

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY**

UNITED STATES OF AMERICA

Plaintiff,

vs.

SUIZA FOODS CORPORATION

**d/b/a Louis Trauth Dairy,
Land O' Sun Dairy, and
Flav-O-Rich Dairy, and**

BROUGHTON FOODS COMPANY,

d/b/a Southern Belle Dairy

Defendants.

Civil Action No.

**PROTECTIVE ORDER GOVERNING
DESIGNATION AND USE OF CONFIDENTIAL MATERIALS**

Pursuant to Fed. R. Civ. P. 26(c)(7), and in the interest of ensuring that matters raised by this proceeding are open to the public to the greatest extent possible, and at the same time to ensure that confidential information submitted by the defendants or any third parties, whether pursuant to compulsory process or voluntarily, is not improperly disclosed, the undersigned hereby agree, subject to approval and entry by the Court, to the following Protective Order, which shall govern certain pretrial discovery and procedures:

DEFINITIONS

1. As used herein, the following words shall have the following meanings:

- a. "This action," "this litigation," and "the court action" means the civil action captioned above and pending in this Court;
- b. "Party" or "parties" means the plaintiff or one or more of the defendants in this action;
- c. "Protected person" means any non-party that furnishes any information to any party in connection with this litigation;
- d. "Court" means the District Court for the Eastern District of Kentucky;
- e. "Disclosed" or "furnished" means shown, divulged, revealed, produced, described, transmitted or otherwise communicated, in whole or in part;
- f. "Confidential" means any trade secret or other confidential research, development, or commercial information, as such terms are used in Fed. R. Civ. P. 26(c)(7);
- g. "Outside counsel" means the counsel of record, specifically listed on this Order, other lawyers in their law firms, persons employed by their law firms as well as any lawyer subsequently retained or designated by the defendants to appear in this action, PROVIDED that any person identified as "Outside Counsel" is not an employee of, or a person who is involved in competitive decision-making on behalf of, the Defendants or other dairy companies, any non-party submitting documents in connection with this action, or any dairy trade association;

h. "Department" means the United States Department of Justice and all subdivisions thereof, as well as all officers, employees, agents, representatives, contractors, consultants, attorneys, or any of them.

USE OF CONFIDENTIAL INFORMATION

2. Any information submitted by a defendant or by any third party to the United States Department of Justice during its investigation of Suiza Foods Corporation's proposed acquisition of Broughton Foods Company, whether pursuant to compulsory process or voluntarily in lieu of compulsory process, that has been or is designated as confidential by the submitting party or that is subject to a request for confidentiality shall be treated as confidential material for the purposes of this Protective Order. The identity of a third party submitting such confidential material shall also be treated as confidential material for the purposes of this Protective Order where the third party submitter has requested such confidential treatment. Nothing herein shall be deemed to constitute a waiver of confidentiality as to any information, document or thing produced by any defendant or protected party pursuant to the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. §18a, or the Antitrust Civil Process Act, 15 U.S.C. §§ 1311-1314.

3. All information hereinafter furnished, either voluntarily or pursuant to Court order by or on behalf of any party or protected person to any party in connection with this litigation, whether or not designated as confidential as set

forth below, shall be used solely in connection with pretrial proceedings, preparation for trial, or other proceedings in this litigation. Provided, however, that nothing in this Protective Order shall limit the United States, subject to taking appropriate steps to preserve the confidentiality of such information, from using information in performance of its continuing law enforcement responsibilities consistent with applicable law, and nothing herein shall limit any party's use of its own information, whether or not designated as confidential, which it has furnished to another party in connection with this litigation.

4. All information produced by protected persons submitted voluntarily, in response to CIDs or to other requests for information shall be treated as if designated as confidential until such time as (but no later than April 5, 1999) the non-party producing such information identifies the documents, if any, it wishes to have treated as confidential.

5. All copies or reproductions of confidential information shall be subject to the terms of this Order. If the duplicating process by which copies of confidential materials are made does not reproduce the "CONFIDENTIAL" stamp appearing on the original, all copies shall be stamped with a "CONFIDENTIAL" designation.

