**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

UNITED STATES OF AMERICA et al., *Plaintiffs*,	Civil Action No. 08-CV-5992
v.	Honorable Elaine E. Bucklo
JBS S.A. and NATIONAL BEEF PACKING COMPANY, LLC *Defendants.*	

**PLAINTIFF UNITED STATES' OPPOSITION TO NON-PARTY
R-CALF'S AND OCM'S MOTION FOR REASSIGNMENT AND CONSOLIDATION**

The United States opposes the motion of Ranchers-Cattlemen Action Legal Fund, the United Stockgrowers of America ("R-CALF") and the Organization for Competitive Markets ("OCM") (collectively "R-CALF/OCM plaintiffs'") for reassignment and consolidation under Local Rule 40.4 and Federal Rule of Civil Procedure 42(a) [Docket No. 59]. The R-CALF/OCM plaintiffs seek not only to tag-along on claims the United States has alleged in this case but also to inject new grounds for finding the challenged merger illegal, based on additional facts and legal theories. R-CALF and OCM repeatedly presented these additional grounds to the United States during the course of its pre-filing investigation. But after conducting its investigation, the United States chose not to include them in its complaint.

Now, the R-CALF/OCM plaintiffs seek to have their case and their private issues consolidated with the United States' case. Such an outcome is unwarranted. Courts have long recognized that the United States has a unique role in enforcing the antitrust laws and that the cases it brings in the public interest should not be encumbered or delayed by combination with suits in which private plaintiffs seek to advance their own interests. The mere presence of some common questions of law and fact does not override this strong public policy, especially where, as here, the private action relies on facts and theories not relevant to the government's case. In any event, the R-CALF/OCM plaintiffs fail to meet their burden, under the applicable rules, of demonstrating with particularity the appropriateness of reassignment and consolidation in light of the additional issues they raise.

I. Background

In early March 2008, JBS publicly announced that it had reached agreements to acquire National Beef Packing Company, LLC ("National") and Smithfield Beef Group, Inc. ("Smithfield") and that, through Smithfield, it would acquire ownership of Five Rivers Cattle Feeding, LLC ("Five Rivers"). The Department of Justice ("Department") proceeded to investigate whether JBS's acquisitions of National, Smithfield, and Five Rivers would likely lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

During the course of its investigation, the Department obtained information from numerous parties, including R-CALF and OCM.[1] These two groups repeatedly expressed

[1] R-CALF submitted written materials and data to the Department on March 12, 2008; April 9, 2008; April 24, 2008; May 8, 2008; May 20, 2008; May 28, 2008; and August 1, 2008 and made in-person presentations to legal staff on April 16, 2008 and September 5, 2008. OCM met with the Department on March 26, 2008 and September 10, 2008.

concern that vertical integration by packers – that is, packers having an ownership or contractual interest in cattle before they are slaughtered (or, using R-CALF's and OCM's phrase, controlling "captive supplies") – has largely diminished the number of cattle sold on the open market and, concurrently, has enhanced packer market power in their purchase of cattle.[2] R-CALF claimed that JBS's acquisition of Five Rivers, a large feedlot operator with extensive operations throughout the United States,[3] would increase packer ownership of cattle and "exacerbate the ongoing exercise of market power." Letter from Bill Bullard, CEO, R-CALF, to Thomas Barnett, Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice, at 21-22 (Apr. 9, 2008) (Ex. A). R-CALF asked the United States to block both the National and Smithfield acquisitions, including the acquisition of Five Rivers. *Id.* at 1-2.

On October 20, 2008, the United States and thirteen states[4] filed a complaint [Docket No. 1] alleging that JBS's proposed acquisition of National will likely lessen competition in the purchase of fed cattle and in the sale of USDA-graded boxed beef to consumers in violation of

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[2] *E.g.*, Presentation from R-CALF to Antitrust Division Staff, at 23 (Sept. 5, 2008) (Ex. B) (highlighting how transactions would increase the "volume of captive supply cattle controlled by JBS/Swift); Letter from Bill Bullard, CEO, R-CALF, to Thomas Barnett, Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice, at 11-12 (May 8, 2008) (Ex. C) (alleging that JBS ownership of Five Rivers would increase the percentage of packer-owned cattle and "thin the cash market"); Letter from Bullard to Barnett, at 14-15 (Apr. 9, 2008) (Ex. A) (alleging harm from "vertical coordination between the live cattle industry and the beef manufacturing industry" and the "present use of captive supplies").

[3] Feedlots take cattle that have reached an appropriate age and feed them a high-energy grain diet for three to six months or more. When the cattle reach an appropriate weight, they are sent to packing plants (operated by firms such as JBS or National) for slaughter and processing.

[4] An Amended Complaint [Docket No. 48], filed on November 7, 2008, added four additional Plaintiff States. Each Plaintiff State brings this action in its sovereign capacity and as parens patriae on behalf of the citizens, general welfare and economy of each of their states. As such, their goals are similar to those of the United States in representing the public interest.

Section 7. The complaint alleges that the proposed transaction would eliminate head-to-head competition between JBS and National and would make interdependent or coordinated conduct among JBS and the other two significant packers more likely. *See, e.g.*, United States' Complaint ¶ 6. On the same day the United States filed its complaint, it also notified JBS that it would not seek to block JBS's acquisition of Smithfield. JBS has closed that acquisition and now owns Smithfield and Five Rivers.

On November 13, 2008, the R-CALF/OCM plaintiffs filed their own complaint. In a press release announcing their case, they "applauded" the United States' suit to block the National acquisition but were "disappointed" that Smithfield and Five Rivers were excluded from that suit. After noting that they had encouraged the United States "to take enforcement action" against JBS's acquisition of Smithfield and Five Rivers, the R-CALF/OCM plaintiffs stated that their action would expand the United States' suit by addressing merger effects relating to Five Rivers as well as "how packers use captive supplies to leverage down prices and how this negatively impacts the price for all classes of cattle." "Cattle Producers and OCM File Suit Against JBS Merger" (R-CALF USA media release, Nov. 14, 2008) (Ex. D).

Although much of their complaint is lifted verbatim from the United States' complaint, the R-CALF/OCM plaintiffs make additional factual allegations about Five Rivers (*e.g.*, ¶¶ 3 & 12) and the likely effects arising from vertical integration and captive supply issues (*e.g.*, ¶¶ 28 & 29) that are not present in the United States' complaint. The R-CALF/OCM plaintiffs also allege specifically that JBS's acquisition of National violates Section 7 of the Clayton Act based on the "increased concentration in feedlot ownership" and the "increased reliance on captive supplies." ¶ 48(d). Those theories of liability are not in the United States' complaint. The R-

CALF/OCM plaintiffs nonetheless now seek to have their case reassigned and consolidated with the United States' action.

II. Argument

Whether to reassign a case under Local Rule 40.4 and consolidate it with another action pursuant to Federal Rule of Civil Procedure 42 lies within the sound discretion of this Court. *King v. Gen. Elec. Co.*, 960 F.2d 617, 626 (7th Cir. 1992) ("A district court's decision to consolidate cases is subject to review only for an abuse of discretion."); *Clark v. Ins. Car Rentals, Inc.*, 42 F. Supp. 2d 846, 847 (N.D. Ill. 1999). Here, consolidation is unwarranted given the strong public policy against combining private actions with public antitrust cases and the failure of the R-CALF/OCM plaintiffs to justify reassignment and consolidation, given the additional facts and theories they seek to pursue.[5]

A. The Courts Have Articulated a Strong Public Policy That Dictates Against Combining Private and Government Antitrust Suits.

The United States has responsibility to represent the public interest in enforcing the nation's antitrust laws, and it should have the ability to do so without interference by private parties. *See, e.g., Sam Fox Publ'g Co. v. United States*, 366 U.S. 683, 693 (1961) (emphasizing "the unquestionably sound policy of not permitting private antitrust plaintiffs to press their claims against alleged violators in the same suit as the Government").

Courts have consistently held in a wide variety of procedural contexts that claims by

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[5] Though consolidation is inappropriate, as an alternative, the United States would not oppose the R-CALF/OCM plaintiffs making an amicus submission at the close of trial to present their views, based on the record evidence, as to the competitive effects of the transaction. *See United States v. Visa U.S.A., Inc.*, No. 98 Civ. 7076, 2000 WL 1174930, at *2 (S.D.N.Y. Aug. 18, 2000) (denying motion to intervene but granting permission to proposed intervenor to file amicus brief).

private plaintiffs should not be combined with antitrust enforcement actions brought by the United States, especially where, as here, the United States objects to their inclusion.[6] *See, e.g.*, *United States v. Dentsply Int'l, Inc.*, 190 F.R.D. 140, 144-45 (D. Del. 1999) (denying consolidation of pre-trial proceedings of two "tag-along" private antitrust damages actions with antitrust enforcement action brought by the United States);[7] *United States v. Visa U.S.A., Inc.*, No. 98 Civ. 7076, 2000 WL 1174930 (S.D.N.Y. Aug. 18, 2000) (denying private party's motion to intervene during course of civil antitrust case brought by the United States); *Sam Fox Publ'g*, 366 U.S. at 693 (denying private party's motion to intervene for purposes of modifying antitrust consent decree obtained by the United States); *see also United States v. Int'l Bus. Mach. Corp.*, 62 F.R.D. 530, 532 n.1 (S.D.N.Y. 1974) ("It is a firmly established general principle that a private party will not be permitted to intervene in government antitrust litigation."); 7C WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1909, at 414 (3d. ed. 2007) ("[I]n the absence of a very compelling showing to the contrary, it will be assumed that the United States adequately

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[6] The case cited by the R-CALF/OCM plaintiffs, *Community Publishers, Inc. v. Donrey Corp.*, 892 F. Supp. 1146 (W.D. Ark. 1995), is inapposite because it was the United States that moved for consolidation of its case with a previously filed private action challenging a consummated merger. Such consolidation was in the public interest and did not add additional issues to the pending private action. As the court in *Dentsply* observed, there is not a *per se* ban on consolidation of a Government antitrust case under Rule 42(a), but when the government objects, the public policy concerns outweigh other considerations in favor of consolidation. *United States v. Dentsply Int'l, Inc.*, 190 F.R.D. 140, 145 (D. Del. 1999).

[7] In *Dentsply*, the district court declined to consolidate cases that presented similar factual and legal issues, finding that "Congress has articulated a strong public policy against combining antitrust complaints brought by the Government with private antitrust damages suits." 190 F.R.D. at 144. R-CALF/OCM seeks to distinguish *Dentsply* on the basis that it involved private damages suits. R-CALF/OCM Mem. at 8-9. The *Dentsply* court, however, was concerned with delay that would be caused by interjecting private interests into a public action, 190 F.R.D. at 144-45, and such delay will arise regardless of whether the private suit is one seeking damages or one seeking injunctive relief on a basis advanced solely by a private party.

represents the public interest in antitrust suits.") (collecting cases).

The individual interests advanced by private plaintiffs – whether they be customers, suppliers, or competitors of the defendants in an antitrust action – will of necessity diverge from the public interest and will likely distract, delay and complicate the government's case.[8] Here, if consolidation is granted, the R-CALF/OCM plaintiffs will inject their additional theories – already rejected by the United States – into the United States' case, pursuing their private interests and complicating the litigation with new facts and legal issues. In addition, if the R-CALF/OCM plaintiffs are allowed to join this case, then other non-parties who have an interest in this industry – or even in the general enforcement of the antitrust laws – could also seek to join, resulting in enormous complexities in this case, as well as adversely affecting future government cases.[9]

B. The R-CALF/OCM Plaintiffs Have Failed to Meet Their Burden to Support Reassignment and Consolidation

The R-CALF/OCM plaintiffs have failed to establish how reassignment and consolidation is warranted given the additional facts and theories at issue in their case. Local

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[8] The risk of such complications outweigh any inefficiencies or burdens on the private parties that might result from a failure to consolidate. *See Dentsply*, 190 F.R.D. at 144-45 (recognizing public interest in expedited resolution of government antitrust actions outweighs potential burdens of duplicative discovery on defendants) (citing H.R. Rep. No. 90-1130, at 8 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1905); *Visa*, 2000 WL 1174930, at *2 (denying intervention because potential delay "clearly outweighs any benefit that may accrue therefrom") (internal quotation marks omitted).

[9] If other parties followed R-CALF/OCM's model – waiting until the government challenges a transaction and then seeking consolidation after filing a lawsuit that copies much of the government's complaint – the government's enforcement actions would be quickly bogged down with private plaintiffs. *See Dentsply*, 190 F.R.D. at 144 ("If consolidation were permitted with the Government antitrust case under Rule 42(a), it would encourage more private tag-along suits, which would likely delay future Government antitrust cases.").

Rule 40.4(b) sets forth the "stringent criteria," *Goldhamer v. Nagode*, No. 07 C 5286, 2007 WL 4548228, at *3 (N.D. Ill. Dec. 20, 2007), that the movant must meet for reassignment of a related[10] case:

> (1) both cases are pending in this Court; (2) the handling of both cases by the same judge is likely to result in a substantial saving of judicial time and effort; (3) the earlier case has not progressed to the point where designating a later filed case as related would be likely to delay the proceedings in the earlier case substantially; and (4) the cases are susceptible of disposition in a single proceeding.

The R-CALF/OCM plaintiffs fail to meet this burden because they ignore the differences in their case and the United States' case and fail to explain how those differences would affect the current, pending matter.[11] Instead, they gloss over the issues at the crux of their motion with the conclusory statement that there are "significant similarities between the two cases." R-CALF/OCM Mem. at 5. Such a statement is plainly insufficient because the moving party must "sufficiently apply the facts of the case" to be consolidated to each element of the rule. *Mach. Movers v. Joseph/Anthony, Inc.*, No. 03 C 8707, 2004 WL 1631646, at *3 (N.D. Ill. July 16, 2004).[12]

R-CALF/OCM's memorandum fails to disclose – let alone analyze the implications of – the significant differences between the two complaints. As explained above, the R-CALF/OCM

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[10] The R-CALF/OCM case likely meets the test for a "related" case in that it involves "some of the same issues of fact or law" as the United States' case. *See* Local Rule 40.4(a)(2).

[11] The movants satisfy only the first 40.4(b) factor: They filed their action in this Court.

[12] The R-CALF/OCM plaintiffs may attempt to meet their burden by providing specific facts in their reply brief; however, arguments raised for the first time in a reply brief that should have been made in support of a motion should be deemed waived. *Wells v. Bartley*, 553 F. Supp. 2d 1019, 1028 n.9 (N.D. Ill. 2008) (Bucklo, J.); *see also Global Patent Holdings, LLC v. Green Bay Packers, Inc.*, No. 00 C 4623, 2008 WL 1848142 (N.D. Ill. Apr. 23, 2008) (motion to reassign) ("We emphatically do not endorse a practice of filing underdeveloped motions or saving the bulk of a party's arguments for presentation in a reply brief.").

complaint contains new factual allegations concerning Five Rivers and captive supply issues and a separate legal basis for relief relating to vertical effects arising from feedlot ownership. These facts and theories are not part of the United States' case, which is grounded on horizontal claims. Proof of these facts and theories will require a significantly different evidentiary and economic basis than what will be at issue in the United States' action.[13]

If consolidated, the R-CALF/OCM claims necessarily will complicate the United States' action. First, R-CALF/OCM's pursuit of a legal theory intentionally excluded from the United States' case raises the question of whether the two cases are, in fact, susceptible of disposition in a single proceeding, and the R-CALF/OCM plaintiffs have not explained how they can be. Second, introducing R-CALF/OCM and their additional issues to the United States' case would needlessly complicate the proceedings. The United States would need to account for R-CALF/OCM counsel when scheduling and taking depositions.[14] It would also need to cover additional depositions noticed by R-CALF/OCM, thereby requiring the United States to expend resources to cover depositions that it had not planned on taking on issues irrelevant to its case. The defendants also would likely seek discovery and engage in motions practice relating to

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[13] Effects arising from vertical integration raise separate analytical issues than those relating to the merger of horizontal competitors. *Compare* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTRITRUST LAW ¶¶ 900-990 (2d ed. 2006) (discussing principles for evaluating horizontal mergers), *and* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (1992) (same), *with* AREEDA, ANTRITRUST LAW ¶¶ 1000-1041 (discussing principles for evaluating mergers raising vertical issues), *and* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, NON-HORIZONTAL MERGER GUIDELINES (1984) (same).

[14] Under the scheduling order negotiated between the United States and counsel for JBS and National, each party is entitled to take only 35 total depositions. That number was negotiated with regard to the claims in the United States' complaint and to likely defenses, not to the claims that R-CALF/OCM now raise.

issues such as R-CALF's and OCM's standing to bring their suit. Non-party witnesses would be likely to object to disclosing proprietary information to market participants and industry observers (such as R-CALF and OCM). Similarly, the R-CALF/OCM issues would likely lead to additional expert reports, pre-trial hearings and fact and expert witnesses at trial, all of which has the potential to significantly complicate the United States' action. The R-CALF/OCM plaintiffs' professed willingness to abide by the Court's discovery schedule here does not eliminate these potential disputes and additional complications, and "there is no way to ensure ahead of time that delay will not occur." *Dentsply*, 190 F.R.D. at 146.

In short, R-CALF/OCM have failed to show that reassignment is warranted given the additional facts, theories and claims that R-CALF/OCM now seek to inject into the proceedings.[15] These concerns are equally apposite in the context of consolidation.[16]

The R-CALF/OCM plaintiffs appear to argue that their case should be consolidated with the United States' action because R-CALF and OCM expended significant time and effort

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[15] *See generally Goldhamer*, 2007 WL 4548228, at *2 (movant failed to meet second, third and fourth prongs of Local Rule 40.4(b) given that second case raised new facts and claims that will "require different discovery and motions, and will generally raise different legal issues"); *Williams v. Walsh Constr.*, No. 05 C 6807, 2007 WL 178309, at *2 (N.D. Ill. Jan. 16, 2007) (savings in judicial time and effort must be substantial; "if the cases will require different discovery, legal findings, defenses or summary judgment motions, it is unlikely that reassignment will result in a substantial judicial savings").

[16] *See Goldhamer*, 2007 WL 4548228, at *2 ("In exercising our discretion on the issue of consolidation and reassignment, we look to the Local Rules for guidance."); *see generally* FED R. CIV. P. 42(a) (noting unnecessary costs and delay as factors in decisions relating to consolidation); 9A WRIGHT, FEDERAL PRACTICE § 2383, at 36 (3d. ed. 2008) (stating that the court must weigh any inconvenience, delay, or expense that consolidation would cause); *Cf. Visa*, 2000 WL 1174930, at *2 (intervention by private party would "'unduly delay or prejudice the adjudication of the rights of the original parties,' . . . by imposing additional and unnecessary burdens - in the form of new discovery, evidence, and even legal issues – on the resolution of the matter before me.") (internal citation omitted).

"urging the DOJ to rigorously investigate the potential anticompetitive impact" of JBS's proposed acquisitions and because they will help rather than hinder the government's case. R-CALF/OCM Mem. at 2-3. These claims do not warrant what is effectively intervention into a government enforcement action – over the United States' opposition – and do not distinguish the R-CALF/OCM plaintiffs from many other parties that advocate their interests before the Department of Justice.

III. Conclusion

For the reasons stated above, the United States respectfully requests that the Court deny R-CALF/OCM's motion to reassign and consolidate. In addition, if the Court considers arguments in the movant's reply brief that should have been made initially, the United States respectfully asks for an opportunity to rebut those untimely new arguments with oral argument.

Respectfully Submitted,

s/

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Dated: November 26, 2008

CERTIFICATE OF SERVICE

Claude F. Scott, Jr., an attorney, hereby certifies that on November 26, 2008, he caused true and correct copies of the foregoing "Plaintiff United States' Opposition to Non-Party R-CALF's and OCM's Motion for Reassignment and Consolidation" to be served via the Court's ECF system on the following counsel of record in this matter:

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Claude F. Scott, Jr. further certifies that on November 26, 2008, he caused true and correct copies of the foregoing "Plaintiff United States' Opposition to Non-Party R-CALF's and OCM's Motion for Reassignment and Consolidation" to be served via e-mail and first class mail on the following counsel:

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s/
Claude F. Scott, Jr.

EXHIBIT LIST

Letter from Bill Bullard, CEO, R-CALF USA, to Thomas Barnett, Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice (Apr. 9, 2008)	Exhibit A
Presentation from R-CALF USA to Antitrust Division Staff (Sept. 5, 2008)	Exhibit B
Letter from Bill Bullard, CEO, R-CALF USA, to Thomas Barnett, Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice (May 8, 2008)	Exhibit C
"Cattle Producers and OCM File Suit Against JBS Merger" (R-CALF USA media release, Nov. 14, 2008)	Exhibit D

EXHIBIT A

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April 9, 2008

The Honorable Thomas Barnett
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Office of Operations
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Washington, D.C. 20530

Re: R-CALF USA's Request to DOJ for Consideration of Important Factors Related to the U.S. Cattle Industry and Relevant to the Proposed JBS Acquisition of National Beef Packing Co., Smithfield Beef Group, and Five Rivers Ranch Cattle Feeding, LLC

Dear Mr. Barnett:

The Ranchers Cattlemen Action Legal Fund United Stockgrowers of America ("R-CALF USA") respectfully requests that the U.S. Department of Justice ("DOJ") carefully consider the important factors discussed below concerning the current state of the U.S. live cattle industry during the Agency's analysis of the proposed mergers by JBS Acquisitions (hereafter "JBS-Brazil") to purchase National Beef Packing Co. ("National"), Smithfield Beef Group ("Smithfield"), and Five Rivers Ranch Cattle Feeding, LLC ("Five Rivers"), (collectively "JBS-Brazil Merger").

R-CALF USA represents thousands of U.S. cattle producers on domestic and international trade and marketing issues. R-CALF USA, a national, non-profit organization, is dedicated to ensuring the continued profitability and viability of the U.S. cattle industry. R-CALF USA's membership consists primarily of cow-calf operators, cattle backgrounders, and feedlot owners. Its members are located in 47 states, and the organization has approximately 60 local and state association affiliates, from both cattle and farm organizations. Various main street businesses are associate members of R-CALF USA.

R-CALF USA previously submitted a letter to your agency on March 12, 2008 expressing its initial concerns regarding the JBS-Brazil Merger. In that letter, R-CALF USA requested that your agency 1) oppose the JBS-Brazil Merger should evidence be found indicating *any* reduction in competition to either the U.S. cattle industry or the U.S. beef industry, 2) investigate the circumstances surrounding any anti-competitive practices alleged against and/or

committed by JBS-Brazil, and 3) determine if U.S. laws are adequate and adequately enforced to prospectively prevent a recurrence of the kind and type of anti-competitive behavior as was alleged to have been perpetrated by JBS-Brazil.

This communication is a follow-up to R-CALF USA's initial letter and describes in greater detail the basis for R-CALF USA's present request that the U.S. Department of Justice (DOJ) indefinitely block the JBS-Brazil Merger. As discussed below, R-CALF USA is concerned that the JBS-Brazil Merger would 1) harm the entire U.S. live cattle industry by reducing competition for slaughter-ready steers and heifers, resulting in reduced competition among and between the industry's subparts, and 2) harm U.S. live cattle producers by reducing competition in the U.S. live cattle market and subjecting them to abusive market power.

I. The JBS-Brazil Merger Would Result in Harm to the Entire U.S. Live Cattle Industry by Reducing Competition For Slaughter-Ready Steers and Heifers, Resulting in Reduced Competition Among and Between the Industry's Various Subparts.

As a preliminary matter, R-CALF USA requests that the DOJ comport its analysis of the JBS-Brazil Merger to recognize the unique standing of the U.S. live cattle industry within the multi-segmented U.S. beef supply chain. The U.S. live cattle industry is a separate and distinct U.S. agricultural industry whereas the meatpacking firms subject to the horizontal merger aspect of the JBS-Brazil Merger – National and Smithfield – are manufacturing firms, recognized separately by the U.S. Department of Commerce as manufacturers of nondurable goods.[1] Thus the cattle industry, a subset of the U.S. agricultural industry, is a distinguishable value-added, contributing industry to the gross domestic product of the United States; and the meatpacking industry, a subset of the food manufacturing industry, is itself a distinguishable value-added, contributing industry to the gross domestic product of the United States.[2] These industry delineations are based on the 1997 North American Industry Classification System.[3]

The U.S. Census Bureau reinforces this industry delineation in its 2007 North American Industry Classification System ("NAICS") using a six-digit code.[4] Under this system, "Animal Food Manufacturing" is a subset of "Food Manufacturing," which is a subset of the general industry type "Manufacturing."[5] In contrast, "Cattle Feedlots" is a subset of "Cattle Farming and Ranching," which is a subset of the general industry type "Agriculture, Forestry, Fishing and Hunting."[6]

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[1] *See* Value Added by Industry, Gross-Domestic-Product by Industry Accounts, Bureau of Economic Analysis, U.S. Department of Commerce, available at http://www.bea.gov/industry/gpotables/gpo_action.cfm?anon=65796&table_id=20841&format_type=0.
[2] *See id*.
[3] *See* Guide to the Interactive GDP-by-Industry Accounts Tables, Bureaus of Economic Analysis, U.S. Department of Commerce, at fn 1, available at http://www.bea.gov/industry/gpotables/Guide.cfm?anon=65796#Value_Added_by_Industry.
[4] *See* 2007 NAICS Codes and Titles, U.S. Census Bureau, available at http://www.census.gov/naics/2007/NAICOD07.HTM.
[5] *See id*. (The NAICS codes for the listed industries are: Animal Food Manufacturing (3111), Food Manufacturing (311) and Manufacturing (31-33.).
[6] *See id.* (The NAICS codes for the listed industries are: Cattle Feedlots (112112), Cattle Farming and Ranching (1121), Agriculture, Forestry, Fishing and Hunting (11.).

A. Failure to Assess the Potential Impact of the JBS-Brazil Merger on the Entire U.S. Live Cattle Industry Would Result in a Significant Understatement of the Mergers' Effect.

The delineation of the U.S. live cattle industry as a separate value-added industry is crucial to the DOJ's analysis of the JBS-Brazil Merger. If the DOJ mistakenly presumed the U.S. live cattle industry was not distinguishable as a separate industry, the mergers' potential impact on competition for slaughter-ready cattle (just one of the value-added products created within the U.S. cattle industry) would improperly be viewed as the ultimate outcome of the merger, and the likely impact from the merger would be significantly understated. This is because any lessening of competition, or exercise of market power in the slaughter-ready cattle market, would have a profound, though indirect impact on competition *within* the entire U.S. live cattle industry. For example, the competitiveness of the breeding stock industry is highly sensitive to market signals emanating from the slaughter-ready cattle market, e.g., supply-side signals indicating a need for herd expansion or liquidation, though this industry subpart does not generally market slaughter-ready cattle. [7]

To further explain this relationship, it is helpful to review the annual disposition and marketing of the varied products produced by the U.S. live cattle industry, i.e., the various classes of live cattle. In 2006 (latest comprehensive data available), total federally inspected cattle slaughter in the U.S. consisted of ~33 million head,[8] which represented a total live weight of ~42 billion pounds, and generated a production value of ~$35 billion. [9] However, in that year the U.S. live cattle industry actually marketed ~45 million head of cattle,[10] which represented a total live weight of ~55 billion pounds, and generated cash receipts of ~$49 billion.[11]

What this data clearly shows is that the U.S. live cattle industry, a "Cattle Farming and Ranching Industry" depends only partially on the sale of slaughter-ready cattle to the "Food Manufacturing Industry" (hereafter "manufacturing industry") for its annual revenues. In fact, as evinced by this data, sales of live cattle *not* destined for sale to the manufacturing industry accounted for over 27 percent of the annual revenues generated by the U.S. live cattle industry in 2006.[12]

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[7] The breeding stock industry produces registered breeding cattle – both males and females – that have productive lifespans ranging from about 4 to 14 years.
[8] *See* Livestock Slaughter 2007 Summary, U.S. Department of Agriculture, National Agricultural Statistics Service, March 2008, at 11 (the actual number was 33,145,000 head), available at http://usda.mannlib.cornell.edu/usda/current/LiveSlauSu/LiveSlauSu-03-07-2008_revision.pdf.
[9] *See* Meat Animals Production, Disposition, and Income 2006 Summary, U.S. Department of Agriculture, National Agricultural Statistics Service, April 2007, at 8 (the actual amount was 42,102,317,000 pounds and the value of production was $35,740,774,000), available at http://usda.mannlib.cornell.edu/usda/current/MeatAnimPr/MeatAnimPr-04-27-2007.pdf.
[10] *See id.*, at 6 (the actual number was 45,001,400 head).
[11] *See id.,* at 8 (the actual amount was 54,739,022,000 pounds and cash receipts were $49,148,364,000).
[12] *See id*. (the percentage was calculated using the 2006 value of production ($35,740,774,000) and the 2006 cash receipts from marketing ($49,148,364,000) (note that the cash receipts from marketing understate the actual cash receipts because it excludes interfarm sales within the same state. *See id.,* at 27.)).

