

# Court Transcript Details Southeast Dairy Antitrust Conspiracy

by Pete Hardin

An alleged, long-running conspiracy that blocked access to regional fluid milk plants for many Southeast dairy farmers was eloquently detailed in courtroom testimony on January 20, 2011 by attorney Robert Abrams of the Howrey law firm. Abrams is plaintiff's lead counsel in the Southeast dairy antitrust case that fingers Dean Foods and Dairy Farmers of America (DFA) as blatant antitrust conspirators and violators. Abrams' statements summarized the evolution of the conspiracy alleged by plaintiffs' lawyers, before Judge Rusty Greer of the Federal District Court for the Eastern District of Tennessee (Greeneville division).

Attorney Abrams' comments are part of a 275-page transcript covering day-long proceedings on January 20, 2011. Abrams is a tough, world-class antitrust attorney. His thorough summary of the facts — gained through discovery of documents and depositions of personnel representing defendants — paints a chilling picture of just how lawless the leaders of Suiza Foods (later Dean Foods) and DFA were in these matters. The “worst of the worst” contained in Abrams' statements on January 20, 2011 detail the following:

**\* A conspiracy to dump “independent” Southeast dairy farmers into the clutches of DFA was achieved by DFA creating exclusive raw milk supply contracts with a variety of Southeast fluid processors. Plans for that conspiracy were hatched in 1997-98 between Gregg Engle\$ (then Suiza Foods CEO) and DFA's CEO Gary Hanman.**

**\* Hanman's annual salaries averaged roughly \$5 million per year for the 1998-2004 period. He received additional bonuses from DFA for the market share DFA controlled (including non-members).**

**\* DFA CEO Hanman also received some sort of bonus compensation from Dean Foods for keeping Dean Foods' raw milk costs low in the Southeast. IMAGINE! GARY HANMAN PAID A BONUS TO KEEP RAW MILK COSTS LOW FOR DFA'S PREDOMINANT RAW MILK BUYER IN THE SOUTHEAST.**

To summarize this long, complex courtroom document, *The Milkweed* will selectively quote statements by Abrams in the January 20, 2011 proceedings.

**Abrams:** “... during 1997 and 1998, Gregg Engles, the chairman of Dean, and Gary Hanman, the CEO of DFA, formed what they called a strategic partnership. Suiza agreed to stop competing for milk procurement by ceding this to DFA through exclusive supply agreements and conversion of non-DFA members to DFA. DFA agreed to stop competing in milk bottling by selling DFA plants to Suiza, Assisting Suiza acquire additional plants, and three, marketing milk to Suiza at below market prices.” (P. 89.)

**Abrams:** “Next we come to promise of preferential prices. These are contemporaneous notes of a 1998 Engles-Hanman meeting which shows that DFA agreed to use credits and rebates to help Suiza expand. Gary Hanman wrote, quote, ‘need to access market, willing to price milk so you can be competitive, can give credits into areas as you expand,’ End quote.

“And next is a 1998 Engles letter to Hanman that reflects this strategic partnership in more detail, confirming Suiza's agreement to withdraw from milk procurement in the future. It says, after DFA successfully assumes responsibility for the co-op milk supply as contemplated by the milk supply agreement, we would expect that DFA would gradually expand its milk supply responsibilities to include other milk supply needs of the venture, including those which may be provided by independent producers. We, with DFA, would turn our efforts to the conversion of independent producers to DFA membership. We would support and join your efforts to represent other producers so as to increase the percent of DFA controlled milk supplied to the venture in the future.” (P. 90-91.)

**Abrams:** “... in 1998, DFA began transferring Southeast bottling plants to Suiza while retaining milk procurement as per the agreement. The Land-O-Sun deal. In 1998, DFA and Allen Meyer sell Land-O-Sun bottling plants to Suiza. DFA gets full requirements agreement. Seven of eight of those plants are in the Southeast. Southern Foods, 1999, in 1999 DFA and Schenkel sell Southern Foods bottling plants to Suiza, DFA gets full supply agreement. Four of five of those plants are in the Southeast. The Suiza Dairy Group, in 2000 other DFA bottling plants were consolidated into the Suiza Dairy Group in which DFA obtained a 33.8 percent ownership interest. Suiza managed Suiza Dairy Group and DFA supplied milk exclusively.” (P. 91.)

