IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	
SUIZA FOODS CORPORATION,	)	
d/b/a Louis Trauth Dairy,	)	
Land O' Sun Dairy, and	)	Civil Action No. 99-CV-130
Flav-O-Rich Dairy, and	)	Judge Jennifer Coffman
	)	Filed: 3/18/99
BROUGHTON FOODS COMPANY,	)	
d/b/a Southern Belle Dairy	)	
Defendants.	)	

MEMORANDUM OF UNITED STATES IN SUPPORT OF ITS MOTION FOR PRELIMINARY INJUNCTION

REDACTED VERSION FILED MARCH 24, 1999

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INTRODUCTION

The merger of Suiza Foods Corporation ("Suiza") and Broughton Foods Company ("Broughton") would reunite a business combination that operated as an illegal bid-rigging cartel in South Central Kentucky for ten years, raising prices of milk to schools and school children. The United States brings this action to block that combination.

Two milk processors, Suiza and Broughton, seek to merge. The proposed acquisition will eliminate competition in the sale of milk to schools in parts of Kentucky. This loss of competition is significant because Suiza and Broughton are two of the largest suppliers of milk in these areas. In many school districts, Suiza and Broughton are the only two bidders on the milk contract, and in numerous other districts they are two of only three bidders.

Through this acquisition of Broughton, Suiza would unlawfully gain market power in the sale of milk to school markets, enabling the merged firm to raise prices and to reduce quality of service. In the affected markets, concentration levels will far exceed that which constitute a *prima facie* violation of Section 7 of the Clayton Act, 15 U.S.C. §18. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 361-64 (1963). Accordingly, the proposed acquisition should be enjoined.

Unless restrained by this Court, the defendants propose to consummate the transaction as early as March 20, 1999. (Ex. 1, Letter from Paul T. Dennis to James K. Foster, Jr., dated Feb. 3, 1999). To prevent serious harm to competition and to protect school districts, as well as students and their families who benefit from the competition between the merging firms, the United States has filed a complaint under Section 7 of the Clayton Act. Section 7 provides that:

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock . . . of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create an monopoly.

15 U.S.C. §18. Plaintiff United States submits this Memorandum in support of its Motion for a Preliminary Injunction.

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STATEMENT OF THE CASE

A. The Defendants and the Proposed Transaction

Suiza, a Delaware corporation with headquarters in Dallas, Texas, now owns and operates 37 fluid milk processing plants in the United States. In 1997, Suiza had sales of approximately $1.8 billion. (Ex. 8).[1]

Suiza operates its Kentucky dairy business out of the processing plants in London, Kentucky and Bristol and Kingsport, Tennessee, it acquired in 1998 from Land O' Sun Dairies, and out of the Louis Trauth Dairy in Newport, Kentucky. Using the "Flav-O-Rich," "PET" and "Trauth" brand names, Suiza distributes its products to schools, grocery stores, convenience stores and institutions located primarily within approximately 100 miles from its dairies located in London and Newport, Kentucky and Bristol and Kingsport, Tennessee and primarily within 50 miles of its distribution branches served from those dairies. (Ex. 13, tendered under seal).

Broughton, an Ohio corporation with headquarters in Marietta, Ohio, owns and operates three fluid milk processing plants: Southern Belle in Somerset, Kentucky, London Farms in Port Huron, Michigan, and Broughton's in Marietta, Ohio. In 1997, Broughton had sales of approximately $87 million. (Ex. 11). In Kentucky, Broughton conducts its dairy operations through its plants in Somerset, Kentucky and Marietta, Ohio. Using the "Southern Belle" and "Broughton's" brand names, Broughton distributes its products to schools, grocery stores, convenience stores and institutions located primarily within 100 miles from its dairy and primarily within 50 miles of its distribution branches served from those dairies. (Ex. 13, tendered under seal).

Suiza proposes to acquire all the outstanding stock of Broughton for approximately $110 million. (Ex. 10, tendered under seal). The parties have indicated the intention to consummate this transaction as early as 11:59 p.m., March 19, 1999, at the expiration of a timing agreement between the parties and the United States.

B. The Milk Industry

The milk industry is composed of milk processors (dairies) who purchase raw milk from dairy farmers and agricultural cooperatives. These dairies pasteurize and package the raw milk and then sell the resulting product, known in the industry as "fluid milk," to their distributors or directly to their customers. The primary customers for milk are grocery stores, convenience stores, restaurants, and institutions such as schools and hospitals. Customers are offered milk packaged in gallons, half gallons,

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[1] All numbered exhibits attached to Declaration of James K. Foster in Support of United States Motion For a Preliminary Injuction, March 18, 1999. Many of the exhibits are tendered under seal with an application for a protective order.

quarts, pints and/or half-pints. In order to package milk in half-pints, dairies must have specialized half-pint filler machines. Accordingly, not all dairies offer this size.

Because milk is highly perishable, with a shelf life of approximately 10 days, it must either be immediately stored in the dairies' coolers or distributed to customers who have facilities to store the milk properly. Some dairies use independent distributors to assist in the distribution of the dairies' milk. Independent distributors commonly deliver milk on behalf of a dairy. In some cases, distributors purchase milk from a dairy to sell to customers.

The majority of a dairy's or independent distributor's income is derived from the sale of milk packaged in gallons, half gallons and quarts to its commercial customers. For a dairy that has the capability of packaging milk in half-pint containers, sales to school districts typically range from about five to twenty-five percent of the dairy's or distributor's total sales.[2]

C. The Sale of School Milk

School Districts in South Central Kentucky (the counties listed in Attachment A) provide their students with the option of purchasing breakfast and lunch.[3] Under the federal National School Lunch Program and the School Breakfast Program ("School Meal Programs") of the Food and Nutrition Service of the USDA, these school districts receive federal subsidies for each student to whom breakfast or lunch is served. Students with low family income are eligible for federally funded free or reduced-price meals. (Ex. 47, declaration of Kentucky Department of Education official). School districts that participate in a School Meal Program must offer for sale a half-pint package of milk to every attending student who wants one. (Ex. 47).

As a result, each South Central Kentucky School District (those listed in Attachment B) solicits bids for the delivery of half-pint containers of milk. School districts either solicit such bids themselves or through a buying cooperative of school districts.[4]

School districts and cooperatives typically solicit bids in May and June for the delivery of half-pint containers of milk during the following school year. The winning bidder is required to supply milk

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[2] E.g., Distributor declaration (Ex. 50, tendered under seal) ("Schools represent only about 10% of our business."); competitor deposition at 23, stating that school milk constitutes 5 to 10 percent of its overall business (Ex. 12, tendered under seal); Suiza's Response to Specification 6 of the Department of Justice's Request for Additional Information (Ex. 14, tendered under seal).

[3] See, e.g., Customer declarations (Exs. 44, 40 and 31 tendered under seal).