1. The DOJ merger analysis should be conducted for two distinct subparts of the U.S. live cattle industry.

It is incumbent upon the DOJ to incorporate into its merger analysis the fact that there are two distinct subparts of the U.S. live cattle industry that would be affected by both the horizontal mergers and the vertical merger contemplated in the JBS-Brazil Merger. The first industry subpart includes cattle feedlots, which are primarily engaged in feeding of cattle for fattening and eventual sale to slaughter plants.[13] As explained above, this subpart generated ~73 percent of the U.S. live cattle industry's revenues in 2006. The second subpart, which generated ~27 percent of industry revenues in 2006, and which does *not* generally sell products directly to slaughter plants, consists of a wide range of essential industry production activities including, but not limited to: beef cattle ranching or farming, backgrounding cattle, feeder calf production, stocker calf production, cattle conditioning operations, livestock breeding services, and showing of cattle, hogs, sheep, goats, and poultry.[14] Though these significant U.S. live cattle industry subparts do not generally sell products directly to food manufacturers, they would nonetheless be impacted significantly by any lessening of competition or any exercise of market power by the manufacturing industry when live cattle are procured from cattle feedlots.

2. The competitiveness of the entire U.S. live cattle industry is intrinsically tied to the level of competition occurring between cattle feedlots that sell steers and heifers and the food manufacturing industry.

To understand how the significant, though non-feedlot subparts of the U.S. live cattle industry are impacted by changes in the level of competition occurring between cattle feedlots and the food manufacturing industry, it is helpful to consider the subpart of the industry that produces steers and heifers for slaughter, i.e., the largest subpart within the cattle feeding subpart, as the U.S. live cattle industry's flagship – its industry market maker. In 2006 the slaughter of steers and heifers accounted for the largest class of cattle slaughtered, totaling ~27 million head, or approximately 82 percent of the ~33 million cattle slaughtered that year.[15] Those steers and heifers, with average carcass weights of 833 pounds and 767 pounds, respectively,[16] produced ~22 billion pounds, or approximately 84 percent of the ~26 billion pounds of total beef produced in the U.S. in 2006.[17]

Because beef produced from steer and heifer slaughter is of high quality and constitutes a supermajority of all beef produced in the United States, it can be presumed that both the base

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[13] *See* 2007 NAICS Codes and Titles, U.S. Census Bureau (the NAICS Code for Cattle Feedlots is 112112), available at http://www.census.gov/naics/2007/NAICOD07.HTM.

[14] *See* 2007 NAICS Definition: 112111 Beef Cattle Ranching and Farming; *see also* 2007 NAICS Definition: 115210 Support Activities for Animal Production.

[15] *See* Livestock Slaughter 2007 Summary, U.S. Department of Agriculture, National Agricultural Statistics Service, March 2008, at 13 (the actual number of steers and heifers slaughtered was 27,297,800 head and the total number of cattle slaughtered in the U.S. was 33,145,000 head), available at http://usda.mannlib.cornell.edu/usda/current/LiveSlauSu/LiveSlauSu-03-07-2008_revision.pdf.

[16] *See id.,* at 5, available at http://usda mannlib.cornell.edu/usda/current/LiveSlauSu/LiveSlauSu-03-07-2008_revision.pdf.

[17] *See id.*, at 2 (the actual amount produced from steers and heifers was 22,090,980,400 pounds and total beef produced in the U.S. was 26,256,200,000 pounds), available at http://usda.mannlib.cornell.edu/usda/current/LiveSlauSu/LiveSlauSu-03-07-2008_revision.pdf.

price for beef and the base price for live cattle are intrinsically tied to the price of beef produced from steer and heifer slaughter. This presumption is validated by the fact that the expansion and contraction of the entire U.S. live cattle industry is intrinsically tied to the expected price of market weight cattle. The U.S. Government Accountability Office ("GAO") explained that the U.S. live cattle industry is subject to a historical cycle, referred to by "increases and decreases in herd size over time and [] determined by expected cattle prices and the time needed to breed, birth, and raise cattle to market weight," factors that are complicated by the fact that "[c]attle have the longest biological cycle of all meat animals."[18]

B. The Ongoing Disruption of the Historic U.S. Cattle Cycle Indicates a Lessening of Competition Within the U.S. Live Cattle Industry.

The U.S. cattle cycle historically occurred every 10-12 years, a function of the long biological cycle for cattle. The U.S. Department of Agriculture ("USDA") reported it consists of about 6 to 7 years of expanding cattle numbers, followed by 1 to 2 years in which cattle numbers are consolidated, leading to 3 to 4 years of declining numbers before the next expansion cycle begins again.[19] In 2001, the USDA reported that the cycle has been shortened over time.[20] However, in 2002 the USDA acknowledged that "the last cycle was 9 years in duration; the present cycle is in its thirteenth year, with two more liquidations likely."[21] In early 2004 the USDA stated that 2003 marked the eighth year of herd liquidation in the current cattle cycle.[22] In late 2005, the USDA declared that the U.S. was "in the early herd expansion stages of the new cattle cycle."[23] In late September 2006, the USDA optimistically declared that the U.S. was "in the second year of expansion of the current cattle cycle."[24] However, in late 2007, the USDA began cautioning the industry, stating that "[s]ome analysts suggest the cattle cycle has gone the way of the hog and dairy cow cycles."[25] These analysts, according to the USDA, "suggested that the cattle cycle has returned to its liquidation phase."[26]

The foregoing discussion reveals that the historical U.S. cattle cycle began to function erratically during the last decade and continues doing so today, suggesting that the competition-induced demand/supply signals that once led to expectations about changes in cattle prices have been disrupted. While cattle industry analysts ponder this phenomenon, in February 2008 the

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[18] Economic Models of Cattle Prices, How USDA Can Act to Improve Models to Explain Cattle Prices, U.S. Government Accountability Office (formally the General Accounting Office), (, GAO-020246, March 2002, at 30.
[19] *See* The U.S. Beef Industry: Cattle Cycles, Price Spreads, and Packer Concentration, Kenneth H. Mathews et al., U.S. Department of Agriculture, Economic Research Service, April, 1999, at 3, attached as Exhibit 1.
[20] *Id.*
[21] Interagency Agricultural Projections Committee, *USDA Agricultural Projections to 2011, Staff Report WAOB-2002-1, February 2002, available at* http://www.ers.usda.gov/publications/waob021/waob20021.pdf, obtained from internet on October 17, 2002.
[22] *See* Livestock, Dairy, & Poultry Outlook, U.S. Department of Agriculture, Economic Research Service, February 4, 2004, at 2, available at http://www.ers.usda.gov/publications/LDP/Feb04/ldpm116t.pdf.
[23] Livestock, Dairy, & Poultry Outlook, U.S. Department of Agriculture, Economic Research Service, December 16, 2005, at 8, available at http://www.ers.usda.gov/publications/ldp/dec05/ldpm138t.pdf.
[24] *See* Livestock, Dairy, & Poultry Outlook, U.S. Department of Agriculture, Economic Research Service, September 18, 2006, at 4, available at http://www.ers.usda.gov/Publications/LDP/2006/09Sep/LDPM147T.pdf.
[25] Livestock, Dairy, & Poultry Outlook, U.S. Department of Agriculture, Economic Research Service, December 19, 2007, at 5, available http://www.ers.usda.gov/Publications/LDP/2007/12Dec/ldpm162.pdf.
[26] *Id.*

USDA attributed a similar disruption that was occurring in the U.S. hog industry cycle to the hog industry's new structure. The USDA declared that the "New Hog Industry Structure Makes Hog Cycle Changes Difficult to Gauge," and stated, "The structure of the U.S. hog production industry has changed dramatically in the past 25 years."[27] This "dramatically" changed structure includes the consolidation of the industry, where "fewer and larger operations account for an increasing share of total output."[28] The USDA predicted that U.S. hog producers, which in January of 2008 were experiencing hog prices 17 percent below January 2007 prices, would likely be operating in the red in 2008.[29]

As *was* the case in the hog industry, a functioning cattle cycle, itself, is an indicator of a competitive market. The USDA succinctly explained:

> The cattle cycle refers to cyclical increases and decreases in the cattle herd over time, which arises because biological constraints prevent producers from instantly responding to price. In general, the cattle cycle is determined by the combined effects of cattle prices, the time needed to breed, birth, and raise cattle to market weight, and climatic conditions. If prices are expected to be high, producers slowly build up their herd size; if prices are expected to be low, producers draw down their herds.[30]

As the USDA explained with respect to the disrupted hog cycle, "In the past, persistent financial losses often prompted hog producers to liquidate breeding stock to reduce losses, or to exit the industry altogether."[31] Obviously, such a liquidation of breeding stock previously resulted in a decrease in price-depressing hog supplies, which subsequently resulted in increased hog prices. Under the hog industry's new structure, however, the USDA claims it is now "difficult to predict the timing and duration of hog cycle changes."[32]

The recently acknowledged disruption of the historical U.S. cattle cycle, as discussed above, is a bellwether indicator that competition has lessened in the U.S. live cattle industry; and, as the USDA now succinctly concludes for the analogous hog industry cycle disruption, there is a causal relationship between this phenomenon and a changed industry structure marked by increased consolidation.

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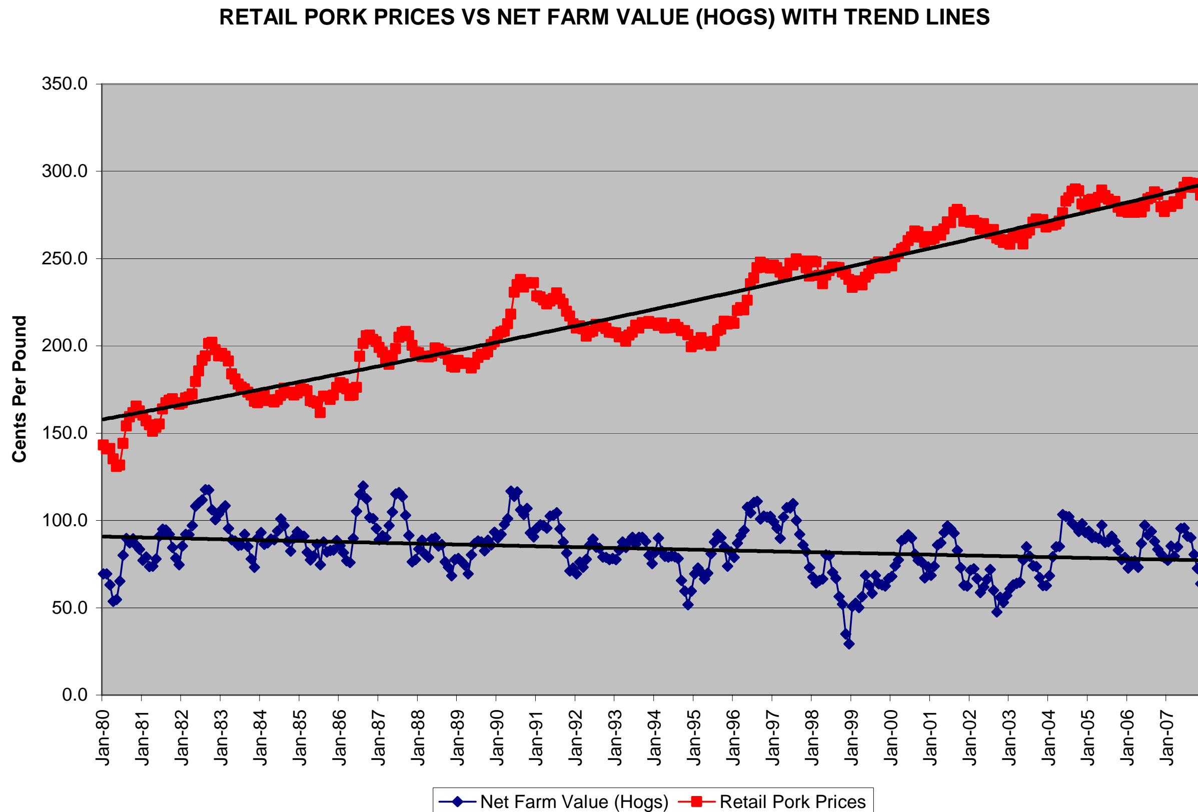
[27] Livestock, Dairy, & Poultry Outlook, U.S. Department of Agriculture, Economic Research Service, February 15, 2008, at 14, available at http://www.ers.usda.gov/Publications/LDP/2008/02Feb/ldpm164.pdf.
[28] Hog Operations Increasingly Large, More Specialized, Amber Waves, U.S. Department of Agriculture, Economic Research Service, February 2008, available at http://www.ers.usda.gov/AmberWaves/February08/Findings/HogOperations.htm.
[29] *See* Livestock, Dairy, & Poultry Outlook, U.S. Department of Agriculture, Economic Research Service, February 15, 2008, at 14, available at http://www.ers.usda.gov/Publications/LDP/2008/02Feb/ldpm164.pdf.
[30] Cattle: Background, Briefing Room, U.S. Department of Agriculture, Economic Research Service, updated June 7, 2007, available at http://www.ers.usda.gov/Briefing/Cattle/Background htm.
[31] Livestock, Dairy, & Poultry Outlook, U.S. Department of Agriculture, Economic Research Service, February 15, 2008, at 14, available at http://www.ers.usda.gov/Publications/LDP/2008/02Feb/ldpm164.pdf.
[32] *Id.*

C. The New, More Consolidated Structure of the U.S. Hog Industry Provides Insights For the Future of a Further Consolidated U.S. Live Cattle Industry.

As shown in Chart 1 below, during the past 25-plus years, beginning January 1980, the new, more consolidated hog industry structure has resulted in a downward trend in live hog prices paid to producers and an upward trend in retail pork prices paid by consumers, along with an ever widening spread between farm prices and retail prices.

Chart 1



Data Source: USDA Economic Research Service.[33]

D. The Current Structure of the Animal Food Manufacturing Industry Has Already Reduced Competition, Causing the Exodus of Hundreds of Thousands of Industry Participants.

With respect to the U.S. live cattle industry as a whole, the relevant question the DOJ should ask when assessing the potential impacts of additional concentration in the beef manufacturing industry, as would occur under the JBS-Brazil Merger, is whether the merger would likely cause the U.S. live cattle industry to lose the critical mass of participants necessary to sustain current levels of competition that take place among and between its various subparts?

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[33] *See* Meat Price Spreads, Data Set for Historical Monthly Price Spread Data for Beef, Pork, Broilers, Turkeys, and Eggs, U.S. Department of Agriculture, Economic Research Service, available at http://www.ers.usda.gov/Data/meatpricespreads/.

Again, the U.S. live hog industry, once analogous to the U.S. live cattle industry in that it too sustained a vibrant industry consisting of hundreds of thousands of producers, has already experienced such a *fait accompli*. According to the USDA, during the period 1980 to 2004, when the concentration by the top four hog slaughter firms increased from 33.6 percent to 61.3 percent, the number of U.S. hog and pig operations declined from 667,000 in 1980 to only 67,000 by 2005.[34]

The U.S. live cattle industry also experienced an alarming contraction inverse to the increased concentration by the top four steer and heifer slaughter firms, which rose from 35.7 percent in 1980 to 81.1 percent in 2004.[35] The size of the U.S. cattle industry, as measured by the number of cattle operation in the United States, declined from 1.6 million in 1980 to 983,000 in 2005.[36]

The DOJ must not ignore this inverse relationship, evinced by historical data, between increased concentration in the animal food manufacturing industry and marked decline in the size of the U.S. live cattle industry. Fortunately for the U.S. live cattle industry, there were significantly more U.S. cattle operations than U.S. hog and pig operations when the contraction of the two agricultural industries accelerated in 1980. With only 67,000 U.S. hog and pig operations remaining, the diminutive live hog industry lacks diversity and robust competition among and between its various subparts, with only 10 percent of its cash receipts generated from sales other than to food manufacturing industries.[37] The U.S. live hog industry's present ability to contribute significantly to the gross domestic products of more than just a handful of states has also been reduced, with only 3 states generating gross incomes of more than $1 billion annually.[38]

In contrast, the U.S. live cattle industry, characterized by the remaining 983,000 cattle operations, still has the critical mass of participants necessary to generate significant revenues among and between its various subparts (as discussed above, 27 percent of the industry's cash receipts are from sales to buyers other than the food manufacturing industry). The U.S. cattle industry, despite its recent contraction, remains the single largest sector of U.S. agriculture, contributing approximately $50 billion annually to the U.S. economy,[39] with significant economic contributions flowing to every state in the Union, including 11 states in which gross incomes from the sales of cattle exceeded $1 billion.[40]

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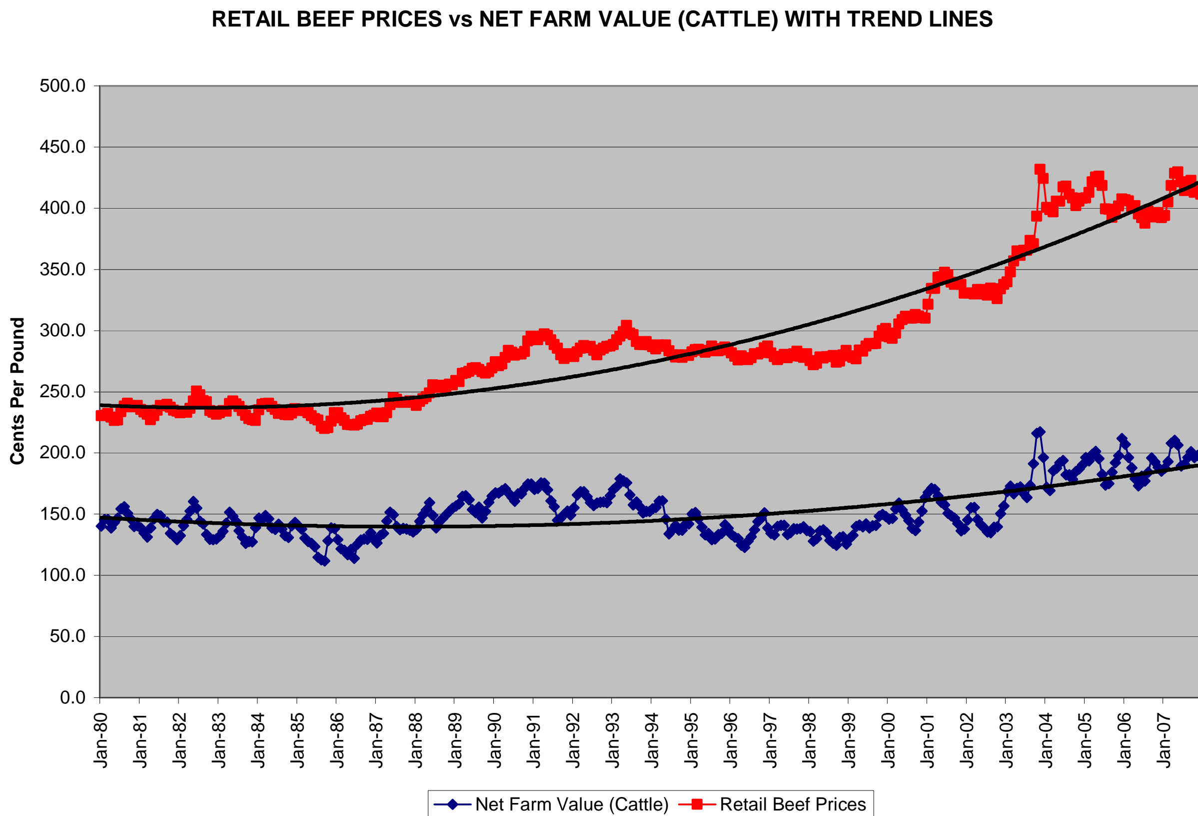
[34] *See* Federal Register, Vol. 72, No. 152, Wednesday, August 8, 2007, at 44,681, col. 2.
[35] *See id.*
[36] *See id.*
[37] *See* Meat Animals Production, Disposition, and Income 2006 Summary, U.S. Department of Agriculture, National Agricultural Statistics Service, April 2007, at 16, available at http://usda.mannlib.cornell.edu/usda/current/MeatAnimPr/MeatAnimPr-04-27-2007.pdf.
[38] *See id.* (Only the states of Iowa, Minnesota, and North Carolina generated gross incomes from hogs of over $1 billion in 2006.).
[39] *See* U.S. Farm Sector Cash Receipts from Sales of Agriculture Commodities, 2004-2008F, U.S. Department of Agriculture, Economic Research Service, available at http://www.ers.usda.gov/briefing/farmincome/data/cr_t3.htm.
[40] *See* Meat Animals Production, Disposition, and Income 2006 Summary, U.S. Department of Agriculture, National Agricultural Statistics Service, April 2007, at 8, available at http://usda.mannlib.cornell.edu/usda/current/MeatAnimPr/MeatAnimPr-04-27-2007.pdf.

E. Although a Synchronous Trend Appears in the Relationship between Retail Beef Prices and Live Cattle Prices, Warning Signs of Impending Change are Evident.

Chart 2 below reveals the relationship between retail beef prices paid by consumers and live cattle prices received by producers over the same 25-plus years that the cattle industry, like the hog industry, began its significant contraction. This is also the same period that the food manufacturing industry began its accelerated concentration. While the trend lines generally show that both retail beef prices and live cattle prices are synchronous and directed upward, thereby lacking the obvious inverse relationship present in the hog and pork prices depicted in Chart 1 above, the trend lines nevertheless show an obvious acceleration of the ever-widening gap between retail beef prices and cattle prices. This evidence suggests that there is an increased exercise of market power that enables the food manufacturing industry to extract a disproportionate profit from the sale of beef to consumers when compared to the share of the profits the cattle industry realizes when selling cattle to the food manufacturing industry.

Chart 2



Data Source: USDA Economic Research Service.[41]

[41] *See* Meat Price Spreads, Data Set for Historical Monthly Price Spread Data for Beef, Pork, Broilers, Turkeys, and Eggs, U.S. Department of Agriculture, Economic Research Service, available at http://www.ers.usda.gov/Data/meatpricespreads/.

II. The JBS-Brazil Merger Would Result in Direct Harm to U.S. Cattle Feeders by Reducing Competition, Creating Market Power, and Facilitating the Exercise of Market Power in the Slaughter-Ready Steer and Heifer Market.

Section I above described the structural-related concerns arising from the JBS-Brazil Merger that reveal the U.S. live cattle industry's inherent vulnerability to any further reduction in competition and any increase in market power or increased exercise of market power that would become manifest with increased consolidation of the *existing* structure of the animal food manufacturing industry. This section, Section II, will describe how the JBS-Brazil Merger would specifically create additional market power, and facilitate the exercise of that additional market power upon the U.S. steer and heifer market, which, as described in Section I above, is the portal through which the harmful effects of market power would endanger the entire U.S. live cattle industry.

The harm that would accrue directly to U.S. steer and heifer producers as a result of the JBS-Brazil Merger is the harm arising from the exercise of market power by buyers ("monopsony power"). R-CALF USA will demonstrate that an assessment of R-CALF USA's monopsony concerns arising from the JBS-Brazil Merger, when applied to the analytical framework analogous to the DOJ's Horizontal Merger Guidelines ("Guidelines"), reveals the imminent harm that would accrue to the U.S. live cattle industry unless the JBS-Brazil Merger is indefinitely blocked.[42] This harm would be the result of the JBS-Brazil Merger's creation and enhancement of monopsony power and the facilitation of its exercise.[43]

A. The JBS-Brazil Merger Would Significantly Increase Concentration and Result in an Extremely Concentrated Market.

As revealed by Chart 3 below, the JBS-Brazil Merger would significantly increase the capacity concentration in the U.S. steer and heifer slaughter by changing the current four-firm capacity concentration, which USDA estimates at 79.1 percent,[44] to an estimated four-firm capacity concentration of approximately 91.2 percent.[45] This estimate represents a 12.1 percent increase in capacity concentration as a result of a 33 percent decrease in the number of firms that would compete for this 91.2 percent share of the market, with the number of competing firms shrinking from 6 to 4.[46]

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[42] *See* Horizontal Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, Revised April 8, 1997, at 3 (to assess potential monopsony concerns, "the Agency will apply an analytical framework analogous to the framework of these Guidelines.").

[43] *See id.* (the ultimate inquiry in merger analysis is "whether the merger is likely to create or enhance market power or to facilitate its exercise.").

[44] Packers and Stockyards Statistical Report, 2005 Reporting Year, Table 27 – Steer and Heifer Slaughter Concentration by 4, 8, 20, and 50 Largest Firms for Selected Years 1980-2005, U.S. Department of Agriculture, Grain Inspection Packers and Stockyards Administration, February 2007, at 44, available at http://archive.gipsa.usda.gov/pubs/2005_stat_report.pdf.

[45] This estimate assumes that American Foods Group is included as a slaughterer of steers and heifers.

[46] Three of the top 6 meatpacking plants are involved in the JBS-Brazil Merger, which would reduce the number of plants that presently control the estimated 91.2 percent of capacity from 6 to 4.

Chart 3

Pre- and Post-Merger Capacity Concentration in U.S. Steer and Heifer Slaughter

	Tyson	Cargill	JBS-Swift	National	Smithfield	Amercian	Total Capacity
Pre-Merger Daily Slaughter Capacity Estimates							
AMI Data*	30,875	25,850	15,800	13,000	7,600	5,200	98,325
Hendrickson/Heffernan Data**	36,000	28,300	16,759	13,000			94,059
CME Group Data***	32,600	29,000	15,850	13,700	8,350	6,500	106,000
Pre-Merger Average of All Daily Capacity Estimates	33,158	27,717	16,136	13,233	7,975	5,850	104,070
Pre-Merger Average of Daily Capacity for Top Four Firms	33,158	27,717	16,136	13,233			90,244
Post-Merger Average Daily Capacity for Top Four Firms	33,158	27,717	37,345			5,850	104,070

Pre-Merger USDA estimate of Four-Firm Capacity Concentration: 79.1%****
Post-Merger Estimate of Four-Firm Capacity Concentration (Using USDA Estimate Where Current CR-4 = 79.1%): 91.2%

Notes:
* AMI data are attached as Exhibit 2.
** Hendrickson/Heffernan data are attached as Exhibit 3.
*** CME Group data are attached as Exhibit 4.
**** *See* footnote 44.

Though R-CALF USA does not venture an estimate of the increased Herfindahl-Hirschman Index ("HHI") that would result from the JBS-Brazil Merger, the CME Group did and estimated the increase to be dramatic, growing by 638 points.[47]

B. The Increased Concentration Created by the JBS-Brazil Merger Would Facilitate the Increased Exercise of Market Power in the U.S. Steer and Heifer Market.