**Abrams:** “Old Dean had a price advantages over both Suiza and DFA in bottling because Old Dean procured less expensive milk from independent farmers. Old Dean had a price advantage over DFA in milk procurement because, by eliminating the middleman, DFA, old Dean paid its independent farmers more than DFA paid its members.

“What did they do? DFA created NDH to help Suiza acquire old Dean. They anticipated Department of Justice concern with the combination of the two largest milk bottlers, so Mr. Engles, Mr. Hanman and Mr. Bos agreed that DFA would acquire some of Suiza and old Dean's bottling plants and hand them over to NDH, a new ‘competitor’ formed by DFA.

“NDH was formed April 5, 2001. Eleven divested bottling plants were subsequently contributed to NDH by DFA, and DFA funded NDH with hundreds of millions of dollars provided by its financing arm, Mid-Am Capital. Suiza and old Dean publicly combined at the end of the year, December 21, 2001.

“... Even before Suiza acquired old Dean, Suiza and DFA agreed that DFA would have the right to supply the full milk requirements of future new Dean's existing and after-acquired plants. And NDH gives DFA a full requirements agreement as well.” (Pages 91-92.)

**Abrams:** “And in December 2001, Mr. Hanman, this is when the merger occurred, December 2001, Mr. Hanman sent a letter that explained DOJ's concern that DFA's full requirements supply agreement with new Dean would limit competition and foreclose farmers, so they knew of that and they acted in the contrary.” (P. 93-94.)

**Abrams:** “Furthermore, now looking at more acts in furtherance of this conspiracy, we see DFA managers actually controlling NDH. Now, the DFA had assured the Department of Justice that old Dean, Suiza divestitures of overlapping plants to NDH would ensure vigorous competition because DFA ‘does not and will not control or have input’ regarding NDH.

“Well, over on the right is a letter that says, in part, DFA does not and will not control or have input into the day-to-day operational decisions regarding NDH's processing plants, including decisions on customers, products, pricing and bidding; and it was sent by DFA's lawyer to the Department of Justice. But, in fact, Mr. Hanman and Mr. Bos served on NDH's management committee. They had veto power over its operational decisions, and DFA later acquired 100 percent ownership and control of DFA.

“Another act is that Suiza and DFA agreed to require farmers to join SMA. Even before Suiza acquired, even before Suiza acquired old Dean, Suiza and DFA had agreed that DFA would supply new Dean from Southeast dairy cooperatives required to join a DFA managed marketing agency. That agency is what became SMA.

“And here in this May 3, 2001 document, it was sent to the Suiza board of directors for a meeting, it says, DFA shall have the right to source raw milk for the applicable Dean plants if DFA provides raw milk either through, one, its cooperative member dairy farmers, that's DFA; two, nonmember dairy farmers whose milk is ‘marketed’ by DFA; that was – ended up being the conversion of independents into DMS; or three, which is SMA, third party cooperatives working within a common marketing agency managed by DFA. That's the whole supply situation in the Southeast, your honor.” (Pages 95-96.)

**Abrams:** “... Dean and NDH terminated non-DFA suppliers at the same time.

“Now I'd like to play a couple clips for you above, from, this is Jay Bryant, Maryland & Virginia Cooperative, I'm on page 32, he testified that Dean terminated its supply agreements, even though Dean had no complaints about the milk supplied.

“... and Mr. Bryant testified that it would not, that Maryland & Virginia would not have joined SMA, but for its lack of access to bottling plants due to DFA full requirements agreements.” (P. 96.)

**Abrams:** “Now SMA was formed to consolidate control over farmers. Defendants acknowledge that SMA was formed to consolidate control over farmers. Defendants acknowledge that SMA was formed in 2002 to ‘control 100% of the milk and to eliminate the independent option for Southeast Dairy Farmers.’ Now, defendants knew that their concerted cancellation of supply agreements would require Southeast farmers to join SMA because DFA held exclusive supply agreements for bottling plants that the farmers needed to access; and that's the explained by SMA's Jeff Sims.

“Now DFA controls SMA. The SMA board seats are assigned to SMA member cooperatives based on the volume of milk they market through SMA; and due to its size, DFA has always held at least half of the voting seats on the SMA board and it can veto any SMA action.

