

CALF's purpose includes representing its members' interests before agencies of the federal government and in court. Its principal place of business is Billings, MT.

2. Plaintiff OCM is a national non-profit, public policy research organization that focuses on antitrust and trade policy in agriculture. OCM is a membership-based research and advocacy organization and its members include farmers, cattle ranchers and feed lot operators. Members of OCM have a common interest in assuring that agricultural markets are competitive and do not short change producers. OCM represents members' interests before Congress and courts. OCM is headquartered in Lincoln, NE.

3. JBS is the world's largest beef packer. In mid-2007, JBS acquired Colorado-based Swift Foods Company ("Swift"), then the third-largest beef packer in the United States, with plants in Texas, Nebraska, Colorado, and Utah. In October 2008, JBS acquired Smithfield Beef Group, Inc. ("Smithfield"), the fifth-largest beef packer in the United States, with packing plants in Arizona, Wisconsin, Michigan, and Pennsylvania. Smithfield also owns Five Rivers Ranch Cattle Feeding, LLC ("Five Rivers"), the largest feedlot company in the United States. Five Rivers has feedlots located in five states that together feed approximately 2 million cattle annually.

4. National is the fourth-largest beef packer in the United States. National operates two major beef packing plants in Kansas and a third plant in southern California. Like JBS's plants in the United States, National's plants process primarily fed cattle, which are steers and heifers raised and fed for the production and sale of high quality beef products, including beef graded as "Choice", "Select" or "Prime" by the United States Department of Agriculture.

5. JBS's proposed acquisition of National, its third major acquisition since 2007, would complete a fundamental restructuring of the United States beef packing industry. The

acquisition would increase JBS's share of fed cattle packing capacity from close to 20% to approximately 35% and eliminate one of three largest packers that compete with JBS. Post merger, over 80% of the nation's fed cattle packing capacity would be controlled by a three-firm oligopoly — JBS, Tyson Foods, Inc. (“Tyson”) with approximately 25-30%, and Cargill, Inc. (“Cargill”) with approximately 20-25% share.

6. Competition among packers to purchase fed cattle is critical to ensure that the nation's thousands of cattle producers, ranchers, and feedlots receive competitive prices for the fed cattle that they produce, feed, and market. In 2007, packers purchased more than 27 million fed cattle at a cost of close to \$30 billion. Defendants plus Tyson and Cargill together purchased over 85% — nearly 24 million — of these cattle.

7. The proposed transaction would eliminate head-to-head competition between the merging parties and likely would diminish the vigor with which JBS and the two other significant packers each will compete to purchase fed cattle, making interdependent or coordinated conduct among these large packers more likely. As a result, cattle producers, ranchers and feedlots likely will receive lower prices for their cattle. Accordingly, JBS's acquisition of National will substantially lessen competition in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

I. JURISDICTION AND VENUE

9. This action is filed by the R-CALF and OCM under Section 15 of the Clayton Act, as amended, 15 U.S.C. § 25, which invests the Court with jurisdiction to prevent and restrain violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. Each of the Defendants, themselves or through wholly-owned subsidiaries that they control, purchase fed cattle from Plaintiffs' members and their activities substantially affect interstate commerce.

10. The Plaintiffs bring this action under Section 16 of the Clayton Act, 15 U.S.C. § 26, to prevent and restrain the violation by the Defendants of Section 7 of the Clayton Act, 15 U.S.C. § 18. The Plaintiffs bring this action on behalf of their members who are cattle producers.

11. Defendant National transacts business and is found in the Northern District of Illinois, through, among other things, selling beef products to customers in this District. Venue is proper over National in this Division within the Northern District of Illinois within the meaning of 15 U.S.C. § 22. Venue is proper in the Northern District of Illinois for Defendant JBS S.A., a Brazilian corporation, under 28 U.S.C. § 1391(d). Alternatively, venue is proper over JBS S.A. in this Division within the Northern District of Illinois under 15 U.S.C. § 22 because JBS S.A. transacts business in this District through wholly-owned subsidiaries, over which JBS S.A. exercises dominant control, that sell beef to customers in this District.