Although the USDA data discussed in Section I suggests that the contraction of the U.S. live hog industry was more severe than was experienced by the U.S. live cattle industry, despite a smaller four-firm concentration ratio of the pork manufacturing industry, there is a measurable difference in the degree to which the concentrated pork manufacturing industry was able to exercise its inherent market power. For example, the pork manufacturing industry exploited the live hog industry's greater propensity toward vertical integration of the entire live hog production cycle – from birth to slaughter – and captured earlier in the industry's concentration process a larger proportion of slaughter-ready hogs before they entered the open cash market, where the base-price for all hogs marketed continues to be established. The recently completed GIPSA Livestock and Meat Marketing Study ("LMMS") found that during the period October 2002 through March 2005, the pork manufacturing industry captured 20 percent of its slaughter-ready hogs through the alternative procurement method of direct ownership;[48] about 57 percent of hogs were captured through marketing contracts, forward contracts or marketing agreements; and fewer than 9 percent of hogs were procured in the open market.[49] Among the conclusions of the LMMS was: "Based on tests of market power for the pork industry, we found a statistically

[47] *See* Daily Livestock Report, CME Group, A CME/Chicago Board of Trade Company, Vol. 6, No. 44, March 5, 2008, attached as Exhibit 4.
[48] *See* GIPSA Livestock and Meat Marketing Study, January 2007, Volume 4, at 2-13, available at http://archive.gipsa.usda.gov/psp/issues/livemarketstudy/LMMS_Vol_4.pdf.
[49] *See id.*

significant presence of market power in live hog procurement."[50] Further, the LMMS concluded that there was a casual relationship between the increased use of non-cash hog procurement methods and lower prices for hogs:

> **Of particular interest for this study is the effect of both contract and packer-owned hog supplies on spot market prices; as anticipated, these effects are negative and indicate that an increase in either contract or packer-owned hog sales decreases the spot price for hogs.** Specifically, the estimated elasticities of industry derived demand indicate
>
> **-** a 1% increase in contract hog quantities causes the spot market price to decrease by 0.88%, and
>
> **-** a 1% increase in packer-owned hog quantities causes the spot market price to decrease by 0.28%.
>
> A higher quantity of either contract or packer-owned hogs available for sale lowers the prices of contract or packer-owned hogs and induces packers to purchase more of the now relatively less expensive hogs and purchase fewer hogs sold on the spot market.[51]

The LMMS found that procurement methods that facilitated the exercise of market power by the concentrated pork manufacturing industry are currently less developed by the concentrated beef manufacturing industry. For example, the study found that only 5 percent of live cattle were procured through packer-ownership and only 33.3 percent of cattle were procured by forward contracts and marketing agreements, leaving nearly 62 percent of the cattle procured through the open market,[52] which continues to set the base price for all marketed cattle. Although alternative procurement methods for cattle destined for slaughter are currently less developed than for hogs destined for slaughter, the LMMS nonetheless found a causal relationship between the increased use of alternative slaughter-ready cattle procurement methods and a decrease in the cash market price for slaughter-ready cattle under the current structure of the beef manufacturing industry. The LMMS found that a 10 percent shift of the volume of cattle procured in the open market to any one of the alternative procurement methods is associated with a 0.11 percent decrease in the cash market price.[53]

C. The More National Scope of the U.S. Live Cattle Market Makes it More Susceptible to Monopsony Power Emanating from a Concentrated Market.

Chart 4 below lists the plant locations for each of the five largest beef-related food manufacturers:

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[50] *See* GIPSA Livestock and Meat Marketing Study, January 2007, Volume 4, at ES-3, available at http://archive.gipsa.usda.gov/psp/issues/livemarketstudy/LMMS_Vol_4.pdf.
[51] *See id.,* at ES-2, 3.
[52] *See* GIPSA Livestock and Meat Marketing Study, January 2007, Volume 3, at ES-4, available at http://archive.gipsa.usda.gov/psp/issues/livemarketstudy/LMMS_Vol_3.pdf.
[53] *See id.,* at ES-5.

Chart 4

Plant Locations for Five Largest Beef Manufacturers

Tyson[54]	**Cargill**[55]	**JBS-Swift**[56]	**National Beef**[57]	**Smithfield**[58]
Kuna, ID	Fresno, CA	Cactus, TX	Brawly, CA	Souderton, PA
Geneseo, IL	Friona, TX	Greeley, CO	Liberal, KS	Tolleson, AZ
Denison, IA	Dodge City, KS	Hyrum, UT	Dodge City, KS	Plainwell, MI
Emporia, KS	Schuyler, NE	Grand Island, NE		Green Bay, WI
Holcomb, KS	Fort Morgan, CO			
Dakota City, NE	Plainview, TX			
Lexington, NE	Wyalusing, PA			
Norfolk, NE	Milwaukee, WI			
West Point, NE				
Amarillo, TX				
Pasco, WA				

While it appears that the beef manufacturing industries subject to the JBS-Brazil Merger do not presently compete against each other in any of the states where their plants currently exist, this measure of competition is irrelevant in the U.S. live cattle industry. This is because the market for both feeder cattle and fed cattle is more national in scope. This appears also to be the case for the wholesale beef market. According to a recent study by John R. Schroeter, "The wholesale beef market . . . is essentially national in scope and insulated, to some extent, from the vagaries of the terms and volume of trade in a single regional fed cattle market."[59] Further, a study by Mingxia Zhang and Richard J. Sexton reported that a number of researchers argue "based on a variety of empirical tests, that regional cattle prices are closely interrelated and that 'analyses of concentration in beef packing need to focus on relatively broad geographic markets.'"[60]

Importantly, the researchers presented a general view that regional competition for raw products, which would include live cattle, is inherently less intense than is competition in

[54] *See* Tyson Corporate, Our Locations – List, available at http://www.tyson.com/Corporate/AboutTyson/Locations/ListPage.aspx.
[55] *See* Cargill Meat Solutions North American Beef Facilities, available at http://www.cargillmeatsolutions.com/about_us/tk_cms_about_loc_beef.htm.
[56] *See* Meat, Poultry, and Egg Product Inspection Directory, U.S. Department of Agriculture Food Safety Inspection Service, December 7, 2007, available at http://www fsis.usda.gov/regulations_&_policies/Meat_Poultry_Egg_Inspection_Directory/index.asp.
[57] *See* National Beef: Company Information, available at http://www nationalbeef.com/.
[58] *See* Meat, Poultry, and Egg Product Inspection Directory, U.S. Department of Agriculture Food Safety Inspection Service, December 7, 2007, available at http://www fsis.usda.gov/regulations_&_policies/Meat_Poultry_Egg_Inspection_Directory/index.asp.
[59] Captive Supplies and Cash Market Prices for Fed Cattle: A Dynamic Rational Expectations Model of Delivery Timing, John R. Schroeter, Department of Economics, Iowa State University, Working Paper # 07002, January 2007, attached as Exhibit 5.
[60] Captive Supplies and the Cash Market Price: A Spatial Markets Approach, Mingxia Zhang and Richard J. Sexton, Journal of Agricultural and Resource Economics, 25(1): 88-108, at 90, fn 7, attached as Exhibit 6.

processed food products.[61] Based on this finding, the DOJ should conduct its review of the JBS-Brazil Merger with the understanding that competition for slaughter-ready cattle is inherently fragile, even without the added burden of monopsony power. And, as such, the market for slaughter-ready cattle should be accorded even greater protections than would be accorded to markets for processed food products.

D. The Pre-existing Market Power that would be Enhanced by the JBS-Brazil Merger is Manifest in the Beef-related Food Manufacturing Industry's Ability to Limit Producer Access to the Market.

Producers of fed steers and heifers are subject to "market access risk," which refers to "the availability of a timely and appropriate market outlet."[62] This risk is particularly significant because fed cattle are perishable commodities that must be sold within a fairly narrow time frame, otherwise they will decrease in value.[63] Under the current level of beef manufacturing industry concentration, there is already evidence that producers of steers and heifers are subjected to market power and are foregoing revenues to avoid market access risk. The LMMS found that "[t]ransaction prices associated with forward contract transactions are the lowest among all the procurement methods [including cash market procurement methods],"[64] and proffered that the results of the study may suggest that "farmers who choose forward contracts are willing to give up some revenue in order to secure market access . . ."[65]

The JBS-Merger would exacerbate market access risk for steer and heifer producers by effectively shrinking the number of market outlet gatekeepers for the estimated 92.1 percent of market outlet capacity from six firms to only four firms, as was previously discussed above.

E. As Gatekeepers of the Market Outlets, the Concentrated Beef Manufacturing Industry Wields Considerable Market Power Exercised through Captive Supply Arrangements, Novel Purchasing Strategies, and Anticompetitive Behavior.

While the beef manufacturing industry has been limiting the number of its market outlet gatekeepers through horizontal consolidation, thus creating market access risk for cattle producers, the beef manufacturing industry has been simultaneously increasing its use of non-traditional contracting and marketing methods, enabling it to more effectively exercise its manifest market power. These non-traditional cattle procurement methods increase the vertical coordination between the live cattle industry and the beef manufacturing industry and include purchasing cattle more than 14 days before slaughter (packer-fed cattle), forward contracts, and exclusive marketing and purchasing agreements. Together, the four largest beef manufacturers employed such forms of "captive supply" contracting methods for a full 44.4 percent of all the

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[61] Captive Supplies and the Cash Market Price: A Spatial Markets Approach, Mingxia Zhang and Richard J. Sexton, Journal of Agricultural and Resource Economics, 25(1): 88-108, at 90, fn 7, attached as Exhibit 6.
[62] GIPSA Livestock and Meat Marketing Study, January 2007, Volume 3, at 5-4, available at http://archive.gipsa.usda.gov/psp/issues/livemarketstudy/LMMS_Vol_3.pdf.
[63] *See id.*
[64] *Id.*, at 2-36.
[65] *Id.*

cattle they slaughtered in 2002.[66] And use of these captive supply methods has been increasing rapidly, rising 37 percent from 1999 to 2002.[67] As stated above, the LMMS found that approximately 38 percent of cattle were procured by such non-traditional methods during the period October 2002 through March 2005.

Captive supplies have been shown to increase the instability of prices for cattle producers and hold down cattle prices.[68] Over the past 20 years studies have supported the idea that buyer concentration in cattle markets systematically suppressed prices, with price declines found to range from 0.5 percent to 3.4 percent.[69] As average prices for cattle are artificially depressed and become more volatile, due to these captive supply procurement methods, it is cattle producers who pay the price, even when broader demand and supply trends should be increasing returns to producers.[70] Despite this negative outcome, cattle producers continue to opt into captive supply arrangements because those producers have few other attractive marketing choices in an industry that effectively reduces access to market outlets.[71] Furthermore, while such captive supply arrangements may appear attractive to an individual producer at a given point in time, the collective impact of these contracting practices on the market as a whole is harmful to the live cattle industry. Producers acting individually are not in the position to change these dynamics of the market.

The JBS-Brazil Merger would facilitate the exercise of market power by further concentrating control over market access, thus increasing the propensity for live cattle producers to continually enter captive supply arrangements despite their negative impact on the live cattle industry.

1. The JBS-Brazil Merger would facilitate ongoing market power abuses to the detriment of U.S. cattle producers.

The beef manufacturing industry recently exacted its market power on the U.S. cattle industry for purposes of influencing national public policy; and, in doing so, imposed unnecessary costs and burdens on U.S. cattle producers, which costs and burdens U.S. producers could not avoid without eliminating or severely limiting their marketing options. In March 2003, beef-related food manufacturer IBP, Inc., notified U.S. cattle producers that it would require producers to, *inter alia*, "Provide IBP, inc. access to your [producers'] records so that we [IBP] can perform random producer audits . . ." and "Provide third-party verified documentation of where the livestock we [IBP] purchase from you [producers] were born and raised."[72]

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[66] *See* RTI International, "Spot and Alternative Marketing Arrangements in the Livestock and Meat Industries: Interim Report," Report Prepared for the Grain Inspection, Packers, and Stockyard Administration, U.S. Department of Agriculture, July 2005 at 3-15.
[67] *See id.* at 3-17.
[68] *See* John M. Connor, "The Changing Structure of Global Food markets: Dimensions, Effects, and Policy Implications," Staff Paper #3-02, Department of Agricultural Economics, Purdue University, February 2003, at 7-8, attached as Exhibit 7.
[69] *See id.*
[70] *See id*., at 8.
[71] *See id.*
[72] Letter from Bruce Bass, IBP, Inc., to Producers, March 2003, attached as Exhibit 8.

This coercive threat to impose costly and burdensome requirements on U.S. cattle producers was initiated by IBP for the express purpose of soliciting producers' help in contacting "Senators or members of Congress," to whom producers were asked to express their concerns regarding IBP's plans to impose such onerous conditions on their industry. This was IBP's political response to Congress' passage of the mandatory country of origin labeling law.[73] This abuse of market power was initiated months *before* the USDA even published its October 30, 2003 proposed rule to implement the country of origin labeling law.

Such abuses of market power would be facilitated by the JBS-Brazil Merger as U.S. cattle producers' market outlets would become even more limited, particularly in certain geographic areas, and producers would not be able to avoid the arbitrary dictates of any one of the remaining beef manufacturing industries.

2. The JBS-Brazil Merger would facilitate the imposition of arbitrary product specification, leading to unavoidable cattle price discounts.

In addition to the application of price premiums and discounts for contract or grid-priced cattle that are based on standardized USDA yield and quality grades, Tyson and Smithfield have each established different price premiums and discounts for additional factors, such as muscle scoring. For example, Smithfield discounts certain muscle scores between $5.00 per cwt. and $10.00 per cwt, and Tyson uses muscle scores to apply varying discounts under a different system.[74] These discounts and premiums are purported to reflect consumer preferences,[75] but whether a $120 discount (i.e., $10 per cwt. applied to a 1,200 lb. animal) is reflective of the actual discount the beef manufacturing industry receives upon the sale of the resulting meat, or if it represents a windfall for the beef manufacturing industry, is undeterminable without additional information. Nevertheless, the ability to impose such discounts, without knowing if they are legitimate, is facilitated by the currently limited marketing outlets, which would become even more limited under the JBS-Brazil Merger.

There is a host of potential market power abuses, the propensity toward which would be facilitated by an increased concentration of the steer and heifer market, that would either force producers into compliance or cause them to suffer economic losses. For example: a beef manufacturer in a more concentrated market could establish discounts for cattle that were not conceived by the beef manufacturer's preferred genetic lineage, or that were not fed the beef manufacturer's preferred brand of mineral or feed supplement.

Thus, the potential for the beef manufacturing industry to impose wholly arbitrary product specifications, which directly result in lower cattle prices paid to producers, is a significant concern arising from the JBS-Brazil Merger.

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[73] Letter from Bruce Bass, IBP, Inc., to Producers, March 2003, attached as Exhibit 8.
[74] *See* Muscle Scoring Provides Important Production Tips, Nexus Marketing, Ames, Iowa, attached as Exhibit 9.
[75] *See id.*

3. The JBS-Brazil Merger would increase the potential exercise of pricing strategies that disrupt competitive market fundamentals.

As part of its investigation, the DOJ should determine if pricing strategies of the concentrated beef manufacturers, such as that described in the example above, are among the reasons for the pricing anomalies disclosed in the LMMS study. The LMMS study states that in direct trade transactions based on a carcass weight valuation, the average cattle price is 1.3 cents lower than the average price for direct trade transactions with live weight valuation.[76] Even more striking is the difference for grid valuation transactions, where prices average 1.8 cents lower than the average price for direct trade transactions.[77] Assuming an average dressed weight for cattle of 781 pounds,[78] this price differential translates into a loss of $10.15/head for producers selling on a carcass weight basis and a loss of $14.06/head for producers selling on a cash grid basis compared to producers selling on a live weight valuation. It is important to note that these comparisons hold other explanatory variables for price differentials fixed in the model.[79] When this price difference is multiplied times the volume of cattle sold during the period examined by the LMMS study, it adds up to a total loss of $202,631,068 for producers who sold their cattle on the cash market on a carcass weight or grid basis rather than a live weight basis.[80]

The LMMS study reveals that cattle producers selling their animals on a carcass weight basis or a grid basis have lost more than $200 million on these transactions in the period covered by the study. The anomalous price differential for dressed weight and grid basis cattle compared to cattle sold on a live weight basis appears counter-intuitive and contradicts a conclusion that beef manufacturers use purchasing methods that provide an incentive for quality and yield. Instead, it appears that the uncertainty inherent in dressed weight and grid basis transactions, and the transference of that price risk from beef manufacturers to cattle producers through these types of transactions, has only operated to depress prices for live cattle and to deprive cattle producers of a market-based price for their product.

The data suggest that beef manufacturers have been able to manipulate the grid system to engineer a lower overall average return to producers who sell on a grid basis. This practice fails to send the right market signals to producers and feeders, and it creates a counter-intuitive disincentive to sell on a grid basis and to seek premiums for yield and quality characteristics. The LMMS data reveal an unreasonable and unfair depression of cattle prices for those producers who sell on a grid basis that is contrary to competitive market fundamentals.

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[76] *See* GIPSA Livestock and Meat Marketing Study, Vol. 3 (Jan. 2007) at 2-39.
[77] *See id.*
[78] *See id.*, at 1-21.
[79] *See id.* at 2-39.
[80] This estimate is based on a total of 58 million head of cattle sold reported to RTI from October 2002 through March 2005 and RTI statistics showing that 61.7% of these cattle were sold on the cash or spot market, 17% of which were on a carcass weight basis and 28% of which were on a grid basis. *See Id.* at ES-3 – ES-4, 2-40.

4. The JBS-Brazil Merger would facilitate a division of the market, effectively eliminating competition for certain subclasses of cattle in certain regions.

Tyson Fresh Meats, Inc., ("Tyson") has issued presumably new terms and conditions under which it will purchase cattle for slaughter.[81] Tyson states that it "does not typically accept for processing at its facilities" cattle that exceed 58 inches in height, cattle that exceed 1,500 pounds, or cattle with horns longer than 6 inches in length.[82] The imposition of such restrictions presents a number of competition-related concerns: First, if Tyson is one of only two buyers in the marketing region where such restricted cattle are potentially available (i.e., cattle are approaching but have not yet exceeded any of Tyson's restrictions) and if the other buyer imposed no comparable restrictions, then the other buyer would have an incentive not to bid on such cattle, which, if Tyson did not purchase, would be available for sale at a discount as soon as Tyson's restrictions were exceeded. In fact, Tyson would have an incentive to lowball such potentially available cattle knowing that if the producer did not sell to Tyson within a short period of time, there would be no competition for the cattle after the restrictions were exceeded. Second, for cattle that already exceed Tyson's restrictions, regardless of the demand for beef, the producer would have significantly fewer market outlets for the cattle. Third, this action constitutes an outright denial of access to the marketplace, which is even more egregious than would be a discount for cattle that exceeded Tyson's restrictions, as it automatically eliminates a dominant competitor from the marketplace.

The JBS-Brazil Merger would potentially exacerbate the division of the marketplace that has already been initiated by Tyson. Should one beef manufacturer declare that it would slaughter only steers, only heifers, only Holsteins, or only hornless cattle, for example, the marketplace could be sufficiently divided by the remaining food manufacturers to severely limit competition for each subclass of cattle, if not eliminate competition altogether.

5. The JBS-Brazil Merger would facilitate strategic entries and exits from the cash market for the purpose and with the effect of lowering cattle prices.

Under the existing, concentrated structure of the beef manufacturing industry, empirical evidence shows that the U.S. cattle market is already susceptible to coordinated and/or simultaneous entries and exits from the market. In February 2006, all four major beef-related food manufacturers – Tyson, Cargill, Swift, and National – withdrew from the cash cattle market in the Southern Plains for an unprecedented period of two weeks. On February 13, 2006, market analysts reported that no cattle had sold in Kansas or Texas in the previous week.[83] No cash trade occurred on the southern plains through Thursday of the next week, marking, as one trade publication noted, "one of the few times in recent memory when the region sold no cattle in a non-holiday week."[84] Market analysts noted that "[n]o sales for the second week in a row would

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[81] *See* Standard Terms and Conditions for the Sale of Cattle to Tyson Fresh Meats, Inc. ("TFM"), Effective Date – February 4, 2008, attached as Exhibit 10.
[82] *Id*.
[83] "Packers Finally Seriously Cut Kills," *Cattle Buyers Weekly* (Feb. 13, 2006).
[84] "Classic Standoff Continues Through Thursday," *Cattle Buyers Weekly* (Feb. 20, 2006).

be unprecedented in the modern history of the market."[85] During the week of February 13 through 17, there were no significant trades in Kansas, western Oklahoma, and Texas for the second week in a row.[86] Market reports indicated that Friday, February 17, 2006, marked two full weeks in which there had been very light to non-existent trading in the cash market, with many feedlots in Kansas, Oklahoma, and Texas reporting no bids at all for the past week.[87] The beef manufacturers made minimal to no purchases on the cash market, relying on captive supplies of cattle to keep their plants running for two weeks and cutting production rather than participating in the cash market. The beef manufacturers reduced slaughter rates rather than enter the cash market. Cattle slaughter for the week of February 13 – 17 was just 526,000 head, down from 585,000 the previous week and 571,000 at the same time a year earlier.[88] According to one analyst, the decision to cut slaughter volume indicated "the determination by beef packers to regain control of their portion of the beef price pipeline."[89] Another trade publication noted that the dramatic drop in slaughter was undertaken in part to "try and get cattle bought cheaper."[90] At the end of the second week of the buyers' abandonment of the cash market, one market news service reported, "The big question was whether one major [packer] would break ranks and offer higher money. That has often occurred in the past, said analysts."[91]

As a result of the beef manufacturers shunning the cash market, cash prices fell for fed cattle, replacement cattle, and in futures markets. Sales took place after feedlots in Kansas and the Texas Panhandle lowered their prices to $89 per hundredweight, down $3 from the $92 per hundredweight price reported in the beginning of February.[92] The same day, February 17, live and feeder cattle futures fell to multi-month lows.[93] Replacement cattle prices also dropped in response to buyer reluctance.[94] In Oklahoma City, prices for feeder cattle dropped as much as $4 per hundredweight.[95]

Whether the beef manufacturers' simultaneous boycott of the cash market was deliberately coordinated or not, it was a highly unusual event that required simultaneous action in order to effectively drive down prices, which it did. As market analysts observed, the major question in markets during the second week of the buyers' strike was whether or not any one of the major beef manufacturers would "break ranks" to purchase at higher prices than the other beef manufacturers. No buyer did so until prices began to fall. In fact, beef manufacturers were willing to cut production rather than break ranks and purchase on the cash market.

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[85] "Classic Standoff Continues Through Thursday," *Cattle Buyers Weekly* (Feb. 20, 2006).
[86] Curt Thacker, "Cash Cattle Quiet 2-20," *Dow Jones Newswires* (Feb. 20, 2006).
[87] Lester Aldrich, "Cash Cattle Standoff 2-17," *Dow Jones Newswires* (Feb. 17, 2006).
[88] Curt Thacker, "Cash Cattle Quiet 2-20," *Dow Jones Newswires* (Feb. 20, 2006).
[89] Jim Cote, "Today's Beef Outlook 2-17," *Dow Jones Newswires* (Feb. 17, 2006).
[90] "Classic Standoff Continues Through Thursday," *Cattle Buyers Weekly* (Feb. 20, 2006).
[91] "Classic Standoff Continues Through Thursday," *Cattle Buyers Weekly* (Feb. 20, 2006).
[92] Curt Thacker, "Cash Cattle Quiet 2-20," *Dow Jones Newswires* (Feb. 20, 2006).
[93] Jim Cote, "Live Cattle ReCap – 2/17/2006," *Dow Jones Newswires* (Feb. 17, 2006).
[94] "The Markets," *AgCenter Cattle Report* (Feb. 18, 2006), available on-line at http://www.agcenter.com/cattlereport.asp.
[95] "The Markets," *AgCenter Cattle Report* (Feb. 18, 2006), available on-line at http://www.agcenter.com/cattlereport.asp.

Abandonment of the cash market in the Southern Plains by all major beef manufacturers for two weeks in a row resulted in lower prices and had an adverse effect on competition. Cattle producers in the Southern Plains cash markets during those two weeks were unable to sell their product until prices fell to a level that the buyers would finally accept. The simultaneous refusal to engage in the market did not just have an adverse effect on competition – it effectively precluded competition altogether by closing down an important market for sellers. The simultaneous boycott of cash markets in the Southern Plains was, however, a business decision on the part of the beef manufacturers that did not conform to normal business practices and that resulted in a marked decline in cattle prices. At the time, market analysts interpreted the refusal to participate in the cash market as a strategy to drive down prices, and purchases only resumed once prices began to fall.

The coordinated/simultaneous action in February 2006 was not isolated and was soon followed by a second, coordinated/simultaneous action. During the week that ended October 13, 2006, three of the nation's four largest beef manufacturers – Tyson, Swift, and National - announced simultaneously that they would all reduce cattle slaughter, with some citing, *inter alia,* high cattle prices and tight cattle supplies as the reason for their cutback.[96] During that week, the packers reportedly slaughtered an estimated 10,000 fewer cattle than the previous week, but 16,000 more cattle than they did the year before.[97] Fed cattle prices still fell $2 per hundredweight to $3 per hundredweight and feeder prices fell $3 per hundredweight to $10 per hundredweight.[98]

By Friday of the next week, October 20, 2006, the beef manufacturers reportedly slaughtered 14,000 more cattle than they did the week before and 18,000 more cattle than the year before – indicating they did not cut back slaughter like they said they would.[99] Nevertheless, live cattle prices kept falling, with fed cattle prices down another $1 per hundredweight to $2 per hundredweight and feeder cattle prices were down another $4 per hundredweight to $8 per hundredweight.[100]

The anticompetitive behavior exhibited by the beef-related food manufacturers' coordinated/simultaneous market actions caused severe reductions to U.S. live cattle prices on at least two occasions in 2006. This demonstrates that the exercise of market power is already manifested in the U.S. cattle industry – a situation that would only worsen if there were even fewer buyers in the marketplace. For example, the reduction in cattle prices that followed the coordinated/simultaneous actions of four beef-related food manufacturers in February 2006 and three beef-related food manufacturers in October 2006 could be accomplished by only three beef manufacturers, and only two beef manufacturers, respectively, should the JBS-Brazil Merger be consummated.

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[96] *See* "National Beef Cuts Hours at Two Kansas Plants (Dodge City, Liberal)," Kansas City Business Journal (October 10, 2006) attached as Exhibit 11; "Update 1 – Tyson Foods to Reduce Beef Production," Reuters (October 10, 2006), attached as Exhibit 12; "Swift to Stay with Reduced Production at U.S. Facilities," Meatpoultry.com (October 10, 2006), attached as Exhibit 13.
[97] *See* "Livestock Market Briefs, Brownfield Ag Network," (October 13, 2006), attached as Exhibit 14.
[98] *See id.*
[99] *See* "Livestock Market Briefs, Brownfield Ag Network," (October 20, 2006), attached as Exhibit 15.
[100] *See id*.

The potential for a recurrence of this type of anticompetitive behavior is considerable and constitutes an empirically demonstrated risk that would likely become more frequent, more intense, as well as extended in duration. Therefore, this anticompetitive behavior is evidence that the JBS-Brazil Merger would reduce competition in the marketplace.

F. JBS-Brazil Has a History of Being a Bad Actor and Should Not Be Permitted to Exploit the U.S. Cattle Industry as It Did the Brazilian Cattle Industry.

On November 28, 2007, Dow Jones Newswires reported that "JBS SA's Friboi Group (JBSS3.BR)" was among a number of Brazilian companies which, after a two-year investigation by the Brazilian Justice Department's antitrust division, were accused of engaging in anti-competitive practices.[101] JBS SA was reportedly charged with "anti-competitive practices for coordinating price agreements among themselves in order to keep cattle prices low when purchasing livestock for slaughter."[102] The report indicated that JBS SA had denied the charges. However, in a subsequent news article, JBS SA reportedly agreed to pay $8.5 million to an antitrust fund as a result of the charges and further agreed to end the practices that were allegedly anti-competitive.[103]

This example demonstrates that it is highly likely that the U.S. live cattle market would be subjected to coordinated interaction by JBS-Brazil given that the company was reportedly accused, and was found culpable based on the payment of restitution, of engaging in such anticompetitive behavior in another geographic market, which is comparable to the U.S. market.