[4] See, e.g., Customer declarations (Exs. 32 and 44, tendered under seal).

for the following school year.[5] A Kentucky statute mandates that the school district award the contract to the lowest bidder. KY. Rev. Stat. Ann. §45A.365(2) (Banks-Baldwin 1998). A school may nevertheless reject a bid if the vendor is unwilling or unable to meet all of the contract's requirements. For example, schools typically require a vendor to deliver milk to every school located in the district at least every other day, sometimes daily, and require that deliveries be made during particular hours.[6]

D. Prior Collusion on School Milk Sales

Suiza and Broughton are successors to companies that pled guilty to criminal antitrust charges for rigging bids on school milk contracts in Kentucky. In 1992, Southern Belle (acquired by Broughton) pled guilty in the U.S. District Court in the Eastern District of Kentucky, and Flav-O-Rich, Inc. (acquired by Suiza) pled guilty in the U.S. District Court in the Northern District of Georgia (consolidating allegations filed in the Eastern and Western Districts of Kentucky, Eastern District of Tennessee, the Western District of North Carolina and the Northern District of Georgia) to the felony of bid-rigging school milk prices to over 30 county and independent school systems within South Central Kentucky beginning at least as early as the late 1970s and continuing through 1989. See U.S. v. Southern Belle Dairy Co., [1988-1996 Transfer Binder] Trade Reg. Rep. (CCH) ¶45,092, at 44,599 (E.D. Ky. Nov. 13, 1992); U.S. v. Flav-O-Rich, Inc., [1988-1996 Transfer Binder] Trade Reg. Rep. (CCH) ¶45,092, at 44,605 (N.D. Ga. Dec. 22, 1992). These included school systems in the following South Central Kentucky counties: Adair, Barren, Bell, Casey, Clay, Clinton, Cumberland, Garrard, Hart, Jackson, Knott, Knox, Laurel, Lincoln, McCreary, Metcalfe, Perry, Pulaski, Rockcastle, Russell, Taylor, Wayne and Whitley. Southern Belle paid a $375,000 criminal fine and Flav-O-Rich paid $1,750,000.

According to the then President and CEO of Southern Belle, Flav-O-Rich conspired with Southern Belle to raise prices by agreeing to which school districts each company would submit the winning bid. (Ex. 9). No other dairies and no distributors were charged with participating in this conspiracy.

After its bid-rigging prosecution, Southern Belle faced debarment as a seller of school milk under USDA regulations. In 1997, defendant Broughton acquired Southern Belle. Broughton appealed the proposed debarment, filed statements with the USDA, and participated in a USDA hearing. Final USDA action is now pending.

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[5] See, e.g., Customer declarations (Exs. 41 and 35, tendered under seal).

[6] E.g., Customer declaration (Ex. 36, tendered under seal) (district requires daily delivery of school milk to each school in district during school hours); customer declaration (Ex. 44, tendered under seal) (district requires daily delivery at some schools and every other day at remaining schools; milk must be delivered between 6 a.m. and 10 a.m.).

ARGUMENT

I. THE LEGAL STANDARD FOR PRELIMINARY RELIEF HAS BEEN SATISFIED

Pursuant to section 15 of the Clayton Act, in proceedings brought by the United States to prevent the Act's violation, "the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises." 15 U.S.C. §25. Although the Clayton Act does not provide a more specific standard for preliminary relief in such cases, "[t]he failure of Congress to require that the Government show irreparable loss on the application for a preliminary injunction in a Section 7 action, as is the case with a private plaintiff, 15 U.S.C. § 26, indicates the Congressional desire to lighten the burden generally imposed on an applicant for preliminary injunctive relief." United States v. Atlantic Richfield Co., 297 F. Supp. 1061, 1074 n.21 (S.D.N.Y. 1969), aff'd sub nom, Bartlett v. United States, 401 U.S. 986 (1971).

The Sixth Circuit standard for granting preliminary relief requires consideration of four basic factors: (1) whether the plaintiff has shown a likelihood of success on the merits of its actions; (2) whether irreparable harm could result if the court did not issue such relief; (3) whether the issuance of preliminary relief would result in substantial harm to others; and (4) whether the public interest is served by granting the relief. See United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth., 163 F.3d 341, 347 (6th Cir. 1998); Six Clinics Holding Corp., II . Cafcomp Sys, Inc., 119 F.3d 393, 399 (6th Cir. 1997); Washington v. Reno, 35 F.3d 1093, 1099 (6th Cir. 1994). The factors to be reviewed are the same in cases brought under the Clayton Act as in other actions. Christian Schmidt Brewing Co. v. G. Heileman Brewing Co., 753 F.2d 1354, 1356 (6th Cir. 1985) (same four-factor analysis applied to private suit under Clayton Act); United States v. Ivaco, Inc., 704 F. Supp. 1409, 1414 (W.D. Mich. 1989) (same analysis applied to Clayton Act suit initiated by the United States).

Although each of the facts must be considered in assessing a request for preliminary relief, they "do not establish a rigid and comprehensive test." Christian Schmidt Brewing, 753 F.2d at 1356. Rather, "the district court must engage in a realistic appraisal of all the traditional factors weighed by a court of equity." Id. (citations omitted).

The government's application meets the four-factor test in this case. First, the United States can demonstrate a strong likelihood that the proposed transaction may substantially lessen competition in the market for school milk in South Central Kentucky and thus would violate Section 7 of the Clayton Act. Second, once the Government shows a reasonable probability that Section 7 would be violated, "irreparable harm to the public should be presumed." United States v. Siemens Corp., 621 F.2d 499, 506 (2d Cir. 1980); Ivaco, 704 F. Supp. at 1429. Third, although defendants may claim they would suffer financial harm as a result of a delay in closing the transaction, such harm will not outweigh the public's interest in preserving competition. Christian Schmidt Brewing Co. v. G. Heileman

Brewing Co., 600 F. Supp. 1326, 1332 (E.D. Mich.) aff'd, 753 F.2d at 1354 (6th Cir. 1985); Ivaco, 704 F. Supp. at 1430. Fourth, maintenance of the status quo through the issuance of preliminary relief comports with Congress' intent in enacting the Clayton Act, and thus is in the public interest. Gulf & W. Indus., Inc. v. Great Atl. & Pac. Tea Co., 476 F.2d 687, 699 (2d Cir. 1973) (noting that in litigation brought by the United States, any "doubts as to whether an injunction sought is necessary to safeguard the public interest . . . should be resolved in favor of granting the injunction") (citing United States v. First Nat'l City Bank, 379 U.S. 378, 383 (1965)).