II. THE DEFENDANTS AND THE PROPOSED TRANSACTION

12. JBS, a corporation organized under the laws of Brazil, is the world's largest beef packer. JBS's wholly-owned subsidiary, JBS USA, is currently the third-largest beef packer in the United States. JBS's beef packing plants in Cactus, Texas; Grand Island, Nebraska; Greeley, Colorado; and Hyrum, Utah have a combined slaughter capacity of approximately 20,000 head of cattle per day and generate over \$6 billion in beef sales annually. Through the acquisition of Smithfield Beef Group, the fifth-largest United States beef packer, JBS will obtain additional packing plants in Tolleson, Arizona; Green Bay, Wisconsin; Plainwell, Michigan; and Souderton, Pennsylvania, increasing its total slaughter capacity to approximately 27,000 head per day. Also through the acquisition of Smithfield Beef Group, JBS will obtain Five Rivers, which owns feedlots in Colorado, Idaho, Kansas, Oklahoma and Texas and feeds approximately 2

million cattle annually, representing approximately 7 percent of the annual U.S. steer and heifer slaughter.

13. National is the nation's fourth-largest beef packer, with annual beef sales of over \$5 billion and a packing capacity of approximately 14,000 head of cattle per day. National operates three beef packing plants located in Liberal, Kansas; Dodge City, Kansas; and Brawley, California. National is majority-owned by U.S. Premium Beef, LLC ("U.S. Premium Beef"), a Delaware limited liability company. U.S. Premium Beef is a vertically integrated beef marketing company that feeds cattle in over 1,400 feedlots in 14 states and that holds rights to deliver cattle to National for slaughter. Pursuant to its contractual/ownership arrangement with National, U.S. Premium Beef delivers approximately 13,000 cattle per week, or about 676,000 cattle annually, to National for slaughter.

14. JBS agreed to purchase 100% of National shares for approximately \$560 million pursuant to an agreement dated February 29, 2008. At closing, JBS will assume the debt and other liabilities of National, resulting in an enterprise value of approximately \$970 million.

III. TRADE AND COMMERCE

A. The Beef Packing Industry is Centered in the High Plains

15. The overwhelming majority of cattle sold and slaughtered in the United States occurs in the High Plains, a region often referred to as the "Beef Belt", which is centered in Colorado, Western Iowa, Kansas, Nebraska, Oklahoma, and Texas. Approximately three-quarters of the fed cattle packing capacity in the United States is found in this region, along with close to 80% of all cattle on feedlots.

16. Both National and JBS operate significant packing plants in the High Plains area. National's plants in Liberal, Kansas and Dodge City, Kansas are among the largest and most

profitable beef packing plants in the nation. Located in the center of the High Plains region, the National plants compete with JBS's Grand Island, Nebraska plant to the north; its Cactus, Texas plant to the south; its Greeley, Colorado plant to the west; and other plants in the High Plains. Together, the five plants owned by JBS and National account for approximately one-third of total fed cattle packing capacity in the High Plains. Tyson and Cargill also each operate five fed cattle plants in the High Plains, with Tyson and Cargill accounting for approximately 30% and 25% of High Plains packing capacity, respectively.

17. An area centered in the Imperial Valley of California, encompassing parts of southern California and Arizona (hereinafter "the Southwest"), is another important region for the production and feeding of fed cattle. National operates a plant in the Imperial Valley, in Brawley, California. The next closest major packing facility for the slaughter of fed cattle is the former Smithfield Beef Group plant in Tolleson, Arizona, which is being acquired by JBS. Other packing plants in the region purchase and slaughter only small volumes of fed cattle.