G. The JBS-Brazil Merger Would Significantly Exacerbate the Ongoing Exercise of Market Power Through JBS-Brazil's Ownership of the Nation's Largest Cattle Feeding Facility.

If consummated, the JBS-Brazil Merger would result in the nation's largest beef manufacturer owning Five Rivers, the nation's largest cattle feeding company. Five Rivers currently feed and market approximately 2 million cattle annually and is currently owned by the nation's fifth largest beef manufacturer, Smithfield, under a joint venture.[104] Based on Smithfield's estimated daily capacity of 7,975 cattle (*see* Chart 3), and applying the 260 reporting days established by the USDA Agricultural Marketing Service ("AMS") as the number of annual slaughter days,[105] Smithfield's estimated annual slaughter is 2.1 million. Therefore, Smithfield's ownership of Five Rivers gives it sufficient numbers of fed cattle to meet nearly 100 percent of its annual slaughter capacity. However, it is not likely that Smithfield could

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[101] "Brazil Justice Department Fines Major Beef Cos In Cartel Case," Kenneth Rapoza, Dow Jones Newswires (November 28, 2007), attached as Exhibit 16.
[102] *Id.*
[103] "Brazil Antitrust Agency Signs Agreements with JBS, Lafarge," Jeb Bount, Bloomberg (November 29, 2007), attached as Exhibit 17.
[104] History of Smithfield Foods, attached as Exhibit 18, available at http://www.smithfieldfoods.com/Understand/History/.
[105] Livestock Mandatory Reporting; Reestablishment and Revision of the Reporting Regulation for Swine, Cattle, Lamb, and Boxed Beef; Proposed Rule, U.S. Department of Agriculture, Agricultural Marketing Service, Federal Register, Vol. 72, No. 152, August 8, 2007, at 44,688-689 (meatpackers are required to report each day for an estimated total of 260 reporting days in a year).

coordinate the finishing of cattle such that it could meet its daily capacity throughout the year with cattle from its own feedlots. If this assumption is correct, Smithfield would likely have fewer cattle than it needs on a daily basis during some periods, in which case it would need to purchase from other sources, thus adding to the competitiveness of the market. And, it would likely have more cattle than it needs on a daily basis during other periods, in which case it would need to sell cattle to other beef manufacturers, thus again adding to the competitiveness of the market.

Post-merger, JBS-Brazil would own both Smithfield and Five Rivers, affording it control over approximately 2 million fed cattle annually, representing approximately 7 percent of the nation's annual steer and heifer slaughter. However, whereas Smithfield was not likely capable of slaughtering 100 percent of the cattle fed at Five Rivers, due to the combination of limited daily slaughter and the logistics of timing the finishing of cattle, thus potentially contributing to the market volume of cattle sold to other beef manufacturers, JBS-Brazil could likely slaughter all of the cattle fed at Five Rivers due to its significantly increased number of plants and capacity. The effect would be a potential increase in the percentage of packer-owned cattle presently slaughtered on a national basis and a potential reduction in the volume of cattle sold in the cash market – a circumstance that would effectively thin the cash market and potentially drive down prices.

The DOJ should investigate both the current practices of Smithfield with respect to the disposition of cattle fed at Five Rivers and the change in this disposition of cattle that would likely occur should the JBS-Brazil Merger be consummated.

H. The JBS-Brazil Merger Would Likely Violate Both the Spirit and Express Language of the Packers and Stockyards Act.

Congress enacted the Packers and Stockyards Act of 1921 ("PSA") to not only prohibit anticompetitive and monopolistic practices, but also to protect livestock producers from unfair, deceptive, and manipulative practices by the animal food manufacturing industry. Thus, the PSA goes well beyond the traditional antitrust concerns of efficiency and market competition. The PSA's central provision for protecting the U.S. live cattle industry is 7 USC § 192. Section 192 provides:

> It shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:
>
> (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or
>
> (b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect; or

(c) Sell or otherwise transfer to or for any other packer, swine contractor, or any live poultry dealer, or buy or otherwise receive from or for any other packer, swine contractor, or any live poultry dealer, any article for the purpose or with the effect of apportioning the supply between any such persons, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly; or

(d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or

(e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or

(f) Conspire, combine, agree, or arrange with any other person (1) to apportion territory for carrying on business, or (2) to apportion purchases or sales of any article, or (3) to manipulate or control prices; or

(g) Conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by subdivisions (a), (b), (c), (d), or (e) of this section.

The concerns raised herein demonstrate that the JBS-Brazil Merger would increase the probability, if not the certainty, that the practices prohibited by the PSA will occur to the detriment of U.S. cattle producers. In fact, the evidence presented demonstrates that many of the prohibited practices are already occurring unabated within the U.S. live cattle industry. Inasmuch as the term "creating" in subdivisions (c), (d), and (e) above need not occur instantaneously, the JBS-Merger clearly catapults the beef manufacturing industry toward monopolization nationally, and perhaps achieves complete monopolization in certain geographic regions.

I. The JBS-Brazil Merger Presents Additional Concerns that Should Be Investigated by the DOJ.

In addition to the concerns discussed above, the DOJ should consider that the JBS-Brazil Merger would increase the probability that the following anticompetitive practices would become more frequent and would intensify in the U.S. live cattle industry:

1. Bidding not to buy cattle, i.e., offering a low bid with no intent to buy, but rather, with the intent to lower prices for live cattle.
2. Offering preferential agreements with captive suppliers for prices and terms not available to other sellers of comparable cattle in the market.

3. Entering into strategic alliances that contain special agreements for preferential access to the market and/or special prices.
4. Exercising undue influence over national commodities markets, potentially eliminating this hedging tool for U.S. cattle producers.

III. CONCLUSION

The U.S. live cattle industry is a unique value-added U.S. industry that is highly susceptible to any reduction in competition and any exercise of market power. Factors contributing to this susceptibility include the perishable nature of slaughter-ready cattle as well as the fact that regional competition in raw material markets, such as the live cattle market, is inherently less intense than in processed food markets. Unlike many other raw material industries, the U.S. live cattle industry is comprised of numerous value-added segments that collectively generate 27 percent of the industry's $50 billion contribution to the U.S. economy.

The viability of the numerous value-added segments of the U.S. live cattle industry are intrinsically tied to the price of the industry's principal product – slaughter-ready cattle, and it is this segment of the industry that is most susceptible to monopsony power wielded by an extremely concentrated beef manufacturing industry and that serves as the portal through which monopsony power can invade the entirety of the U.S. live cattle industry. The U.S. live cattle industry has already partially succumbed to the exercise of market power emanating from pre-existing levels of concentration in the beef manufacturing industry as evidenced by the loss of nearly 40 percent of its participants since 1980; and by the ongoing disruptions in the historic cattle cycle – itself an indicator of the industry's competitiveness as it functioned in response to competitive supply and demand signals. Even the USDA attributes recent disruptions to livestock cycles as a function of structural changes to the industry.

The U.S. hog industry, which lost 90 percent of its participants since 1980, no longer is comprised of the critical mass of participants necessary to sustain a national, competitive market. The U.S. cattle industry, however, still consists of hundreds of thousands of independent businesses that can, indeed, sustain a robust, competitive market, provided it is protected from further erosion of competition and monopsony power. Despite its present, diminutive size, the U.S. hog industry provides valuable insights into the future of the U.S. live cattle industry should increased concentration in the beef manufacturing industry and increased monopsony power continue unabated. It also reveals the harm to consumers arising from the food manufacturers' excessive control over livestock production, which is evidenced by an upward trend in retail pork prices paid by consumers and a downward trend in hog prices paid to producers.

The JBS-Brazil Merger would significantly increase the concentration of the beef manufacturing industry and would facilitate significantly the exercise of market power. Albeit too late, a USDA study recently acknowledged that market power emanates from the similarly concentrated pork manufacturing industry, concluding there was a "significant presence of market power in live hog procurement." This study also found a causal relationship between the use of captive supply livestock and depressed livestock prices, concluding that a small increase in packer-owned hogs caused cash market prices to decrease. Of particular concern is that the

JBS-Brazil Merger would result in both the increased use and effectiveness of captive supply cattle to depress U.S. cattle prices by increasing the beef manufacturing industry's ability to further restrict producer access to market outlets.

The present use of captive supplies and other strategies designed to effect market power by beef manufacturers is already harming the U.S. live cattle industry. Empirical evidence shows that beef manufacturers have used their market power to coerce political support from producers. They have engaged in coordinated actions resulting in reduced prices for live cattle. They have imposed disparate discounts for similar quality specifications. They have imposed pricing strategies that defy competitive market fundamentals. And, they have begun to subdivide the cattle market by denying access to the market for certain subclasses of cattle.

The JBS-Brazil Merger would exacerbate the monopsony power that presently enables the foregoing anticompetitive practices. To make matters worse, JBS-Brazil has a history of being a bad actor, as evidenced by media reports that it engaged in anticompetitive practices against Brazilian cattle producers. Further, the vertical integration component of the JBS-Brazil Merger – the acquisition of the nation's largest feedlot – will significantly intensify the degree of market power emanating from this holding because, unlike the present owner, JBS-Brazil would likely have the daily slaughter capacity to slaughter all the cattle it feeds, thus increasing the percentage of captive supply cattle that are withheld from the cash market.

Finally, the JBS-Brazil Merger would most likely violate both the spirit of and express prohibitions contained in the Packers and Stockyards Act of 1921, which was designed to afford the U.S. live cattle industry with protections beyond the traditional concerns of efficiency and market competition. In particular, it was designed to prohibit unfair, deceptive, and manipulative acts and practices that have the effect of manipulating or controlling prices, such as those acts and practices described above, as well as to prohibit the creation of a monopoly. Inasmuch as creation need not occur instantaneously, the JBS-Merger clearly catapults the beef manufacturing industry toward monopolization nationally, and perhaps achieves complete monopolization in certain geographic regions.

For the foregoing reasons, R-CALF USA respectfully requests that the DOJ conduct a thorough, probing analysis of the JBS-Brazil Merger and that it expand its investigation to include a thorough, probing analysis of the current market environment in which this merger is proposed. R-CALF USA is confident that such a comprehensive analysis will reveal the need to aggressively challenge the JBS-Brazil Merger, as well as to initiate immediate remedial action to halt the anticompetitive practices already prevalent within the U.S. live cattle industry.

Sincerely,

Bill Bullard
CEO
R-CALF USA

Attachments: Exhibits 1-18

EXHIBIT B

Fighting for the U.S. Cattle Producer!

R-CALF USA

R-CALF USA Overview of Proposed JBS-Brazil Acquisitions

Presented by
Bill Bullard
CEO, R-CALF USA
September 5, 2008

Merger Benefit Claims

- Merger would revitalize the ailing U.S. beef packing sector – new blood, new capital.
- Merger would create improved economies of scale.
- JBS is an aggressive global exporter and will teach the U.S. beef industry how to compete globally.
- JBS will increase beef demand, resulting in greater demand for live cattle.
- JBS will introduce new technologies
- JBS will hire more workers.
- Three major packers is all that is needed in the U.S. market to maintain robust competition.

PRODUCT MARKET

A. The Relevant Product Market (Supply side)

1. **Direct Products: fed steers and heifers, slaughter cows and bulls.**

2. **Indirect Products: feeder steers and heifers, calves, breeding cows and bulls.**

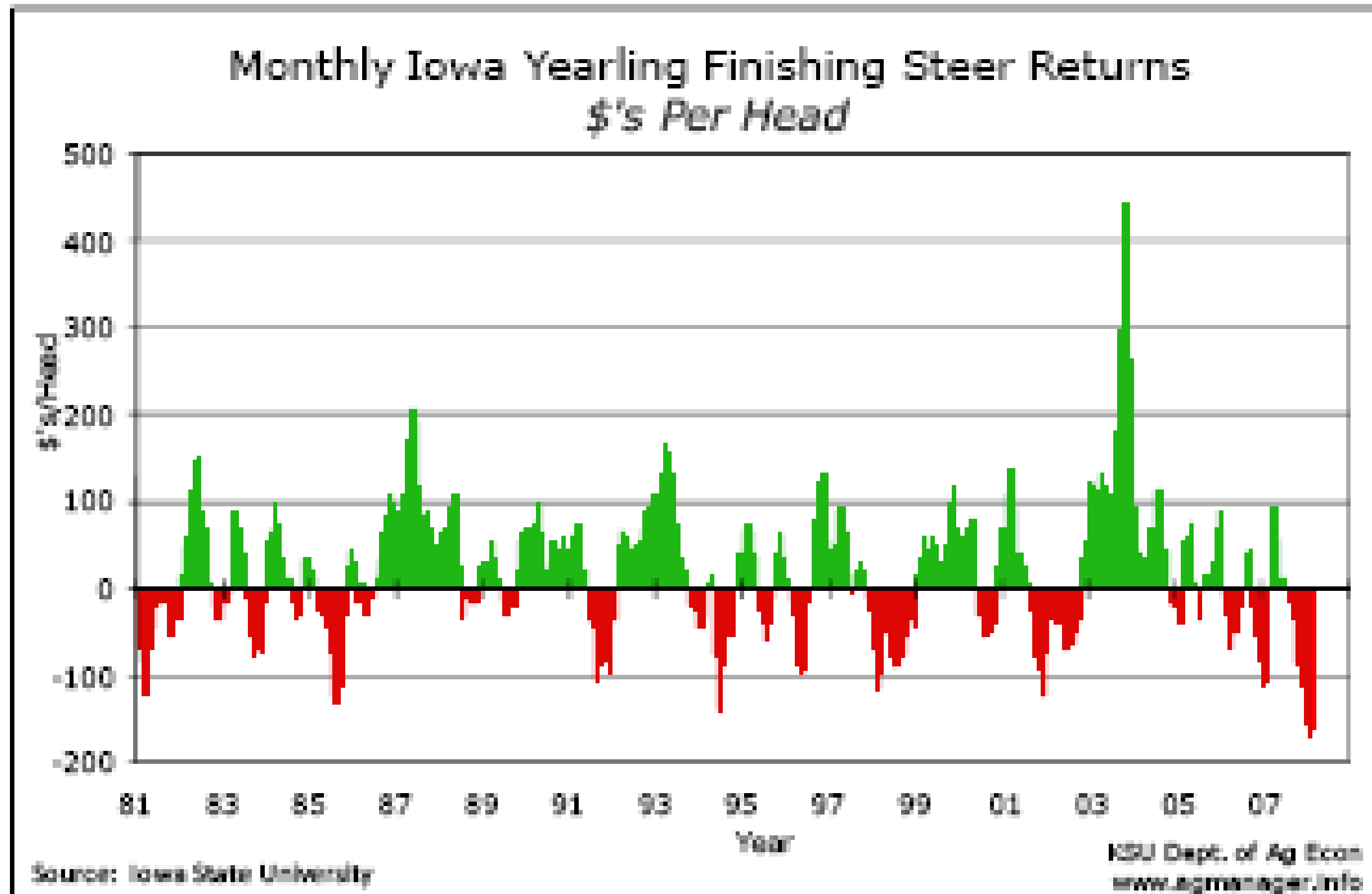
B. The Relevant Geographic Market (Supply Side)

1. For Direct Products: Approximately a 300-mile radius from plant.

2. For Indirect Products: Beyond a 300-mile radius and extending nationally.

What would happen if the merger caused about a 5% decrease in prices?

For Direct Products: the net returns (in current dollars) from feeding yearling steers averaged less than only $14 per head over the 1994-2008 period. For a $1,000 per head fed steer, the 5 percent test would allow a merger that would decrease price by $50 per head, which would mean that cattle feeders would be losing $36 per head compared to the historical average profit of about $14 per head. A price decrease of only 1.4 percent would completely eliminate the modest profits realized by cattle feeders over the period 1994-2008. Therefore, criteria typically used to define markets and to define an acceptable level of market power in the merger approval process are inappropriate to the U.S. fed cattle market.

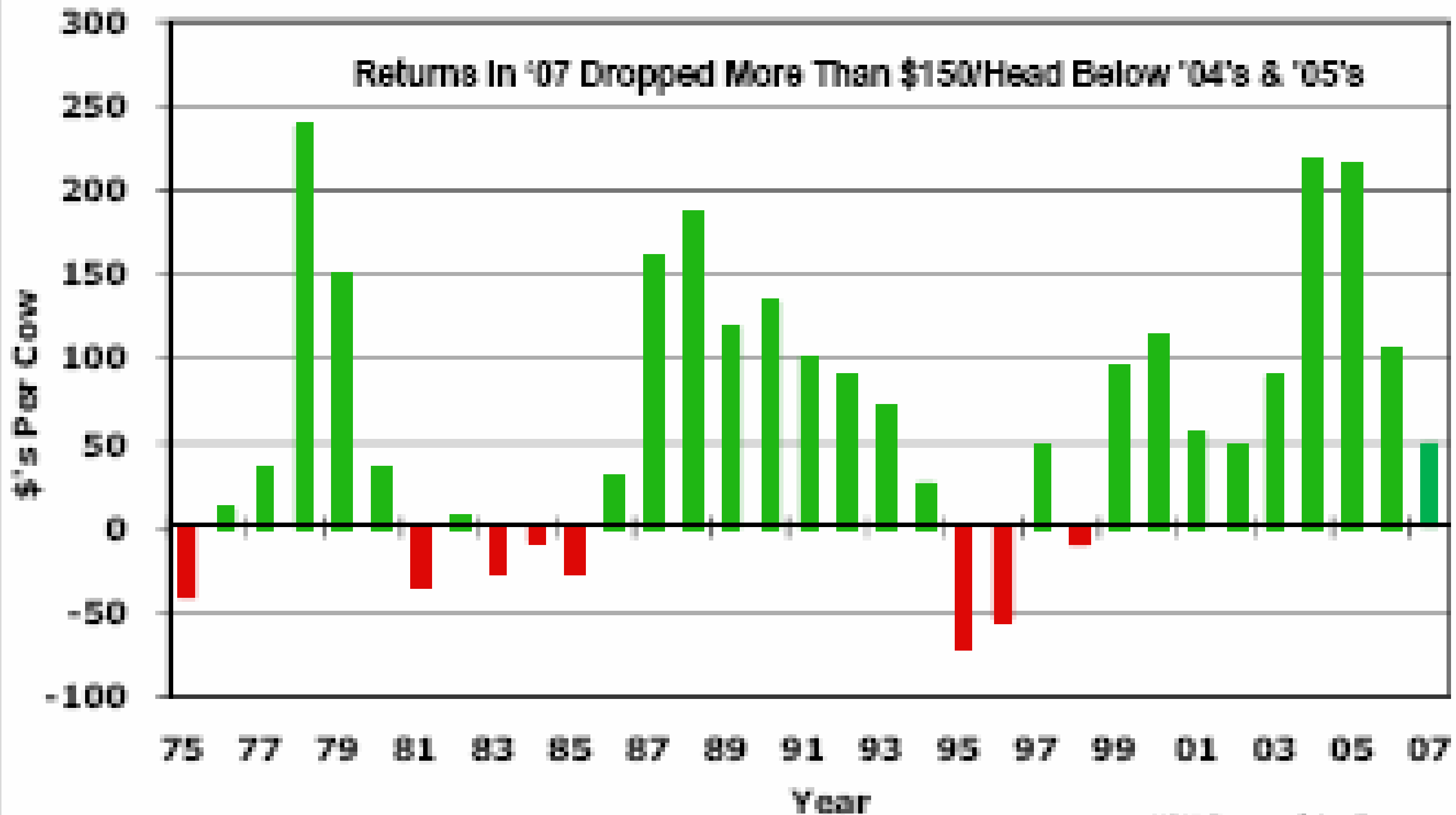

Record Losses for Cattle Feeders
1st Quarter '08 Losses Averaged $160/Head
Monthly Iowa Yearling Finishing Steer Returns
$'s Per Head
$'s/Head
500
400
300
200
100
0
-100
-200
81
83
85
87
89
91
93
95
97
99
01
03
05
07
Year
Source: Iowa State University
KSU Dept. of Ag Econ
www.agmanager.info

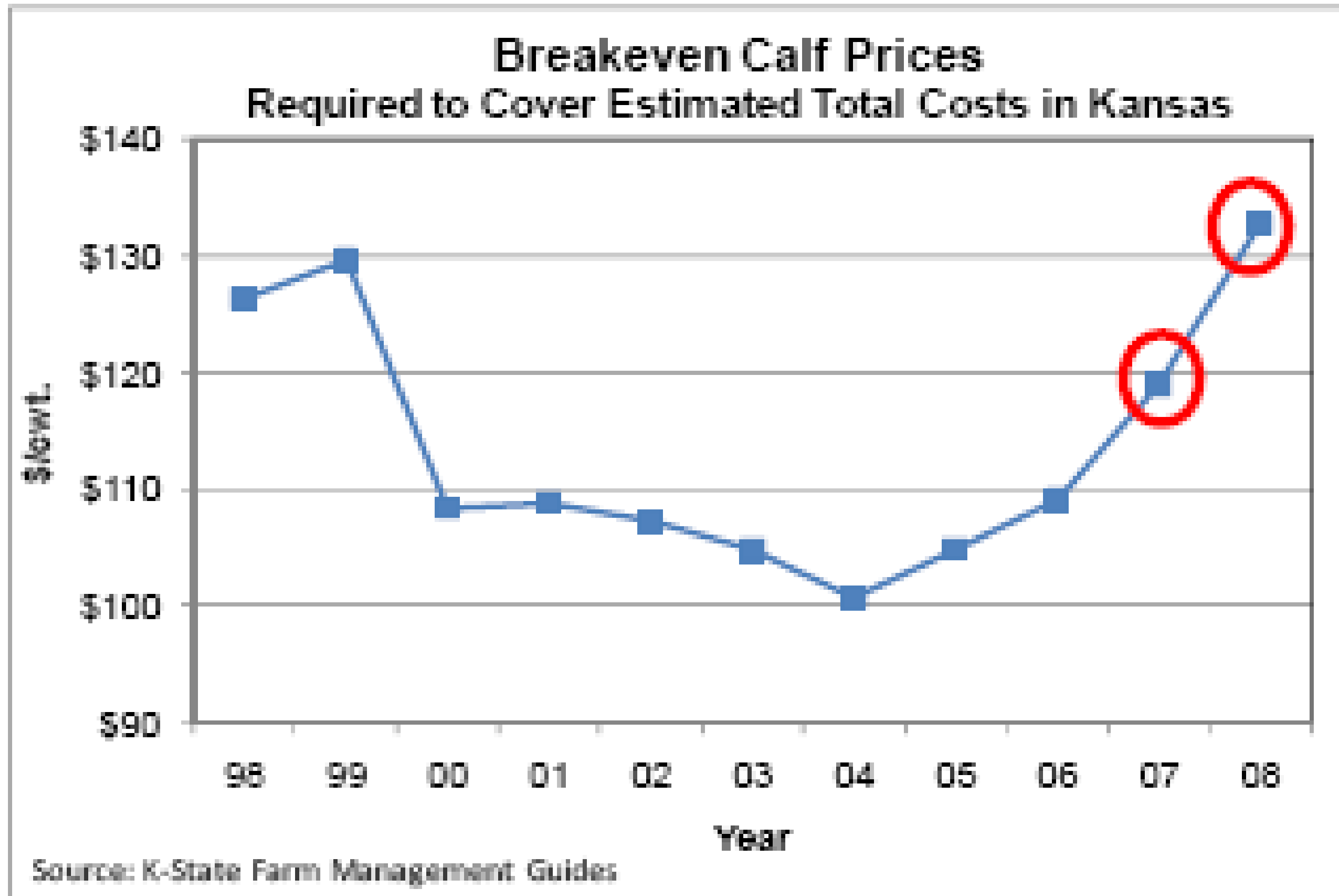
What would happen if the merger caused about a 5% decrease in prices?

- For Indirect Products:
  - Continued and perhaps accelerated reduction in U.S. cattle operations.
  - Continued and perhaps accelerated liquidation of U.S. cattle herd.
  - Continued and perhaps exaggerated disruption of U.S. cattle cycle.

