~~**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
REPLY BRIEF FOR THE APPELLANTS UNITED STATES OF AMERICA AND COMMONWEALTH OF KENTUCKY

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INTRODUCTION

In its opening brief, the government argued that the district court erred in granting summary judgment for defendants without addressing either the government's challenge to the arrangement in effect until after the close of discovery or the remedies the government sought to restore competition impaired by that arrangement. In response, Dairy Farmers of America ("DFA") asks this Court to reverse the burden of proof as to mootness and to rule *de novo* that the injunctive relief the government seeks would be unavailable, although the district court never reached that question. Such a rule would contravene well-established law and impair public antitrust enforcement.

The government also argued that the district court failed to acknowledge the largely undisputed facts presented by the government to show that the effect of the acquisition, even as revised, "may be substantially to lessen competition" in violation of Section 7 of the Clayton Act. 15 U.S.C. § 18. DFA's response is to focus on a straw man—the absence of evidence that DFA participates in the day-to-day operations of Southern Belle—and to recite the evidence that DFA submitted on that point. Section 7 does not require a showing of day-to-day involvement in the acquired firm's business, and such involvement is not needed to lessen competition in this case. Summary judgment is proper only if there is no

genuine issue of material fact, viewing "the evidence, all facts, and any inferences that may be drawn from the facts in the light most favorable to the nonmoving party." *Lewis v. Philip Morris Inc.*, 355 F.3d 515, 523 (6th Cir.), *cert. denied*, 125 S. Ct. 61 (2004) (citation and quotation marks omitted).

The government did offer evidence that the ownership and control structure created by the acquisition—including DFA's substantial ownership interests in Southern Belle and Flav-O-Rich, the powerful financial incentives to promote DFA's interests shared by its long-time business allies to whom DFA gave the remaining ownership interests and operational authority, and DFA's significant powers, including its role as financier—cause Southern Belle and Flav-O-Rich to conform their actions to DFA's interests. The essential facts of this structure have not been disputed, and experts in economics, corporate governance, and the dairy industry supported the inferences drawn from them. This evidence was ample to withstand summary judgment, and DFA barely addresses any of it.

While the government was not required to do so, its economic expert also presented statistical evidence suggesting that the acquisition had caused an increase in school milk prices. DFA disputed this evidence and asked the district court to exclude it, but the court neither ruled on the motion nor addressed this evidence. DFA renews its evidentiary quarrels in this Court, but its arguments are

misdirected and unpersuasive, and should more appropriately be considered by the district court on remand.

ARGUMENT

I. THE DISTRICT COURT ERRED IN NOT RULING ON THE ORIGINAL DFA–SOUTHERN BELLE DEAL

The government argued in its opening brief that the district court's unexplained failure to rule on the legality of the arrangement in effect for over two years improperly denied the government a remedy for the acquisition's anticompetitive effects and constituted reversible error. Gov't Br. 20-25. DFA offers little in response.

The district court did not find, and DFA did not argue below, that the government's challenge to the original deal was moot. As the government's opening brief explained, any effort to justify the district court's omission on mootness grounds would be barred by well-established precedent. *Id.* at 23-25. DFA does not explicitly argue that the government's challenge was moot, but nonetheless contends that the government presented "no evidence that DFA has any intention of reinstating the terms of the original operating agreement." DFA Br. 45. DFA offers no reason independent of the government's enforcement action for the revisions, however, nor does it even represent that it does not intend

to reinstate the original agreement. To the contrary, it emphasizes that the revised agreement makes express provision for further amendment, which possibly includes reinstating the original agreement. *Id.* at 45-46.