B. The Production of Fed Cattle for Slaughter

18. Fed cattle are steers and heifers that are raised and fed specifically for beef production. Most fed cattle are breeds that are raised only for beef production. After being weaned, these cattle spend anywhere between two and ten months grazing on pasture or being "backgrounded" in confined lots, where they are typically fed forage or hay until they reach a weight of 600 to 800 pounds. The cattle, then referred to as feeder cattle, are transferred or sold to feedlots where they are fed a high-energy grain feed for three to six months or more, until they reach an average slaughter weight of 1,250 pounds (referred to as "fed cattle").

19. Cattle have the longest biological cycle of any farmed animal and it takes between 15 to 24 months to raise cattle from birth to market weight, which is typically about 1,250

pounds. For purposes of comparison, this is more than twice the time it takes for hogs to reach market weight. These unique characteristics help to explain the different types of cattle producers and the distinct classes of cattle within the U.S. cattle industry, all of which stand to be impacted by the Defendants' proposed merger. These cattle producers include 1) seed stock producers – who raise and sell breeding cattle; 2) cow/calf producers – who breed, birth, and sell calves; 3) stockers and backgrounders – who purchase calves from cow/calf producers and grow them until they reach the optimal weight for feeding; and 4) feeders – who purchase cattle from the stocker/backgrounder and feed them in a confined area until they reach market weight, at which time they are sold to beef packers.

20. The sequences of breeding to feedlot are linked such that adverse competitive effects in the ultimate market will affect the prices paid in all the upstream, input markets involved in the production of fed cattle. Moreover, because the supply of cattle is on a 24 to 33-month basis from gestation to slaughter, there are very significant inelasticities in supply for substantial time periods during which lower prices are passed up the supply chain of markets. Finally, even over longer periods of time, supply of calves is likely to be relatively price inelastic as the next best use of the farms and ranches producing calves makes switching production to other agricultural products unlikely and costly. Hence, depressed prices, while reducing supply, will not eliminate the production of fed cattle, but will allow the beef packers to reap monopsony profits as well as depressing supply overall resulting in higher prices to consumers.

21. A small percentage of fed cattle slaughtered annually are calf-fed Holstein steers and heifers. Many Holstein calves are raised for dairy production. A portion, however, are designated for beef production and are transferred to calf ranches almost immediately after birth.

Calf-fed Holsteins are typically placed in feedlots much earlier than other breeds of fed cattle and remain there, often for as long as a year, until they reach slaughter weight.

22. Fed cattle are usually transported only moderate distances from feedlot to packing plant due to transportation costs and the “shrinkage” in the weight of the cattle that occurs during transport. Cattle can be, and sometimes are, transported further, but prices for fed cattle transported long distances are often discounted to reflect higher shipping costs and increased shrinkage.

C. Competition in the Purchase of Fed Cattle

23. In an average week, fed cattle packers in the United States purchase more than half a million fed cattle at a combined price of close to half a billion dollars. Packers purchase the majority of fed cattle on a weekly “cash” or “spot” market that is centered in the High Plains region. Over the course of the week, feedlots obtain bids from cattle buyers from several companies. Typically, after several days of a “bid and quibble” process, most transactions clear within a period of a few hours late in the week.

24. Throughout the “bid and quibble” process, packers have extensive and timely information about the cash market. Packers regularly obtain detailed information regarding competitive bids, sales quantities, and prices from feedlot managers. In addition, packers have access to pricing and volume information from numerous commercial and governmental sources, including aggregated but detailed information reported daily by the USDA.

25. Packers also purchase fed cattle under “grid” or “formula” pricing arrangements and forward contracts. The applicable base price under these pricing arrangements is often linked to one of several USDA-reported regional cash prices. Grids typically include discounts or premiums that are based on the characteristics of the cattle carcasses.