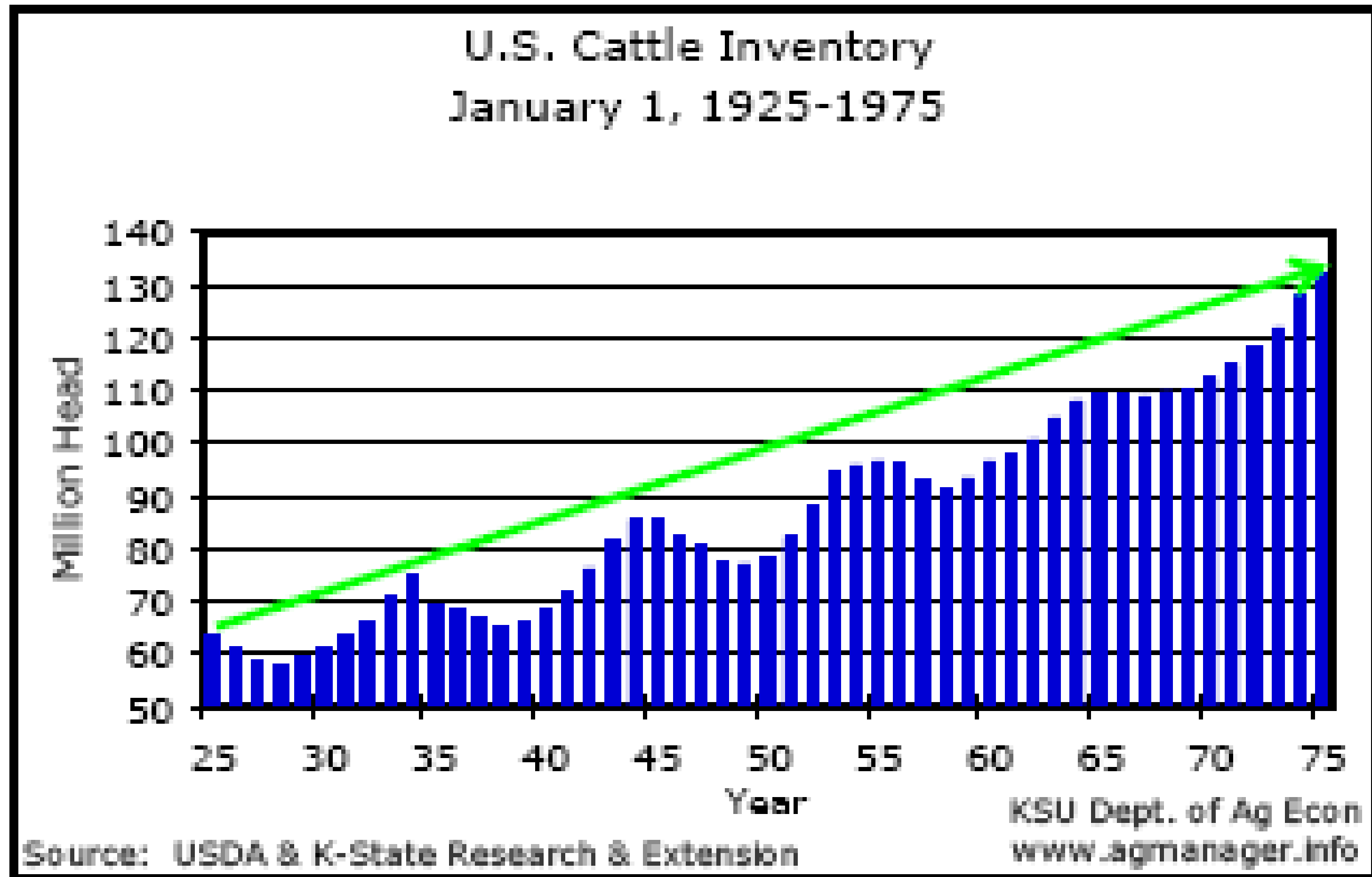
Returns Declining Rapidly

Returns Could Dip Into The Red During 2008

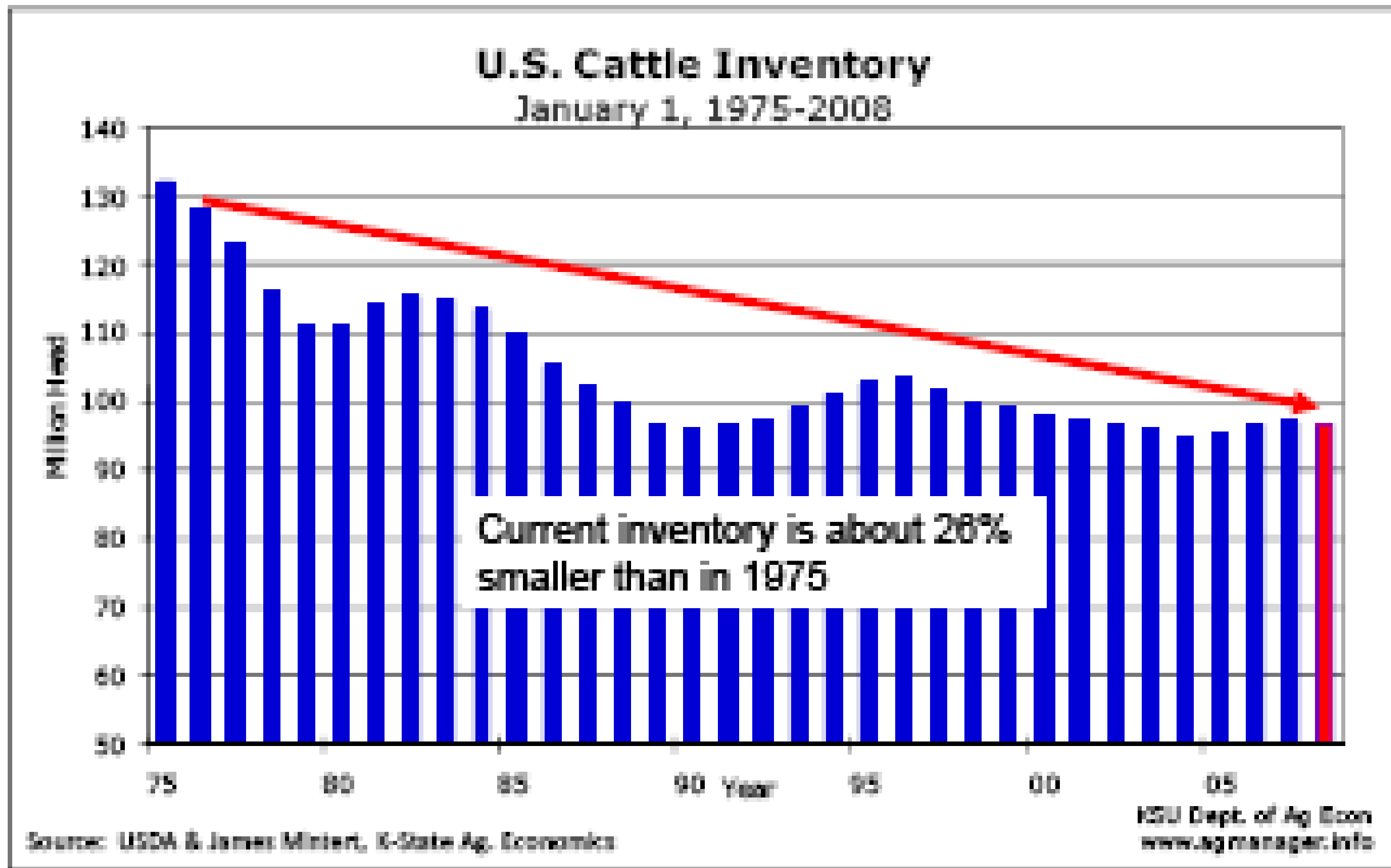



Rising Breakevens Putting Pressure On Cow-Calf Sector
'08 Breakevens Up 12% Compared to '07
Breakeven Calf Prices
Required to Cover Estimated Total Costs in Kansas
$/cwt.
$140
$130
$120
$110
$100
$90
98
99
00
01
02
03
04
05
06
07
08
Year
Source: K-State Farm Management Guides

A Picture of A Healthy Industry



A Shrinking Industry
Responding to a Long-Run Lack of Profitability



Why Cattle Industry Highly Sensitive to Price Changes

- Longest biological cycle of any farmed animal – inelastic supply.
- Finished cattle are highly perishable.
- Demand for cattle bounded on weekly basis – Packers set weekly limits by choice and by capacity constraints.
- Transportation costs limit marketing options.
- Packing industry already well above levels considered to elicit noncompetitive behavior.
- Competition for raw products, e.g., cattle, is inherently less intense than is competition for processed food products.
- Cattle market highly sensitive to slight changes in cattle supplies (1 percent increase in supplies causes 2 percent decrease in price).
- Marginal transparency in cattle markets.
- Packers have superior marketing information, particularly those with substantial captive supply arrangements.

The 5 Percent Test is Too High for the U.S. Cattle Industry

- Oklahoma State University economist Clement E. Ward found that "[r]esearch to date suggests price impacts from packer concentration have been negative in general, but small." He found that most studies found price distortions of 3 percent or less, though he explained that "even seemingly small impacts on a $/cwt. basis may make substantial difference to livestock producers and rival meatpacking firms operating at the margin of remaining viable or being forced to exit an industry.

- In 1999, economists at Utah State University found it "surprising in the face of greatly increased packer concentration" that many studies found no or very limited ability of packers to exploit feeders/ranchers and consumers. These researchers found that most of the studies used to identify market power (reduced-form modeling approaches) focused on market outcomes and "overlooked important elements of the competitive process in the beef packing industry.

C. Firms that Participate in the Relevant Market

1. Total Packing Plants: 5 largest firms own 30 plants in 14 states.
2. Plants Subject to Merger: 3 merging firms own 11 plants in 10 states.
3. Feedlots: 2,160 feedlots>1,000 hd.; 85,000 feedlots<1,000 hd.
4. Cattle Operations: 757,900 beef cattle operations. 585,050<50 head and 78,360>100 head.

D. Market Share

1. **Pre-Merger: Four firms purchased 66 percent of livestock (2006).**

2. **Pre-Merger: Four firms slaughtered 80.9 percent of steers and heifers (2006).**

3. **Post-Merger: Four firms will slaughter estimated 91.2 percent of steers and heifers.**

E. Post-Merger Market Concentration Using HHI

1. **Pre-Merger livestock purchases by meatpackers: HHI = 1,269 (2006).**
2. **Pre-Merger steer and heifer slaughter concentration: HHI = 1,826 (2006).**
3. **Pre-Merger HHI indices in regional procurement areas are much higher, ranging from 2,610 to 4,451. Data show substantial price differences among regions – nearly $6.00 per cwt. according to July 21, 2008 AMS report.**
4. **Post-Merger steer and heifer slaughter concentration: CME Group estimates an increase of 638 points.**

III. POTENTIAL ADVERSE COMPETITIVE EFFECTS

A. Coordinated Interaction (e.g. tacit or express collusion)

1. **Evidence of strategic entry and exit from cash market for the purpose and with the effect of lowering cattle prices.**

   i. In February 2006, all four major beef packers – Tyson, Cargill, Swift, and National – withdrew from the cash cattle market in the Southern Plains for an unprecedented period of two weeks.

   ii. Week ending October 13, 2006 three of the nation's four largest beef manufacturers – Tyson, Swift, and National - announced simultaneously that they would all reduce cattle slaughter, with some citing, *inter alia,* high cattle prices and tight cattle supplies as the reason for their cutback.

A. Coordinated Interaction (e.g. tacit or express collusion)

1. Evidence of propensity for express collusion

i. A November 28, 2007, Dow Jones Newswires reported that "JBS SA's Friboi Group (JBSS3.BR)" was among a number of Brazilian companies which, after a two-year investigation by the Brazilian Justice Department's antitrust division, were accused of engaging in anti-competitive practices, including coordinating with other firms to purchase livestock cheaper.

ii. Anecdotal evidence reveals that packer buyers contact cattle sellers to learn what prices other packers are offering.

A. Coordinated Interaction (e.g. tacit or express collusion)

1. **Ongoing and predicted strategies to lower cattle prices.**

   iii. **The LMMS found that a 10 percent shift of the volume of cattle procured in the open market to any one of the alternative procurement methods is associated with a 0.11 percent decrease in the cash market price.**

   iv. **Over the past 20 years studies have supported the idea that buyer concentration in cattle markets systematically suppressed prices, with price declines found to range from 0.5 percent to 3.4 percent.**

   v. **Researches found that a 1 percent increase in regional firm concentration as measured by the RHHI raises the probability that packers would use packer fed arrangements by 3.18 percent. The proposed merger, which would increase the RHHI in one or more of the nine procurement regions, would be expected to shift more cattle into packer feeding arrangements.**

A. Coordinated Interaction (e.g. tacit or express collusion)

1. Ongoing and predicted strategies to lower cattle prices.

vi. The merger would significantly increase the volume of captive supply cattle controlled by JBS/Swift by combining two principal market outlets for U.S. feeder cattle – Five Rivers and U.S. Premium Beef. Together, these entities feed about 2.68 million, or nearly 10 percent, of the 27 million steers and heifers slaughtered annually in the United States.

vii. The volume of cash cattle procurements has already dropped significantly since 2005, falling 15.2 percent in the TX/OK/NM market, with a corresponding increase in captive supply procurements. Studies have found that producers participate in counterproductive marketing arrangements because they are unable to coordinate actions with other producers.

viii. Producers already subject to market access risk: The LMMS found that "[t]ransaction prices associated with forward contract transactions are the lowest among all the procurement methods [including cash market procurement methods]," and proffered that the results of the study may suggest that "farmers who choose forward contracts are willing to give up some revenue in order to secure market access . . ."

B. Unilateral Effects

1. Evidence of market power abuses

i. **Using producers to advance political goals: In March 2003, IBP, Inc., notified U.S. cattle producers that it would require producers to, *inter alia*, "Provide IBP, inc. access to your [producers'] records so that we [IBP] can perform random producer audits . . ." and "Provide third-party verified documentation of where the livestock we [IBP] purchase from you [producers] were born and raised."**

ii. **Imposition of arbitrary discounts: Tyson and Smithfield have each established different price premiums and discounts for additional factors, such as muscle scoring. For example, Smithfield discounts certain muscle scores between $5.00 per cwt. and $10.00 per cwt, and Tyson uses muscle scores to apply varying discounts under a different system.**

iii. **Anticompetitive pricing strategies: The LMMS study states that in direct trade transactions based on a carcass weight valuation, the average cattle price is 1.3 cents lower than the average price for direct trade transactions with live weight valuation. Even more striking is the difference for grid valuation transactions, where prices average 1.8 cents lower than the average price for direct trade transactions.**

B. Unilateral Effects

1. **Evidence of market power abuses**

   iv. **Anticompetitive division of the market: Tyson Fresh Meats, Inc., ("Tyson") has issued presumably new terms and conditions under which it will purchase cattle for slaughter. Tyson states that it "does not typically accept for processing at its facilities" cattle that exceed 58 inches in height, cattle that exceed 1,500 pounds, or cattle with horns longer than 6 inches in length.**

   v. **Actions to coerce producers to waive rights under P&S Act: On April 23, 2008, JBS/Swift originated a one-year contract for the sale of slaughter-ready cattle to JBS/Swift. Under the contract terms, feedlots must grant JBS/Swift the right to withhold payment for "grade and yield" cattle for three days after the "final grade" and feedlot owners and managers must additionally waive any rights they have "under the trust provisions of Section 206 of the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 106, Pub. L. 94-410)."**

B. Unilateral Effects

1. Evidence of market power abuses

vi. Each of the merging packer firms have been accused of unilateral engaging in anticompetitive practices: Swift & Co. accused of underpaying on hot carcass weights; National paid $50,000 penalty involving failure to disclose freight charge deductions and data errors; and Smithfield paid $325,000 penalty involving improper rounding of hot carcass weights.

vii. Anecdotal evidence reveals that meatpackers with multiple plants deny access to plants that are offering a higher price and require producers to deliver to the plant offering a lower price.

III. ENTRY ANALYSIS

A. Can entry achieve significant market impact in timely period?

B. Would committed entry be profitable?

C. Would timely and likely entry be sufficient to return market prices to premerger levels?

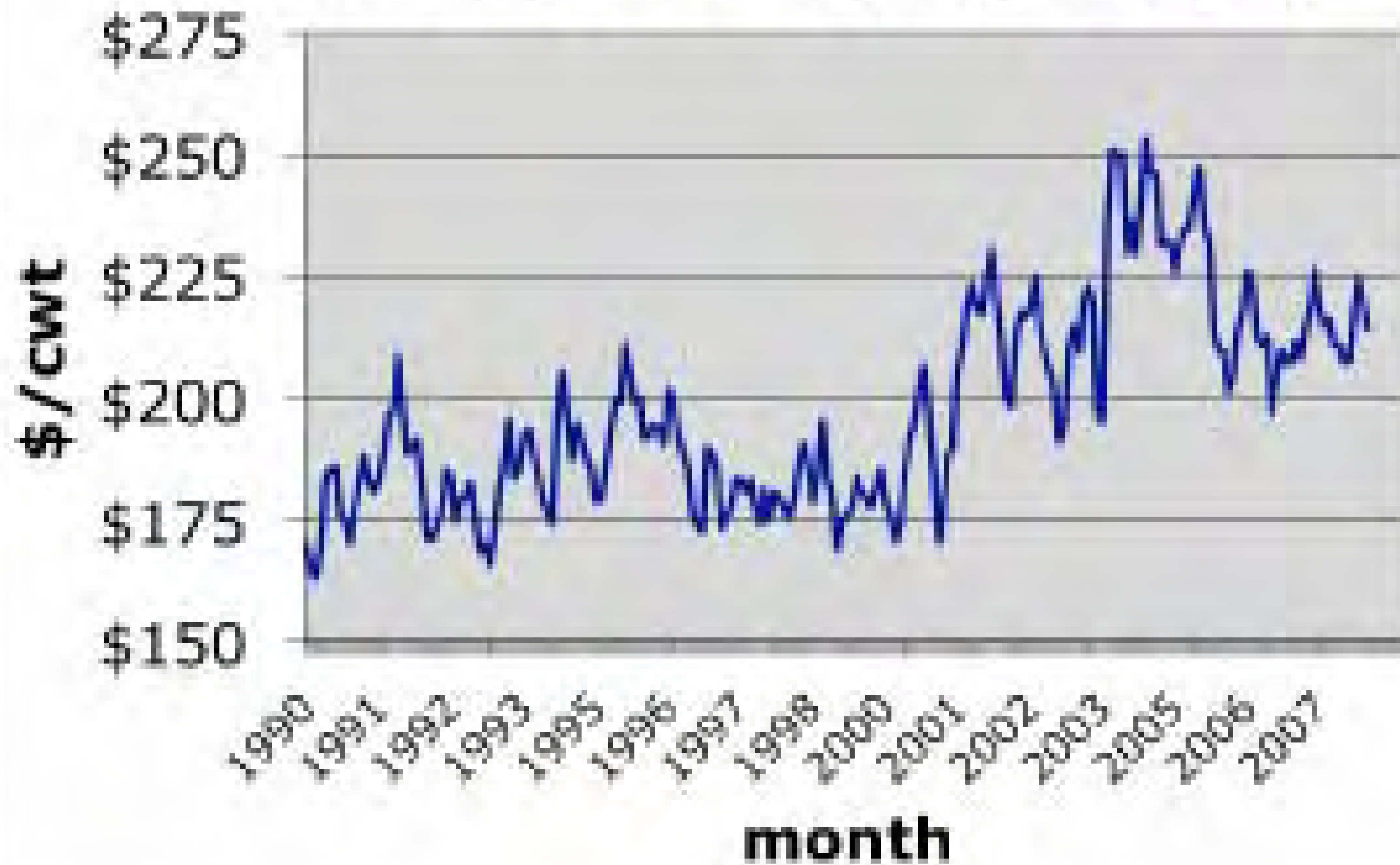
POTENTIAL ADVERSE COMPETITIVE EFFECTS

Imagine if you will, the day before the merger is announced, that three buyers from Swift, National and Smithfield meet together to discuss their plans to buy slaughter cattle. If that occurred, those buyers would be in violation of antitrust laws against collusion

The activities of three buyers of the third, fourth and fifth largest beef processors colluding would most certainly hurt the price of live cattle. But, on the day after the merger, the same three buyers could discuss their plans without violating the law.

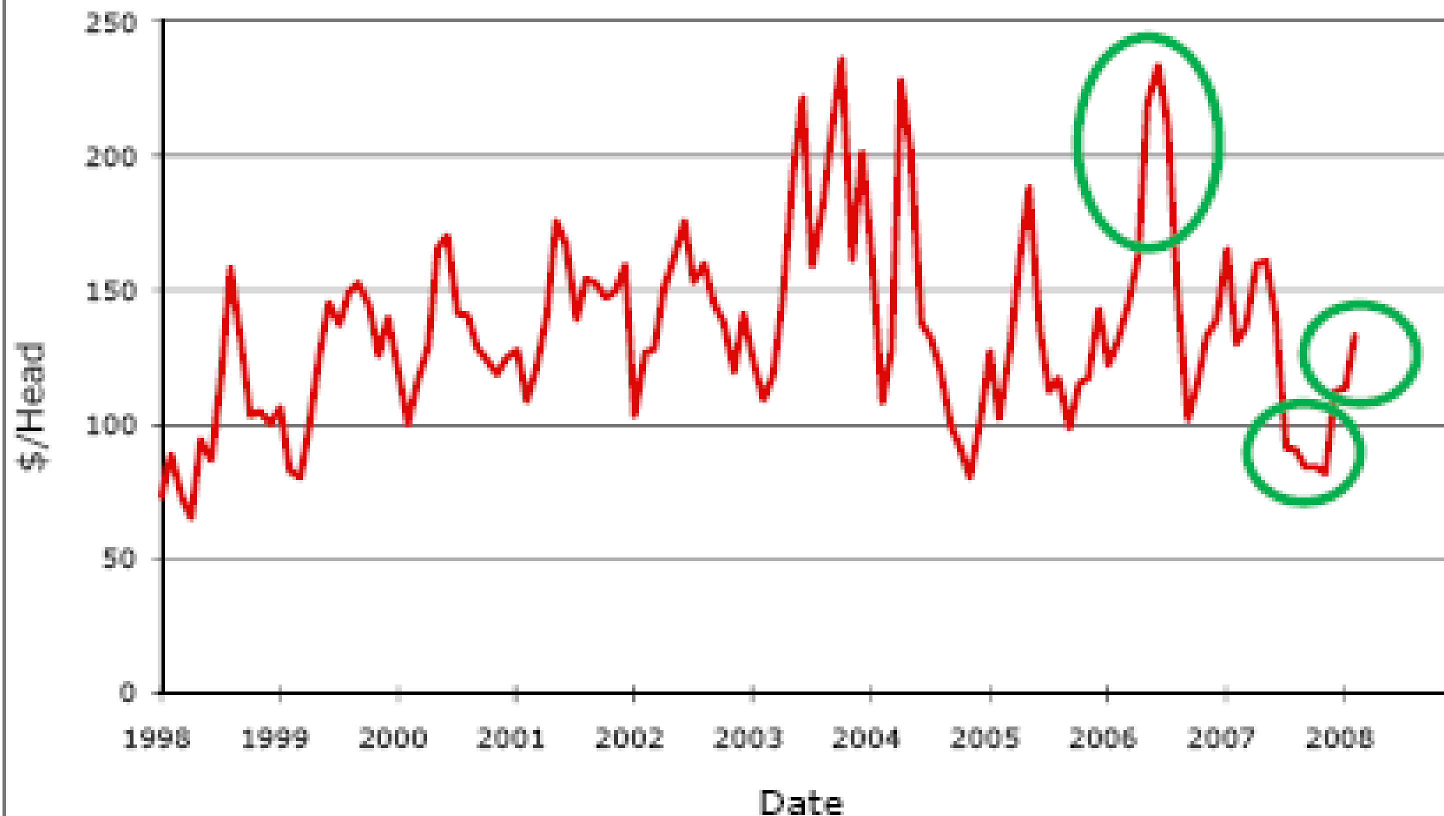
IV. REVIEW EFFICIENCIES

A. On July 11, 2008, the Associated Press issued a news article stating that National Beef had attributed its higher third-quarter profits to, *inter alia*, increased beef demand and lower cattle prices. This is a counter-intuitive outcome for a properly functioning competitive market as higher demand for beef should translate into higher prices for the fed cattle from which the beef was derived.



Farm-to-Retail Price Spread for Beef
(in constant 2007 dollars for a spec animal and
spec cuts of meat--no quality differences)
$/cwt
$275
$250
$225
$200
$175
$150
1990
1991
1992
1993
1995
1996
1997
1998
2000
2001
2002
2003
2005
2006
2007
month

Processor Margins Still Narrow, But Are Starting to Recover



Effects of Declining Competition on Cattle Prices 1987 - 2007

Prepared by R-CALF USA

Key:

Above-the-Average National Cattle Price

Below-the-Average National Cattle Price

1987 (HHI = 768; CR4 = 47%)

1997 (HHI = 1,170; CR4 = 81%)

2007 (HHI = 1,288; CR4 = 88%*)

Data Source:

Average Cattle Prices: USDA, NASS, Meat Animals: Production, Disposition and Income, Summaries for 1987, 1997 and 2007.
HHI and CR4: USDA GIPSA, Livestock Purchase Concentration, Packers and Stockyards Statistical Report, 2006 (CR4 is the concentration ratio for top 4 firms).

*2006 is the latest data available.

Additional Concerns

- **Many of the practices described above are inconsistent with the provisions of the Packers and Stockyards Act of 1921. Specifically 7 USC § 192 *et seq*.**

- **Additionally, the following practices should be investigated:**
  - **Bidding not to buy cattle, i.e., offering a low bid with no intent to buy, but rather, with the intent to lower prices for live cattle.**
  - **Offering preferential agreements with captive suppliers for prices and terms not available to other sellers of comparable cattle in the market.**
  - **Entering into strategic alliances that contain special agreements for preferential access to the market and/or special prices.**
  - **Exercising undue influence over national commodities markets, potentially eliminating this hedging tool for U.S. cattle producers.**

Packing Industry Exceeds Optimal Economy of Scale

Beef Packer Operating Income as a Percent of Sales (GIPSA/USDA data) by Size

Time Period	Big Four	5th to 8th	9th to 20th	21st to 40th
2006	-0.2	2.3	2.22	5.42
2005	0.92	1.69	4.47	3.51
Average 1992-2006	**1.46**	**2.34**	**3.86**	**1.77**

Fighting for the U.S. Cattle Producer!

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EXHIBIT C

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Website: www.r-calfusa.com

May 8, 2008

The Honorable Thomas Barnett
Assistant Attorney General
U.S. Department of Justice
Office of Operations
Premerger Notification Unit, Room 3335
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Re: R-CALF USA's Third Submission of Information to the U.S. Department of Justice regarding the Proposed JBS-Brazil Merger

Dear Mr. Barnett:

The Ranchers Cattlemen Action Legal Fund United Stockgrowers of America ("R-CALF USA") submitted written information to the U.S. Department of Justice ("DOJ") on April 9, 2008, and April 24, 2008, regarding the proposal by JBS Acquisitions (hereafter "JBS-Brazil") to purchase National Beef Packing Company ("National"), Smithfield Beef Group ("Smithfield"), and Five Rivers Ranch Cattle Feeding, LLC ("Five Rivers"), collectively "JBS-Brazil Merger."

Following these earlier submissions to the DOJ, R-CALF USA prepared and presented written testimony on May 7, 2008, to the U.S. Senate Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights ("Subcommittee"). Some of the information incorporated into R-CALF USA's written testimony to the Subcommittee was identical to the information previously provided to the DOJ. However, a substantial portion of R-CALF USA's written testimony was new, including new exhibits representing new studies not previously provided to the DOJ.

This letter contains the portions of R-CALF USA's written testimony to the Subcommittee that constitute new and/or updated information relevant to the JBS-Brazil Merger that we would like the DOJ to consider during its merger review process. Attached also are 7 new exhibits and 3 exhibits that, although previously submitted, are necessarily reincorporated in this letter.

A. Like the Beef Packing Industry, the Feeding Sector of the U.S. Live Cattle Industry has become Increasingly Concentrated.

The structure of the U.S. cattle industry is like that of a pyramid. Filling the base of this pyramid in 2007 were 967,440 cattle operations, including both dairy and beef cattle operations.[1] This represents 40 percent fewer U.S. cattle operations than existed in 1980, which numbered 1.6 million at the time.[2] Of the 967,440 remaining cattle operations, only 757,900 are beef cattle operations, and the vast majority of these operations (585,050) have fewer than 50 head of cattle.[3] Only 78,360 beef cattle operations have herd sizes of more than 100 head.[4] While all 757,900 beef cattle operations would be harmed by the lessening of competition and increased exercise of market power that would result from the JBS-Brazil Merger, it is most likely that producers within the class of operations with more than 100 head, the class with fewer than 80,000 operations, would be at greatest risk of being forced to exit the industry due to lower cattle prices, based on the presumption that this class is comprised of more full-time cattle producers wholly dependent on competitive cattle prices for their livelihoods.

Moving toward the top of this pyramid are cattle feeders that feed cattle in feedlots until they reach slaughter weight, at which time the cattle would be sold directly to beef packers for slaughter. Like the beef packing industry, feedlots have become increasingly concentrated. In 1995, 41,365 feedlots marketed 23.365 million cattle.[5] By 2002, only 2,209 feedlots marketed 23.637 million cattle.[6] The remaining 4.070 million cattle fed in feedlots in 2002 were fed in 93,000 feedlots with capacities of less than 1000 head.[7]

B. The Concentrated Feeding Sector is the Portal through Which Market Power Invades the Entire U.S. Live Cattle Industry.

Thus, while 45 million cattle are marketed annually within the base of the cattle industry pyramid among and between 967,440 cattle operations, the vast majority of steers and heifers slaughtered each year are funneled through only about 2,200 feedlots, which in turn sell the lion's share of 27 million steers and heifers to only four major beef packers. And it is here, at the apex of the pyramid, where 60 percent of the cattle marketed annually are marketed to only four beef packers, that the price of cattle is established, and this price, whether competitive or not, is the price that becomes the basis for pricing the remaining 40 percent (18 million) of cattle that are *not* sold to the four major meatpackers. This is because the price for slaughter-ready steers and heifers received by cattle feeders is transferred, at least in part, backward throughout the live

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[1] *See* Farms, Land in Farms, and Livestock Operations, U.S. Department of Agriculture, National Agricultural Statistics Service, Sp Sy 4 (08) a, February 2008, at 14.
[2] *See* Federal Register, Vol. 72, No. 152, Wednesday, August 8, 2007, at 44,681, col. 2.
[3] *See* Farms, Land in Farms, and Livestock Operations, U.S. Department of Agriculture, National Agricultural Statistics Service, Sp Sy 4 (08) a, February 2008, at 14.
[4] *Ibid*.
[5] Structural Changes in Cattle Feeding and Meatpacking, Clement E. Ward and Ted C. Schroeder, Managing for Today's Cattle Market and Beyond, Oklahoma State University and Kansas State University, respectively, attached hereto as Exhibit 1.
[6] Cattle Final Estimates 1999-2003, U.S. Department of Agriculture, National Agricultural Statistics Service, Statistical Bulletin Number 989, April 2004, at 75.
[7] *Ibid*.

cattle production cycle, impacting seed stock producers, cow/calf producers, backgrounders, and stockers. The market for slaughter-ready steers and heifers – the market directly impacted by the JBS-Brazil Merger – is the price-making market for the entire $50 billion U.S. live cattle industry.

The significance of these basic facts about the U.S. live cattle industry is profound, particularly when evaluating the potential impacts from the proposed JBS-Brazil Merger. For example, if the DOJ were to look only at the JBS-Brazil Merger's direct impacts, i.e., the impacts on the sale of only 27 million cattle annually, and found such impacts to be "small," the DOJ would completely miss the compounding impacts that even a small lessening of competition or exercise of market power in the slaughter-ready steer and heifer market would have on the annual sale of 45 million cattle and, consequently, on the welfare of hundreds of thousands of independent cattle producers and thousands of rural communities that depend on a vibrant, competitive U.S. live cattle industry.