“I'm going to focus now on Mr. Engles and Mr. Hanman's agreement to convert farmers to DMS, page 39. Now, as we saw earlier, Engles and Hanman agreed that Suiza would exit milk procurement, stop procuring milk directly from farmers and convert them to DFA.” (P. 98-99.)

**Abrams:** “Well, Mr. Engles lived up to his agreement, during an October 10, 2002 meeting, he, Mr. Schenkel, Mr. Hanman and Mr. Bos all planned the conversion of Southeast farmers still supplying old Dean's plants, with Engles declaring that he would, quote, live up to his word and turn the farmers over to DFA.

“What you have there is a document, is a transcript of the telephone conference of the Dean milk procurement team dated December 17, 2002, which reflects by Marty Devine that, quote, ‘There was a meeting about six weeks ago with Gregg Engles where he stated that he would live up to his word; and based upon this, we are going to have to make some changes. Effective January 2003, we will be changing our relationship with the field. We will be outsourcing the field operations to Dairy Marketing Services.’

“Well, you'll see on slide 41, Mr. David Geisler, he was the DMS president, he was also the vice president of legal for DFA. He testified that DFA controls all aspects of DMS' operations, including DMS prices.” (Pages 99-100.)

**Abrams:** “Next, you see that farmers, the farmers, the independent farmers are not even informed of DFA's role in DMS. This is Ronnie Rider, he is a former DMS manager, and he testified that defendants did not seek independent farmers' consent before their conversion to DMS and none were informed that DFA was setting their prices.” (Page 100.)

**Abrams:** “And going on, we see that defendants offer no defense for SMA's participation in setting prices paid to DMS farmers. For example, I provide you with the January 2007 Ernie Yates, he's from Dean, Ronnie Rider from DMS, Sonia Fabian from DFA and Mr. Baird from SMA discussing prices to be paid DMS farmers. Defendants' explanation, that this is a supplier, DMS and customer discussing prices ignores the horizontal competitors DFA and SMA. (P. 103.)

**Abrams:** “... I'm going to now turn to flooding, which we say is an additional means of price suppression. ... There's no dispute that flooding reduces

minimum blend prices. The USDA and defendants acknowledge that flooding occurs and it reduces minimum blend prices.

“2006 USDA analysis determined that excessive milk was being pooled and diverted on federal orders 5 and 7, and this was driving down the minimum blend price.

“In the *Federal Register*, which you see on the right, it says, quote, “Accordingly, this decision, this is USDA, this decision finds that the pooling of diverted milk arising from supplemental milk supplies receiving transportation credits needlessly results in the unwarranted lowering of the blend prices to producers whose milk regularly and consistently supplies the Class I needs of the Appalachian and Southeast market area.” (P. 105-106.)

**Abrams:** “Now the next page is kind of interesting, slide 57, including the objective of diverting far more than actual need.

“This is a document, a DFA document, that shows that DFA/SMA monitoring the objective of diverting 96 million pounds of supplemental milk each month; that’s milk not delivered to and therefore not needed by the Southeast processors. On this document page, June 2004, DFA diverted 301 percent more milk than was needed by Southeast customers. And you can see from the document itself, the pooling objective, the objective is 96 million diversions per month.

“Now your honor, there are cases, in fact there in this outline here somewhere, that says, that hold that diverting is illegal, if done with the intent to suppress price and reduce competition. I would submit that this is direct evidence of that.

“Going on, flooding also reduces farmer prices because defendants made Southeast farmers overpay for the excessive quantities of supplemental milk that were acquired. An example: DFA and SMA paid Mr. McCloskey and his cooperative, Continental, \$2 premiums and provided free hauling for an unlimited quantity of supplemental milk. Now, Mr. McCloskey was an individual who helped Mr. Baird and other defendants form SMA. I think a reasonable jury could conclude that this was pay back.

“DFA and SMA purchased 15.3 billion pounds of supplemental milk from McCloskey and his co-op, Continental, during 2002-2007, which resulted in Southeast farmers overpaying by at least \$139 million up to the range was \$180 million.

“Now, going on, defendants’ purchase and hauling of unneeded milk used for flooding also increases the Southeast farmer marketing cost. Remember, Mr. Kuney said earlier that all this outside milk is cheap. Go look at the Southwest, it’s cheap. Well, he didn’t tell who pays for that transportation coming from New Mexico into the Southeast. It’s the Southeast farmers paying for that, it isn’t cheap.