26. Beef packers have increased their use of a variety of procurement devices that enable them to obtain “committed procurement” cattle, otherwise known as captive supplies, that limit their exposure to the competitive cash or spot market. Captive supplies are devices that include cattle fed by a packer more than 14 days prior to slaughter, cattle procured by a forward contract or marketing agreement that has been in place for more than 14 days, or cattle that are otherwise committed to a packer more than 14 days prior to slaughter. The use of these captive supply devices has increased in recent years. In 2006, over 40 percent of the cattle procured by beef packers were procured through the use of these captive supply devices, an increase from the 23 percent that was procured in this manner a decade earlier. More recent USDA data shows a significant increase in the use of captive supply devices by beef packers, *e.g.*, beginning in 2006 and through June 2008, over 50 percent of the cattle procured from Kansas feedlots each year were procured with captive supply devices, with over 56 percent procured with such devices in 2008.

27. The likely effects of the National acquisition will be less competition and lower prices for fed cattle, which would lead to lower prices for all classes of cattle; and a shift of the volume of cattle procured in the open market to one or more of the various captive supply procurement devices, which also would result in lower fed cattle prices and lead to lower prices for all classes of cattle. The shift in the volume of cattle procured by captive supply devices will occur despite the fact that these devices are known to return lower prices to cattle producers because the three remaining packers will be able to further exploit their ability to create market access risks for producers (which refers to the availability of a timely and appropriate market outlet), creating an incentive for producers to give up revenue in order to secure market access.

28. These effects of the proposed acquisition are even more significant because of the degree of vertical integration in the market. As noted before, JBS owns Five Rivers and National is owned by U.S. Premium Beef, giving the merged firm control of two significant feedlot operations in the market. This increases the ability of the merged firm to manipulate the price for fed cattle because they can satisfy beef demand by slaughtering their own cattle when they desire to hold down cash or spot market prices.

29. Cattle producers are particularly susceptible to market access risk due to the perishable nature of fed cattle. When fed cattle reach their optimal weight, they must be sold within a fairly narrow window of time, otherwise they will decrease in value (*e.g.*, they will quickly become overweight resulting in lower quality meat and the producer will additionally incur costs associated with a longer feeding period). Another factor contributing to the producers' susceptibility to market access risk is the fact that regional competition in raw material markets, such as the live cattle market, is inherently less intense than in processed food markets.

D. Packer Profits are Affected by Industry Output Decisions

30. Beef packing has historically been a high-volume, relatively low-margin business with predictable seasonal demand variations. With the price of fed cattle representing most of the cost of beef production, packer profitability is determined largely by the "meat margin," or the spread between the price packers pay for fed cattle and the price packers charge for beef, including USDA-graded boxed beef.

31. This meat margin is highly sensitive to changes in the aggregate output levels of fed cattle packers. All else being equal, when the meat packing industry reduces production

levels, feedlots and cattle producers are paid less for fed cattle because fewer fed cattle are demanded.

32. Because the supply of fed cattle is relatively insensitive to short term changes in price, even small changes in industry production levels can significantly affect packer profits. The major packers obtain significant information about each other's past and future output decisions, including the number of days and shifts that competitors' plants operate. Information about production levels is obtained by directly observing plant operations and from third-party sources, including USDA reports showing aggregate industry slaughter of fed cattle. Major packers use this information to calculate market shares based on output and consider this information when setting their own production schedules.

E. The Beef Packing Industry is Highly Concentrated

33. At the turn of this century, the U.S. Government Accountability Office reported that the U.S. beef packing industry showed the largest increase in concentration of any manufacturing industry in the U.S. "since the U.S. Bureau of Census began regularly publishing concentration data in 1947." Concentration, as measured by the market share held by the largest four firms, increased from 36 percent of total commercial slaughter in 1980 to 81 percent in 1999, a percentage that remained relatively constant until the 2008 acquisition of Smithfield by JBS, and which will again increase if this merger is allowed.

34. The defendants, each of them, have been involved in a number of recent acquisitions: In 2006, National acquired Vintage Foods, L.P.: Los Angeles, California, and Brawley Beef LLC.; Brawley, California. In 2007, JBS acquired Swift; Greeley, Colorado. In 2008, JBS acquired Smithfield, which included four packing plants and the nation's largest feedlot corporation, Fiver Rivers.