II. THE GOVERNMENT CAN SHOW A REASONABLE LIKELIHOOD OF SUCCESS ON THE MERITS UNDER THE STANDARDS ESTABLISHED BY SECTION 7 OF THE CLAYTON ACT

Section 7 prohibits any acquisition "where in any line of commerce or in any activity affecting 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. The purpose of Section 7 is to prevent acquisitions or mergers *before* they create harm. "'The intent [was] to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding.'" Brown Shoe Co. v. United States, 370 U.S. 294, 318 n.32 (1962) (quoting S. Rep. No. 1775, 81st Cong., 2d Sess. 4-5); Fruehauf Corp. v. FTC, 603 F.2d 345, 351 (2d Cir. 1979) ("Requiring a plaintiff to prove that substantial lessening of competition is inevitable would thwart the express intent of Congress to nip anticompetitive practices in the bud before they blossom into a Sherman Act restraint of trade . . . and would run counter to Congress' view that neither the Commission nor the courts should be charged with possession of powers of prevision that no one else has achieved.") (citing Brown Shoe Co., 370 U.S. at 323 n.39). Indeed, application of this "incipiency" standard is particularly relevant given this market's history of collusion.

To establish a Section 7 violation, a "plaintiff need only prove that [the] effect [of the challenged acquisition] '*may be* substantially to lessen competition'" within a relevant market. California v. American Stores Co. 495 U.S. 271, 284 (1990) (quoting 18 U.S.C. §18) (emphasis added). Accordingly, "Section 7 does not require proof that a merger or other acquisition has caused higher prices in the affected market. All that is necessary is that the merger create an appreciable danger of such consequences in the future. A predictive judgment, necessarily probabilistic and judgmental rather than demonstrable . . . is called for." Hospital Corp. of Am. v. FTC, 807 F.2d 1381, 1389 (7th Cir. 1986) (citing Philadelphia Nat'l Bank, 374 U.S. at 362); FTC v. PepsiCo, Inc., 477 F.2d 24, 28 (2d Cir. 1973) (the "Commission here need not establish any actual anticompetitive effects"); Ivaco, 704 F. Supp. at 1414 ("to prevail on its Section 7 claim, the government must establish a *reasonable probability* that the proposed [transaction] *may* substantially lessen competition in the relevant product and geographic market") (emphasis added). Any doubts are to be resolved against the transaction. Philadelphia Nat'l Bank, 374 U.S. at 362-63.

To predict whether an acquisition may substantially lessen competition or tend to create a monopoly, the reviewing court must determine: (1) the "line of commerce" or product market in which to assess the transaction; (2) the "section of the country" or geographic market in which to assess the transaction; and (3) the acquisition's probable effect on competition in the product and geographic markets. See United States v. Marine Bancorporation, Inc., 418 U.S. 602, 618-23 (1974); FTC v. Staples, Inc., 970 F. Supp. 1066, 1072 (D.D.C. 1997); Christian Schmidt Brewing, 600 F. Supp. at 1328; Ivaco, 704 F. Supp. at 1415-1420. Competition is adversely affected when the challenged acquisition results in the creation or enhancement of market power. Market power is the ability profitably to raise price above a competitive level for a period of time. See U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines § 0.1 (1992), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104 (hereinafter "Merger Guidelines").

A. The Government is Likely to Prevail at Trial in Establishing a Relevant Product Market for Purposes of Section 7 of the Clayton Act

1. The Relevant Product Market is Defined by Identifying Those Products that Constrain Each Others' Prices

The relevant product market defines the product boundaries within which meaningful competition exists. Brown Shoe Co., 370 U.S. at 325. Product markets are delineated by "the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." Id.; see also United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 394-399 (1956). The market "must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn; in technical terms, products whose 'cross-elasticities of demand' are small." Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 612 n.31 (1953). The pivotal question in product market definition is thus whether an increase in price for one product would cause a sufficient number of buyers to turn to other products so as to make the price increase unprofitable. United States v. Archer-Daniels-Midland Co., 866 F.2d 242, 246 (8th Cir. 1988). If not, those other products are properly excluded from the relevant product market. Id.

Of course, "[f]or every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range." Times-Picayune Pub. Co., 345 U.S. at 612 n.31; see also United States v. Aluminum Co. of Am., 148 F.2d 416, 426 (2d Cir. 1945) (Hand, J.) ("[S]ubstitutes are available for almost all commodities, and to raise the price [is] enough [for customers] to evoke them."). Thus, it is important to determine the appropriate level of price increase against which to measure the kind of substitution that should define the relevant product market.

This same analytical approach is incorporated in the Department of Justice and Federal Trade Commission 1992 Horizontal Merger Guidelines.[7] The Merger Guidelines take the smallest possible grouping of competing products, here the sale of milk to schools, and ask whether a hypothetical monopolist over that product or group of products would profitably impose "at least a 'small but significant and nontransitory' increase in price." Merger Guidelines at ¶ 1.11. Under the Merger Guidelines, a "small but significant and nontransitory" price increase in most instances comprises an "increase of five percent lasting for the foreseeable future." Id. Accord Consolidated Gold Fields, PLC v. Anglo Am. Corp., 698 F. Supp. 487, 501 (S.D.N.Y. 1988), aff'd in part and rev'd in part sub nom, Consolidated Gold Fields, PLC v. Minorco, SA, 871 F.2d 252 (2d Cir.1989) ("benchmark for including a substitute . . . is that the sales of the substitute rise significantly in response to a non-temporary 5% or more increase in prices);" IIA Areeda, Hovenkamp and Solow, Antitrust Law ¶ 537b (1995) ("We emphasize that the 5 percent test of significance will govern the great preponderance of cases.")

2. The Relevant Product Market is the Sale of School Milk

The sale of milk to schools ("school milk") constitutes the relevant product market for purposes of analyzing the likely effect of the proposed transaction. Milk is recognized by dairies, school systems and government regulators as a distinct product. E.g., 42 U.S.C. §1772(a)(1) (1998) (Congress has deemed it in the public interest "to encourage consumption of fluid milk by children in the United States.") Milk has unique nutritional characteristics and it has a unique flavor and texture. Federal regulations require that schools offer milk at each meal to be eligible for reimbursement under the School Meal Programs. 7 C.F.R. §§ 210.10, 220.8 (1998) (Nutrition standards for lunch and breakfast). Thus, if prices of school milk increased five percent, ten percent or more, this obligation would still require school districts to purchase and offer milk. As detailed in the accompanying declaration,[8] schools in South Central Kentucky that participate in the School Meal Programs receive federal subsidies. These federal programs underwrite all or part of the costs of breakfast and lunch to students of low-income families but only if a half-pint package of milk is offered for sale to every attending student who wants one. If a school district substituted any other beverage for fluid milk, it would not receive the related federal subsidy. (Ex. 47). Accordingly, even if the price of milk rose five to ten percent, school districts would find it more profitable to pay the increase rather than lose the federal subsidy. A typical school district with about 2700 students receives 100 percent reimbursement

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[7] Courts often look to the Merger Guidelines' analytical approach to define markets. See, e.g., Community Publishers, Inc. v. Donrey Corp., 892 F. Supp. 1146, 1153 n.6 (W.D. Ark. 1995) ("It is well recognized that the Merger Guidelines do not have the force of law, but many courts still cite them, and the expert testimony in this case shows that they represent the mainstream economic thinking") (citation omitted), aff'd, 139 F.3d 1180 (8th Cir. 1998); accord FTC v. Illinois Cereal Mills, Inc., 691 F. Supp. 1131 (N.D. Ill.), aff'd, 868 F.2d 901 (7th Cir. 1988).

