

**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.

**MEMORANDUM OF LAW IN SUPPORT OF  
PLAINTIFF'S PROPOSED PROTECTIVE ORDER**

Pursuant to Fed. R. Civ. P. 26(c)(7), the United States of America has filed with this Court on March 18, 1999, a proposed protective order governing the designation and use of confidential materials. The government's proposed protective order was previously submitted to counsel for defendants, Suiza Foods Corporation ("Suiza") and Broughton Foods Company ("Broughton"), on the afternoon of March 17, 1999, in an effort to reach an agreement with the defendants with respect to the proper dissemination of confidential business information relevant to this case.

Under Fed. R. Civ. P. 26(c), this Court may issue protective orders for good cause shown. Rule 26(c)(7) expressly contemplates issuance of protective orders to

protect “trade secret[s] or other confidential research, development, or commercial information.” A protective order is necessary here to prevent the wide-spread dissemination of sensitive information such as bid, pricing and strategic business plans, exactly the type of information protected by Rule 26(c)(7).

The government proposes in its protective order that access to any confidential information disclosed in the course of this proceeding, including confidential business information contained in pleadings filed with the Court under seal, shall be restricted to those persons needing the information for use in this proceeding, such as outside counsel for defendants. The defendants’ corporate employees, including in-house counsel, shall be precluded from reviewing such information.

Protective orders properly limit access to confidential business information to outside counsel retained by the parties where in-house counsel “has a part in the type of competitive decision-making that would involve the potential use of the confidential information.” Sullivan Marketing, Inc. v. Valassis Communications, Inc., No. 93-CIV 6350, 1994 WL 177795, (S.D.N.Y. May 4, 1994); see also Brown Bag Software v. Symantec Corp., 960 F.2d 1465 (9<sup>th</sup> Cir. 1992), *cert. denied*, 506 U.S. 869 (1992); U.S. Steel Corp. v. United States, 730 F.2d 1465 (Fed. Cir. 1984); Ball Memorial Hospital v. Mutual Hospital Insurance, 784 F.2d 1325 (7<sup>th</sup> Cir. 1986). In restricting the disclosure of confidential information, courts recognize that in-house counsel often participates in the business decision-making process of the corporation, and cannot effectively perform their responsibilities without

risking inadvertent disclosure of the confidential information. Brown Bag Software, 960 F.2d at 1470; U.S. Steel Corp. , 730 F.2d at 1468.

In antitrust lawsuits, courts have particularly cautioned that parties, including in-house counsel, should not gain access to confidential competitive information that could defeat the interests of preserving competition. See Ball Memorial Hospital, 784 F.2d at 1346 ( “Access to the data could turn an antitrust suit into the basis of effective collusion, a concern we have expressed above.”). Similar to Ball Memorial Hospital, the government here seeks to protect highly sensitive competitive information that, if disclosed to the defendants or their in-house counsel, could effectively defeat the purpose of this antitrust lawsuit.

Undersigned counsel hereby certifies that counsel conferred with defendants’ counsel in a good-faith effort to determine whether there is any opposition to the relief sought. After consultation with defendants counsel, the parties have been unable to agree on the terms of a proposed Protective Order that would adequately protect non-party confidential business information.

Dated: March 17, 1999

Respectfully submitted,

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/s/

JAMES K. FOSTER  
Trial Counsel  
U.S. Department of Justice  
Antitrust Division  
1401 H Street, N.W.  
Room 4000  
Washington, D.C. 20530  
Telephone: (202) 514-8362  
Facsimile: (202) 307-5802

JOSEPH L. FAMULARO  
United States Attorney  
Eastern District of Kentucky  
110 W. Vine Street, Suite 4000  
Lexington, Kentucky 50407  
Telephone: (606) 233-2666