35. In 2006, the 25 beef packing plants owned by the four largest beef packers, including Defendants, slaughtered approximately 81 percent of the 27.8 million steers and heifers that were slaughtered in federally inspected plants in the United States.

36. Following the acquisition of Smithfield, and prior to a National acquisition, there are approximately 29 beef packing plants owned by the four largest beef packers, including Defendants, that slaughter approximately 88 percent of the 27.8 million steers and heifers that were slaughtered in federally inspected plants in the United States.

37. Post National acquisition, the number of major fed cattle buyers would be further reduced from 4 to 3, and approximately 88 percent of the U.S. steer and heifer market would then be controlled by a 3-firm oligopoly – Tyson, Cargill, and JBS.

IV. MARKET DEFINITION

A. Relevant Antitrust Market for the Purchase of Fed Cattle

1. The Purchase of Fed Cattle is a Relevant Product Market

38. Fed cattle are steers and heifers that are raised and fed high-energy, corn-based feed for several months to “finish” them for sale to packers for the production of high-quality USDA- graded boxed beef. There are no other reasonable uses for fed cattle other than for the production of beef, including wholesale USDA-graded boxed beef and derivative consumer products. A small but significant, non-transitory decrease in the price paid by packers for fed cattle likely would not be rendered unprofitable by a switch of the sale of fed cattle to other purchasers for any other use or by the repositioning of cattle producers, ranches or feedlots to other purposes.

39. The purchase of fed cattle is a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

2. *The High Plains and the Southwest are Relevant Geographic Markets for the Purchase of Fed Cattle*

40. Cattle producers and feedlots face increased transportation and other costs when shipping fed cattle long distances. In the event of a small but significant, non-transitory decrease in the prices paid by fed cattle packers in the High Plains, cattle producers and feedlots likely would not shift a sufficient volume of fed cattle to other geographic areas or reduce sufficiently the production of fed cattle to render the price decreases unprofitable. Similarly, in the event of a small but significant, non-transitory price decrease on the prices paid by fed cattle packers to feedlots in the Southwest, cattle producers and feedlots likely would not shift a sufficient volume of fed cattle to other areas or reduce sufficiently the production of fed cattle to render the price decreases unprofitable.

41. Relevant geographic markets for the purchase of fed cattle within the meaning of Section 7 of the Clayton Act are the High Plains and the Southwest regions of the United States.

V. **LIKELY ANTICOMPETITIVE EFFECTS OF THE TRANSACTION ON REGIONAL FED CATTLE PROCUREMENT MARKETS**

42. JBS's acquisition of National would give JBS control of approximately one-third of fed cattle packing capacity in the High Plains and leave three firms with more than 85% of capacity in that region. Using a measure of market concentration called the Herfindahl-Hirschman Index ("HHI") (defined and explained in Appendix A), the post-acquisition HHIs would increase by over 500 points, resulting in a post-acquisition HHI of approximately 2,600 points. JBS's purchase of National would reduce the number of competitively significant actual or potential bidders for fed cattle from 4 to 3 in the High Plains, resulting in less aggressive competition and lower prices for feedlots and producers of fed cattle. The proposed transaction,

therefore, is likely to lessen competition substantially in the purchase of fed cattle in the High Plains.

43. In the Southwest, JBS's acquisition of National would give JBS control of approximately 75% of the region's fed cattle packing capacity. Using the Herfindahl-Hirschman Index, the post-acquisition HHIs would increase by approximately 2,800 points, resulting in a post-acquisition HHI of over 6,000. JBS's purchase of National would eliminate actual and potential competition between JBS — via the Smithfield plant it acquired — and National, leaving feedlots in the market with only one major buyer of fed cattle. The proposed transaction, therefore, is likely to lessen competition substantially in the purchase of fed cattle in the Southwest.