[8] Ex. 47, at ¶ 4.

for about 50 percent of its meals and partial reimbursement for about 10 percent of its meals. (Ex. 15, "Adair County"). Additionally, school districts will purchase milk only from dairies or distributors who meet the schools' special service requirements. Accordingly, only dairies or distributors which meet these requirements can supply schools.

Schools purchasing milk can turn only to vendors that can provide half-pint containers and meet the schools' specific needs. For example, a typical school milk contract requires a vendor to deliver school milk to every school located in the district at least every other day, sometimes daily, and requires that deliveries be made during particular hours, usually between 6 a.m. and 10 a.m.[9] In addition, most schools require the vendor to provide coolers to store the milk, to rotate the stock and replace the older stock of milk and to clear out the coolers before the weekend or holidays.[10]

These specialized requirements are essential to the school districts. Unlike a commercial establishment, schools in these areas generally do not have the space to store a week's supply of milk. Therefore, they can accept a bid proposal only from a vendor willing to distribute several times during the week.[11] Similarly, the school districts in these areas do not have the capability to accept the milk delivery at a central location and then distribute the milk themselves to each school.[12] Many of these districts are located in rural areas where the district's schools are spread miles apart.[13] The affected school districts can therefore choose only a bidder which is able to provide the services described

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[9] See, e.g., Customer declaration (Ex. 44, tendered under seal) (district requires delivery between 6.am. and 10 a.m.); customer declaration (Ex. 32, tendered under seal) (district requires delivery between 6 a.m. and 9 a.m.)

[10] See, e.g., Customer declarations (Exs. 37 and 35, tendered under seal).

[11] See, e.g., Customer declaration (Ex. 45, tendered under seal) (district has insufficient cooler space to accept delivery less frequently than 3 times a week); customer declaration (Ex. 28, tendered under seal) ("we require deliveries to made to each school in our district four days a week").

[12] See, e.g., Customer declarations (Exs. 39 and 40, tendered under seal).

[13] See, e.g., Customer declaration (Ex. 27, tendered under seal) ("[Our district] is very rural and mountainous. Our district consists of eleven schools with approximately 4,000 students in a one hundred mile radius."); customer declaration (Ex. 29, tendered under seal) ("[Our district] is a rural county in the southern corner of the state . . . . Our district consists of 13 schools with approximately 13,000 students in a 42-mile radius.")

above.[14] An examination of all of the foregoing factors demonstrates that the sale of school milk is a relevant product market.

B. The Government is Likely to Prevail at Trial in Establishing that the Relevant Geographic Market are South Central Kentucky School Districts

A relevant geographic market is an area in which the seller operated, and to which the purchaser can practically turn for supplies. Philadelphia Nat'l Bank, 374 U.S. at 359. If consumers in a given geographic area do not consider products from outside that area as reasonable, practical alternatives, then that geographic area is a relevant geographic market. Hospital Corp. of Am., 807 F.2d at 1388. The Merger Guidelines identify the relevant geographic market as "a region such that a hypothetical monopolist that was the only present or future producer of the relevant product at locations in that region would profitably impose at least a 'small but significant and nontransitory' increase in price, holding constant the terms of sale for all products produced elsewhere." Merger Guidelines at ¶ 1.21.

A relevant geographic markets in which the effect of this merger on competition for the sale of milk to schools can be evaluated is South Central Kentucky and narrower markets contained therein including each of the South Central Kentucky School Districts. The 55 South Central Kentucky School Districts, each of which is a relevant market, are listed in Attachment B.

The relevant area in which the defendants' dairies operate is each school district because each school milk contract is negotiated separately. For all of the South Central Kentucky School Districts, there are only two or three sellers to which buyers can practically turn because they are the only two or three firms that are bidding to supply school milk to those districts.

None of the South Central Kentucky School Districts can practically turn to any other milk source even if prices went up by a small but significant amount. Only dairies and distributors that will deliver to each school within a school district or, in the case of cooperative buying, deliver to each school within a group of districts, will be awarded a school milk contract.

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[14] E.g., Customer declaration (Ex. 41, tendered under seal) ("Any milk bid that does not meet [our] delivery terms and service requirements will be rejected."); customer declaration (Ex. 36, tendered under seal) ("we will not negotiate the delivery terms and service requirements in our milk contracts.").

Moreover, when the Flav-O-Rich/Southern Belle cartel was formed, these were the two firms in the cartel. There were no other dairies in the region, nor any distributors, who were charged in participating in the cartel. Nevertheless, these two dairies were able to raise prices for a decade. If the geographic market includes more firms beyond the geographic vicinity of the defendants' dairies, the cartel that lasted a decade would have been unable to survive. (Ex. 2, Declaration of Sheldon Kimmel, tendered under seal, at ¶ 11, 15).

This historic fact strongly supports the conclusion that each South Central Kentucky School District is a separate geographic market. It also supports the conclusion that Flav-O-Rich's successor -- Suiza -- and Southern Belle's successor -- Broughton --are the two significant participants in each geographic market known collectively as the South Central Kentucky School Districts. In some districts, another firm has been included as a competitor because the firm has bid or intends to bid in these markets. (See Ex. 2, Kimmel Decl., tendered under seal, at ¶ 20); Competitor deposition (Ex. 12, tendered under seal).

Each South Central Kentucky School District is a relevant geographic market, in the sense that its price could be increased without effect on the price in other districts or other customers; for convenience we may refer to the affected districts collectively as the relevant geographic markets.

C. The Government is Likely to Prevail at Trial in Establishing that the Acquisition is Likely to Lessen Competition Substantially

1. Suiza's Acquisition of Broughton in the Highly Concentrated Markets for the Sale of School Milk in South Central Kentucky is Presumptively Illegal

A transaction challenged under Section 7 is *presumed* illegal if the Government can show that the combined entity would have a significant market share in a sufficiently concentrated market. Philadelphia Nat'l Bank, 374 U.S. at 363; FTC v. University Health, 938 F.2d 1206, 1218 (11th Cir. 1991). In Philadelphia National Bank, the Supreme Court held that a merger resulting in a single firm controlling 30 percent of a market in which four firms had 78 percent of the sales was presumptively illegal, calling the merger "*inherently* likely to lessen competition substantially." 374 U.S. at 363-64.

Currently, both parties share the vast majority of the school milk revenues of the South Central Kentucky School Districts. Under the standards set forth in the cases cited above, the transaction is presumptively illegal.