DESIGNATION OF CONFIDENTIAL INFORMATION

6. A party or protected person, which has previously submitted documents to the parties voluntarily, or in complying with informal discovery

requests or discovery requests served upon them pursuant to the HSR Act, the ACPA, or the Federal Rules of Civil Procedure, may designate any documents submitted as "confidential," to the extent such materials constitute confidential information as defined in this Order. Such designation shall constitute a representation to the Court that such party or protected person (and its counsel, if any) in good faith believes that the information so designated constitutes confidential information. Such designation may include the identity of a declarant, and any information that may reveal the identity of such declarant, who has provided a declaration or any other testimony to the plaintiff and who fears retaliation if their identity is disclosed to the defendants. The parties, in conducting discovery from third parties, shall attach to such discovery requests a copy of this Protective Order so as to apprise such third parties of their rights herein.

7. A party or third party may designate information as confidential by placing on or affixing to documents containing such information (in such manner as will not interfere with the legibility thereof) the word "CONFIDENTIAL" together with an indication of the portion or portions of such document considered to be confidential. If confidential information is furnished via electronic means, any hard copy printouts of such confidential information shall be stamped or imprinted with the same legend. Information that a party or protected person hereafter furnishes to a

party in connection with this litigation in a form other than a document, and which the furnishing party or protected person believes to be confidential information, shall be specified by the furnishing party or protected person as confidential in writing at the time it is furnished.

DISCLOSURE OF CONFIDENTIAL INFORMATION

8. Counsel for the party receiving the information designated as confidential shall not disclose that information to any person other than the individuals set forth below, and may disclose that information only to the individuals set forth below as necessary in connection with pretrial proceedings, preparation for trial, or other proceedings in this litigation:

- a. Persons within the Department;
- b. Outside counsel for the defendants,
- c. Qualified court reporters taking testimony involving such information, and necessary stenographic and clerical personnel thereof;
- d. Consultants or economic experts who are retained for the purpose of this litigation by any party, provided that such experts are not presently and have no plans to become an employee of the defendants, any dairy company, any other non-party submitting documents in connection with this action, or any dairy trade association;

e. Persons with prior knowledge of the confidential information, and their agents, including any person who was, or whom any counsel for any party in good faith believes to have been, a participant in a communication or transaction and from whom verification of that communication or transaction is sought. The party wishing to make such disclosure must give at least 72 hours advance notice in writing, via facsimile, to the producing person who designated such information as confidential, stating the names and addresses of the person(s) to whom the disclosure will be made, identifying with particularity the documents to be disclosed, and stating the purposes of such disclosure. If within the 72 hour period, an objection is made and a protective order sought by the producing person, such stamped, confidential document shall not be disclosed unless the Court has denied the request for a protective order. The Court will deny the motion unless the objecting party shows good cause why the proposed disclosure should not be permitted;

g. Persons noticed for depositions to the extent reasonably necessary if:

(1) The deponent already knows the confidential information contained therein. The party wishing to make such disclosure must give at least 72 hours advance notice in writing, via facsimile, to the producing person who designated such information as confidential, stating the names and addresses of the

person(s) to whom the disclosure will be made, identifying with particularity the documents to be disclosed, and stating the purposes of such disclosure. If, within the 72 hour period, an objection is made and a protective order sought by the producing person, such stamped confidential document shall not be disclosed unless the Court has denied the request for a protective order. The Court will deny the motion unless the objecting party shows good cause why the proposed disclosure should not be permitted; or

(2) The party wishing to make such disclosure has given at least 72 hours advance notice in writing, via facsimile, to the party or producing person who designated such information as confidential, stating the names and addresses of the person(s) to whom the disclosure will be made, identifying with particularity the documents to be disclosed, and stating the purposes of such disclosure. If, within the 72 hour period, an objection is made and a protective order sought by such a party or the producing person, such stamped, confidential document shall not be disclosed unless the Court has denied the request for a protective order. The Court will deny the motion unless the objecting party shows good cause why the proposed disclosure should not be permitted. Notice, however, is not required where the deponent is one of a class of persons under paragraph 8 to whom confidential information may be disclosed or the deponent is a director,

officer or employee of a defendant and the material was designated confidential by that defendant;

h. The party or protected person that furnished the information designated as confidential; and

