

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
LONDON DIVISION**

**UNITED STATES OF AMERICA,**

*Plaintiff,*

v.

Civil Action No.: Civ. 99-CV-130

Filed: March 18, 1999

**Suiza Foods Corporation,**

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

**Broughton Foods Company,**

**d/b/a Southern Belle Dairy,**

*Defendants.*

**COMPLAINT**

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil action to prevent the proposed acquisition by Suiza Foods Corporation ("Suiza") of the stock of Broughton Foods Company ("Broughton"), and alleges as follows:

1. Suiza and Broughton each own milk processing plants ("dairies") in South Central Kentucky and bid against each other to sell milk to school districts

located there. Competition between Suiza and Broughton in South Central Kentucky has resulted in lower prices and better service for school districts that supply milk to their students.

2. Defendants are the only two firms that bid to supply school milk in parts of Kentucky. In these areas, the acquisition will create a monopoly. In other areas, the number of bidders will decline from three to two, reducing competition substantially.

3. School milk sales have suffered from a history of criminal antitrust violations. Bid rigging has occurred in many of the same counties where the proposed acquisition would eliminate competition. Indeed, the proposed acquisition would recreate the effect of a criminal bid-rigging conspiracy that raised milk prices to Kentucky schools and school children for over a decade.

4. Less than a year ago, defendant Broughton predicted in a letter to the United States Department of Agriculture ("USDA"), dated May 26, 1998, that school milk prices in certain Kentucky school districts (including a number involved in this case) would rise if its Southern Belle Dairy in Somerset, Kentucky, were not a competitor for school milk sales in Kentucky and Tennessee:

If Southern Belle is suspended . . . it will lose the opportunity to bid. . . . The school districts, for their part, will face higher bid prices with the elimination of a competitor from the marketplace.

5. The proposed acquisition of Broughton by Suiza is likely to lessen

competition substantially, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

### I. JURISDICTION AND VENUE

6. This Complaint is filed under Section 15 of the Clayton Act, as amended, 15 U.S.C. § 25, to prevent and restrain a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. Venue is proper in this District pursuant to 15 U.S.C. § 22 and 28 U.S.C. § 1391(b), (c).

7. Suiza is a Delaware corporation doing and transacting business in the Eastern District of Kentucky, London Division, and one of its dairies relevant to the alleged violation of law is located in London, Kentucky.

8. Broughton is an Ohio corporation doing and transacting business in the Eastern District of Kentucky, London Division, and one of its dairies relevant to the alleged violation of law is located in Somerset, Kentucky.

9. Suiza and Broughton sell milk and other dairy products in the flow of interstate commerce. Defendants' activities in processing and selling milk and other dairy products also substantially affect interstate commerce. This Court has jurisdiction over the subject matter of this action and the parties pursuant to Section 12 of the Clayton Act, 15 U.S.C. § 22, and 28 U.S.C. §§ 1331, 1337(a), and 1345.

## II. DEFENDANTS

10. Suiza is a Delaware corporation with headquarters in Dallas, Texas. Suiza had sales of approximately \$1.8 billion in 1997.

11. In South Central Kentucky, Suiza conducts its dairy operations through its Land O' Sun division in London, Kentucky, and Bristol and Kingsport, Tennessee, and through its Louis Trauth Dairy division in Newport, Kentucky. Using the Flav-O-Rich, PET and Trauth names, Suiza distributes its products to grocery stores, convenience stores, schools, and institutions from its dairies located in London and Newport, Kentucky; and Bristol and Kingsport, Tennessee.

12. Broughton is an Ohio corporation with its headquarters in Marietta, Ohio. Broughton had sales of approximately \$87.2 million in 1997.

13. In South Central Kentucky, Broughton, using the Southern Belle and Broughton's names, distributes its products to grocery stores, convenience stores, independent distributors, schools, and institutions from its dairies in Somerset, Kentucky and Marietta, Ohio.

## III. PROPOSED TRANSACTION

14. On September 10, 1998, Suiza and Broughton entered into an agreement and plan of merger, pursuant to which Suiza intends to purchase all of the stock of Broughton for \$109.7 million and assume Broughton liabilities of \$13 million.