A growing number of courts, have adopted the Merger Guidelines' approach for assessing pre- and post-merger concentration through the use of the Herfindahl-Hirschman Index ("HHI"). See, e.g., FTC v. PPG Indus., Inc., 798 F.2d 1500, 1503 n.4 (D.D.C. 1986) (noting that the Merger Guidelines

provide "a useful illustration of the application of the HHI"); Ivaco, 504 F. Supp. at 1419 n.5. The HHI for a market is calculated by summing the squares of the individual market shares of all firms participating in the market. Merger Guidelines at ¶1.5. Unlike an alternative measure, the "four-firm concentration ratio" (which measures the combined share of the four largest firms as an indicator of market concentration), "the HHI reflects both the distribution of the market shares of the top four firms and the composition of the market outside the top four firms. It also gives proportionally greater weight to the market shares of the larger firms, in accord with their relative importance in competitive interactions." Id.

Under the Merger Guidelines' approach, markets with an HHI below 1,000 are deemed "unconcentrated;" those with an HHI between 1,000 and 1,800 are "moderately concentrated;" and those with an HHI above 1,800 are termed "highly concentrated." Id. at § 1.51. In cases where the post-merger market is "highly concentrated," and an acquisition would result in an increase of more than 100 points in the HHI, the acquisition is presumed to be "likely to create or enhance market power or facilitate its exercise." Id. For example, the court in University Health found that the proposed merger would increase the HHI by over 630 to approximately 3200, "clearly establish[ing] a prima facie case of anticompetitive effect." University Health, 938 F.2d at 1211 n.12, 1219.

To assess the level of concentration in these school milk markets, the Government has included each dairy and distributor that has bid on any school milk contract in a relevant geographic market within the past three years. Furthermore, to ensure that the analysis did not understate the level of competition in this area, the Government has also included those dairies that have indicated a future intention to bid in some of the affected districts or have a route structure that appears to enable them to make a reasonably competitive bid.[15] In measuring the level of concentration within each of the affected districts, all dairies and distributors that have sufficient route structure in a school district to allow them to bid competitively on that district's contract have been attributed an equal market share for such school district. Merger Guidelines, at ¶ 1.41 n.15. This is because all milk processors and distributors with an adequate route structure in place within a school district may win such school district's milk contract in any given year.

Under this analysis, in South Central Kentucky Suiza's acquisition of Broughton would increase the HHI by 5,000 points, from 5,000 to 10,000 in the following 23 school districts: Adair County, Breathitt County, Casey County, Clark County, Clay County, Clinton County, Cumberland County, Garrard County, Hazard Independent, Jackson County, Jackson Independent, Lee County, Leslie

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[15] For example, one competitor has told the Government that two of its dairies have made plans to bid on school milk in some counties in South Central Kentucky even before it learned about the proposed merger: Anderson, Taylor, Metcalfe, Allen, Barren, Hart, Knox, Bell, Pulaski, Laurel, McCreary, and Whitley Counties. Competitor deposition (Ex. 12, tendered under seal).

County, Letcher County, Lincoln County, Mercer County, Monticello Independent, Owsley County, Perry County, Rockcastle County, Russell County, Wayne County, and Woodford. In these districts, there is no other firm with sufficient route structure to bid competitively for school milk contracts.

In the following 32 school districts, the acquisition would increase the HHI by 1,667 from 3,333 to 5,000: Allen County, Anderson County, Barbourville Independent, Barren County, Bell County, Berea Independent, Bourbon County, Burgin Independent, Campbellsville Independent, Caverna Independent, Corbin Independent, East Bernstadt Independent, Glasglow Independent, Harrodsburg Independent, Hart County, Henry County, Jessamine County, Knott County, Knox County, Laurel County, Madison County, McCreary County, Menifee County, Metcalfe County, Middlesboro Independent, Pineville Independent, Pulaski County, Science Hill Independent, Somerset Independent, Taylor County, Whitley County, and Williamsburg Independent. In these districts, the number of participants would be reduced from three to two.

Applying either a market share analysis or an HHI analysis, the Government has established that Suiza's acquisition of Broughton would afford it a significant market share in a sufficiently concentrated market for the production and sale of school milk in South Central Kentucky. Following the Supreme Court's mandate in Philadelphia National Bank, the proposed transaction is presumed illegal.

2. The Defendants Cannot Rebut the Presumption of Illegality

Once the United States has established a presumptive violation of the Clayton Act, defendants can introduce evidence to rebut that presumption. The Supreme Court, however, has directed that the presumption will not easily be overcome. Philadelphia Nat'l Bank, 374 U.S. at 363 (defendants must clearly show that the acquisition will not substantially lessen competition). Defendants can rebut this presumption of illegality only by a clear showing that other market characteristics would preclude the merger from substantially lessening competition. United States v. General Dynamics Corp., 415 U.S. 486, 497 (1974). In such a case, the presumption of illegality "can be overcome only by evidence that market share data give an 'inaccurate account of the acquisition['s] probable effects on competition.'" R.C. Bigelow, Inc. v. Unilever N.V., 867 F.2d 102,108 (2d Cir. 1989).[16]

a. The Evidence Shows That the Proposed Merger is Likely to Increase Prices or Reduce Services

[16] In the 32 school districts where the HHI will increase from 3,333 to 5,000, the combined share of the parties may understate the effect of the transaction. In some of these districts, the third bidder typically bids higher than the parties. In markets where another competitor has historically bid higher than the merging parties, Suiza will have unilateral market power to raise price and impose delivery terms at that bidder's traditionally higher level.

The presumption of illegality is well justified in this case. In assessing what the school milk market would look like if Southern Belle did not participate, defendant Southern Belle has predicted that school districts would "face higher bid prices with the elimination of a competitor from the marketplace." (Ex. 16, Letter from Joseph L. Ruby, Wiley, Rein & Fielding to Mr. George A. Braley, USDA, May 26, 1998, at 2); see also Ex.17, Letter from Steven S. Diamond and Matthew W. Garber, Arnold & Porter to Mr. George A. Braley, USDA, July 16, 1998)

i. In Some Geographic Markets, The Proposed Merger Would Give Suiza the Ability to Raise Prices or Reduce Services

Suiza's proposed merger allows it to acquire a monopoly in 24 school districts. As a result, after the acquisition, Suiza would be able to increase school milk prices and reduce the quality of service to South Central Kentucky School Districts.[17]

ii In Other Geographic Markets, the Proposed Merger is Likely to Lead to Higher Prices or Reduced Services

The proposed merger is likely to lead to higher prices in the other 31 school districts for two reasons. First, a reduction in the number of competitors from three to two increases the likelihood of successful collusion. This is of particular concern in school milk markets, where express collusion has been documented in over 113 criminal school milk price-fixing convictions since 1988 in 24 states, including Kentucky. (Ex. X, Declaration of Sheldon Kimmel, tendered under seal, at ¶¶ 30-35) As noted above, such collusion occurred in South Central Kentucky School Districts.[18]

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[17] See, e.g., Customer declaration (Ex. 40, tendered under seal) ("This merger will decrease our bidding pool from two to one bidders, leaving only the newly-formed combination of Flavorich and Southern Belle. I am concerned that school milk prices may increase and the financial burden will be transferred to the students and their families."); customer declaration (Ex. 39, tendered under seal) ("This merger will decrease our bidding pool from two to one bidders. I am very concerned that school milk prices may increase or that service will decrease as a result of this reduction in bidders.").