DFA cannot avoid the well-established principles governing mootness, which place the burden on DFA to make it absolutely clear that the allegedly illegal behavior will not recur, and instead make it the government's burden to prove that DFA is likely to reinstate the original deal. The "heavy burden of demonstrating mootness rests on" DFA, "the party claiming mootness." *Ammex, Inc. v. Cox,* 351 F.3d 697, 705 (6th Cir. 2003). This rule prevents defendants from avoiding enforcement actions by temporarily modifying their conduct. "The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement." *United States v. W.T. Grant Co.,* 345 U.S. 629, 632 (1953).[1]

DFA's alternative argument, that no remedy would have been proper for the unlawful original arrangement, is also unsound. DFA argues that the revised deal

[1]DFA's promise to notify the government thirty days before it again changes its arrangement (DFA Br. 44-46) does not justify an exception to this well-established principle. Even if the promise were enforceable, the government would be put to the expense of beginning a new enforcement action (which could also be blocked, under DFA's theory, by yet another last-minute change), while DFA enjoyed the benefits of an unlawful arrangement.

is lawful, so there is no need to remedy the original violation. DFA Br. 46-48. But the revised deal is not lawful, *see* pp. 8-19 *infra* and Gov't Br. 31-37, and even if it were, the government would be entitled at least to an injunction against resumption of the original arrangement. *See United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 331-32 (1961).

Moreover, relief in a government antitrust case is not limited to an injunction prohibiting the unlawful conduct. *See* Gov't Br. 21-23. Rather, the court "has the duty to compel action . . . that will, so far as practicable, cure the ill effects of the illegal conduct." *United States v. United States Gypsum Co.*, 340 U.S. 76, 88 (1950). The revised deal does not allow school districts to rescind milk contracts entered into before the revisions, the relief sought by the government to remedy the effects of the original deal.[2] *Cf. United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 408-09 (S.D.N.Y. 2001), *aff'd*, 344 F.3d 229 (2d Cir. 2003), *cert. denied*, 125 S.Ct. 45 (2004) (third-party banks affected by illegal and anticompetitive credit card rules given rescission option). The revised deal also fails to divest DFA of its illegally acquired interest in Southern Belle. *See California v. American Stores Co.*, 495 U.S. 271, 280-81 (1990) ("[I]n

[2]Defendants' objections to the rescission remedy (DFA Br. 47-48, Southern Belle Br. 5-9) are addressed at pages 22-25 below.

Government actions divestiture is the preferred remedy for an illegal merger or acquisition."); *du Pont*, 366 U.S. at 331-34 ("divestiture only of voting rights" is an inadequate remedy and requiring "complete divestiture" of partial interest).

DFA is wrong to the extent it seeks to excuse the district court's failure to rule on the government's challenge to the original deal based on any proposition that, as a matter of law, no relief could be granted. And to the extent that DFA urges this Court to determine that no relief is necessary, as an equitable matter, to restore competition, its argument is premature. The district court never reached that question, which is properly considered only after trial.

Finally, DFA's implicit argument that the district court was not obliged to address the original deal separately because the government did not prove that DFA was involved in the "day-to-day business" of Southern Belle under either arrangement, DFA Br. 21-23, is also unsound. Before the revisions, DFA had a 50% voting interest and extensive veto powers, and it could block capital expenditures or contracts valued over $150,000, disapprove bonuses and salary increases, and completely control the dairy's raw milk procurement. Gov't Br. 10-13 & n.24, 27-28. Analyzing these and other DFA powers, the government's expert on corporate governance, Professor Edward Rock, concluded that DFA's influence and control over Southern Belle would produce anticompetitive effects

on Southern Belle's school milk bidding without any involvement in the dairy's "day-to-day business." DFA invites this Court to reject the opinions of Professor Rock, on the grounds that he "had no factual basis to conclude that DFA's ownership might influence the sale of milk to schools" because he had not examined Southern Belle's internal procedures "regarding the sale of milk to schools," DFA Br. 26, but the underlying facts of the DFA-Southern Belle relationship are undisputed. Because the district court failed to address the original deal, the district court made no finding as to the existence of a disputed issue of fact concerning the effect of DFA's powers on the likelihood of a substantial lessening of competition resulting from DFA's acquisition.