#### IV. DESCRIPTION OF COMMERCE

##### A. MILK INDUSTRY

15. The milk industry is comprised of milk processors (dairies) that purchase raw milk from dairy farmers and agricultural cooperatives, pasteurize and package it, and then sell the processed product known in the industry as fluid milk. Milk processors with specialized filler equipment can package milk in half pint containers.

##### B. SCHOOL MILK CUSTOMERS

16. School milk customers are school districts that purchase half pint containers of milk for school breakfast and lunch programs. The majority of milk packaged in half pint containers is sold directly to school districts or to independent distributors who resell it to school districts.

17. School districts in the counties listed in Attachment A ("South Central Kentucky") participate in the National School Lunch and School Breakfast Programs ("School Meal Programs") of the Food and Nutrition Service of the USDA. The school districts that participate in this program receive federal payments for each eligible student with low family income; the eligible students then receive free or reduced price meals from their school district. School districts that participate in a School Meal Program must offer for sale a half-pint package of milk to every student who wants one.

18. Each county in South Central Kentucky operates a school district. There are also separate municipal public school districts in some counties. Each of these school districts is responsible for purchasing school milk. Each school district annually solicits bids from dairies and distributors located within South Central Kentucky, and some school districts in the region solicit bids from dairies located outside South Central Kentucky. The proposed acquisition is likely to harm competition for the supply of school milk in at least 55 school districts in South Central Kentucky. These school districts are listed in Attachment B ("South Central Kentucky School Districts").

#### C. SALE OF MILK TO SCHOOLS AND OTHER CUSTOMERS

19. When dairies sell to schools, they either deliver the milk directly by their own delivery services or they deliver through independent distributors. Direct store delivery ("DSD") routes consists of direct milk delivery to customers' retail locations. Products sold on DSD routes includes school milk and dairy products sold to supermarkets, convenience stores and restaurants.

20. The defendants operate the only two dairies that supply school milk to South Central Kentucky School Districts and that are also located within South Central Kentucky. These dairies are Suiza's Flav-O-Rich dairy in London and Broughton's Southern Belle dairy in Somerset. Defendant Suiza also sells school milk to school districts on the fringe of this region from its dairies in Newport,

Kentucky (Louis Trauth) and Bristol, Tennessee (Land O' Sun).

21. The volume of school milk business is relatively small compared to other milk delivery business in most areas. Moreover, school districts rely on dairies to furnish certain delivery services. For example, dairies now servicing South Central Kentucky School Districts provide milk storage coolers, daily or every-other-day delivery to each school, delivery within limited hours, and constant rotation of older stock and replacement of expired stock.

22. In describing Broughton's school milk operations in connection with *State of Ohio v. Louis Trauth Dairy, Inc.*, C-1-93-553 (S.D. Ohio) in 1995, an expert for Broughton stated:

[D]istribution of school milk is a function of [Broughton's] overall business. . . . All school milk is piggy-backed onto deliveries going to Broughton's commercial (wholesale) customers like grocery and convenience stores. That means, in turn, that Broughton's school-milk bidding is very much determined by the location of its other, commercial customers. . . . Broughton bids aggressively year after year for the same school districts . . . served in tandem with the vastly more important commercial customers that are the long-term bulwarks of Broughton's business. Broughton never goes looking for new school accounts by themselves; indeed the reverse is true. Only as Broughton attracts new commercial business does the possibility of serving nearby schools become attractive. (Statement Concerning Broughton Foods Company by Fred S. McChesney, Sep. 23, 1995, at 2-3.)

Similar conditions prevail today in South Central Kentucky.

23. Defendants Suiza and Broughton integrate school route deliveries and other milk delivery business into their DSD routes when serving school districts in

South Central Kentucky. As the President and CEO of Broughton elaborated to the USDA last year:

Most schools, when you are bidding schools, have to be fit in with all your other business along that route. You could not just have a school on your route and furnish it milk. . . . It would be too expensive, and they would not buy it. They [schools] would serve them Coke. (Statement of Phil Cline, President and CEO of Broughton Foods Company, before the United States Department of Agriculture, Jan. 15, 1998, Tr. at 41).