[18] See Ex. 18, Declaration of Martin Shearer, V.P., General Manager - Southern Belle, Broughton Foods Company, filed in support of Southern Belle Dairy v. USDA (E.D. Ky. Aug. 19, 1998) (suit withdrawn Aug. 20, 1998). In 1995, Southern Belle, Flav-O-Rich and PET/Land O' Sun, all agreed, as part of a settlement of separate civil charges relating to the same alleged criminal bid rigging conspiracy, to pay $11.2 million to Kentucky school districts as restitution. (Ex. 19, Mark Schaver, Dairies to Pay Schools $11.2 Million; 3 Firms Settle Bid-Rigging Case, The Courier-J. Louisville, Ky., Jun. 16, 1995, 1995 WL 2323161).

Second, in addition to the risk of further criminal collusion, the reduction in the number of competitors from three to two increases the likelihood of other coordinated interaction that harms consumers (sometimes called tacit collusion). As the Merger Guidelines state, such "[c]oordinated interaction is comprised of actions by a group of firms that are profitable for each of them only as a result of the accommodating reactions of the others." Merger Guidelines at § 2.1. Anticompetitive coordinated interaction need not include an actual agreement and therefore there is nothing illegal about such interdependent pricing. However, a purpose of the Clayton Act is to stop mergers that would alter the structure of a market that would make it easier for firms to engage in coordinated interaction. Fruehauf Corp., 606 F.2d at 351 (noting that intent of Congress was "to nip anticompetitive practices in the bud before they blossom into a Sherman Act restraint of trade)

The concentrated school milk markets here are conducive to coordinated interaction. Indeed, the simple elimination of a bidder in a concentrated school milk market can lead to higher prices or lower quality of service. (Ex. 2, Kimmel Decl., tendered under seal, at ¶¶ 28-29) (describing the Merger Guidelines factors describing markets that are conducive to coordinated interaction and explaining why they are present in the instant matter).[19]

A clear illustration of the way in which concentrated milk markets are prone to coordinated interaction is the one provided by defendant Broughton's corporate official responsible for setting bid prices. She described her concern about retaliation in deciding how to set prices:

> I also have always considered the effect an aggressive bid for a new school district would have upon our competitors' bidding strategy. In other words, I have always been concerned that if I bid too aggressively to a school district then being served by a competitor of Broughton, the competitor would retaliate by taking school business that Broughton already had. If that occurred, Broughton would have gained nothing by going after new school business because the volume of milk sold probably would have stayed the same.

(Ex. 20, Affidavit of Eloise Strum Stalnaker, Broughton Food Company, Dec. 29, 1995 in Ohio v. Louis Trauth Dairy, Inc., No. C-1-93-553 (W.D. Ohio) at 3). This analysis would apply fully to the markets in South Central Kentucky after the proposed merger. Consequently, the potential for coordinated interaction will substantially increase after the acquisition reduces the number of competitors from three to two.

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[19] The Merger Guidelines recognize that collusion is more likely to be successful where market conditions "are conducive to reaching terms of coordination, detecting deviations from those terms, and punishing such deviations." (Merger Guidelines at ¶ 2.1). See also Richard A. Posner, Antitrust Law: An Economic Perspective 55-62 (University of Chicago Press 1976) (examining conditions that render markets "favorable to collusion").

b. Defendants Cannot Point to any Mitigating Factors to Overcome the Presumption that the Proposed Acquisition is Illegal

The defendants cannot rebut the presumption of illegality by showing that entry will restore the competition lost because of this merger. Indeed, there are three strong pieces of evidence to the contrary, any one of which demonstrates the opposite of what defendants must prove.

First, the Flav-O-Rich and Southern Belle criminal cartel lasted for over a decade and raised prices to customers. If entry were truly as easy as defendants contend, the cartel could never have been successful.[20] (Ex. 2, Kimmel Decl, tendered under seal, at ¶ 30, 37).

Second, over the past year Broughton has repeatedly argued to the USDA during debarment proceedings that Southern Belle's presence in South Central Kentucky is essential to maintaining a competitive market for school milk. In fact, counsel for Broughton predicted that school districts "will face higher bid prices with the elimination of [Southern Belle] from the marketplace." (Ex. 16, at 2). This could not be true if entry were likely to solve any reduction in competition. Any argument to the contrary before this Court would be disingenuous.

Moreover, counsel for Broughton admitted to the USDA that many of the affected school districts in South Central Kentucky "would likely find it difficult to attract alternative suppliers from more distant locations." (Ex. 22, at 2).

> [I]f you look at the geographical area that gets these low numbers of bids, one or two, these are the eastern Kentucky Mountains. These are very small communities with poor roads and very small schools.
>
> This is not an area where you can expect a large outside dairy company to make a major investment of establishing routes and to move in. These are really quite small communities.

Ex. 21.

Third, the most likely potential entrants (firms within about 200 miles driving distance of the defendants' plants), have stated that they would not enter the affected markets, even if school milk

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[20] Cf. United States v. Baker Hughes Inc., 908 F.2d 981, 987 (D.C. Cir. 1990) ("In the absence of significant [entry] barriers, a company probably cannot maintain supracompetitive pricing for any length of time.")

prices increased by a small but significant amount.[21] Each of these firms has stated that the costs of entry are too high to justify the establishment of a competitive school milk presence in any affected district.

From a dairy's or distributor's perspective, entry is unattractive for a number of reasons, including the following: (1) serving schools is a relatively low margin, low volume business in this region;[22] and (2) the school milk business is not profitable in the absence of other milk delivery business; that is, a dairy or distributor would need to win other milk delivery accounts in this area if it wanted to enter profitably the school milk markets in South Central Kentucky.[23]

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[21] Competitor deposition (Ex. 12, tendered under seal); competitor declaration (Ex. 59, tendered under seal); competitor declaration (Ex. 60, tendered under seal); competitor declaration (Ex. 65, tendered under seal); competitor declaration (Ex. 63, tendered under seal).

[22] See Ex. 17, Letter from Steven S. Diamond, Arnold & Porter, Broughton counsel, to George Braley, USDA, July 16, 1998 ("school milk is a low margin, high cost part of Broughton's business"); competitor deposition, (Ex. 23, tendered under seal) (school milk margins tend to be lower than other commercial account margins); competitor declaration (Ex. 59, tendered under seal) ("As a general rule, [our firm] does not use school business as a base on which to enter a new area due to . . . the service and other requirements of schools and the lower margins received on school milk contracts."); competitor declaration (Ex. 65, tendered under seal) ("school milk accounts require a high level of service and maintenance and typically generate lower margins than commercial deliveries.").

