scott explained, "[t]o think that the nature of the interaction between the two dairies will not change is naïve, because that would be contrary to the economic incentives of all of the parties." Scott Report 49, JA 1202. The evidence before the district court, viewed in the light most favorable to the government, demonstrates an "appreciable danger" of substantial anticompetitive effects. The grant of summary judgment in favor of DFA was error.

Moreover, even if the government's evidence with respect to the revised deal had not been sufficient to preclude summary judgment, the district court's failure to allow the government discovery on that deal pursuant Rule 56(f) of the Federal Rules of Civil Procedure would have required reversal. "The general rule is that summary judgment is improper if the non-movant is not afforded a sufficient opportunity for discovery. . . . *If* the non-movant makes a proper and timely showing of a need for discovery, the district court's entry of summary judgment without permitting him to conduct any discovery at all will constitute an abuse of discretion." *Vance v. United States*, 90 F.3d 1145, 1148-49 (6th Cir. 1996); *accord March v. Levine*, 249 F.3d 462, 473 (6th Cir. 2001). The court's action here meets this standard for abuse of discretion.

The government was not afforded any opportunity for discovery on the new DFA-Southern Belle deal. When it learned of the modifications and the defendant's assertions that the modified deal differed materially from the original one and removed any genuine issue of material fact, DFA Mem. 2, 11-12, R-97, JA 672, 681-82, the government promptly sought discovery and filed an affidavit pursuant to Rule 56(f), the "'carefully crafted' rule that serves as a vehicle through which the non-movant meets his 'obligation to inform the district court of his need for discovery,'" *Cacevic v. City of Hazel Park*, 226 F.3d 483, 488 (6th Cir. 2000) (quoting *Vance*, 90 F.3d at 1149).[49] The government also focused on the material facts it sought to discover and spelled out with particularity the type of discovery it would need. Donaldson Aff. ¶ 6(a)-(f), at 2, Counterstatement, ex. 28, R-108, JA 1084. The defendants did not oppose the government's discovery request. DFA Reply, R-126, JA 1277; Southern Belle Reply, R-127. At a minimum, the district court's decision to grant summary judgment on the basis of the revised deal without permitting the government any opportunity for discovery was error.[50]

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[49] Opp. 33, R-105, JA 926; Donaldson Aff. 1-2, Counterstatement, ex. 28, R-108, JA 1083-84.

[50] As Southern Belle recognized, Southern Belle Reply 4-6, R-127, non-acquiring parties can be joined as defendants in a Section 7 case if they are necessary for relief, *see, e.g., United States v. Coca-Cola Bottling Co. of L.A.*, 575 F.2d 222, 227-31 (9th Cir. 1978). The district court granted Southern Belle summary judgment based on its conclusion that "Southern Belle's presence in this

CONCLUSION

This Court should reverse the district court's grant of summary judgment to DFA and remand for trial. Because the district court granted summary judgment to Southern Belle on the ground that DFA was not liable, that judgment should also be reversed.

Respectfully submitted.

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case is not required for complete relief" because DFA was entitled to summary judgment. Op. 15, JA 91. Thus, the grant of summary judgment in favor of Southern Belle must also be reversed if this Court reverses the entry of summary judgment in DFA's favor.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND LENGTH LIMITATIONS

I, James J. Fredricks, certify that this brief complies with the type-volume limitations of Pursuant to Fed. R. App. P. 32(a)(7)(B) because it contains 9151 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), as counted by the Word Perfect 10.0 word processor program used to prepare it.

I, James J. Fredricks, further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word Perfect 10.0 word processor program in 14 point Times New Roman.

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ADDENDUM
Government's Designation of the Parts of the Record for Inclusion in the Joint Appendix pursuant to Sixth Circuit Rule 28(d)

1. District Court Docket Sheet

2. Judgment, R-160 (filed Aug. 31, 2004)

3. Opinion and Order, R-159 (filed Aug. 31, 2004)

4. Complaint, R-1 (filed April 24, 2003)

5. Amended Complaint, R-65 (May 6, 2004)

6. Notice of Appeal, R-175 (filed Oct. 28, 2004)

7. Motion for Summary Judgment by Defendant DFA, R-95 (filed July 20, 2004)

8. Motion for Summary Judgment by Defendant Southern Belle, R-100 (filed July 20, 2004)

9. Complaint in *United States v. Suiza Foods Corp., et al.*, CV. No. 99-CV-130 (E.D. Ky.), Plaintiff United States' Motion and Memorandum in Support thereof for Partial Summary Judgment as to Defendant Dairy Farmers of America's Estoppel and Waiver Affirmative Defenses, exhibit 5, R-24 (filed January 12, 2004)

10. Final Judgment in *United States v. Suiza Foods Corp., et al.*, CV. No. 99-CV-130 (E.D. Ky.), Plaintiff United States' Motion and Memorandum in Support thereof for Partial Summary Judgment as to Defendant Dairy Farmers of America's Estoppel and Waiver Affirmative Defenses, exhibit 6, R-24 (filed January 12, 2004)