24. Generally, dairies other than Suiza and Broughton do not have the significant milk delivery business, DSD route structure, distribution branches, and other economic conditions that would make them meaningful competitors for the sale of school milk in most of South Central Kentucky.

25. Generally, distributors are not independent competitors for the sale of school milk. Distributors deliver school milk within South Central Kentucky. Most commonly, however, the dairy bids on the school milk business and the distributor acts as the dairy's agent by delivering it. In other instances, distributors bid separately on the school milk business and then buy their milk from a dairy. Virtually all distributors, whether they bid separately from a dairy, or deliver on behalf of a dairy to the South Central Kentucky School Districts, obtain their supply of milk from one of the defendants' dairies.



## V. LIKELY ANTICOMPETITIVE EFFECTS

### A. THE RELEVANT PRODUCT MARKET

26. Milk is a product that has special nutritional characteristics and has no practical substitutes. Dairies that sell milk to schools provide certain services, including coolers to store the milk, daily or every-other-day delivery service to each school, limited hours delivery, and constant rotation of older stock and replacement of expired stock.

27. There are no other beverages that school districts would substitute for milk in the event of a small but substantial price increase for school milk. School districts must provide milk in order to receive substantial federal funds under the School Meal Programs. If the price of school milk rose by a small but significant amount, school districts would be forced to pay the price increase.

28. A relevant product market in which the competitive effects of the proposed acquisition may be assessed is the sale of milk to schools (school milk). School milk is a relevant product market (*i.e.*, a "line of commerce") within the meaning of Section 7 of the Clayton Act.

### B. THE RELEVANT GEOGRAPHIC MARKETS

29. A relevant geographic market within which to assess the competitive effects of the proposed acquisition is South Central Kentucky, and narrower markets contained therein, including each of the South Central Kentucky School

Districts. As a practical matter, South Central Kentucky School Districts would be unable to turn to additional school milk producers not currently bidding or not currently intending to bid for school milk contracts within South Central Kentucky School Districts to supply them with school milk if the price of school milk were to increase by a small but significant amount.

30. South Central Kentucky and the South Central Kentucky School Districts constitute relevant geographic markets (*i.e.*, a "section of the country") within the meaning of Section 7 of the Clayton Act.

#### C. PRIOR COLLUSION ON SCHOOL MILK SALES

31. According to the then President and CEO of Southern Belle, Flav-O-Rich, Inc. conspired with Southern Belle to raise prices by agreeing on which company would submit the winning bid for which school district. (Statement of Martin Shearer, Hearing For Filing of Information, Arraignment & Plea, Sep. 3, 1992, *United States v. Southern Belle Dairy Co.*, CR-92-36, E.D. Ky., Tr. at 17-19). Consequently, Southern Belle pled guilty in United States District Court in the Eastern District of Kentucky, and Flav-O-Rich, Inc. pled guilty in United States District Court in the Northern District of Georgia (consolidating allegations filed in the Eastern and Western Districts of Kentucky, the Eastern District of Tennessee, the Middle District of North Carolina, the Southern District of Mississippi, the District of South 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 *United States v. Southern Belle Dairy Co.*, [1988-1996 Transfer Binder] Trade Reg. Rep. (CCH) ¶45,092, at 44,599 (E.D. Ky. Nov. 13, 1992); *United States v. Flav-O-Rich, Inc.*, [1988-1996 Transfer Binder] Trade Reg. Rep. (CCH) ¶45,092, at 44,605 (N.D. Ga. Dec. 22, 1992). Districts whose school milk contracts were rigged 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; Flav-O-Rich paid \$1,750,000. No other dairies and no distributors were charged with participating in this conspiracy.

32. Flav-O-Rich, Inc. was acquired by Land O' Sun Dairies, L.L.C., in September 1995. Defendant Suiza acquired Land O' Sun in February 1998. Defendant Broughton acquired Southern Belle in December 1997.