Moreover, neither DFA nor Bob Allen needs to be directly involved in, or have detailed information on, the bidding for school milk contracts for a reduction in competition to occur. Rather, a policy of not competing for the other dairy's existing school milk customers could be articulated at the highest levels and implemented below, as Southern Belle and Flav-O-Rich had successfully done under prior ownership for over a decade. Gov't Br. 6.

II. THE GOVERNMENT RAISED A TRIABLE ISSUE AS TO THE LEGALITY OF BOTH THE ORIGINAL AND REVISED DEALS

A. DFA's Acquisition Created a Mechanism that Lessens Competition

The district court held that the government failed to demonstrate a "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 Bell." Op. 13, JA 89. The government, however, made that mechanism clear: the acquisition allowed DFA to place Southern Belle under the control of Robert Allen, who had a long and highly profitable history with DFA. DFA also gained the opportunities to punish and reward Southern Belle as the supplier of raw milk and the sole provider of debt financing. Gov't Br. 9-11, 27-29, 31-34. Similarly, NDH/Flav-O-Rich was in the hands of Allen Meyer, who also has a profitable past with DFA, and DFA also financed NDH. *Id.* at 8-9, 27-28, 31-33. Consequently, there is a reasonable probability that Southern Belle and NDH will act essentially as if DFA had full ownership and control over them and thus that the acquisition would substantially lessen competition between them in the sale of milk to schools. *Id.* at 26-30.

DFA does not specifically contest any fact on which the government relied for this mechanism, or the logic of any argument the government made as to this

mechanism. Indeed, it hardly mentions this mechanism except to dismiss it as "speculation" that "does not suffice to support a Section 7 claim." DFA Br. 20. But the government's evidence was not speculation, and DFA wrongly implies that Section 7 demands a high degree of confidence that an acquisition will substantially lessen competition. "All that is necessary" for a violation of Section 7 is for an acquisition to create "an appreciable danger" of anticompetitive effects "in the future." *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986) (Posner, J.). A "high probability" of anticompetitive effects need not be shown: "[T]he statute requires a prediction, and doubts are to be resolved against the transaction." *FTC v. Elders Grain, Inc*., 868 F.2d 901, 906 (7th Cir. 1989) (Posner, J.). Section 7's "aim was primarily to arrest apprehended consequences of intercorporate relationships *before* those relationships could work their evil." *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 597 (1957) (emphasis added).

DFA also ignores the case law establishing that 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); *cf.* DFA Br. 36-44, 46-47. "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). So long as there is the potential for anticompetitive effects, it is immaterial how an acquisition brings it about.

DFA insists that the acquisition poses no anticompetitive risk because DFA has no involvement in the "day-to-day business" of Southern Belle, DFA Br. 20-23, and because there is "no evidence that DFA has controlled or influenced Southern Belle's school milk business in the past, or could control or influence it in the present or future," *id.* at 18. But involvement in a company's day-to-day operations is not required for control over its policies, which is why Section 7 cases involving 100% stock acquisitions never inquire into involvement in the acquired firm's day-to-day operations.

DFA's argument is inconsistent with the logic of a fundamental precept of antitrust law that "a parent and a wholly owned subsidiary . . . share a common purpose whether or not the parent keeps a tight reign over the subsidiary." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984). This is true even if the subsidiary has "separate control of its day-to-day operations, separate officers, separate corporate headquarters, and so forth." *Id.* at 772 n.18. Likewise, a "division within a corporate structure [necessarily] pursues the

common interests of the whole rather than interests separate from those of the corporation itself." *Id.* at 770.