[23] See, e.g., competitor declaration (Ex. 63, tendered under ("[Our dairy] does not use school milk business as a base on which to enter a new region due to the instability of annual school milk bidding, the service requirements of schools and the lower margins received on school milk contracts. School milk business alone is simply an insufficient basis for entry or expansion into a new area. This is particulary true in rural areas, where schools are further apart and account volumes are small."); competitor declaration (Ex. 59, tendered under seal) ("By and large, while school milk business is desirable as an add on to commercial accounts, such business is not a market builder in and of itself. This is particularly true in rural, mountainous areas, where schools are further apart and account volumes are small. In short, without the ability to sell milk to commercial accounts through direct store distribution ("DSD") in Eastern Kentucky, there is little economic incentive for [our dairy] to enter that market for school milk alone."); distributor declaration (Ex. 50, tendered under seal) ("[S]chool milk accounts require a high level of service and maintenance an typically generate lower margins than commercial deliveries. The added hassles of serving schools include frequent, small deliveries at each school throughout a district, seasonal deliveries, restricted delivery times, stock rotations and occasionally the provision of coolers. Thus, it is generally not profitable to serve school milk accounts that are

As the President and CEO of defendant Broughton elaborated to the USDA last year:

> Most schools, when you are bidding schools, have to fit in with all your other business along that route. You could not just have a school on your route and furnish it with milk. . . . It would be too expensive, and they would not buy it. They [schools] would serve them Coke.

Ex. 21, at 41.

Accordingly, it is ordinarily unprofitable to develop a distribution system to serve schools alone, particulary because the volume of most school contracts is insufficient to support a route. Consequently, dairies seldom bid on school business unless they already have non-school milk delivery routes in the area.[24] In an existing service area, dairies or distributors can integrate school deliveries into their other routes, thereby considerably reducing the costs of serving school accounts. This is particularly important in areas like South Central Kentucky where parts of many school districts are in mountainous and sparsely-populated areas.[25] In this area, however, none of the potential entrants would seek additional commercial business in response to a ten percent increase of the price of school milk.[26]

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more than 50 miles from a distribution point, unless supported by established commercial routes. School milk business alone is simply an insufficient basis for entry or expansion into a new area and is not a priority for my business.")

[24] See Exs. 23 and 24, tendered under seal (no bid letters stating company cannot bid on school milk contract due to a lack of commercial business in the area).

[25] In some densely populated areas such as large cities, it can be economical to have a special route devoted to school deliveries. There are no such densely populated school districts among the South Central Kentucky School Districts.

[26] See, e.g., competitor declaration (Ex. 60, tendered under seal) ("[Our firm] does not currently bid, nor do I expect it to bid in the foreseeable future, on school milk contracts for district located in South Central Kentucky. . . . The company has no current commercial DSD routes in this area from which it could serve schools, and it is too far away from our existing facilities for school milk-only routes to be profitable. [Our firm] is not pursuing commercial DSD accounts in this rural region of Kentucky, and would not consider serving schools there even if school milk prices in the area rose from current rates of approximately 17-18¢ per half-pint to as high as 20¢ or more per half-pint."); competitor declaration (Ex. 65, tendered under seal) ("[Our firm does] not currently bid on school districts in south central Kentucky, nor do we expect to bid on them, or any other new districts east of them in the next three years. . . . [Our firm has] no commercial business in these counties and [has] no plans to expand into this

Accordingly, the defendants cannot rebut the presumption of illegality by any credible evidence that entry into the market will be timely, likely or sufficient to constrain post-merger pricing.

c. Defendants Cannot Demonstrate that the Anticompetitive Effects of the Transaction are Overcome by Countervailing Efficiencies

Defendants may suggest that improvements in the efficiency of their operations created by the transaction justify an otherwise anticompetitive merger. An argument that efficiencies justify an anticompetitive merger was rejected by the Supreme Court in FTC v. Procter & Gamble Co., 386 U.S. 568, 580 (1967) ("Possible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition.") See Philadelphia Nat'l Bank, 374 U.S. 321, 371 (1963). Nonetheless, such efficiencies arguments have been presented and considered in recent years, although not accepted to approve an otherwise anticompetitive merger. See, e.g., University Health, Inc., 938 F.2d 1206 (11th Cir. 1991); FTC v. Cardinal Health, 1998-2 Trade Cas. (CCH) ¶ 72,226 (D.D.C. 1998) (calling into doubt appropriateness of balancing efficiencies against anticompetitive effects under Proctor & Gamble and then concluding that defendants had not shown that "the projected savings from the mergers are enough to overcome the evidence that tends to show that possibly greater benefits can be achieved by the public through existing, continued competition"); Staples, Inc., 970 F. Supp. 1066 (questioning the appropriateness of conducting balancing test but concluding that, even if such an approach is warranted, efficiencies do not outweigh anticompetitive concerns).

In the Merger Guidelines, the enforcement agencies have stated the method by which they analyze such claims. The Merger Guidelines allow for consideration of verifiable, merger-specific efficiencies that are generated in the relevant product market. The Merger Guidelines, however, caution that "[e]fficiencies almost never justify a merger to monopoly or near-monopoly," Merger Guidelines at § 4, as is present in this case.

Accordingly, if any efficiency claims are appropriately condsidered, they should be subjected to "a very rigorous standard." United States v. Rockford Memorial Corp., 717 F. Supp. 1251, 1289 (N.D. Ill. 1989) (holding that the efficiency claims were generated after merger was consummated and did not account for costs of completing merger), *aff'd*, 898 F.2d 1278 (7th Cir. 1990) (Posner, J.). "In order for [efficiency claims] to prove successful, the Defendants must establish by clear and convincing evidence that the efficiencies provided by the merger produce a significant economic benefit to consumers, even in light of the possible anti-competitive effects of the merger." Id. Once plaintiff shows that the proposed transaction gives rise to a presumption that the proposed transaction gives rise to a presumption that anticompetitive effects are likely to result, the Defendants may attempt to rebut this presumption with evidence that efficiencies resulting from the transaction will render any

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region.")

anticompetitive effects unlikely. University Health, 938 F.2d at 1218-23. The Defendants' rebuttal case must meet the following standards:

(a) the claimed efficiencies may not be speculative, University Health, 938 F. 2d at 1222-23 ("speculative, self-serving assertions" concerning efficiencies cannot be credited);

(b) the claimed efficiencies must be attributable to the merger (i.e., the efficiencies cannot be achieved independently or through some other, less anticompetitive means than the proposed merger), Id. At 1222 n.30; United States v. Mercy Health Servs., 902 F. Supp. 968, 987 (N.D. Iowa 1995), vacated as moot, 107 F.3d 632 (8th Cir. 1997); Rockford Mem. Hosp., 717 F. Supp. At 1289-91; Merger Guidelines, § 4.0;

(c) the claimed efficiencies must produce a significant economic benefit to consumers and be sufficient to reverse the merger's potential to harm consumers, University Health, 938 F. 2d at 1222-23 (efficiencies must "benefit competition and, hence, consumers"); Rockford Mem. Hosp., 717 F. Supp. at 1289-91; see also Merger Guidelines, § 4.0.