VI. ABSENCE OF COUNTERVAILING FACTORS

44. New entry into the production and sale of USDA-graded boxed beef is costly and time consuming. Construction of a large-scale fed cattle packing facility would require investment of over \$250 million and take two or more years to obtain necessary permits, plan, design, and build. Repositioning by firms or facilities that slaughter primarily cows and bulls, as opposed to fed cattle, would require additional capital investment, such as expansion of cooler capacities. In addition, there are significant costs and inefficiencies associated with the start-up period of a new fed cattle packing facility and substantial expenses related to establishing necessary cattle procurement and marketing organizations. Entry or repositioning into USDA-graded boxed beef production would therefore not be timely, likely, or sufficient to defeat a small but significant, non-transitory decrease in the price of fed cattle.

45. The likely anticompetitive effects of the proposed transaction are not likely to be eliminated or mitigated by any efficiency that may be achieved by the merger.

**VII. THE PROPOSED ACQUISITION VIOLATES
SECTION 7 OF THE CLAYTON ACT**

46. Each and every allegation in paragraphs 1 through 45 of this Complaint is realleged herein with the same force and effect as though said paragraphs were set forth in full herein.

47. The proposed acquisition of National by JBS is likely to lessen competition substantially in violation of Section 7 of the Clayton Act in the purchase of fed cattle in the High Plains and the Southwest.

48. JBS's acquisition of National likely will have the following effects:

- a. actual and potential competition in the purchase of fed cattle in the High Plains and the Southwest likely will be lessened substantially;
- b. prices paid by packers for fed cattle will likely decrease and prices charged by packers for USDA-graded boxed beef sold in the United States will likely increase;
- c. because of lower prices for fed cattle, the prices paid for the types of cattle identified in ¶¶ 19-29 will also be adversely affected; and
- d. the increased concentration in feedlot ownership combined with the increased concentration at the slaughter market stage will result in increased adverse competitive effects directly through lower prices for fed cattle and increased reliance on captive supplies resulting in relatively lower prices for all classes of cattle.

49. Unless restrained, the proposed acquisition will violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

VIII. REQUESTED RELIEF

50. Plaintiffs request:
- a. that the proposed acquisition by JBS of National be adjudged to violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18;
 - b. that the Defendants and all persons acting on their behalf be permanently enjoined and restrained from carrying out the proposed acquisition of National, or from entering into or carrying out any other agreement, plan, or understanding by which JBS would acquire, be acquired by, or merge with National;
 - c. that Plaintiffs be awarded their costs of this action;
 - d. that the Plaintiffs be awarded their reasonable attorneys' fees; and
 - e. that Plaintiffs receive such other and further relief as the case requires and the Court deems just and proper.

Dated: November 13, 2008

Respectfully submitted,

By: /s/ Mary Jane Fait

Mary Jane Fait, Esq.
Theodore B. Bell, Esq.
**WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLC**
55 W. Monroe Street, Suite 1111
Chicago, IL 60603
Tel: (312) 984-0000
Fax: (312) 984-0001

David Balto, Esq.
LAW OFFICES OF DAVID BALTO
1350 I Street, N.W., Suite 850
Washington, DC 20005
Tel: (202) 789-5424

Counsel for Plaintiffs

APPENDIX A
DEFINITION OF HHI

The term “HHI” means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. The HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of 30, 30, 20, and 20%, the HHI is 2,600 ($30^2 + 30^2 + 20^2 + 20^2 = 2,600$). The HHI takes into account the relative size distribution of the firms in a market. It approaches zero when a market is occupied by a large number of firms of relatively equal size and reaches its maximum of 10,000 points when a market is controlled by a single firm. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Markets in which the HHI is between 1,000 and 1,800 points are considered to be moderately concentrated, and markets in which the HHI is in excess of 1,800 points are considered to be highly concentrated. *See Horizontal Merger Guidelines* ¶ 1.51 (revised Apr. 8, 1997). Transactions that increase the HHI by more than 100 points in highly concentrated markets presumptively raise antitrust concerns under the *Horizontal Merger Guidelines* issued by the Department of Justice and the Federal Trade Commission. *See id.*