Moreover, this logic has been applied even in cases that did not involve complete common ownership. *See City of Mt. Pleasant, Iowa v. Associated Elec. Coop., Inc.*, 838 F.2d 268 (8th Cir. 1988) (independent electric power cooperatives under the same umbrella organization); *Century Oil Tool, Inc. v. Prod. Specialties, Inc.*, 737 F.2d 1316, 1317 (5th Cir. 1984) (corporations with the same three owners); *Cmty. Publishers, Inc. v. Donrey Corp.*, 892 F. Supp. 1146, 1171-72 (W.D. Ark. 1995), *aff'd sub nom. Cmty. Publishers, Inc. v. DR Partners*, 139 F.3d 1180 (8th Cir. 1998) (corporations controlled by different members of same family). To be sure, this logic would not apply where one firm has a small equity investment in another, but DFA has a 50% equity interest in Southern Belle and is its sole and substantial lender. Gov't Br. 9-13, 28-30. And DFA installed as Southern Belle's co-owner and operator DFA's long-time ally Robert Allen, who has a long and profitable association with DFA and a strong financial interest in running Southern Belle to please DFA. *Id.*

These facts make out a prima facie violation of Section 7, especially in view of the Supreme Court's unambiguous holding that Section 7 does not require that an acquisition confer control over the acquired party for it to violate the law.

Denver & Rio Grande W. R.R. v. United States, 387 U.S. 485, 501 (1967); *see also United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 173-74 (1964) (holding that Section 7 could be violated by the formation of a joint venture which eliminated potential competition between the joint venture partners, although neither partner could exercise any control or influence over the other).

United States v. International Harvester Co., 564 F.2d 769 (7th Cir. 1977), relied on by the defendant, DFA Br. 38, 41, is not to the contrary. The court was willing to "assum[e]" that International Harvester's acquisition of a 39% interest in Steiger Tractor fell within the presumption of *United States v. Philadelphia National Bank*, 374 U.S. 321, 363 (1963), but it nevertheless ruled against the government on grounds irrelevant in the present case. 564 F.2d at 773-80. In passing, the court observed indications of Harvester's lack of control over Steiger, but only in the context of its central finding that Harvester's investment was the "only practicable source" of funds without which Steiger would be seriously handicapped as a competitor. *Id.* at 777, 779. DFA made no similar claim, and the district court in this case made no similar finding.

B. The Government's Evidence Raises a Triable Issue of Fact

DFA insists that the government "did not, and could not present *facts* that would indicate its theory required a trial," DFA Br. 7, but the uncontested facts

and the reasonable inferences from them, supported by expert testimony, establish the mechanism required for a Section 7 violation. "Southern Belle and NDH are managed by Bob Allen and Allen Meyer, respectively." DFA Br. 11. And while neither personally formulates bids on school milk contracts, DFA provides no basis for doubting that Southern Belle and NDH are run exactly as their chief executives, Allen and Meyer, see fit. It is uncontested that Allen and Meyer are long-time DFA allies and have earned millions of dollars through their relationships with DFA. Moreover, DFA does not dispute that Allen and Meyer understand that it is in the mutual interest of DFA, NDH, and Southern Belle for NDH and Southern Belle to avoid competition.[3] Contrary to DFA's assertion, *id.* at 25-26, these facts provided an ample foundation for the opinions of the government's expert economist, Professor Frank Scott, and its corporate governance expert, Professor Edward Rock. These facts and the expert testimony also support an inference of a reasonable probability of an anticompetitive effect from the acquisition.

DFA has no basis for its contention that the district court "performed [an]

[3]DFA does assert that the government's experts were not "competent to offer . . . an opinion" on this point, DFA Br. 29, but they clearly drew on expertise in economics and corporate governance, which DFA does not deny that they possessed, and they had an ample foundation in the undisputed facts.

assessment" of the testimony of the government's experts and implicitly excluded it. *See* DFA Br. 28-32.[4] The district court's decision never mentioned the government's experts or DFA's motions challenging the admissibility of the experts' testimony, let alone ruled on the admissibility or sufficiency of their testimony.[5] Thus, DFA's analogy to *Target Market Publishing, Inc. v. ADVO, Inc.*, 136 F.3d 1139, 1142-43 (7th Cir. 1998) (DFA Br. 31-32), fails because in that case the court of appeals found specific language in the district court's order

[4]Defendants did not make a *Daubert* challenge to the government's dairy industry expert, John Johnson, who described how DFA's role as the dairies' raw milk supplier and its veto powers could impact the dairies' competitiveness. *See* Expert Report of John P. Johnson 5-6, 21-23, Plaintiffs' Counterstatement to Defendant DFA's Statement of Material Facts Not in Dispute ("Counterstatement"), ex. 37, R-108, JA 1218-19, 1234-36.