11. Deposition of Robert Allen (Mar. 9, 2004), Plaintiffs' Statement of Undisputed Facts for its Motion for Partial Summary Judgment on DFA's "Control" Affirmative Defense ("Statement"), exhibit A, R-84 (filed July 2, 2004) (submitted under seal in the district court)

12. Deposition of Gerald Bos (Mar. 19, 2004), Statement, exhibit D, R-84 (filed July 2, 2004) (submitted under seal in the district court)

13. Deposition of David A. Geisler (June 17, 2004), Statement, exhibit E, R-84 (filed July 2, 2004) (submitted under seal in the district court)

14. Deposition of Gary Hanman (April 14, 2004), Statement, exhibit F, R-84 (filed July 2, 2004) (submitted under seal in the district court)

15. Deposition of Allen Meyer (April 16, 2004), Statement, exhibit H, R-84 (filed July 2, 2004) (submitted under seal in the district court)

16. Deposition of David Meyer, Statement, exhibit I, R-84 (filed July 2, 2004) (submitted under seal in the district court)

17. National Dairy Holdings, LP: Second Amended and Restated Agreement of Limited Partnership, Statement, exhibit N, R-84 (filed July 2, 2004) (submitted under seal in the district court)

18. Revised and Restated Limited Liability Company Agreement of Southern Belle Dairy Co., LLC, Statement, exhibit O, R-84 (filed July 2, 2004) (submitted under seal in the district court)

19. Purchase Agreement, Statement, exhibit P, R-84 (filed July 2, 2004) (submitted under seal in the district court)

20. Dairy Management LLC First Amended and Restated Limited Liability Company Agreement (April 3, 2004), Statement, exhibit R, R-84 (filed July 2, 2004) (submitted under seal in the district court)

21. Second Amended and Restated Limited Liability Co. Agreement of Southern Belle Dairy Co., LLC, Statement of Material Facts Not in Dispute by Defendant DFA, tab 9, R-99 (filed July 20, 2004) (submitted under seal in the district court)

22. Plaintiffs' Opposition to DFA's Motion for Summary Judgment and Reply to DFA's Opposition to Plaintiffs' Motion for Partial Summary Judgment, R-105 (filed July 28, 2004) (submitted under seal in the district court)

23. Report of Edward B. Rock, Plaintiffs' Counterstatement to Defendant Dairy Farmers of America, Inc.'s Statement of Material Facts Not in Dispute ("Counterstatement"), exhibit 1, R-108 (filed July 28, 2004) (submitted under seal in the district court)

24. Deposition of Edward B. Rock, Counterstatement, exhibit 2, R-108 (filed July 28, 2004) (submitted under seal in the district court)

25. Deposition of Gary Hanman (July 16, 2002), Counterstatement, exhibit 5, R-108 (filed July 28, 2004) (submitted under seal in the district court)

26. Secured Line of Credit Note, Counterstatement, exhibit 25, R-108 (filed July 28, 2004) (submitted under seal in the district court)

27. Declaration of John D. Donaldson, Counterstatement, exhibit 28, R-108 (filed July 28, 2004)

28. Dairy Management LLC Limited Liability Company Agreement (April 5, 2001), Counterstatement, exhibit 29, R-108 (filed July 28, 2004) (submitted under seal in the district court)

29. Sixth Amendment of the Amended and Restated Agreement of Limited Partnership of NDH, Counterstatement, exhibit 31, R-108 (filed July 28, 2004) (submitted under seal in the district court)

30. Rebuttal Report of Frank A. Scott, Counterstatement, exhibit 33, R-108 (filed July 28, 2004) (submitted under seal in the district court)

31. Expert Report of Frank A. Scott, Counterstatement, exhibit 36, R-108 (filed July 28, 2004) (submitted under seal in the district court)

32. Expert Report of John P. Johnson, Counterstatement, exhibit 37, R-108 (filed July 28, 2004) (submitted under seal in the district court)

33. Deposition of G. Maurice Binder (Dec. 17, 2003), Counterstatement, ex. 41, R-108 (filed July 28, 2004)

34. Second Supplemental Report of Frank A. Scott at Second Supplemental

Exhibit 1, Counterstatement, exhibit 42, R-108 (filed July 28, 2004) (submitted under seal in the district court)

35. Declaration of Rick Fehr, Counterstatement, exhibit 48, R-108 (filed July 28, 2004) (submitted under seal in the district court)

36. Declaration of Mike Nosewicz, Counterstatement, exhibit 55, R-108 (filed July 28, 2004) (submitted under seal in the district court)

CERTIFICATE OF SERVICE

I, James J. Fredricks, hereby certify that I caused to a copy of the accompanying FINAL BRIEF FOR THE APPELLANTS UNITED STATES OF AMERICA AND COMMONWEALTH OF KENTUCKY to be sent via Federal Express on the 15th of March, 2005 to the following:

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