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

#### D. HARM TO COMPETITION

34. After they pled guilty to rigging bids to the school districts affected, Southern Belle and Flav-O-Rich took steps to once again compete against each other. Today, the successor-owner of the Flav-O-Rich dairy (Suiza) and the successor-owner of the Southern Belle dairy (Broughton) compete against each other to supply school milk to school districts in South Central Kentucky. As Broughton's attorneys stated in 1998, "Southern Belle . . . is now a strong competitor and often the low bidder for school milk and other government contracts." (Letter from Joseph L. Ruby, *Wiley, Rein & Fielding*, to Yvette Jackson, *Acting Administrator, Food and Consumer Service, USDA*, Jan. 23, 1998, at 2). The competition between the defendants has ensured that South Central Kentucky School Districts benefit from lower prices and higher quality service.

35. The proposed acquisition will reduce the number of competitors in some South Central Kentucky School Districts from three to two. Only two competitors would remain in the following 32 school districts: 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, Glasgow 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.

36. Dairies bid on each school milk contract separately. Where the acquisition would reduce the number of bidders on these contracts from three to two, the likelihood that the remaining bidders will bid less aggressively against each other on both price and service terms is significantly increased.

37. In explaining to the USDA why Southern Belle should not be debarred, Broughton stated that many of the South Central Kentucky School Districts, including those in which there have been three bidders, "will face higher bid prices with the elimination of a competitor from the marketplace." (Letter from Joseph L. Ruby, Wiley, Rein & Fielding, to George A. Braley, *Program Analysis and Monitoring Branch, Food and Nutrition Service, USDA*, May 26, 1998, at 2). Hence, defendant Broughton predicted that it is likely that prices would rise in Kentucky when three school milk competitors are reduced to two.

38. Furthermore, the history of school milk bid rigging indicates that school milk markets are conducive to collusion. Future coordinated activity in this industry could take the form of customer allocation, as in the past, and result in higher bid prices, lower quality, or less favorable delivery service terms. The proposed acquisition would likely increase the danger of tacit or overt collusion in

those school districts where the acquisition would reduce the number of firms competing to provide school milk from three to two.

39. Moreover, in other South Central Kentucky School Districts, the effect of the proposed acquisition would be to establish a monopoly. A monopoly would be created 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 County, Letcher County, Lincoln County, Mercer County, Monticello Independent, Owsley County, Perry County, Rockcastle County, Russell County, Wayne County, and Woodford County. In these counties, the proposed acquisition would give the merged firm the ability to raise prices or to decrease the level or quality of service provided to these school districts.

#### E. ENTRY CONDITIONS

40. In explaining to USDA why Southern Belle was an "important" supplier to "very small school districts in Kentucky" and should not be debarred, Broughton stated that "many of these are rural districts in the mountains of eastern Kentucky. These districts would likely find it difficult to attract alternative suppliers from more distant locations." Defendant Broughton elaborated on this at a transcribed USDA meeting, stating that:

if you look at the geographical area that gets these low number of bids, one or two, 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. (Statement of Joseph L. Ruby, Wiley Rein & Fielding, Counsel for Broughton Foods Company, before the United States Department of Agriculture, Jan. 15, 1998, Tr. at 30-31).

41. Defendant Broughton predicted that eliminating it as a competitor in South Central Kentucky would reduce competition and allow prices to increase above the competitive level. Notably, it did not predict that entry would deter any anticompetitive price increase.

42. Entry by other dairies or distributors will not be timely, likely or sufficient to deter any anticompetitive effect caused by the acquisition. Dairies or distributors are unlikely to decide that it has become profitable to compete for this low margin, low volume, seasonal business as a result of a small but significant increase in school milk prices.

## VI. VIOLATION ALLEGED

43. The acquisition would have the following effects, among others:

- A. competition generally in the production and sale of school milk in South Central Kentucky School Districts would likely be substantially lessened;
- B. actual and potential competition between Suiza and Broughton in the production and sale of school milk in South Central Kentucky would be eliminated; and
- C. the prices for school milk would likely increase, and the quality of service in the sale of school milk would likely decline, in the relevant geographic markets.