[5]DFA erroneously accuses the government of inviting "this Court to hear argument on DFA's motion to strike" the expert testimony (DFA Br. 32 n.77). This motion is properly decided in the first instance by the district court. *See Lewis v. Philip Morris, Inc.*, 355 F.3d 515, 533 n.27 (6th Cir.), *cert. denied*, 125 S.Ct. 61 (2004). DFA's attempt to incorporate by reference the arguments in its motions to strike (DFA Br. 32 n.77) is improper. *See Northland Ins. Co. v. Stewart Title Guar. Co.*, 327 F.3d 448, 452-53 (6th Cir. 2003). And it inappropriately designates these motions' supporting memoranda of law and numerous other memoranda of law without "independent relevance" for inclusion in the joint appendix in violation of 6th Circuit Rule 30(f)(1)(E) and Federal Rule of Appellate Procedure 30(a)(2). *See* DFA Br. 53-56. If the Court considers these memoranda, it should also consider the government's responsive memoranda, which are in the record though not in the joint appendix.

that characterized the disputed testimony as "mere assumptions."[6] Here, in contrast, nothing in the district court's order could possibly be interpreted to assert any basis for excluding these experts' testimony. Presumably, the court viewed this testimony as insufficient to raise a triable issue based on its erroneous belief that involvement in the day-to-day operations of the acquiring firm was a *sine qua non* of a Section 7 violation. Op. 13, JA 89.

The government also produced statistical evidence generated by Professor Scott suggesting that DFA's acquisition had already increased school milk prices. *See* Gov't Br. 13-14. Of course, evidence of actual anticompetitive effects was not required. Moreover, "[p]ost-acquisition evidence that is subject to manipulation by the party seeking to use it is entitled to little or no weight." *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1384 (7th Cir. 1986).[7] Conversely, evidence not

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[6]In the other cases cited by DFA, the district courts—unlike the district court here—gave express and reasoned explanations for rejecting expert testimony. *See Kalamazoo River Study Group v. Rockwell Int'l Corp.*, 171 F.3d 1065, 1072 (6th Cir. 1999); *Williams v. Ford Motor Co.*, 187 F.3d 533, 542-44 (6th Cir. 1999); *Evers v. General Motors Corp.*, 770 F.2d 984, 986-87 (11th Cir. 1985).

[7]*See also United States v. General Dynamics Corp.*, 415 U.S. 486, 505 (1974) ("[T]he mere nonoccurrence of a substantial lessening of competition in the interval between acquisition and trial does not mean that no substantial lessening will develop thereafter; the essential question remains whether the probability of such *future* impact exists at the time of trial."); *FTC v. Consol. Foods Corp.*, 380 U.S. 592, 598 (1965) ("If the post-acquisition evidence were given conclusive weight or allowed to override all probabilities, then acquisitions would go forward

subject to the plaintiff's control, like the school bidding data that Professor Scott statistically analyzed, that shows a "post-acquisition anticompetitive effect cements the plaintiff's case." *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 276 (7th Cir. 1981).

DFA argues, as it did in district court, that Professor Scott's statistical evidence is inadmissible because his methodology could be improved upon. DFA Br. 26-27. But the district court did not grant DFA's motion to exclude this evidence,[8] and DFA does not argue that Professor Scott's analysis was inadmissible for failure to employ "the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).[9] DFA objects to the fact that the government did much of the support work for Professor Scott, but it provides no hint why that might render the evidence inadmissible. Professor Scott determined

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willy-nilly, the parties biding their time . . . .").

[8]The court granted DFA's summary judgment motion just one week after the government filed its opposition to DFA's motion to exclude.