“But looking at this document, slide 59, Compton & Associates, retained by SMA, found that SMA should have paid \$56 million less in costs during 2005. When SMA admitted that defendants’ supplemental milk/pooling diversion tactics cost farmers at least \$1.50 per hundredweight, and this was an admission before a regu – USDA over some regulations, and in testimony before USDA, and you have the cities on this page, SMA estimated that Southeast farmers lose \$4 million a month, \$48 million an year, due to supplemental milk acquisition and hauling.” (P. 106-108.)

**Abrams:** “Defendants argument that processors have no incentive to flood overlooks, and we heard that again this morning, overlooks their own admissions that lower blend prices tend to increase processor profits.

“Mr. Haugh’s deposition says, and Mr. Haugh is the NDH president, explaining that processors have record profits when, ‘pay prices to farmers are in the tank.’” (P. 109.)

**Abrams:** “... Flooding is anticompetitive, if undertaken with unlawful intent and in the desire to achieve an unlawful goal. The Department of Justice has challenged flooding undertaken with improper intent.

“This is part of the conspiracy, an act in furtherance of the conspiracy, which we say is part and parcel of this *per se* horizontal market allocation price fixing arrangement. The record in this case we say, your honor, supports the conspiracy. There’s direct evidence of a *per se* unlawful agreement. Defendants’ story, therefore, is irrelevant, and there’s also circumstantial evidence. And we do agree that RE/MAX, the parties agree that RE/MAX, deals with the factors for circumstantial evidence. You know, acts against self interest, common motive and opportunity.

“... the alleged acts if taken independently make no sense. They admit that. The alleged acts if taken independently make no sense.

“...does Dean as part of this conspiracy benefit from having its supplies have monopoly power? Does DFA as part of this conspiracy benefit from its big customer having monopoly power? And the answer is no, it doesn’t make any sense. It’s incentive incompatible.

“Now defendants claim that these acts if taken independently would make no sense. The conclusion is they took them, and they took them in a context of a conspiracy where it makes perfect sense.

“Let’s focus on the full requirements agreements for a moment. They are not in the interest of Southeast farmers. We all know that Southeast is a deficit region. Full requirements agreements in a deficit region saddle Southeast farmer with the burden of procuring and supplying supplemental milk to bridge the deficit. That basic.

“And now we’re going to hear from Jerry Bos, the former – well, he’s a defendant here and a former DFA CFO who acknowledged that the most favored nations provisions in DFA’s full requirements agreements do not operate to benefit the farmers because they prevent DFA from maximizing farmer prices.” (P. 109-110.)

**Abrams:** “And now I’m going to talk about the other RE/MAX factor, common motive. Milk processors want to maximize profits by paying the lowest possible prices for milk, their largest input cost. Marty Devine, the Dean exec-

utive, you’ve heard him, testified that, “I want the lowest possible price all the time.” DFA’s chief economist testified that DFA, as a milk processor, wants the lowest possible price for milk.

“On the right on this page, 78, you see a DFA internal presentation. It was a presentation by Gary Hanman to DFA managers, and what does he say? Our value added investments must return earnings. Supply costs must be kept to a minimum, and net costs paid from the supply function. Supply costs must be kept to a minimum, 70 percent. They’re buying milk. Now, he’s also a processor, so he’s talking as a, as a bottler.” (P. 115-116.)

**Abrams:** “Talking about further motive. Cooperative managers want control rather than competition. Mr. Hanman and Mr. Bos’ model for DFA was increasing market power by controlling access to processors. This is a DFA internal presentation to the right on page 80, it’s by Gary Hanman, and it has a chart, consolidated milk marketing. Their goal was to get all milk to be funneled through DFA, then going to the processor.

“...Now, our, one of our experts, Professor Scott, found that defendants’ conspiracy enabled top management simultaneously to satisfy all their desires: locking up the supply to most Southeast bottling plants; reducing competition; increasing DFA-marketed milk; and realizing personal economic gains.