I. The Court and all persons assisting the Court in this action.

9. Each individual described in subparagraphs 5(a), (b), (c), (d), (e), (f), (g) and (h) above, to whom information designated as confidential is disclosed, shall not disclose that information to any other individual, except as provided in this Protective Order, or use it for any purpose other than in connection with this litigation. Specifically, these individuals must agree not to divulge, publish, or reveal by word, conduct, or any other means, any such information to any other person except as authorized by the Protective Order Governing Designation and Use of Confidential Material entered in this case. Reasonable care must be exercised to safeguard such information against unauthorized disclosure, and individuals receiving confidential information must expressly acknowledge that under no circumstances should such confidential information, in any form whatsoever, be disclosed. Before any information designated as confidential may be disclosed to any person described in subparagraphs 5(a), (b), (c), (d), (e), (f), (g) or (h), above, he or she shall have first read this Protective Order and shall have executed the Acknowledgment of Compliance With Protective Order Governing

Designation and Use of Confidential Materials, attached hereto as Exhibit "A." The counsel for the party making the disclosure shall promptly provide the party producing the confidential information copies of all executed Acknowledgments and shall retain the original of such executed Acknowledgment for a period of one year following the final resolution of this litigation.

10. Notwithstanding the provisions of paragraph 7 hereof, parties and deponents may, on the record of a deposition, or within three days after receiving a deposition transcript, designate pages of the transcript (and exhibits thereto) as confidential pursuant to the criteria set forth in this Protective Order. Until expiration of the three-day period, the entire deposition transcript shall be treated as subject to protection against disclosure under this Protective Order. If no party or deponent timely designates confidential information in a deposition, then none of the transcript or its exhibits will be treated as confidential; if a timely designation is made, the cover of the transcript shall be prominently marked and the confidential portions and exhibits shall be filed under seal separate from the portions and exhibits not so marked.

PROCEDURE UPON TERMINATION OF LITIGATION

11. Within sixty days of the final resolution of this litigation, each party shall assemble and, at the election of the party or protected person which furnished information designated as confidential, either destroy or return to the furnishing

party or protected person all documents containing that information, including all copies thereof. Counsel for the party receiving the information designated as confidential shall confirm in writing to the party or protected person that furnished that information that such destruction has occurred. Nothing in this Protective Order shall be deemed to require the return or destruction by a party of any document in that party's possession prior to the commencement of this action.

CHALLENGES TO DESIGNATIONS OF CONFIDENTIALITY

12. Any party may, at any time after attempting to resolve the matter by agreement, apply by motion to the Court for a ruling that certain information designated as confidential is not entitled to confidential treatment under this Order. Any such application must identify with particularity each "Confidential" document being challenged. Any application that is directed at only unidentified groups, boxes, or categories of documents without separately and individually identifying each and every "Confidential" document that is being challenged is presumptively deficient on its face. The confidential status of the information at issue shall be maintained pending the Court's ruling on the motion.

13. However, the parties shall not be obligated to challenge the propriety of any designation of information as confidential and the failure to do so promptly shall not preclude any subsequent objection to such designation or motion seeking permission to disclose such material to persons not referred to in paragraph 8.

14. The party objecting to the motion to the Court for a ruling that certain information designated as confidential is not entitled to confidential treatment under this Order must file an explanation of its opposition within 72 hours. Failure to do so shall constitute waiver of opposition to the motion.

PROCEDURE UPON UNAUTHORIZED DISCLOSURE

15. If confidential information under the terms of this Order is disclosed to any person other than one entitled to disclosure in the manner authorized under the Order, the party responsible for the unauthorized disclosure shall immediately upon learning of such disclosure inform the party or non-party that designated the information as confidential in writing of all pertinent facts relating to such disclosure and shall make every effort to prevent further unauthorized disclosure of the information.