[9]A "minor flaw in an expert's reasoning or a slight modification of an otherwise reliable method will not render an expert's opinion *per se* inadmissible. 'The judge should only exclude the evidence if the flaw is large enough that the expert lacks "good grounds" for his or her conclusions.'" *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002) (quoting *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 746 (3d Cir. 1994)).

which data to analyze and supervised the collection and assembly of that data by government economists and research assistants, including checking the data for accuracy.[10] And DFA asserts that Professor Scott "destroyed evidence" (DFA Br. 26-27), without explaining that, consistent with accepted professional practice, all he did was not retain preliminary results that used preliminary data, were never put on paper, and formed no part of the basis for his opinions.[11]

Contrary to DFA's assertion, Professor Scott did not testify that he was unaware "of any facts identifying any 'mechanism' used by DFA to assert control or influence over Southern Belle." DFA Br. 28. Rather, he testified that he was aware of "no specific instance" of interactions between persons at DFA and persons at Southern Belle.[12] Such interactions need not play any role in the mechanism the government relies upon and, in any event, are not required for "an appreciable danger" of anticompetitive effects "in the future." *Hospital Corp. of America*, 807 F.2d at 1389.

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[10]Declaration of Frank A. Scott, Jr. ("Scott Declaration") ¶ 8, at 2, Plaintiffs' Memorandum in Opposition to Defendants' Motion to Exclude Testimony of Frank A. Scott, Jr., ex. A, R-158.

[11]Scott Declaration ¶¶ 9-12, at 2-3.

[12]Deposition of Frank A. Scott, Jr. (July 13, 2004) 99, Defendants DFA's and Southern Belle's Memorandum of Law in Support of Motion to Exclude Testimony of Plaintiffs' Expert Frank A. Scott, Jr., ex. A, R-141, JA 1451.

DFA cites Professor Scott's testimony for the proposition that the government "presented no evidence that DFA's investments have had any adverse effect on the sale of milk to schools *anywhere or at any time*." DFA Br. 10-11. But the cited testimony indicates only that Professor Scott had no evidence on DFA joint ventures other than NDH and Southern Belle, and that he was aware of no specific actions DFA had taken to dictate Southern Belle's school milk bids.[13] Again, DFA is simply wrong to assert that such actions are required to violate Section 7.

Finally, DFA makes much of the alleged concession by the government, through the testimony of Professor Scott in a Rule 30(b)(6) deposition, "that there was no evidence that competition had been eliminated." DFA Br. 15.[14] But there

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[13]Deposition of Frank Scott (April 26, 2004) 51, 68-72, 77, 88-89, 115-16, Defendants' Opposition to Plaintiffs' Motion to Exclude Evidence Relating to Recent Revisions to the Southern Belle and NDH Operating Agreements, ex. A, R-162, JA 1782, 1786-90, 1791, 1798-99, 1805-06.

[14]DFA cites to page 51 of Scott's April 26, 2004 deposition by citing to exhibits that, while containing portions of that deposition, do not contain this page. *See* DFA Br. 11 n.28 (citing exhibit A to Defendants' Opposition to Plaintiffs' Motion to Exclude Evidence Relating to Recent Revisions to the Southern Belle and NDH Operating Agreements, R-162, and exhibit 2 to Defendant DFA's Statement of Material Facts Not in Dispute, R-99); DFA Br. 15 n.48 (citing exhibit A to Defendant DFA's Memorandum in Support of Motion for Sanctions and to Exclude Evidence, R-72). This page, however, is found in exhibit 1 to Defendant Southern Belle Dairy Co., LLC's Reply to Plaintiffs' Opposition to Defendant's Motion for Summary Judgment, R-127, and is thus

was no such "concession." Professor Scott did not testify as DFA asserts; rather, he testified that he did not know what evidence of anticompetitive effects the government had when it filed its complaint.[15]

C. The Government Was Entitled to Discovery on the Revisions to the Deal

DFA defends the district court's implicit denial of the government's request for Federal Rule of Civil Procedure 56(f) discovery related to the newly revised deal by arguing—for the first time on appeal—that such discovery "was unnecessary." DFA Br. 48. Absent exceptional circumstances, this Court "will not consider arguments raised for the first time on appeal." *Bailey v. Floyd County Bd. of Educ.*, 106 F.3d 135, 143 (6th Cir. 1997). In the district court, DFA never mentioned—let alone opposed—the government's discovery request, and DFA does not claim any exceptional circumstance justifying initial consideration of DFA's argument here.