Indeed, noted Oklahoma State University economist Clement E. Ward found that "[r]esearch to date suggests price impacts from packer concentration have been negative in general, but small."[8] He found that most studies found price distortions of 3 percent or less, though he explained that "even seemingly small impacts on a $/cwt. basis may make substantial difference to livestock producers and rival meatpacking firms operating at the margin of remaining viable or being forced to exit an industry."[9]

In 1999, economists at Utah State University found it "surprising in the face of greatly increased packer concentration" that many studies found no or very limited ability of packers to exploit feeders/ranchers and consumers.[10] These researchers found that most of the studies used to identify market power (reduced-form modeling approaches) focused on market outcomes and "overlooked important elements of the competitive process in the beef packing industry."[11]

Notwithstanding the potential that most studies have overlooked important elements of the competitive process but nevertheless found "small" negative impacts due to packer concentration and monopsony power, the application of even a 3 percent price distortion on the entire $50 billion live cattle industry would result in a loss of $1.5 billion to U.S. cattle producers. Importantly, this is the level of harm that likely accrues today, even without the additional market concentration and consummate increase in market power that would be expected from the JBS-Brazil Merger. Importantly, the concentrated feeding sector is the portal through which even small market-power induced price distortions can invade and cripple the entire U.S. live cattle industry.

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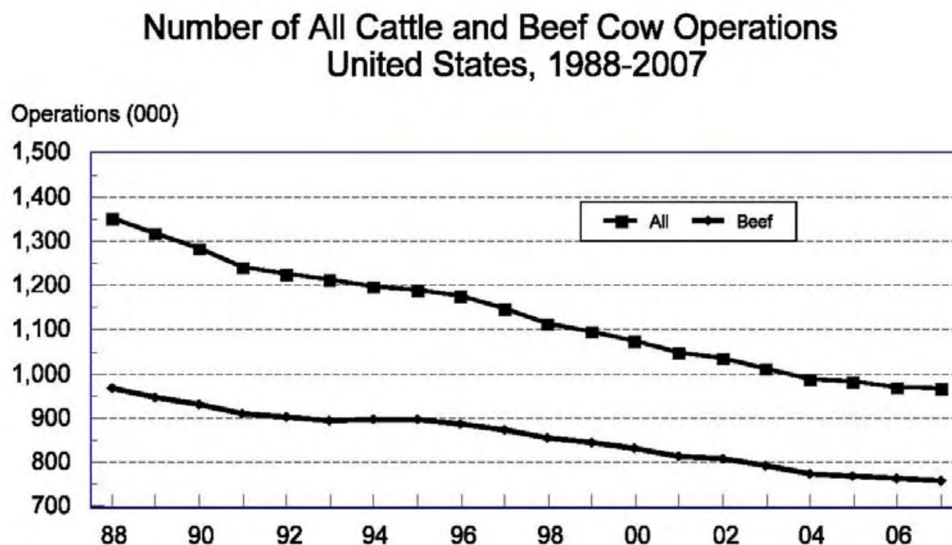
[8] Packer Concentration and Packer Supplies, Clement E. Ward, Oklahoma Cooperative Extension Service, AGEC-554, at 554-5, attached hereto as Exhibit 2.
[9] A Review of Causes for and Consequences of Economic Concentration in the U.S. Meatpacking Industry, Clement E. Ward, Current Agriculture Food and Resource Issues, 2001, at 2, attached hereto as Exhibit 3.
[10] Testing for Market Power in Beef Packing: Where are We and What's Next?, Lynn Hunnicutt, Quinn Weninger, Utah State University, August 1999, at 5, attached hereto as Exhibit 4.
[11] *Id.*, at 1

C. The U.S. Cattle Industry has Already Partially Succumbed to Increased Market Power

The U.S. cattle industry has already partially succumbed to the exercise of market power emanating from the highly concentrated beef packing industry – at current concentration levels, and it is uniquely susceptible to the exercise of market power. The effects of market concentration and market power have contributed to 1) the rapid decline in the number of U.S. cattle operations as discussed above and shown in Figure 1 below:

Figure 1

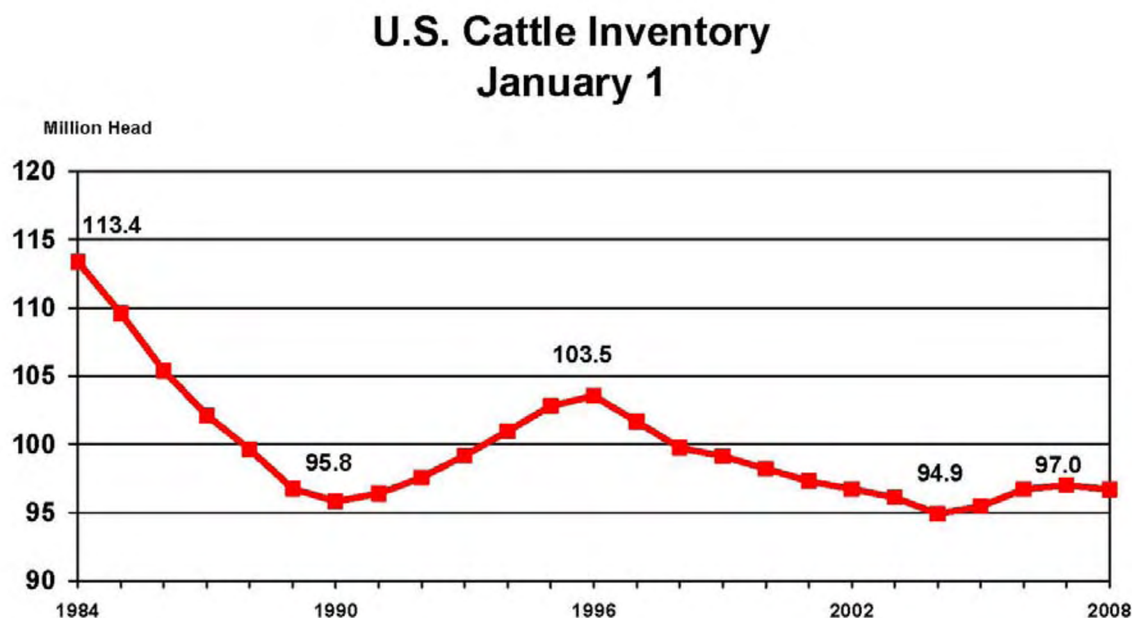


Source: Farms, Land in Farms, and Livestock Operations, 2007 Summary, U.S. Department of Agriculture, National Agricultural Statistics Service, February 2008, at 14.

Figure 1 shows that the U.S. live cattle industry experienced contraction inverse to the increased concentration by the top four steer and heifer slaughter firms, which rose from 35.7 percent in 1980 to 81.1 percent in 2004.[12] The effects of market concentration and market power have contributed also to 2) the contraction of the U.S. cattle herd and the disruption, if not the loss of the historical cattle cycle – itself a bellwether indicator of the declining competitiveness of the U.S. live cattle industry – as shown in Figure 2 below.

[12] Testing for Market Power in Beef Packing: Where are We and What's Next?, Lynn Hunnicutt, Quinn Weninger, Utah State University, August 1999, at 1, attached hereto as Exhibit 4.

Figure 2



Source: Cattle, U.S. Department of Agriculture, National Agricultural Statistics Service, February 2008, at 1.

The U.S. Government Accountability Office ("GAO") explained that the U.S. live cattle industry is subject to a historical cycle, referred to by "increases and decreases in herd size over time and [] determined by expected cattle prices and the time needed to breed, birth, and raise cattle to market weight," factors that are complicated by the fact that "[c]attle have the longest biological cycle of all meat animals."[13] The U.S. cattle cycle has historically occurred every 10-12 years.[14] In 2002 the USDA acknowledged that "the last cycle was 9 years in duration; the present cycle is in its thirteenth year, with two more liquidations likely."[15] In late 2005, the USDA declared that the U.S. was "in the early herd expansion stages of the new cattle cycle."[16] However, in late 2007, the USDA began cautioning the industry, stating that "[s]ome analysts suggest the cattle cycle has gone the way of the hog and dairy cow cycles."[17] These analysts, according to the USDA, "suggested that the cattle cycle has returned to its liquidation phase."[18]

The alarming irony, as shown in Figure 3 below, is that the U.S. cattle industry was contracting, both in terms of the number of cattle operations and herd size, during the decade

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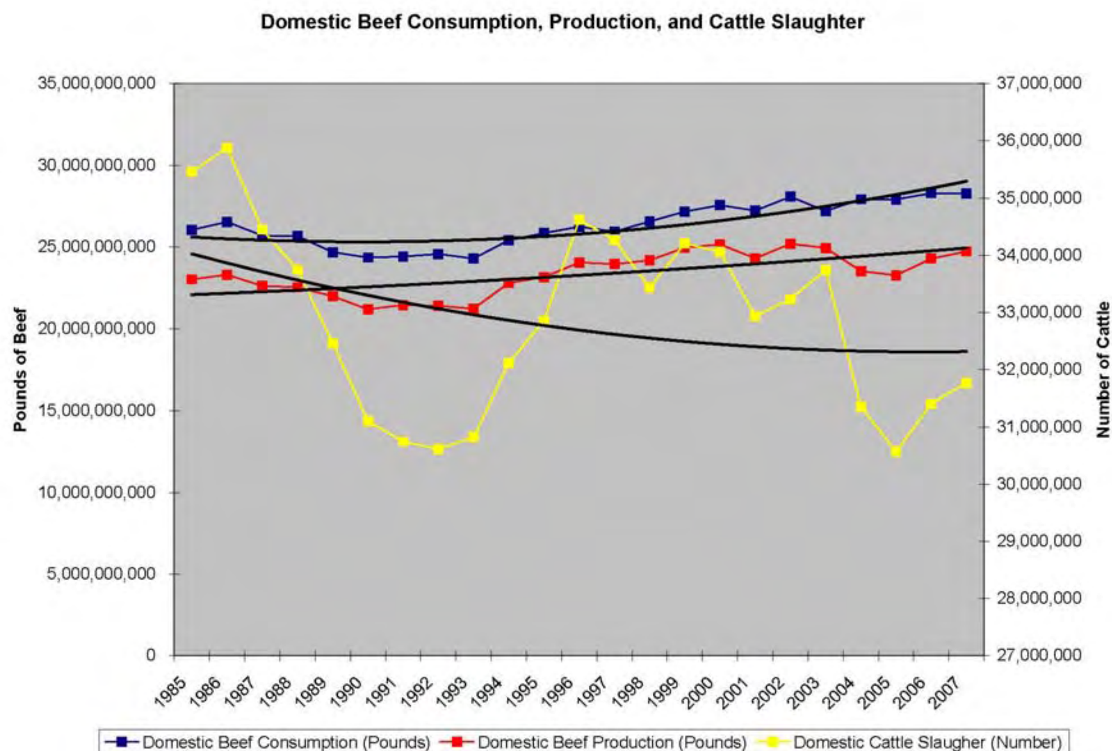
[13] Economic Models of Cattle Prices, How USDA Can Act to Improve Models to Explain Cattle Prices, U.S. Government Accountability Office (formally the General Accounting Office), (GAO-020246, March 2002, at 30.
[14] *See* The U.S. Beef Industry: Cattle Cycles, Price Spreads, and Packer Concentration, Kenneth H. Mathews et al., U.S. Department of Agriculture, Economic Research Service, April, 1999, at 3, attached as Exhibit 5.
[15] Interagency Agricultural Projections Committee, *USDA Agricultural Projections to 2011, Staff Report WAOB-2002-1, February 2002, available at* http://www.ers.usda.gov/publications/waob021/waob20021.pdf, obtained from internet on October 17, 2002.
[16] Livestock, Dairy, & Poultry Outlook, U.S. Department of Agriculture, Economic Research Service, December 16, 2005, at 8, available at http://www.ers.usda.gov/publications/ldp/dec05/ldpm138t.pdf.
[17] Livestock, Dairy, & Poultry Outlook, U.S. Department of Agriculture, Economic Research Service, December 19, 2007, at 5, available http://www.ers.usda.gov/Publications/LDP/2007/12Dec/ldpm162.pdf.
[18] *Id.*

after 1993 when domestic beef consumption began increasing significantly. The polynomial trend lines in Figure 3 reveal that domestic beef production could not keep pace with increased domestic beef consumption and the volume of domestic cattle slaughter trended downward in the face of this favorable consumption/demand situation.

Figure 3



Data Source: **Domestic beef consumption data obtained from USDA-FAS.[19]**
Domestic beef production calculated by subtracting beef-equivalent weights of imported cattle from production data compiled by USDA-ERS.[20]
Domestic slaughter calculated by subtracting imported cattle numbers from commercial U.S. slaughter.[21]

Another unfavorable phenomenon revealed by Figure 3 is that the shortfall between domestic production and domestic consumption, during each of the years 2004, 2005, 2006, and 2007, was greater than at any time in recent history (at least since 1961).

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[19] *See* U.S. Department of Agriculture, Foreign Agricultural Statistics Database, *Production, Supply and Distribution Online*, available at http://www fas.usda.gov/psd/complete_files/LP-0111000.csv.

[20] *See* Table 94, Beef Supply, Utilization, and Per Capita Consumption, 1970-2005, Red Meat Yearbook, U.S. Department of Agriculture, Economic Research Service, available at http://usda.mannlib.cornell.edu/MannUsda/viewDocumentInfo.do?documentID=1354.

[21] *See* Table 1, Commercial Cattle Slaughter, Red Meat Yearbook, U.S. Department of Agriculture, Economic Research Service, available at http://usda.mannlib.cornell.edu/MannUsda/viewDocumentInfo.do?documentID=1354.

The foregoing data run counter to competitive market principles that suggest a decade of nearly continuous increases in beef consumption would lead to industry revitalization, not industry contraction. R-CALF USA respectfully requests that the DOJ rigorously investigate this counterintuitive profile of the U.S. cattle industry to determine the true extent to which market concentration and market power has irreparably harmed the U.S. cattle industry. The proposed JBS-Brazil Merger should not be allowed to proceed without conclusive evidence showing that the U.S. live cattle industry is not already subject to harmful market power exercised by the highly concentrated beef packing industry.

D. The U.S. Live Cattle Industry is Uniquely Susceptible to Market Power

The characteristic nature of cattle and the characteristics of the U.S. live cattle market make the U.S. live cattle industry uniquely susceptible to monopsony power. These characteristics include for cattle:

1. The longest biological cycle of any farmed animal, making it difficult for the industry to react to changes in demand.[22]

2. Slaughter-ready cattle are highly perishable products that must be marketed within a narrow window of time; otherwise, the animals would degrade in quality and value.[23]

3. Feasibility of transporting cattle long distances decreases as cattle approach slaughter weight. Researchers have found that the distance of the seller from the slaughtering plant affects the choice of cattle procurement methods[24] and that "most cattle are purchased for a specific plant from within a 100-mile radius of that facility, whether the owning firm had one or several slaughtering plants."[25] The researchers found that the cost of transporting cattle long distances creates a limited procurement area for meat packing plants, resulting in higher packer concentration within certain states than nationally.[26]

For cattle markets:

1. Oklahoma State University Economist Clement Ward asserts that concentration levels in the U.S. meatpacking industry are already among the highest of any industry in the United States, "and well above levels generally considered to elicit non-competitive behavior and result in adverse economic performance."[27]

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[22] Economic Models of Cattle Prices, How USDA Can Act to Improve Models to Explain Cattle Prices, U.S. Government Accountability Office (formally the General Accounting Office), (GAO-020246, March 2002), at 30.
[23] GIPSA Livestock and Meat Marketing Study, January 2007, Volume 3, at 5-4, available at http://archive.gipsa.usda.gov/psp/issues/livemarketstudy/LMMS_Vol_3.pdf.
[24] Examining Packer Choice of Slaughter Cattle Procurement and Pricing Methods, Oral Capps, Jr., et al., Agricultural and Resource Economics Review, April 1999, at 21, attached hereto as Exhibit 6.
[25] *Id*. at 15.
[26] *Id*. at 16.
[27] A Review of Causes for and Consequences of Economic Concentration in the U.S. Meatpacking Industry, Clement E. Ward, Current Agriculture Food and Resource Issues, 2001, at 1, attached hereto as Exhibit 3.

2. Researchers have found that regional competition for raw products, which would include competition for slaughter-ready cattle, is inherently less intense than is competition in processed food products.[28] Based on this finding, the DOJ should review the JBS-Brazil Merger with the understanding that competition for slaughter-ready cattle is inherently fragile, even without the added burden of monopsony power that would be expected to increase following the increased horizontal concentration and vertical integration proposed by the JBS-Brazil Merger.

3. As confirmed by the United States International Trade Commission (USITC), the U.S. cattle market is highly sensitive to even slight changes in cattle supplies. The USITC found that the farm level elasticity of demand for slaughter cattle is such that "each 1 percent increase in fed cattle numbers would be expected to decrease fed cattle prices by 2 percent."[29]

4. As confirmed by the Grain Inspection Packers and Stockyards Administration (GIPSA) Livestock and Meat Marketing Study (LMMS), the cash cattle market is sensitive to shifts in cattle procurement methods. The LMMS found that a 10 percent shift of the volume of cattle procured in the open market to any one of the alternative procurement methods is associated with a 0.11 percent decrease in the cash market price.[30] The comprehensive econometric analysis documented in *Pickett v. Tyson Fresh Meats, Inc.*, which covered the period 1994-2004, showed an even greater sensitivity to shifts is cattle procurement. The analysis showed that for each 1% increase in captive supply cattle, cattle prices decreased 0.155%.[31]

5. The packer demand for live cattle is bounded on a weekly basis by available slaughter capacity, which is a limiting factor on demand for cattle, i.e., slaughter capacity sets the weekly slaughter cattle-marketing limit.[32]

6. The combination of the perishable nature of slaughter-ready cattle and limited weekly slaughter capacity creates market access risk for U.S. cattle producers within the U.S. cattle market. The GIPSA LMMS study defines market access risk as "the availability of a timely and appropriate market outlet"[33] and proffered that the results of the study may suggest that "farmers who choose forward contracts are willing to give up some revenue in order to secure market access. . ."[34]

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[28] Captive Supplies and the Cash Market Price: A Spatial Markets Approach, Mingxia Zhang and Richard J. Sexton, Journal of Agricultural and Resource Economics, 25(1): 88-108, at 90, fn 7, attached as Exhibit 7.
[29] U.S.-Australia Free Trade Agreement: Potential Economywide and Selected Sectoral Effects, United States International Trade Commission (Publication 3697; May 2004) at 44, fn 26, available at http://hotdocs.usitc.gov/docs/pubs/2104f/pub3697.pdf.
[30] *See* GIPSA Livestock and Meat Marketing Study, January 2007, Volume 3, at ES-5, available at http://archive.gipsa.usda.gov/psp/issues/livemarketstudy/LMMS_Vol_3.pdf.
[31] *See* Trial Transcript in *Pickett et al. v. Tyson Fresh Meats, Inc. (IBP, Inc.)* Civil No. 96-A-1103 N, U.S. District Court for the Middle District of Alabama, Northern Division.
[32] *See* Beef Pricing and Other Contentious Industry Issues, Special Report, Kevin Grier and Larry Martin, George Morris Centre, March 16, 2004 (an analysis of the live versus beef price disparity in Canada), attached as Exhibit 8.
[33] GIPSA Livestock and Meat Marketing Study, January 2007, Volume 3, at 5-4, available at http://archive.gipsa.usda.gov/psp/issues/livemarketstudy/LMMS_Vol_3.pdf.
[34] *Id.* at 2-36.

7. The Regional Herfindahl-Hirschman Indices (RHHI) are already exceedingly high in all nine cattle procurement regions. In studying regional differences in procurement and pricing methods (resulting in part from transportation constraints) researchers

8. calculated the RHHI for nine regional procurement areas for meatpacking plants.[35] Values for RHHI in the nine regions ranged from a low of 2,610 to a high of 4,451, though the RHHI values in three regions were deleted to avoid disclosure.[36] The researches found that a 1 percent increase in regional firm concentration as measured by the RHHI raises the probability that packers would use packer fed arrangements by 3.18 percent.[37] Based on this research, the proposed JBS-Brazil Merger, which would necessarily increase the RHHI in one or more of the nine procurement regions, would be expected to shift more cattle into packer feeding arrangements, which are known to facilitate market power and decrease fed cattle prices, as was more fully discussed in Item 2 above.

9. Transparency in the U.S. live cattle market is already limited as was reported by the Government Accountability Office (GAO) in 2005. The GAO reported on a number of deficiencies in the government's Livestock Mandatory Reporting system with regard to the transparency of the reporting system and accuracy of the data reported.[38] Included among the deficiencies found was the exclusion of a large percentage of cattle transaction data.[39] In addition to the lack of transparency and accuracy of marketing transaction data already impacting the U.S. live cattle industry, the so-called 3/70/20 confidentiality guidelines that structurally limit reports of transactions in concentrated regions may be significantly impacted by the proposed JBS-Brazil Merger. The confidentiality guidelines that may well restrict or eliminate the reporting of currently reported cattle transaction data following the proposed JBS-Brazil Merger include the requirement that at least 3 reporting entities provide data at least 50 percent of the time during a 60-day period; no entity may provide more than 70 percent of the data during a 60-day period; and no entity may be the only reporting industry more than 20 percent of the time during a 60-day period.[40]

10. Researchers have found that individual producers within the U.S. cattle industry will agree to sign captive supply contracts even while knowing that the aggregate effect of captive supply contracts is to depress the cash market price and make all producers,

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[35] Examining Packer Choice of Slaughter Cattle Procurement and Pricing Methods, Oral Capps, Jr., et al., Agricultural and Resource Economics Review, April 1999, at 16, attached hereto as Exhibit 6.
[36] *Id.,* at 16.
[37] Examining Packer Choice of Slaughter Cattle Procurement and Pricing Methods, Oral Capps, Jr., et al., Agricultural and Resource Economics Review, April 1999, at 21, attached hereto as Exhibit 6.
[38] U.S. Government Accountability Office, Livestock Market Reporting: USDA Has Taken Some Steps to Ensure Quality, but Additional Efforts Are Needed, GAO-06-202 (Dec. 2005).
[39] *Id*., at 10.
[40] USDA Announces New Confidentiality Guidelines for Livestock Mandatory Reporting Program, U.S. Department of Agriculture, Release No. 0132.01, August 3, 2001, attached hereto as Exhibit 9.

including him/herself, worse off.[41] The researchers explained that it is the producer's inability to coordinate action that enables a packer to obtain acceptance for exclusionary contracts, and "as long as the producer is offered at least as much as could be received in the spot market in the equilibrium with captive supplies, the

11. producer's equilibrium strategy is to ACCEPT the contract."[42] Based on this finding, U.S. live cattle producers would likely be defenseless against the increased monopsony power expected to be exercised as a result of the proposed JBS-Brazil Merger. Indeed, the acquisition of Five Rivers feedlots by JBS-Brazil would most likely cause such a shift to occur, given that the acquisition would place JBS-Brazil in closer proximity to the feedlots than is the current packer-owner.

E. The More Regional Scope of the U.S. Steer and Heifer Market When Compared to the Feeder Cattle Market Makes it More Susceptible to Monopsony Power Emanating from a Concentrated Market.

Figure 7 below lists the plant locations for each of the five largest beef packers:

Figure 7

Plant Locations for Five Largest Beef Packers

Tyson[43]	Cargill[44]	JBS-Swift[45]	National Beef[46]	Smithfield[47]
Kuna, ID	Fresno, CA	Cactus, TX	Brawly, CA	Souderton, PA
Geneseo, IL	Friona, TX	Greeley, CO	Liberal, KS	Tolleson, AZ
Denison, IA	Dodge City, KS	Hyrum, UT	Dodge City, KS	Plainwell, MI
Emporia, KS	Schuyler, NE	Grand Island, NE		Green Bay, WI
Holcomb, KS	Fort Morgan, CO			
Dakota City, NE	Plainview, TX			
Lexington, NE	Wyalusing, PA			
Norfolk, NE	Milwaukee, WI			
West Point, NE				
Amarillo, TX				
Pasco, WA				

[41] Captive Supplies and the Cash Market Price: A Spatial Markets Approach, Mingxia Zhang and Richard J. Sexton, Journal of Agricultural and Resource Economics, 25(1): 88-108, at 98, attached hereto as Exhibit 7.
[42] *Ibid*.
[43] *See* Tyson Corporate, Our Locations – List, available at http://www.tyson.com/Corporate/AboutTyson/Locations/ListPage.aspx.
[44] *See* Cargill Meat Solutions North American Beef Facilities, available at http://www.cargillmeatsolutions.com/about_us/tk_cms_about_loc_beef.htm.
[45] *See* Meat, Poultry, and Egg Product Inspection Directory, U.S. Department of Agriculture Food Safety Inspection Service, December 7, 2007, available at http://www fsis.usda.gov/regulations_&_policies/Meat_Poultry_Egg_Inspection_Directory/index.asp.
[46] *See* National Beef: Company Information, available at http://www nationalbeef.com/.
[47] *See* Meat, Poultry, and Egg Product Inspection Directory, U.S. Department of Agriculture Food Safety Inspection Service, December 7, 2007, available at http://www fsis.usda.gov/regulations_&_policies/Meat_Poultry_Egg_Inspection_Directory/index.asp.

As mentioned above, researchers developed nine cattle procurement regions. These regions were based on the geographic proximity of packing plants and the procurement area for packing plants.[48] These researchers defined the general procurement area around a 300-mile radius of packing plants based on a finding that some cattle are regularly purchased from between 100 to 300 miles away from a packing plant.[49] Included as a single region are California and Arizona.[50] The JBS-Brazil Merger acquisitions include the purchase of the California beef packing plant presently owned by National and the Arizona packing plant presently owned by Smithfield. Thus, these two competing beef packers that are in the same defined region and located approximately 226 miles from each other would be merged into a single entity under the proposed JBS-Brazil Merger, resulting in a lessening of competition within that region. In addition, though not in the same defined region, the JBS-Brazil packing plant located in Cactus, TX, is approximately 185 miles and 103 miles from Dodge City, KS, and Liberal, KS, respectively. Currently JBS-Brazil and National are competitors within this cattle procurement area and the effect of the JBS-Brazil Merger would be to eliminate a beef-packer competitor within a 300-mile radius of any one of those three beef packing plants.

On a national level, the JBS-Brazil Merger would combine 11 packing plants now owned by 3 beef packers under the single ownership of JBS-Brazil. While researchers have found that the wholesale beef market is national in scope, the discussion above suggests that transportation costs function to limit the national purview of the slaughter-ready cattle market. According to a recent study by John R. Schroeter, "The wholesale beef market . . . is essentially national in scope and insulated, to some extent, from the vagaries of the terms and volume of trade in a single regional fed cattle market."[51]

F. The JBS-Brazil Merger Would Significantly Exacerbate the Ongoing Exercise of Market Power Through JBS-Brazil's Ownership of the Nation's Largest Cattle Feeding Facility.