Defendants must, therefore, demonstrate that their claimed efficiencies will reverse any likely anticompetitive effects. If they do not do so, the court has no basis for determining whether the claimed efficiencies rebut the presumptions created by plaintiff's prima facie case.

The cost savings resulting from a merger to monopoly would have to be extraordinarily high for such a merger to result in lower prices in spite of the lack of competition. See Merger Guidelines, § 4.0. For this reason, where a merger would create a firm with market power, efficiency claims have been found "insufficient to override the public's clear and fundamental interest in promoting competition." FTC v. Alliant Techsystems, Inc., 808 F. Supp. 9, 23 (D.D.C. 1992). See also United States v. Tote, Inc., 768 F. Supp. 1064, 1084-85 (D. Del. 1991); FTC v. PPG Indus., Inc., 628 F. Supp. 881, 885 (D.D.C.), aff'd in relevant part and rev'd on other grounds, 798 F.2d 1500 (D.C. Cir. 1986).

In this case, the acquisition does not present the exceptional case where a merger in an extremely concentrated market is justified by substantial and credible claims of merger-specific efficiencies. In fact, the parties have conceded that any cost saving efficiencies the parties realize from the merger will not be passed on to the customers, and thus will not reverse the anticompetitive effect.

Ex. 25, deposition of Tracy Noll, March 5, 1999, at 133 (tendered under seal).

III. IN THE ABSENCE OF INJUNCTIVE RELIEF, CUSTOMERS AND COMPETITION WILL SUFFER IRREPARABLE HARM

Once the government has established a likelihood of success on the merits of its Section 7 claim, irreparable harm is presumed. United States v. Ingersoll-Rand Co., 320 F.2d 509 (3d Cir. 1963); Ivaco, 704 F. Supp. at 1429. This is so because "the threatened violation of the law . . . is itself sufficient public injury to justify the requested relief. The Congressional pronouncement in § 7 embodies the irreparable injury of violation of its provisions." United States v.Ingersoll-Rand Co., 218 F. Supp. 530 (W.D. Pa.), aff'd, 320 F.2d 509 (3d Cir. 1963); see also Ivaco, 704 F. Supp. at 1429; Marathon Oil Co. v. Mobil Corp.,530 F. Supp. 315, 320-21 (N.D. Ohio), aff'd, 669 F.2d 378 (6th Cir. 1981) (possible elimination of effective competitor sufficient to establish irreparable harm).

In this instance, serious and permanent harm to competition would occur if the transaction is allowed to proceed. Once the assets of the two companies are combined, management, marketing, and sales personnel integrated and customer and trade relationships rearranged, it becomes unlikely that even a subsequent divestiture would adequately return the market to its pre-merger state. Competition would be harmed substantially in the interim.

Courts have long recognized that an after-the fact, court-ordered divestiture is most often an inferior alternative to preliminary relief. "If preliminary relief is not awarded and the merger is subsequently found to be unlawful, it would be extremely difficult, if at all possible, to remedy effectively the unlawful merger." Christian Schmidt Brewing, 600 F. Supp. at 1332; Ivaco, 704 F. Supp. at 1429 (subsequent divestiture requirements are "typically rejected by courts as ineffective"). Nor would any form of preliminary relief less than a complete injunction be adequate. A hold separate order, no matter how well crafted, would not protect the public against interim competitive harm or ensure the adequacy of final relief. PPG Indus., 798 F.2d at 1507-08; United States v. White Consol. Indus., Inc., 323 F. Supp. 1397, 1399 (N.D. Ohio 1971); United States v. Wilson Sporting Goods Co., 288 F. Supp. 543, 569 (N.D. Ill. 1968). In cases such as this, where the transaction is "almost certainly illegal, the district court face[s] a difficult task in justifying anything less than a full stop injunction." PPG Indus., 798 F. 2d at 1506 (assessing case under statutory preliminary injunction standard of §13(b) of the FTC Act); see also Staples, 970 F. Supp. at 1091 (employing §13(b) standard and stating that where "Commission has established a likelihood of success on the merits, a presumption in favor of a preliminary injunction arises"). Thus, unless a preliminary injunction is issued, Kentucky school districts and the public will suffer irreparable harm.

IV. ANY PECUNIARY HARM TO THE DEFENDANTS' INTERESTS IS OUTWEIGHED BY THE PUBLIC'S INTEREST IN PRESERVING COMPETITION

Although the issuance of a preliminary inducting would delay closing of the proposed transaction, and perhaps cause the defendants some risk of pecuniary harm, "[t]his private, financial harm must . . . yield to the public interest in maintaining effective competition." Ivaco, 704 F. Supp. at 1430 (citing FTC v. Food Town Stores Inc., 539 F.2d 1339, 1346 (4th Cir. 1976); Christian Schmidt Brewing, 600 F. Supp. at 1332; United States v. Columbia Pictures Indus., Inc., 507 F. Supp. 412, 434 (S.D.N.Y. 1980)).

> [I]njury to the private parties must be subordinated to the presumed injury (if any) which the private parties' transaction would cause the public. To tip the scales the other way, evidence of injury to the private parties must be so proportionately persuasive as to submerge the principle that "the status of public interest and not the requirements of private litigation measure the propriety and need for relief."

United States v. Culbro Corp., 436 F. Supp. 746, 750 (S.D.N.Y. 1977) (quoting United States v. Penzoil Co., 252 F. Supp. 962, 986 (W.D. Pa. 1965); see also Hecht Co. v. Bowles, 321 U.S. 321, 331 (1944); FTC v. University Health, Inc., 938 F.2d 1206, 1225 (11th Cir. 1991).

The interest of the public here is great because the lessening in competition in the school milk market alleged is likely to have a significant negative impact on the quality and services provided to the affected customers. The probability that the proposed acquisition is unlawful is, as demonstrated above, substantial. The only harm the defendants would endure if preliminary relief is granted is delay, an equity that should be subordinated to the public's interest in preserving the status quo until these issues are fully heard.

V. PRELIMINARY RELIEF ADVANCES THE PUBLIC INTEREST

Preservation of Suiza and Broughton as independent competitors is also in the public interest. "By enacting Section 7, Congress declared that the preservation of competition is always in the public interest." Ivaco, 704 F. Supp. at 1430; Marathon Oil Co, 530 F. Supp. at 320 ("[T]he mere possibility that Marathon would be eliminated as an effective competitor . . . is sufficient to satisfy the public interest criterion."). An injunction would preserve competition between Suiza and Broughton for the sale of fluid milk to schools in South Central Kentucky. "The public has an interest in the preservation of competition in the market, and an injunction is necessary to protect that interest." Ivaco, 704 F. Supp. at 1430.

CONCLUSION

In order to preserve competition in the market for the sale of milk to schools in South Central Kentucky, the United States requests that this Court issue a preliminary injunction to enjoin Suiza and Broughton from consummating the proposed acquisition pending a full trial on the merits.

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Respectfully Submitted,

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