DFA's defense of the district court's implicit denial of discovery is also substantively mistaken. DFA claimed that the revised deal was materially

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properly a part of the record on appeal. For the Court's convenience, the government includes page 51 in the joint appendix with the exhibits mistakenly cited by DFA, JA 156, 731, 1781.

[15]Deposition of Frank Scott (April 26, 2004) 50-51, Defendant DFA's Memorandum in Support of Motion for Sanctions and to Exclude Evidence, ex. A, R-72 JA 155-56.

different from the old arrangement.[16] The government had no way to know whether there were unwritten side deals or interpretations of the provisions relevant to the issues in the case. It made a timely request for discovery, and it set forth explicitly the pertinent areas of proposed inquiry.[17] The government thus fully met the requirements of Rule 56. *See Cacevic v. City of Hazel Park,* 226 F.3d 483, 488 (6th Cir. 2000). DFA's response is simply to repeat its argument that DFA's ownership interest in Southern Belle cannot violate Section 7 because DFA "had not and could not involve itself in day-to-day operations" of Southern Belle, and to argue that no discovery was necessary because the revised arrangement did not increase its power to do so. DFA Br. 49. As we have shown, *see* pp. 6-17, *supra*, DFA's legal premise is unsound. The requested Rule 56 discovery related to the revised arrangements was necessary and appropriate, and the district court's failure to permit it was an abuse of discretion.

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[16]DFA's Memorandum in Support of its Motion for Summary Judgment 2, 11-12, R-97, JA 672, 681-82.

[17]Declaration of John D. Donaldson, Counterstatement, ex. 28, R-108, JA 1083; Plaintiffs' Opposition to DFA's Motion for Summary Judgment and Reply to DFA's Opposition to Plaintiffs' Motion for Partial Summary Judgment 33, R-105, JA 926.

III. THE DISTRICT COURT WRONGLY GRANTED SUMMARY JUDGMENT TO SOUTHERN BELLE

The district court agreed with Southern Belle that, as the successor of the acquired company, it did not acquire anything, and thus that "Section 7 liability cannot fall as a matter of law" on it. Op. 14-15, JA 90-91. The government does not challenge that determination. The district court, however, also correctly held that a non-acquiring firm may nonetheless be made a defendant if its presence is required for complete relief. *Id.* at 15, JA 91; *see* Gov't Br. 37 n.50; *see generally United States v. Coca-Cola Bottling Co. of L.A.*, 575 F.2d 222, 227-31 (9th Cir. 1978).

The court found that Southern Belle's presence was not required for complete relief only because "Defendant DFA has been found to be entitled to summary judgment on all claims brought against it." Op. 15, JA 91. The government's opening brief argued that "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." Gov't Br. 37 n.50; *see also id.* at 19-20. Accordingly, the government specified in its Conclusion: "Because the district court granted summary judgment to Southern Belle on the ground that DFA was not liable, that judgment should also be reversed." *Id.* at 38.

Southern Belle asserts that the government's argument was not given sufficient prominence in the brief and thus is waived. Southern Belle Br. 4-5. This Court, however, does not have a rule forbidding the placement of any argument in a footnote, and there was hardly reason to fear that the point would be overlooked by a reader in this case, given the three separate and explicit references, two of which were in text. Gov't Br. 19, 37 n.50, 38. When, as here, the argument is a concise yet definitive explanation of why a one-sentence district court ruling should be reversed, a footnote is an appropriate place for it.