44. Unless restrained, the proposed acquisition will violate Section 7 of the Clayton Act.

## VII. REQUEST FOR RELIEF

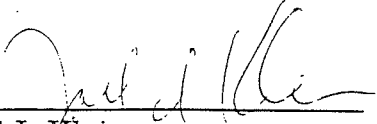
45. The United States requests that this Court:

- A. adjudicate that defendant Suiza's proposed acquisition of Broughton would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18;
- B. preliminarily and permanently enjoin defendant Suiza from carrying out the proposed acquisition, or from entering into or carrying out any agreement, understanding, or plan, the effect of which would be to combine the businesses or assets of Broughton and Suiza;
- C. award the United States the costs of this action; and
- D. award such other relief as is proper.



Respectfully submitted,

For Plaintiff United States of America:

  
Joel I. Klein

Assistant Attorney General




Donna E. Patterson

Deputy Assistant Attorney General

  
Susan M. Davies

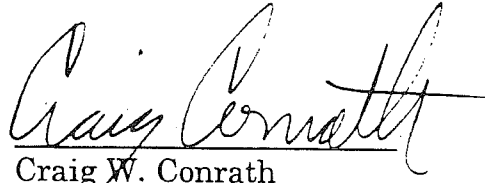
Senior Counsel to the Assistant  
Attorney General



Constance K. Robinson

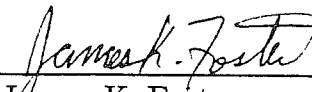
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Dated: March 18, 1998

ATTACHMENT A  
South Central Kentucky

Adair County  
Allen County  
Anderson County  
Barren County  
Bell County  
Bourbon County  
Breathitt County  
Casey County  
Clark County  
Clay County  
Clinton County  
Cumberland County  
Garrard County  
Hart County  
Henry County  
Jackson County  
Jessamine County  
Knott County  
Knox County  
Laurel County  
Lee County  
Leslie County  
Letcher County  
Lincoln County  
Madison County  
McCreary County  
Menifee County  
Mercer County  
Metcalf County  
Owsley County  
Perry County  
Powell County  
Pulaski County  
Rockcastle County  
Russell County

Taylor County  
Wayne County  
Whitley County  
Woodford County

ATTACHMENT B  
South Central Kentucky School Districts

Adair County  
Allen County  
Anderson County  
Barbourville Independent  
Barren County  
Bell County  
Berea Independent  
Bourbon County  
Breathitt County  
Burgin Independent  
Campbellsville Independent  
Casey County  
Caverna Independent  
Clark County  
Clay County  
Clinton County  
Corbin Independent  
Cumberland County  
East Bernstadt Independent  
Garrard County  
Glasgow Independent  
Harrodsburg Independent  
Hart County  
Hazard Independent  
Henry County  
Jackson County  
Jackson Independent  
Jessamine County  
Knott County  
Knox County  
Laurel County  
Lee County  
Leslie County  
Letcher County  
Lincoln County  
Madison County

McCreary County  
Menifee County  
Mercer County  
Metcalf County  
Middlesboro Independent  
Monticello Independent  
Owsley County  
Perry County  
Pineville Independent  
Pulaski County  
Rockcastle County  
Russell County  
Science Hill Independent  
Somerset Independent  
Taylor County  
Wayne County  
Whitley County  
Williamsburg Independent  
Woodford County


CERTIFICATE OF SERVICE

This will certify that a true and correct copy of the foregoing, together with a copy of any Order or Judgment the United States proposes in connection therewith, has been served by mail (to defendant Broughton Foods Company) and by hand (to defendant Suiza Foods Corporation) to:

Suiza Foods Corporation  
c/o Paul T. Denis, Esq.  
Myles R. Hansen, Esq.  
ARNOLD & PORTER  
555 Twelfth Street, N.W.  
Washington, D.C. 20004

Broughton Foods Company  
c/o Thomas J. Murray, Esq. *also by facsimile, James K. Foster*  
Daniel J. Konrad, Esq.  
HUDDLESTON, BOLEN, BEATTY, PORTER & COPEN  
611 Third Avenue  
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Huntington, WV 25722

On this the 18<sup>th</sup> day of March, 1999.

  
\_\_\_\_\_  
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