If consummated, the JBS-Brazil Merger would result in the nation's largest beef packer owning Five Rivers, the nation's largest cattle feeding company. Five Rivers currently feed and market approximately 2 million cattle annually and is currently owned by the nation's fifth largest beef packer, Smithfield, under a joint venture.[52] Based on Smithfield's estimated daily capacity of 7,975 cattle (*see* Figure 6), and applying the 260 reporting days established by the USDA Agricultural Marketing Service ("AMS") as the number of annual slaughter days,[53]

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[48] Examining Packer Choice of Slaughter Cattle Procurement and Pricing Methods, Oral Capps, Jr., et al., Agricultural and Resource Economics Review, April 1999, at 16, attached hereto as Exhibit 6.
[49] *Id*. at 15.
[50] Examining Packer Choice of Slaughter Cattle Procurement and Pricing Methods, Oral Capps, Jr., et al., Agricultural and Resource Economics Review, April 1999, at 16, attached hereto as Exhibit 6.
[51] Captive Supplies and Cash Market Prices for Fed Cattle: A Dynamic Rational Expectations Model of Delivery Timing, John R. Schroeter, Department of Economics, Iowa State University, Working Paper # 07002, January 2007, attached as Exhibit 12.
[52] History of Smithfield Foods, attached as Exhibit 24, available at http://www.smithfieldfoods.com/Understand/History/.
[53] Livestock Mandatory Reporting; Reestablishment and Revision of the Reporting Regulation for Swine, Cattle, Lamb, and Boxed Beef; Proposed Rule, U.S. Department of Agriculture, Agricultural Marketing Service, Federal

Smithfield's estimated annual slaughter is 2.1 million. Therefore, Smithfield's ownership of Five Rivers gives it sufficient numbers of fed cattle to meet nearly 100 percent of its annual slaughter capacity. However, it is not likely that Smithfield could coordinate the finishing of cattle to coincide with its daily capacity needs throughout the year from its own feedlots, nor is it likely that Smithfield could economically transport Five Rivers' cattle to its four packing plants, which are far removed from all of Fiver Rivers' feedlot locations. According to Five Rivers' website, its feedlots are located in Colorado, Idaho, Kansas, Oklahoma, and Texas,[54] locations far removed from Smithfield's packing plants in Pennsylvania, Arizona, Michigan, and Wisconsin.

If this assumption is correct, Smithfield likely operates Five Rivers as an independent feeder, not a vertically integrated component of its packing operations. Thus, Smithfield likely contributes to the current competitiveness of the marketplace by marketing Five Rivers cattle to Tyson, Cargill, or National.

Post-merger, however, JBS-Brazil would own both Smithfield and Five Rivers, affording it control over approximately 2 million fed cattle annually, representing approximately 7 percent of the nation's annual steer and heifer slaughter. Whereas Smithfield was not likely capable of slaughtering all or most of the cattle fed at Five Rivers due to the combination of limited daily slaughter, the logistics of timing the finishing of cattle, and the long distances between its packing plants and Five Rivers' feedlot locations, JBS-Brazil could likely slaughter all of the cattle fed at Five Rivers due to its significantly increased number of plants and capacity. The effect would be a potential increase in the percentage of packer-owned cattle presently slaughtered on a national basis and a potential reduction in the volume of cattle sold in the cash market – a circumstance that would effectively thin the cash market and potentially drive down prices.

In addition to the structural integration Five Rivers would provide JBS-Brazil, JBS-Brazil also would have access to information regarding the value of feeder cattle it intends to purchase for feeding long before independent producers would have such information. The information available to JBS-Brazil would be knowledge of the type and quantity of future purchasing orders for beef – essentially insider information – that would accord JBS-Brazil a distinct advantage when competing against independent cattle producers for feeder cattle.

The DOJ should investigate both the current practices of Smithfield with respect to the disposition of cattle fed at Five Rivers and the change in this disposition of cattle that would likely occur should the JBS-Brazil Merger be consummated.

R-CALF USA appreciates the opportunity to provide the foregoing, additional information regarding the JBS-Brazil Merger. R-CALF USA is confident that the information contained here and in its previous submissions provides clear and convincing evidence that the JBS-Brazil Merger must be challenged because it would lessen competition and facilitate the exercise of market power in the U.S cattle market.

Register, Vol. 72, No. 152, August 8, 2007, at 44,688-689 (meatpackers are required to report each day for an estimated total of 260 reporting days in a year).

[54] Five Rivers website address is available at http://www fiveriverscattle.com/Index.aspx.

If the DOJ has any questions or concerns regarding the information provided, please contact me and I would be happy to provide additional explanation.

Sincerely,

Bill Bullard
CEO
R-CALF USA

Attachments: Exhibits 1 – 10

EXHIBIT D

R-CALF United Stockgrowers of America

"Fighting for the U.S. Cattle Producer"

and the

Organization for Competitive Markets

Honesty. Prosperity. Economic Liberty.

For Immediate Release
November 13, 2008

Contact: Shae Dodson, Communications Coordinator
Phone: 406-672-8969; e-mail: sdodson@r-calfusa.com

Cattle Producers and OCM File Suit Against JBS Merger

Billings, Mont. / Lincoln, Neb. – R-CALF USA, along with the Organization for Competitive Markets (OCM), today jointly filed litigation in the U.S. District Court – Northern District of Illinois, Eastern Division, against the proposed acquisition of National Beef Packing Co. (National Beef) by Brazilian-owned meatpacker JBS, already the world's largest meatpacker. The U.S. Department of Justice – along with a total of 17 state attorneys general – also filed litigation against JBS in this matter.

Like the Government suit the R-CALF USA/OCM lawsuit seeks to block JBS' proposed acquisition of National Beef. The government's lawsuit focuses primarily on the impacts on fat cattle and consumers. Our lawsuit further addresses the impacts on feeders and other cattle. Our lawsuit also explains how packers use captive supplies to leverage down prices and how this negatively impacts the price for all classes of cattle. We specifically explain that the effects of the merger are even more significant because of the Five Rivers Ranch Cattle Feeding (Five Rivers) operations and the U.S. Premium Beef feeding arrangements that are included in the merger.

"We believe our involvement will assist the government's case because we can fully represent the views and competitive concerns of farmers, ranchers and feeders who are most affected by this merger," said R-CALF USA CEO Bill Bullard.

R-CALF USA and OCM have collaborated since March to encourage the Justice Department and numerous state attorneys general to take enforcement action, not only against this particular acquisition but also JBS' recently approved purchases of Smithfield Beef Group (Smithfield) and Five Rivers Ranch Cattle Feeding (Five Rivers). R-CALF USA submitted seven separate white papers to Justice and the state attorneys general and provided state-specific cattle industry information to eight state attorneys general in that effort.

Both R-CALF USA and OCM testified before the U.S. Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights and have met with the Justice Department *and* state attorneys general. R-CALF USA and OCM each applauded the lawsuit filed by the Justice Department and state attorneys general to block the acquisition of National by JBS and both were disappointed that Smithfield and Five Rivers were excluded from that lawsuit.

"Because of the profound impacts this proposed merger would have on U.S. cattle producers, the thousands of domestic cattle farmers and ranchers cannot be sideline observers in this historic lawsuit," Bullard said. "Even without the Smithfield and Five Rivers components, this is the largest and most compelling merger ever contemplated in the U.S. cattle industry and it would radically restructure the U.S. cattle markets."

"That's the reason our two organizations have joined together in a lawsuit concurrent with the Justice Department's and state attorneys' general," said OCM Executive Director Fred Stokes. "While we share an interest in defending our U.S. antitrust laws, we also have a unique perspective regarding the adverse effect this merger would have not just on competition as a whole, but on individual cattle producers as well. We are proud to join this fight to preserve our cattle markets for independent cattle producers."

"R-CALF literally has been on the front lines of every major issue that has threatened the competitiveness of the U.S. cattle industry over the past decade, and we are pleased to join with OCM to continue this important fight," Bullard added.

"Our industry needs more competition, not more concentration, and our lawsuit is an important step in stopping ongoing concentration so we can soon focus on rebuilding the competition we've already lost," Stokes commented.

"I agree," Bullard said. "Unless independent cattle producers want to see their industry to go the way of the corporately controlled poultry and hog industries, every U.S. cattle producer should support R-CALF USA and OCM in their fight to ensure a very different future for the U.S. cattle industry – a future based on competition and independence, not on command and control."

The original 13 state attorneys general who joined Justice in its original Oct. 20, 2008, complaint against JBS represent Colorado, Iowa, Kansas, Minnesota, Missouri, Montana, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Texas and Wyoming. On Friday, Nov. 7, 2008, four more state attorneys general – from Arizona, Connecticut, New Mexico and Mississippi – also joined the Justice Department in its complaint against JBS.

# # #

R-CALF USA (Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America) is a national, non-profit organization dedicated to ensuring the continued profitability and viability of the U.S. cattle industry. R-CALF USA represents thousands of U.S. cattle producers on trade and marketing issues. Members are located across 47 states and are primarily cow/calf operators, cattle backgrounders, and/or feedlot owners. R-CALF USA directors and committee chairs are extremely active unpaid volunteers. R-CALF USA has dozens of affiliate organizations and various main-street businesses are associate members. For more information, visit www.r-calfusa.com or, call 406-252-2516.

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Tab 1

H

United States District Court, S.D. New York.
UNITED STATES of America, Plaintiff,
v.
VISA U.S.A., INC., Visa International Corp., and Mastercard International Incorporated, Defendants.
No. 98CIV.7076(BSJ).

Aug. 18, 2000.

Opinion and *Order*

JONES, District J.
***1** Discover seeks to intervene in this action because it believes that its interests in this case align closely with the interests of consumers and merchants. It argues that unless it is permitted to intervene, those interests will not be fully and accurately reflected in the evidentiary record before the Court. Discover seek intervention as of right, pursuant to Federal Rule of Civil Procedure 24(a), and, in the alternative, by permission of the Court pursuant to Federal Rule of Civil Procedure 24(b). For the reasons set forth below, the motion to intervene is denied.

I.

To qualify for intervention as of right under Rule 24(a)(2), an applicant must demonstrate that: (1) it has an interest relating to the subject of the action; (2) it is so situated that the disposition of the action may as a practical matter impair or impede its ability to protect its interest; and (3) its interest is not adequately represented by existing parties. *See*Fed.R.Civ.P. 24(a)(2); *Restor-A-Dent Dental Labs, Inc. v. Certified Alloy Prods ., Inc.,* 725 F.2d 871, 874 (2d Cir.1984); *In re Ivan F. Boesky Secs. Litigation,* 129 F.R.D. 89, 94 (S.D.N.Y.1990).

While Discover undoubtedly has an interest relating to the subject of the action, in government antitrust actions, courts have uniformly recognized that the government represents the public interest in competition, unless a private party makes an extraordinary showing to the contrary. *See United States v. Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir.), *cert. denied,* 454 U.S. 1083 (1981); *United States v. Associated Milk Producers, Inc.,* 394 F.Supp. 29,*aff'd,* 534 F.2d 113, 117-18 (8th Cir.), *cert. denied sub nom. National Farmers' Organization, Inc. v. United States,* 429 U.S. 940 (1976). Intervention as of right has been recognized only where a showing of bad faith or malfeasance on the part of the Government has been made. *See Associated Milk Producers, Inc.,* 534 F.2d at 117; *United States v. Blue Chip Stamp Company,* 272 F.Supp. 432, 438 (C.D.Cal.1967), *aff'd per curiam sub nom. Thrifty Shoppers Scrip Co. v. United States,* 389 U .S. 580 (1968) (applicant for intervention has burden of demonstrating "that the Government has not acted properly in the public interest."). Discover has made no such showing in this proceeding. To the extent that Discover seeks intervention to protect its private interests, Discover's interests as a competitor are not the subject of this case and Discover cannot seek intervention on this ground.

Moreover, Discover's ability to protect these interests will not be impaired or impeded by the denial of intervention under Rule 24(a)(2). Discover seeks primarily to present to the Court its views on issues concerning the relief the United States is requesting in this case, and more specifically, the impact that relief may have on Discover. Any judgment entered on the United States' complaint in this case, however, would not impair Discover's ability to seek relief in a private antitrust action or otherwise to protect any legitimate interest adversely affected by anti-competitive conduct.

II.

***2** This Court may permit intervention under Rule 24(b): (1) when a statute of the United States con-

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fers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. Under both prongs of this rule, in exercising our discretion we "must consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."Fed.R.Civ.P. 24(b).

In *United States v. Stroh Brewery Co.,* 1982-2 Trade Cas. (CCH) P 64, 804 at 71, 960 (D.D.C.1982), the court denied permissive intervention under Rule 24(b) because, "where there is no claim of bad faith or malfeasance... the potential for unwarranted delay and substantial prejudice to the original parties implicit in the proposed intervention clearly outweighs any benefit that may accrue therefrom."

I have precisely the foregoing concerns with respect to Discover in the instant action, namely, that to permit them the intervention they seek would "unduly delay or prejudice the adjudication of the rights of the original parties,"Fed.R.Civ.P. 24(b), by imposing additional and unnecessary burdens-in the form of new discovery, evidence, and even legal issues-on the resolution of the matter before me.

III.

In sum, I find that intervention pursuant to Rule 24 of the Federal Rules of Civil Procedure, either by right or by permission of the Court, is not appropriate in this proceeding. Accordingly, Discover's motion is denied and its Complaint is dismissed. Discover shall be permitted to make an amicus submission to this Court on the issue of remedies. Any such submission shall be due on or before September 22, 2000.

SO ORDERED:

S.D.N.Y.,2000.
U.S. v. Visa U.S.A., Inc.
Not Reported in F.Supp.2d, 2000 WL 1174930 (S.D.N.Y.), 2000-2 Trade Cases P 73,005

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Goldhamer v. Nagode, No. 07 C 5286, 2007 WL 4548228 (N.D. Ill Dec. 20, 2007)

Tab 2

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Only the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern Division.
Don GOLDHAMER and Robin Schirmer, Plaintiffs,
v.
Lt. NAGODE, et al., Defendants.
No. 07 C 5286.

Dec. 20, 2007.

Jonathan I. Loevy, Arthur R. Loevy, Kurt Henry Feuer, Loevy & Loevy, Jeffrey H. Frank, Law Offices of Jeffrey Frank, Charles Nissim-Sabat, Chicago, IL, for Plaintiffs.
Devlin Joseph Schoop, Joseph Michael Gagliardo, Lawrence Jay Weiner, Laner, Muchin, Dombrow, Becker, Chicago, IL, for Defendants.

MEMORANDUM OPINION

SAMUEL DER-YEGHIAYAN, District Judge.
***1** This matter is before the court on Defendants' motion to reassign Case No. 07-cv-5286, *Goldhamer v. Nagode,* to this court pursuant to Rule 40.4 of the Local Rules of the United States District Court for the Northern District of Illinois ("L.R.40.4"). For the reasons stated below, we deny Defendants' motion to reassign.

BACKGROUND

On July 2, 2006, Plaintiff Melissa Woo ("Woo"), Plaintiff Crystal Wilson ("Wilson"), Plaintiff Megan Gallagher ("Gallagher"), (4) Plaintiff Alberto Guevarra ("Guevarra"), Plaintiff Don Goldhamer ("Goldhamer"), and Plaintiff Robin Schirmer ("Schirmer") were all allegedly present at the taste of Chicago. Sometime that day, City of Chicago Police Lt. Al Nagode ("Nagode") allegedly issued an order to disperse, pursuant to an ordinance, to a large group of people gathered near a United States Armed Services information booth. Subsequently, Wilson, Gallagher, Guevarra, Goldhamer and Schirmer were allegedly arrested at different times by different members of the Chicago Police Department and each was charged with disorderly conduct. Woo individually alleges she was arrested prior to the order to disperse.

On July 6, 2007, Woo, Wilson, Gallagher, and Guevarra (collectively referred to as "Woo Plaintiffs") filed a civil rights action, Case No. 07-cv-3818 ("Woo Action"), against Nagode, other Chicago Police officers, and the City of Chicago ("City"). On September 19, 2007, Goldhamer and Schirmer (collectively referred to as "Goldhamer Plaintiffs") filed a civil rights action, Case No. 07-cv-5286 ("Goldhamer Action"), against Nagode, other Chicago Police officers (not also named in the Woo Action), and the City. The Woo Action was assigned to this court and the Goldhamer Action was assigned to another judge of this district. In the Woo Action, the Woo Plaintiffs have brought a claim under 42 U.S .C. § 1983 ("Section 1983") for false arrest and pendant state law claims for malicious prosecution. In the Goldhamer Action, the Goldhamer Plaintiffs have also brought a claim under Section 1983 for false arrest and pendant state law claims for malicious prosecution. In addition, the Goldhamer Plaintiffs have brought several other claims under Section 1983, a *Monell* claim against the City of Chicago, and other constitutional claims including a facial challenge to the constitutionality of the City's disorderly conduct ordinance.

On October 3, 2007, the Defendants in the Goldhamer Action ("Goldhamer Defendants") filed the instant motion to reassign the Goldhamer Action to this court to be consoli with the Woo Action, pursuant to L.R. 40.4. The Goldhamer Plaintiffs oppose the motion and the proposed consolidation of the two cases, arguing that Defendants have not met the requirements of L.R. 40.4 for consolidation since they have not shown that the actions are sufficiently similar.

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LEGAL STANDARD

Northern District of Illinois Local Rule 40.4(b) ("L.R.40.4(b)") provides that a case may be reassigned to the calendar of another judge if it is found to be related to an earlier-numbered case assigned to that judge and each of the following criteria are met:

> ***2** (1) both cases are pending in this Court; (2) the handling of both cases by the same judge is likely to result in a substantial saving of judicial time and effort; (3) the earlier case has not progressed to the point where designating a later filed case as related would be likely to delay the proceedings in the earlier case substantially; and (4) the cases are susceptible of disposition in a single proceeding.

N.D. Ill. L.R. 40.4(b).

DISCUSSION

In exercising our discretion on the issue of consolidation and reassignment, we look to the Local Rules for guidance. The criteria that courts consider for reassignment of a case are set out in L.R. 40.4(b). The first factor under the Local Rules standard is not in dispute. Both matters are pending in United States District Court for the Northern District of Illinois. However, the parties dispute the remaining three factors.

Under Local Rule 40.4, the burden is on the moving party to specifically identify why each of the factors has been met, and the motion should be denied if the moving party fails to satisfy each of the requirements. *Williams v. Walsh Construction,* 2007 WL 178309, at *2 (N.D.Ill.2007). The Goldhamer Plaintiffs argue that "there are different facts and legal claims that will require different discovery, legal findings, defenses and summary judgment motions."(Gold. P Resp. 5-10). They argue that, based on the factual and legal differences in the two cases, the Goldhamer Defendants have not shown that consolidation would likely result in the substantial saving of judicial time and effort and that the cases are not susceptible to disposition in a single proceeding. We agree.

I. Alleged Factual and Legal Distinctions Between the Two Actions

Based on the factual allegations that exist in the pleadings filed thus far in the Woo Action and the Goldhamer Action, it is clear that there are numerous alleged factual distinctions between the two actions. The Goldhamer Plaintiffs have alleged that they were not members of the same group as the Woo Plaintiffs and that they were not participating in a group protest with the Woo Plaintiffs. (Gold.Compl.Par. 8). The Goldhamer Plaintiffs specifically point out that they have alleged that Goldhamer alone was not handing out leaflets, and thus did not disobey the order to disperse. (Gold. P Resp. 2). The Goldhamer Plaintiffs further allege that the Woo Plaintiffs were each arrested by officers who were not involved in the arrest of the Goldhamer Plaintiffs and who are not named in the Goldhamer Action. (Gold.Compl.Par. 20). The Goldhamer Plaintiffs also point out that it is alleged that one of the Woo Plaintiffs was arrested prior to the order to disperse that was issued by Nagode. (Gold.Compl.Par. 14).

It is also clear from the pleadings that the Goldhamer Action and the Woo Action involve different legal claims as well. Specifically, there are additional claims in the Goldhamer Action which make that case significantly different. In addition to the Section 1983 claims and pendant state law claims for malicious prosecution that are duplicated in the Woo Action, the Goldhamer Plaintiffs have also brought other claims under Section 1983, a *Monell* claim against the City of Chicago, and other constitutional claims including a facial challenge to the constitutionality of the City's disorderly conduct ordinance. (Gold.Compl.25-31, 50-52). These additional legal claims that exist in the Goldhamer Action will require different discovery and motions, and will generally raise different legal issues that

are presented to this court in the Woo Action.

II. Factors for Consolidation

***3** Based on the factual and legal differences between the two Actions, the Goldhamer Defendants have not met the second, third and fourth prong of the local rules standard. The handling of both cases by one judge will not likely result in the substantial saving of judicial time and effort since different individual police officers, other than Nagode, are involved in the two actions. The only fact cited by the Goldhamer Defendants in support of their argument that consolidation of the Woo Action and the Goldhamer Action would save substantial time is that there may be overlapping third-party witnesses in the two cases. (Gold. D Reply 6-7). The Goldhamer Defendants have the burden of satisfying "stringent criteria" to qualify for case reassignment. *Williams,* 2007 WL 178309 at *2. Here, the mere fact that third-party witnesses may overlap in both cases is not enough to satisfy these stringent requirements.

It is also clear that the Woo Action has proceeded to a point where consolidation will substantially delay that proceeding. The Woo Defendants have answered the amended complaint in the Woo Action and this court has already set discovery dates. Consolidation will delay that action.

Finally, it is clear from the factual and legal distinctions between the two actions that both would not be susceptible to disposition in a single proceeding, and may require separate trials. As stated above, the adjudication of Goldhamer's claims, in particular, are likely to involve different legal issues since Goldhamer is alleging that he did not disobey the order and both Goldhamer Plaintiffs are challenging the constitutionality of the ordinance. Based on the information presented to this court, the Goldhamer Defendants have not established that this matter is appropriate for consolidation under the local rules. Therefore, we exercise our discretion and deny the Goldhamer Defendants' motion to reassign.

CONCLUSION

Based on the foregoing analysis, we deny the Goldhamer Defendants' motion to reassign.

N.D.Ill.,2007.
Goldhamer v. Nagode
Not Reported in F.Supp.2d, 2007 WL 4548228 (N.D.Ill.)

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Mach. Movers v. Joseph/Anthony, Inc.,
No. 03 C 8707, 2004 WL 1631646
(N.D. Ill. July 16, 2004)

Tab 3

H
Only the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern Division.
MACHINERY MOVERS, RIGGERS, AND MACHINERY ERECTORS, LOCAL 136 DEFINED CONTRIBUTION RETIREMENT FUND, et al., Plaintiffs,
v.
JOSEPH/ANTHONY, INC., a/k/a Joseph Anthony & Associates, Inc., et al., Defendants.
No. 03 C 8707.

July 16, 2004.

Marc M. Pekay, Idala H. Strouse, Marc M. Pekay, P.C., Chicago, IL, for Plaintiffs and Counter-Defendants.
Brian V. Alcala, Matkov, Salzman, Madoff & Gunn, Craig T. Boggs, Perkins Coie LLC, Chicago IL, for Defendants and Counter-Claimants.
Thomas L. Campbell, James H. Mutchnik, Petra Renee Wicklund, Andrew Paul Bautista, Kirkland & Ellis LLP, Chicago, IL, for Defendants.

MEMORANDUM OPINION AND ORDER

ASPEN, J.
***1** Presently before us is Nationwide Investment Services Corporation's ("Nationwide's") motion to reassign Case No. 04 C 0821 (the "Ironworkers" action) pursuant to Local Rule 40.4 based on that case's alleged relatedness to a case currently pending before this Court, Case No. 03 C 8707 (the "Machinery Movers" action). Nationwide also requests that we stay all further proceedings in the Ironworkers action pending the non-appealable disposition of criminal cases which have been filed against several of the parties and witnesses involved in the Ironworkers and Machinery Movers actions. For the following reasons, we deny the motion to reassign the case and therefore do not address Nationwide's motion to stay.

BACKGROUND

A. The Machinery Movers Action

The plaintiffs in the Machinery Movers action are a group of employee benefit funds (the "Machinery Movers Funds") that are administered pursuant to collective bargaining agreements between Machinery Movers, Riggers and Machinery Erectors, Local 136 (the "Machinery Movers Union") and various employers. The Machinery Movers Funds, along with their trustees, filed suit against: Joseph/Anthony, Inc. ("Joseph/Anthony"); Nationwide Investment Services Corporation ("Nationwide"); Liz/Mar and Associates, Inc. ("Liz/Mar"); and Michael Linder, the President of both Joseph/Anthony and Liz/Mar. According to the complaint, Joseph/Anthony was the administrator of the Machinery Movers Funds. The plaintiffs allege that, as President of Joseph/Anthony, Michael Linder recommended that the trustees select Nationwide to receive all of the funds' future investments. Unbeknownst to the plaintiffs, Linder (via Joseph/Anthony) received unauthorized commissions from Nationwide for bringing the in funds' business. The complaint also alleges that Linder set up another entity, Liz/Mar, which received additional unauthorized commission payments from Nationwide. The plaintiffs claim that the scheme set up by Linder via Joseph/Anthony and Liz/Mar violated various provisions of the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* ("ERISA").

B. The Ironworkers Action

The Ironworkers action is brought by a different group of plaintiff benefit funds and their trustees. The suit names as defendants: Nationwide Life Insurance Company; Nationwide Financial Services, Inc.; Nationwide Trust Company, FSB; Nationwide Financial Institution Distributors Agency, Inc.; and Nationwide Investment Services Corporation. Paragraph 13 of the Ironworkers action provides a sum-

mary of the allegations brought against the defendants:

While the Nationwide Defendants are separate legal entities, upon information and belief, some or all of them, along with persons and corporations acting as their employees or agents, acted to deprive the Plaintiff Funds and their participants of money that should have been invested on their behalf, through a scheme in which the Nationwide Defendants deducted money from Fund assets and paid fees, kickbacks, commissions, or other things of value to Michael G. Linder ("Linder") Liz/Mar and Associates, Inc. ("Liz/Mar"), and/or Joseph/Anthony & Associates, Inc. ("Joseph/Anthony"), in return for Linder's recommendation that the Funds invest their assets with Nationwide.

***2** The Ironworkers Action is brought pursuant to the Racketeer Influence and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.* ("RICO"). However, several of the predicate acts which underlie the RICO claims are premised upon alleged violations of ERISA. In Counts III, IV, and V, the Ironworkers plaintiffs also request rescission of the allegedly fraudulent contracts entered into between the funds and the defendants.

ANALYSIS

Northern District of Illinois Local Rule 40.4 provides for the reassignment of civil cases from one judge to another if certain conditions have been met. First, under Rule 40.4(a), the cases must be related. According to the rule, cases are related if they: 1) involve the same property; 2) involve the same issues of fact or law; 3) grow out of the same transaction or occurrence; or 4) in a class action, one or more of the classes involved are the same. Nationwide argues that the Ironworkers and Machinery Movers cases are related because they involve the same issues of fact or law.

Rule 40.4(a)"does not require complete identity of issues in order for cases to be considered *Fairbanks Capital Corp. v. Jenkins,* 02-C-3930, 2002 WL 31655277, at *2 (N.D.Ill. Nov.25, 2002), rather it is enough that the two cases "involve *some* of the same issues of fact or law." *Lawrence E. Jaffe Pension Plan v. Household Int'l., Inc.,* 02-C-5893, 2003 WL 21011757, at *3 (N.D.Ill. May 5, 2003) (emphasis in original). Here, although there is very little overlap between the parties in each case, the allegations contained in both complaints are quite similar and involve the same group of alleged wrongdoers. Furthermore, although the central legal claims brought in each action appear to be different-the Machinery Movers action claims violations of ERISA, whereas the Ironworkers action brings claims under RICO-the predicate acts alleged in the RICO counts are based on underlying ERISA violations. Because there are some overlapping issues of fact and law in both cases, they are related within the meaning of 40.4(a).

Once the cases have been found to be related, Local Rule 40.4(b) imposes four additional conditions that must be satisfied before a case may be reassigned: 1) both cases must be pending in the Northern District of Illinois; 2) reassignment must result in a substantial savings of judicial time and effort; 3) "the earlier case has not progressed to the point where designating a later filed case as related would be likely to delay the proceedings in the earlier case substantially;" and 4) the actions are susceptible to disposition in a single proceeding. Both the Machinery Movers and the Ironworkers actions are currently pending in the Northern District of Illinois, so the first criterion is easily satisfied. The plaintiffs in the Ironworkers action also concede that the Machinery Movers case is in the relatively early stages of litigation. Upon the parties' joint motion, the proceedings in the Machinery Movers action were stayed not long after the defendants answered the complaint. The Ironworkers action is also in the very early stages of litigation; the complaint was filed on February 2, 2004 and Judge Guzman has granted the defendants' request to file their answer within five busi-

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ness days following this Court's decision on the motion to reassign. Therefore, the only two contentious issues regarding reassignment are whether doing so will result in a substantial savings of judicial time and effort and whether the actions are susceptible to disposition in a single proceeding.