“Now, continuing with the common motive, the individual participants got rich together. The prospect of supra-competitive profits and sweetheart deals is a strong motive to conspire. Mr. Engles was paid \$180 million in compensation since the Dean-Suiza combination, not including his Dean stock holdings. **Mr. Hanman was paid \$31,600,000 by DFA while he was CFO, or CEO. DFA’s joint venture paid Mr. Bos close to a million dollars in special bonuses requested by Mr. Hanman and approved by Mr. Schenkel.**

**“DFA’s executive agreements provided further incentive to Mr. Hanman. Mr. Hanman’s employment contracts had \$5 million-plus in bonuses based, in part, on increasing volume of DFA controlled milk in 2002 to 2004. Those are the same years that Dean converted farmers to DMS and SMA was formed. Hanman also had a multi-million dollar bonus based on increases in value or returns on equity on Suiza/Dean’s bottling plants and DFA’s joint venture bottling affiliate during the 1998-2004 period. Mr. Hanman received no bonuses based on increasing milk prices. The whole point of DFA is to get the best prices for their farmers. None of his bonuses were based on that, they were based on other things that motivated his action.”** (Bold emphasis added.)

## Cast of Characters & Technical Terms:

**Robert Abrams** – Howrey, LLP, lead counsel for plaintiffs.

**James Baird** – Defendant, manager of Lone Star Milk Producers.

**Jerry Bos** – Defendant, former DFA Chief Operating Officer.

**Jay Bryant** – Manager, Maryland & Virginia Cooperative Milk Producers Assn.

This co-op lost access for raw milk sales to Dean Foods’ milk plants and was forced into selling raw milk through SMA.

**Dairy Marketing Services (DMS)** – A milk marketing organization created by DFA to fool “independent” dairy producers their milk sales were not controlled by the hated DFA.

**“Flooding”** – Practice of associating large quantities of milk from outside the Southeast region and then paying producers of that distant milk from resources that should have been paid to dairy farmers in Southeast states. At one point, plaintiffs’ attorney estimates Southeast dairy producers lost \$1.50 per hundredweight to “flooding.”

**“Old” Dean Foods** – One of nation’s leading fluid milk processors, prior to December 2001 merger that created “New” Dean Foods.

**“New” Dean Foods** – The nation’s largest fluid milk processor, formed by “marriage” of Suiza Foods and “Old” Dean Foods” (the nation’s first and second largest fluid milk processors) in December 2001. Dean Foods controls about 40% of all fluid milk packaged and distributed in the U.S.

**Marty Devine** – Dean Foods’ raw milk procurement official.

**Gregg Engles** – CEO of Dean Foods, following December 2001 merger of Suiza Foods and Dean Foods. Prior to merger, Engles was CEO of Suiza Foods, which acquired Dean Foods.

**David Geisler** – DFA internal legal counsel, also president of Dairy Marketing Services.

**Gary Hanman** – Defendant, former CEO and President, Dairy Farmers of America. Served in same roles for DFA’s predecessor co-op, Mid-America Dairyman.

**Land-O-Sun** – Former fluid milk processing firm in Southeast, owned by DFA and Alley Meyer, transferred to Suiza Foods.

**Mike McCloskey** – Principal at Fair Oaks Farms in Indiana, powerful figure in Continental Co-op and Select Milk Producers.

**National Dairy Holdings (NDH)** – Fluid milk processing firm created by DFA in April 2001 as an alleged “competitor” for ultimate merger that created “New” Dean Foods. National Dairy Holdings was owned by DFA, Alan Meyer and Tracy Noll. NDH lost \$134 million in 2007, forcing DFA to take 100% control of business. NDH sold to Grupo LALA (*aka* “The Mexicans”) in spring 2009.

**Ronnie Rider** – Former DMS and Dean Foods milk procurement official.

**SMA** – Southeast Marketing Agency, regional common marketing agency among cooperatives controlled by DFA.

**Southern Foods Group** – Former fluid milk processing firm owned by DFA and Pete Schenkel, transferred into joint venture with Suiza Foods.

**Suiza Foods** – Fluid milk processor, formed in mid-1990s. Suiza conducted numerous fluid processing joint ventures with DFA. Suiza acquired “old” Dean Foods by merger in 2001.

**Suiza Dairy Group** – Fluid milk processing joint venture between DFA and Suiza Foods. DFA owned 33.8%. Sold to Dean Foods in December 2001.

**Ernie Yates** – Ex- Dean Foods’ milk procurement official. Now serves similar responsibilities for Grupo LALA, which purchased National Dairy Holdings in 2009.