16. Notwithstanding the foregoing, counsel are responsible for employing reasonable measures to control, consistent with the terms of this Order, duplication of, access to and distribution of confidential information under the terms of this Order.

OTHER PROCEDURES

17. Nothing in this Protective Order shall preclude any party or protected person from asserting the attorney-client or other privilege, or work product protection, as to any information.

18. Notwithstanding the provisions hereof, each party or protected person is free to disclose information it has designated as confidential and such disclosure shall not be deemed a waiver of the protections hereof, including confidentiality. Moreover, any information, document or thing hereafter produced without its being designated as confidential shall not thereby be deemed a waiver of any claim of confidentiality as to such matter, and the same may thereafter be designated as confidential.

19. This Protective Order shall be without prejudice to the right of any party to bring before the Court the question of (a) whether any particular information is or is not confidential, or (b) whether any particular information is or is not relevant to any issue in this case, provided that the party has complied with the procedures set forth herein. No party concedes by entering into this Protective Order that any information designated by any other party or protected person as confidential does in fact contain or reflect trade secrets or other confidential research, development, or commercial information as those terms are used in Fed. R. Civ. P. 26(c)(7). However, no information designated as confidential pursuant to this Protective Order shall be disclosed except as provided herein unless and until the Court orders the release of such information from the confidentiality provisions of this Protective Order.

20. The parties hereto reserve all rights to apply to the Court for any order

(a) modifying this Protective Order;

(b) seeking further protection against discovery or other use of confidential information, or documents, transcripts, or other materials reflecting confidential information; or

© seeking further production, discovery, disclosure or use of claimed confidential information, or documents, transcripts, or other material reflecting claimed confidential information.

21. This Order shall not restrict the use or disclosure of information that was not obtained through discovery in this action or by the Department in its prior investigation of the proposed acquisition, provided, however, that inadvertent production of any information not designated as confidential shall not itself be deemed a waiver of the producing party's and protected person's claim of confidentiality as to such information, and the producing party or protected person may thereafter designate such information as confidential.

22. The parties shall petition the Court at a future time to establish protective procedures that shall govern the disclosure of confidential information at a hearing on a motion for a preliminary injunction or should a full trial on the merits be held in this matter. This Protective Order does not pertain to information disclosed at a preliminary injunction hearing or trial, or in post-trial memoranda,

findings of fact, or other papers filed with the Court subsequent to commencement of the preliminary injunction hearing or trial of this action. However, unless otherwise ordered by the Court, subsequent to commencement of a preliminary injunction hearing or the full trial on the merits of this action, a party may disclose information a party or protected person designated as confidential only in connection with this litigation and only after giving three days prior notice to the party or protected person furnishing that information. Nothing, however, in this Protective Order shall limit plaintiff's counsel from using information in the performance of its continuing law enforcement responsibilities.

23. Any protected person having a need for confidentiality not satisfied by provisions of this Protective Order may petition the Court for a separate order governing disclosure of its confidential information.

APPROVED AND SO ORDERED:

This _____ day of _____, 1999.

Civil No.:

UNITED STATES DISTRICT COURT JUDGE

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY**

UNITED STATES OF AMERICA

Plaintiff,

vs.

SUIZA FOODS CORPORATION

**d/b/a Louis Trauth Dairy,
Land O' Sun Dairy, and
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BROUGHTON FOODS COMPANY,

d/b/a Southern Belle Dairy

Defendants.

Civil Action No.

**ACKNOWLEDGMENT OF COMPLIANCE WITH
PROTECTIVE ORDER GOVERNING
DESIGNATION AND USE OF CONFIDENTIAL MATERIAL**

I acknowledge that I have read and that I understand the Protective Order Governing Designation and of Use Confidential Materials entered in this action and hereby agree to abide by its terms and conditions. I understand that any violation of the Protective Order Governing Designation and Use of Confidential Materials by me or anyone acting under my direction may subject me to penalties for contempt of Court. I also understand that I am hereby consenting to the exercise of personal jurisdiction by this Court.

Dated:_____

NOTIFICATION LIST

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[[if stipulate:]

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