Southern Belle's further argument that summary judgment was proper because, even if the acquisition violates Section 7, there can be no need for any relief directed toward it (Southern Belle Br. 5-9), is also unsound. Although Southern Belle made the argument below, the district court did not base its ruling on it or even mention it. Op. 15, JA 91. And, since the district court did not rely on Southern Belle's further argument, the government was not obliged to refute it in its opening brief. *Cf.* Southern Belle Br. 7. Moreover, the argument is premature, because only after the violation is established and the parties have an opportunity to argue how best to remedy it, can the district court make a sound decision on relief. *Cf. Cmty. Publishers, Inc. v. Donrey Corp.*, 892 F. Supp. 1146, 1174-79 (W.D. Ark. 1995), *aff'd sub nom. Cmty. Publishers, Inc. v. DR Partners*,

139 F.3d 1180 (8th Cir. 1998) (permitting post-trial amendment of complaint to name non-acquiring party as defendant and ordering rescission of that party's contract). There is at least a genuine factual dispute on whether Southern Belle is necessary for effective relief and, therefore, retaining Southern Belle as a defendant is appropriate pending determination of that relief. *See United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 608 (1957) (denying dismissal of third parties in Section 7 case because "[i]t seems appropriate that they be retained as parties pending determination by the District Court of the relief to be granted").

To be effective, relief must "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), and it must "pry open to competition a market that has been closed by defendants' illegal restraints," *International Salt Co. v. United States*, 332 U.S. 392, 401 (1947). In this case, an effective remedy may require Southern Belle to divest the Somerset dairy plant and other productive assets to restore competition.

In addition, relief permitting school districts to rescind milk contracts also may be necessary. Contrary to the defendants' assertions (Southern Belle Br. 7-8, DFA Br. 47-48), such relief would not be unprecedented, would not leave Flav-O-Rich as the sole source of milk, and would not affect only expired contracts. In

United States v. Visa U.S.A., Inc., 163 F. Supp. 2d 322, 408-09 (S.D.N.Y. 2001), *aff'd*, 344 F.3d 229 (2d Cir. 2003), *cert. denied*, 125 S. Ct. 45 (2004), the district court permitted third party banks to terminate without penalty agreements with the defendant credit card companies whose exclusivity rules violated the antitrust laws. The court recognized that "[w]hile the agreements themselves are not inherently anticompetitive," permitting their rescission was necessary to restore the "competitive landscape." 163 F. Supp. 2d at 408. Permitting the school districts to terminate the contracts, like the banks in *Visa*, may be necessary "to restore competition." *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972) (quotation marks and citation omitted). Moreover, such relief would not grant Flav-O-Rich a monopoly, because the school districts that do rescind their contracts could put them up for bid again. Lastly, while some contracts have expired or will expire, until the illegal acquisition is undone, any contracts bid, including those bid during the course of this litigation and appeal, may be tainted by the anticompetitive arrangement and, therefore, subject to the rescission remedy.

DFA additionally argues that rescission of school milk contracts "would constitute 'punishment,'" DFA Br. 48, but it is hardly punitive to decree that school districts have the opportunity to rebid contracts tainted by the

anticompetitive effects of an illegal acquisition. The only support offered for DFA's assertion is an unexplained citation to *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961), which held that "courts are authorized, indeed required, to decree relief effective to address the violations, whatever the adverse effect of the decree on private interests." *Id.*

CONCLUSION

This Court should reverse the district court's grant of summary judgment and remand for discovery and trial. Even if the Court finds no disputed issue of material fact as to the legality of the arrangements currently in place, this Court should vacate the grant of summary judgment and remand for consideration of whether the original acquisition violated Section 7 and, if it did, what equitable relief is necessary.

Respectfully submitted.

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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 5873 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.

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CERTIFICATE OF SERVICE

I, James J. Fredricks, hereby certify that I caused to a copy of the accompanying FINAL REPLY 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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