***3** The Ironworkers plaintiffs argue that we should deny the motion to reassign because the defendants provide only conclusory statements as to how reassignment will result in substantial savings of judicial time and resources. Local Rule 40.4(c) requires parties to "indicate the extent to which the conditions required by section (b) will be met if the cases are found to be related."Furthermore, "[t]he judges of this Court have interpreted subsection (c) to impose an obligation on the moving party to specifically identify why each of the four conditions for reassignment under LR 40.4(b) is met." *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.,* 02-C-5893, 2003 WL 21011757, at *3 (N.D.Ill. May 5, 2003). Thus, a court may deny a motion to reassign if a party fails to sufficiently apply the facts of the case to each of 40.4(b)'s requirements. *Id.* In this case, we agree that Nationwide's explanation regarding how reassignment will result in a substantial savings of judicial time and resources is inadequate. Nationwide states only that "[t]he weight of common factual and legal issues ... suggests strongly that there will be a substantial conservation of judicial resources if one court considers and decides those common issues ... By contrast, permitting the cases to proceed on separate tracks would result in duplication of (but not parallel or coordinated) discovery efforts, excess use of judicial resources, and the possibility of incongruent factual rulings on identical contracts."(Mem. in Support of Nationwide's Mtn. for Reassignment at 9.) Aside from offering these conclusory allegations, Nationwide fails to specify *how* combining the cases will result in a substantial savings of judicial resources, nor does it pinpoint what issues for discovery will be the same in both cases or what matters are susceptible to disposition in a single proceeding. This failure to comply with Local Rule 40.4(c)'s requirement that parties "indicate the extent to which the conditions required by section (b) will be met if the cases are found to be related" is sufficient grounds, in and of itself, for denial of the motion to reassign. We need not rely on this technical ground for denial, however, because the parties cannot meet the requirements of Local Rules 40.4(b)(2), which requires that reassignment will result in a substantial savings of judicial time and effort or 40.4(b)(4), which requires that the actions be susceptible to disposition in a single proceeding.

First, comparison of the Ironworkers' complaint with the Machinery Movers' complaint reveals that we should deny the motion for reassignment on the merits because reassignment would not result in a substantial savings of judicial time and resources. First, although the schemes alleged in the two cases are similar, both the plaintiffs and the defendants are different in each case. As the Ironworkers plaintiffs point out, each of the cases is brought by a different group of plaintiffs and the only party officially named in both actions as a defendant is Nationwide Investment Services Corporation. This is because the Ironworkers plaintiffs chose to sue only legal entities associated with Nationwide; they did not include Linder, Liz/Mar, or Joseph/Anthony as defendants. Furthermore, the two cases are premised on different legal theories. The Machinery Movers complaint sets forth claims pursuant to ERISA only, whereas the Ironworkers case is brought under RICO. There is *some* overlap between the cases because the predicate acts which underlie the RICO action are premised on violations of ERISA. However, the alleged ERISA violations make up just one element of a RICO claim. To succeed in a RICO action, the Ironworkers plaintiffs must demonstrate that the defendants engaged in: 1) the conduct; 2) of an enterprise; 3) through a pattern; 4) of racketeering activity. *See Richmond v. Nationwide Cassel, L.P.,* 52 F.2d 640, 644 (7th Cir.1995). The issues of whether the various Ironworkers defendants comprised an "enterprise" within the meaning of RICO or whether the alleged ERISA violations amounted to a pat-

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tern of racketeering activity are not at all relevant to the Machinery Movers action. Furthermore, the Ironworkers plaintiffs have also brought rescission claims that are unrelated to the Machinery Movers case. All of these issues would have to be dealt with separately in the Ironworkers action, and the reassignment of the case to this Court's calendar would not make the proceedings any more efficient this respect. In short, although there may be *some* judicial resources saved by bringing together the two actions, there will not be the "*substantial* saving of judicial time and effort" that is contemplated by Rule 40.4. *See*L.R. 40.4(b)(2) (emphasis added); *see also* *Lawrence E. Jaffe Pension Plan,* 2003 WL at *2 (emphasizing that the saving of judicial time and effort must be *substantial* in order for reassignment to be appropriate under Rule 40.4(b)(2)).

***4** These same considerations lead us to find that Nationwide has not satisfied its burden of demonstrating that Rule 40.4(b)'s fourth requirement-that the cases are amenable to disposition in a single proceeding-is met. Courts have held that cases are not susceptible to disposition in one proceeding where both cases present unique issues of law and fact. *Id.* at 3;*see also* *Clark v. Insurance Car Rentals, Inc.,* 42 F.Supp.2d 846, 849 (N.D.Ill.1999). As set forth above, although there is some legal and factual overlap between the Ironworkers and Machinery Movers actions, the issues that are unique to each case predominate. We thus find that reassignment is not appropriate.

CONCLUSION

For the foregoing reasons, Nationwide's motion to reassign is denied. It is so ordered.

N.D.Ill.,2004.
Machinery Movers, Riggers and Machinery Erectors, Local 136 Defined Contribution Retirement Fund v. Joseph/Anthony, Inc.
Not Reported in F.Supp.2d, 2004 WL 1631646 (N.D.Ill.)

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Global Patent Holdings, LLC v. Green Bay Packers, Inc.,
No. 00 C 4623, 2008 WL 1848142
(N.D. Ill. April 23, 2008)

Tab 4

H
Only the Westlaw citation is currently available.

United States District Court, N.D. Illinois, Eastern Division.

GLOBAL PATENT HOLDINGS, LLC, Plaintiff,
v.
GREEN BAY PACKERS, INC., Napleton Elmhurst Imports, Inc., d/b/a Ed Napleton Acura, Orbitz Worldwide, Inc., Peapod, LLC, Officemax Inc. and Caterpillar Inc., Defendants.

No. 00 C 4623.

April 23, 2008.

Paul Christopher Gibbons, Arthur Anthony Gasey, Niro, Scavone, Haller & Niro, Ltd., Chicago, IL, for Plaintiff.

Sheri J. Engelken, Gonzaga University School of Law, Spokane, WA, Christian Chadd Taylor, Gianni L. Cutri, Kirkland & Ellis LLP, Michael P. Padden, Howrey, LLP, John Sheldon Letchinger, Robert Loren Wagner, Wildman, Harrold, Allen & Dixon, LLP, Timothy J. Vezeau, Breighanne Aileen Eggert, Michael Adam Dorfman, Katten Muchin Rosenman LLP, Brad Richard Bertoglio, Dean A. Monco, Wood, Phillips, Vansanten, Hoffman & Ertel, Chicago, IL, Jonathan F. Putnam, Kirkland and Ellis, New York, NY, Gregory L. Baker, Robert G. Abrams, Howrey LLP, Washington, DC, William C. Rooklidge, Howrey LLP, Irvine, CA, Harvey Freedenberg, Shawn K. Leppo, William Patrick Smith, McNees Wallace & Nurick LLC, Harrisburg, PA, for Defendants.

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge.

***1** This matter comes before the court on two motions filed by the parties. In the first, Plaintiff Global Patent Holdings, LLC ("Global Patent") seeks reassignment of another case to this court pursuant to Local Rule 40.4 on the basis that it is related to the instant case. The second is a motion by Defendants Green Bay Packers, Inc.; Napleton Elmhurst Imports, Inc.; Orbitz Worldwide, Inc.; Peapod, LLC; OfficeMax, Inc.; and Caterpillar, Inc. to stay this litigation during the pendency of a reexamination proceeding before the Patent and Trademark Office ("PTO"). For the following reasons, both motions are granted.

BACKGROUND

This case was initially filed by a company called Techsearch, LLC, on July 28, 2000. The complaint contained a claim of patent infringement against Defendants Internet Entertainment Group Inc., Ed Napleton Acura, Gregory Aharonian, and the Green Bay Packers in violation of 35 U.S.C. § 271(a). At that time, Techsearch owned U.S. patent No. 5,253,341, which claimed an improved method and apparatus for downloading compressed audio and visual data as well as other graphical information from a remote server to an end user station ("EUS") for the purpose of decompressing and displaying the data. In its complaint, Techsearch asserted that Defendants infringed its patent by downloading responsive data, including compressed audio/visual and graphical data, on their respective websites. Defendants were also accused of knowingly and intentionally inducing third parties to infringe Techsearch's patent in violation of 35 U.S.C. § 271(b) and (c).

Subsequently, an anonymous requester initiated a reexamination procedure of the patent before the PTO. Rather than keeping the case open while the reexamination ran its course, Techsearch requested and obtained dismissal of its complaint with leave to reinstate the case if the reexamination was resolved in its favor. Eventually, the Board of Patent Appeals cancelled the 16 claims of the original patent and declared a new claim, claim 17, patentable (U.S. Patent No. 5,253,341 C1, hereinafter referred to "the '341 patent").

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According to the motion to reinstate, on January 25, 2005, Techsearch assigned the patent to Global Patent, its parent company. On August 8, 2007, Global Patent sued CDW Corporation and Motorola, Inc., in *Global Patent Holdings v. CDW Corp.,* case No. 07 C 4476.As Techsearch had asserted in the complaint in this case, Global Patent claimed CDW and Motorola infringed the '341 patent by downloading responsive data, including compressed audio/visual and graphical data, on their respective websites. The downloading method utilized both an EUS and a server, with asymmetric processing power capacities and involving compression and inverse decompression techniques requiring less processing power. Furthermore, the complaint argued that these two defendants had knowingly and intentionally induced third parties to infringe the '341 patent. The case was assigned to Judge Norgle. Thus far, CDW and Motorola have answered the complaint and moved to stay the proceedings pending the reexamination that has also prompted the pending motion to stay in this case. No discovery has yet been conducted in the case before Judge Norgle.

***2** On September 10, 2007, Techsearch moved to reinstate the case before this court. We granted Techsearch's motion on October 11 and permitted it to file an amended complaint that substituted Global Patent as the plaintiff, dropped Defendants Aharonian and Internet Entertainment, and added six new defendants. Global Patent then moved to reassign case no. 07 C 4476 to this court on the ground that it is related to this case. Shortly thereafter, Defendants moved to stay the proceedings in this case pending the outcome of the second reexamination procedure before the PTO.

DISCUSSION

I. Motion to Reassign

In the Northern District of Illinois, cases are assigned to a district judge at random. LR 40.1. This system can lead to situations in which two or more cases that are closely related will be assigned to different judges. In such an instance, LR 40.4 provides a mechanism whereby parties can request that the later-filed case be reassigned to the judge who is presiding over the lower-numbered, and thus earlier-filed, case. The rule promotes efficient use of judicial resources by minimizing duplication of effort on cases that have a great deal in common. To obtain reassignment of a case, a movant must first show that the case to be reassigned is related to a previously filed case and then demonstrate that reassignment would promote efficient use of judicial resources. Global Patent invokes LR 40.4 in support of its request for reassignment. CDW is the only defendant to oppose the reassignment.

As a threshold matter, CDW challenges the premise that this case is properly considered earlier-numbered and thus first-filed. In the 2003 dismissal, we granted Techsearch leave to reinstate this case if it prevailed in the patent reexamination. According to CDW, Global Patent previously disavowed any connection to Techsearch, and CDW insists that only a case with Techsearch as the plaintiff can have the benefit of the 2000 filing date.

To support its contention that Global Patent is a stranger to this case, CDW points to a declaratory judgment action filed in the District of Nevada in 2007. In a declaration filed to dispute personal jurisdiction in Nevada, Anthony O. Brown, president of Global Patent, stated that Global Patent had no "current ownership or other interest in, or an affiliation with, TechSearch."Contrary to CDW's position, the declaration also states that in January 2000, Techsearch was both a subsidiary of Global Patent and the owner of the '341 patent.[FN1] In addition, on January 25, 2005, Techsearch LLC, at the time still a subsidiary of Global Patent, assigned the '341 patent to its parent Global Patent. The ownership of the patent resulting from the assignment would make Global Patent the real party in interest for purposes of this case as it is presently postured. Fed.R.Civ.P. 17(a). Furthermore, CDW's argument

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ignores the fact that Techsearch, not Global Patent, moved to reinstate the case on September 10, 2007. Global Patent was substituted as the plaintiff only after the case had been reinstated by the originally filing plaintiff. Thus, this case is the earlier filed, and if the requirements of LR 40.4 are satisfied, the case before Judge Norgle should be reassigned to this court.

FN1. Declaration of Anthony O. Brown, Doc. 15, Ex. A, *Zappos.com, Inc., v. Global Patent Holdings, L.L.C.,* case no. 2:07-cv-01726-RCJ-GWF (D.Nev.).

A. Factors Pertaining to Relatedness

***3** To be deemed related, two cases must satisfy at least one of the four criteria laid out in Rule 40.4(a): the cases share some issues of fact or law; they involve the same property; each grows out of the same transaction or occurrence; or they involve one or more of the same classes if the motion is made in the context of multiple class action suits. Here, Global Patent contends that the first two criteria are present.

To counter Global Patent's position that the two cases satisfy the first criterion, CDW emphasizes differences between the various defendants, such as the nature of their respective businesses. However, two cases need not be absolutely identical to be related for purposes of LR 40.4. *Fairbanks Capital Corp. v. Jenkins,* 2002 WL 31655277, *2 (N.D.Ill. Nov.25, 2002). If some of the same issues of fact or law are common, that can be sufficient to establish relatedness. Here, Global Patent's two complaints share a factual foundation in the form of the assertions that the various Defendants' websites downloaded or induced others to download responsive data, including JPEG images and other compressed audio/video and graphical data. Furthermore, CDW's answer and asserted affirmative defenses are almost indistinguishable from those of the Green Bay Packers, who are already a defendant in the case before us. Consequently, we conclude that this case and case no. 07 C 4476 are related within the meaning of LR 40.4(a).

Global Patent also contends that the cases satisfy the second criterion in that they both involve the same property. CDW hotly contests the argument that the word "property" as used in this portion of the rule necessarily applies to intellectual property with the same force that it would to tangible items. Cases in this district have found that a claim that infringement cases are not necessarily related simply because the same patent is alleged to have been infringed in both cases. *See, e.g., Magnavox Co. v. Electronics, Inc.,* 31 F.Supp.2d 620, 623 (N.D.Ill.1998); *Androphy v. Smith & Nephew, Inc.,* 31 F.Supp. 29, 34 (N.D.Ill.1980). However, our conclusion as to the similarity of facts and law within the two cases distinguishes this case from those upon which CDW relies to contend that the assertion of common property is not enough in this case.

Accordingly, we turn our attention to the four factors contained in LR 40.4(b).

B. Factors Pertaining to Judicial Efficiency

Even if two cases are found to be related, the moving party must also meet each of four criteria specified in LR 40.4(b) before a case will be reassigned. First, both cases must be pending in this district. Second, a substantial savings of judicial time and effort must be likely to result from the reassignment of the cases to a single judge. Third, the earlier-filed case must be at a point where designating a later-filed case would not be likely to substantially delay the proceedings in the earlier case. Finally, the cases must be susceptible to disposition in a single proceeding.

***4** We need look no further than to the respective dockets to conclude that the first and third conditions of LR 40.4(b) are satisfied. Both cases are pending in the Northern District of Illinois. Furthermore, thanks to the 2003 dismissal, this case has

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not progressed to the point where treating the two cases as related would be likely to substantially delay the proceedings; no discovery has been conducted and little judicial effort has been expended thus far.

With respect to the second and fourth conditions, Global Patent, as the moving party, bears the burden of indicating "the extent to which the conditions required by section (b) will be met if the cases are found to be related."LR 40.4(c)(2). On the second factor, Global Patent states that duplicative treatment of claim construction will result in unnecessary consumption of judicial time, effort, and cost. In addition, it asserts that extra time and expense can be avoided by a single resolution of invalidity and inequitable conduct defenses. According to Global Patent, reassignment will also likely result in judicial efficiency in that only one round of depositions will take place for the parties, third party inventors, the prosecuting attorneys, and any potential prior art witnesses or companies. These assertions do not shed much light on how the handling of both cases by the same judge is likely to result in a substantial saving of judicial time and effort. Rather, the content of Global Patent's argument focuses on the potential for duplication in necessary work and resource expenditure by the parties, which may have little impact on the amount of court resources that will be required. For example, with respect to claim construction, a decision construing the claims in either case could be applied to the case in which claims had not yet been construed.

With regard to the fourth condition, Global Patent highlights the likely number of summary judgment motions and evidence provided in support thereof, such as graphical designs or testimony related to the background of the patented invention. Though there is more to a consideration of the fourth prong than Global Patent's narrow focus would imply, a review of the pleadings in conjunction with the parties' submissions on this motion convinces this court that both actions involve *prima facie* fundamentally similar claims and defenses that will likely be amenable to dispositive treatment in unified proceedings, whether in claim construction, summary judgment, or trial.

CDW argues that Global Patent provided only conclusory statements as to how reassignment will result in savings of judicial time and effort, which is true with respect to the initial filing in support of the motion. Many of the points discussed above appear only in Global Patent's reply, and the considerations Global Patent has offered bear more upon time and cost savings to the parties than the impact on the court. We emphatically do not endorse a practice of filing underdeveloped motions or saving the bulk of a party's arguments for presentation in a reply brief. It is well settled that parties engaging in either practice run a very real risk of forfeiting otherwise meritorious arguments. However, as the reassignment mechanism is primarily concerned with judicial efficiency, we will not force the parties to engage in the same exercise in the form of a renewed, better presented motion. We are convinced based on our own examination of the two cases, combined with the information the parties have supplied, that the cases are fundamentally similar, and the motion to reassign case no. 07 C 4476 is therefore granted.

II. Motion to Stay

***5** The second motion under consideration asks us to stay the proceedings in this case, and ostensibly those in the reassigned case, pending the outcome of the reexamination proceeding for claim 17 of the '341 patent. District courts have broad discretion to control their dockets using techniques such as stays of proceedings, provided a stay is not indefinite or otherwise excessive. *Gould v. Control Laser Corp.,* 705 F.2d 1340, 1341 (Fed.Cir.1983).

Global Patent contends that the PTO has already contributed its expertise to this matter via the first reexamination proceeding and thus there is little to be gained from waiting for the second to run its

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course. However, as Defendants point out, claim 17 was not in the original patent but was added by amendment during the previous reexamination. The previous reexamination thus functioned as an original examination of that claim rather than a reexamination of a previous stamp of approval, as was the case with the original 16 claims. Moreover, because the reexamination was conducted *ex parte,* there could be no participation from anyone other than GPH when claim 17 was being examined. Accordingly, the association of claim 17 with the prior reexamination did not result in the same application of the PTO's expertise on patentability that is available for the original 16 claims that were rejected.

No discovery has been conducted and little judicial effort has been expended in either of the cases now before us. Though we are mindful that four years was consumed in waiting for the result of the reexamination of the original 16 claims, a significant amount of time and effort in claim construction and other litigation would have been wasted if we had forged ahead without the benefit of the PTO's examination (and subsequent rejection) of those claims. Also, the fact that this examination will focus on a single claim makes it unlikely that a similar amount of time will be spent in reaching resolution of the new reexamination. The questions of validity, patentability, and claim content are common to the issues before this court and before the PTO, so the more prudent course of action is to stay these cases while the reexamination proceeds. Defendants' motion requesting that relief is therefore granted.

CONCLUSION

Based on the foregoing analysis, Global Patent's motion to reassign is granted, as is the Defendants' motion to stay.

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Slip Copy, 2008 WL 1848142 (N.D.Ill.)

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Williams v. Walsh Constr., No. 05 C 6807, 2007 WL 178309 (N.D. Ill. Jan. 16, 2007)

Tab 5

C
Only the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern Division.
Alphonso WILLIAMS, Plaintiff,
v.
WALSH CONSTRUCTION, Defendants.
No. 05 C 6807.

Jan. 16, 2007.

Michael Irving Leonard, Meckler, Bulger & Tilson, Chicago, IL, for Plaintiff.
Tom H. Luetkemeyer, Aimee Elizabeth Delaney, Hinshaw & Culbertson LLP, Chicago, IL, for Defendant.

MEMORANDUM OPINION AND ORDER

DARRAH, J.
***1** Plaintiff, Alphonso Williams, filed suit against Defendant, Walsh Construction, alleging race discrimination, harassment, and retaliation in violation of Title VII of the Civil Rights Act of 1964. Presently before the Court is Defendant's Motion for Reassignment of an allegedly related case pursuant to Local Rule 40.4.

BACKGROUND

On December 1, 2005, Williams filed suit in this Court against his former employer, Walsh Construction ("the Williams case"). Williams alleged that he was employed by Walsh from September 2000 until his termination on February 10, 2002. At the time of his termination, Williams was a Labor Supervisor. Based on Williams' race, African-American, Walsh: reduced his hours of work; denied him the means to perform his duties, including tools and a truck to carry tools; treated non-African-American employees more favorably; denied Williams' incentive and bonus pay; and forced Williams to single out other African-American employees for termination. Williams' claims are: race discrimination, harassment, and retaliation in Violation of Title VII and 42 U.S.C. § 1981.

In early 2006, the parties in the Williams case engaged in settlement negotiations, which were unsuccessful. Thereafter, the case was scheduled for a April 30, 2007 jury trial, with discovery closing on December 26, 2006, and a pretrial conference scheduled for April 26, 2007.

On July 28, 2006, Wallace Bolden and eleven other named plaintiffs filed a class-action complaint against Walsh ("the Class Action"). This later suit, 06 C 4104, was assigned to Judge Joan H. Lefkow. The named plaintiffs in the Class Action were laborers, labor supervisors, and labor foremen. The Class Action alleges that Walsh discriminated against African-American employees from January 2001 though the present by laying-off, discharging, constructively discharging, and/or failing to hire African-Americans. The eleven counts of the Class Action are race discrimination, retaliation, and termination in violation of Title VII and 42 U.S.C. § 1981. The allegations that form the basis of the claims include: a hostile work environment, disparate impact, denial of overtime, receipt of more dangerous assignments because of race, retaliation for complaining of sexual harassment, and refusal to hire or rehire based on race.

Pursuant to Judge Lefkow's October 31, 2006 Minute Order, non-expert class-certification discovery for the Class Action is to be completed by June 15, 2007; and plaintiffs' motion for class certification is to be briefed as follows: motion to be filed by November 16, 2007, response due by December 14, 2007, and reply brief due by January 28, 2008.

Williams and the Class Action plaintiffs oppose reassignment of the Class Action.

LEGAL STANDARD

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In reviewing a motion to reassign a case on the basis of relatedness, the moving party must satisfy the requirements of both LR 40.4(a) and 40.4(b). *Hollinger International, Inc. v. Hollinger, Inc.,* 2004 WL 1102327, at *1 (N.D.Ill. May 5, 2004)(*Hollinger*). The court has discretion to reassign the case pursuant to LR 40.4. *Clark v. Ins. Car Rentals Inc.,* 42 F.Supp.2d 846, 847 (N.D.Ill.1999)(*Clark*). Under LR 40.4(a), "[t]wo or more civil cases may be related if: "(1) the cases involve the same property; (2) the cases involve some of the same issues of fact or law; (3) the cases grow out of the same transaction or occurrence; or (4) in class-action suits, one or more of the classes involved in the cases is or are of the same."LR 40.4. Only one of the above conditions must be met to satisfy LR 40.4(a).

***2** Once the cases are determined to be related under LR 40.4(a), LR 40.4(b) requires more stringent criteria for the case to qualify for reassignment. *See* *Clark,* 42 F.Supp.2d at 848. LR 40.4(b) requires that to be reassigned: "(1) both cases are pending in this Court; (2) the handling of both cases by the same judge is likely to result in a substantial saving of judicial time and effort; (3) the earlier case has not progressed to the point where designating a later-filed case as related would be likely to substantially delay the proceedings in the earlier case; and (4) the cases are susceptible of disposition in a single proceeding."Under 40.4(b)(2), the judicial savings alleged by the moving party must be substantial; a mere assertion that some judicial time and effort would be saved by reassignment is insufficient. *Hollinger,* 2004 WL 1102327 at *2 (citing *Lawrence Jaffe Pension Plan v. Household Int'l, Inc.,* 2003 WL 21011757 at *2 (N.D.Ill. May 5, 2003)). Likewise, if the cases will require different discovery, legal findings, defenses or summary judgment motions, it is unlikely that reassignment will result in a substantial judicial savings. *See* *Hollinger,* 2004 WL 1102327 at *2; *Donahue v. Elgin Riverboat Resort,* 2004 WL 2495642 at *1 (N.D.Ill. Sept.28, 2004)(*Donahue*). Also, cases are rarely susceptible to disposition in one proceeding pursuant to 40.4(b)(4) where the cases involve unique issues of law and fact and those unique characteristics are dominant. *See* *Machinery Movers, Riggers, and Machinery Erectors, Local 136 Defined Contribution Retirement Fund v. Joseph/Anthony, Inc.,* 2004 WL 1631646 at *4 (N.D.Ill. July 16, 2004)(*Machinery Movers*) (citing *Clark,* 42 F.Supp.2d at 849);*see also* *Donahue,* 2004 WL 2495642 at *1 (motion to reassign denied where all cases involved Title VII claims, but each case was based on a unique set of facts different from every other case involved).

In addition, LR 40.4(c) requires that a motion to reassign: "(1) set forth the points of commonality of the cases in sufficient detail to indicate that the cases are related within the meaning of section (a) and (2) indicate the extent to which the conditions required by section (b) will be met if the cases are found to be related."These provisions "impose an obligation on the moving party to specifically identify why each of the four conditions under LR 40.4(b) is met." *Machinery Movers,* 2004 WL 1631646 at *3 (N.D.Ill. July 16, 2004); *Lawrence Jaffe Pension Plan,* 2003 WL 21001757 at *3. Thus, a motion for reassignment may be denied if a party fails to sufficiently plead each of 40.4(b)'s requirements. *Machinery Movers,* 2004 WL 1631646 at *3.

ANALYSIS

Both cases involve *some* of the same issues of fact or law; accordingly, the cases are related under LR 40.4(a). However, Walsh has failed to demonstrate that the cases satisfy all of the requisite criteria of LR 40.4(b). While the cases are both pending in court in this district, Walsh has failed to demonstrate that: (1) handling of both cases would likely result in a substantial savings of judicial time and effort; (2) the Williams case has not progressed to a point where reassigning the later-filed case would likely substantially delay the proceedings in the Williams case; and (3) the cases are susceptible of disposition in a single proceeding.

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***3** Walsh argues that reassigning the Class Action would likely result in a substantial savings of judicial time and effort because of the similar allegations and claims between the plaintiffs. While some of the claims and allegations are similar in both suits, the Class Action contains allegations and claims that are not present in the Williams suit. The most obvious distinction is the extensive discovery and motion practice involved in the class allegations that are not present in the Williams case. Furthermore, in light of the different claims and specific supporting allegations, a finding in one case would not likely be dispositive of any issues in the other cases. *See* *Donahue,* 2004 WL 2495642 at *3. Thus, the cases are not likely to reach disposition in a single proceeding.

More significantly, the Williams case has progressed to a point where reassigning the Class Action would substantially delay the proceedings in the Williams case. The parties in the Williams case have unsuccessfully attempted to settle the case. Discovery in the Williams case is scheduled to close December 26, 2006; and trial is scheduled for April 30, 2007. On the other hand, non-expert class discovery for the Class Action is not scheduled to close until June 15, 2007; and the motion for class certification will not be fully briefed until January 28, 2008. Accordingly, without reassignment, the Williams case is scheduled to progress through trial before non-expert class discovery is scheduled to close and more than six months before the motion for class certification will be decided. Clearly, reassignment would result in a *significant* delay in the Williams case if the class-action discovery, briefing and certification schedule were imposed on this case through reassignment of Judge Lefkow's case to this Court.

Based on the above, LR 40.4(b) has not been met. Accordingly, Walsh's Motion for Reassignment is denied.

CONCLUSION

For the reasons stated above, Walsh's Motion for Reassignment is denied.

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