

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

UNITED STATES OF AMERICA, et al.,)	
)	Case No. 08-CV-5992
Plaintiffs,)	Judge Bucklo
)	
vs.)	Mag. Judge Keys
)	
JBS S.A., et al.,)	
)	
Defendants.)	
)	

**CATTLE RANCHER PLAINTIFFS’
MEMORANDUM IN SUPPORT OF THEIR
MOTION FOR REASSIGNMENT AND CONSOLIDATION**

Plaintiffs in Case No. 08-CV-6528, Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America (“R-CALF”) and the Organization for Competitive Markets (“OCM”) (collectively, “Cattle Rancher Plaintiffs”) respectfully submit this memorandum in support of their motion pursuant to Federal Rule of Civil Procedure 42 and Local Rule 40.4 of the Northern District of Illinois to reassign to this Court their related case pending before the Honorable Judge William T. Hart, and captioned as *Ranchers-Cattlemen Legal Fund, United Stockgrowers of America, et al. v. JBS S.A., et al.*, No. 08-CV-6528 (“Cattle Ranchers Action”) and consolidate it with *United States of America, et al. v. JBS, S.A., et al.*, No. 08-CV-5992 (“Government Action”).

I. INTRODUCTION

On March 4, 2008, JBS S.A. (“JBS”), the world’s largest beef packer, publically announced its agreement to acquire National Beef Packing Company, LLC (“National”), the fourth-largest beef packer in the United States. Almost immediately thereafter, R-CALF and

OCM,¹ non-profit associations whose members include thousands of cattle ranchers, including fed cattle ranchers who would be directly and adversely impacted, began their efforts to oppose the proposed acquisition. On March 12, 2008, R-CALF sent a letter (attached hereto as Exhibit A) to the Assistant Attorney General in charge of the Antitrust Division of the U.S. Department of Justice (“DOJ”) urging the DOJ to rigorously investigate the potential anticompetitive impact of the merger.

R-CALF subsequently made seven detailed submissions to the DOJ resulting from R-CALF’s own extensive investigation into the impact that the proposed merger between JBS and National would have on competition and pricing in the cattle market.² R-CALF also made presentations to DOJ staff with respect to the proposed merger. On April 30, 2008, R-CALF and OCM also sent letters to the attorneys general of several states, including Colorado, Iowa, Kansas, Minnesota, Missouri, Montana, North Dakota, Nebraska, New Mexico, Ohio, South Dakota, Texas and Wyoming, supplying facts relating to the proposed acquisition and urging those states to oppose the merger.³ R-CALF also, from May through July 2008, sent state-specific reports on the economic impact of the merger to the attorneys general of the states of Oregon, Montana, Missouri, Minnesota, Oklahoma, North Dakota, Ohio and Mississippi. (A sample, the report sent to Mississippi’s Attorney General, is attached as Exhibit C.⁴)

¹ R-CALF “represents thousands of U.S. cattle producers on domestic and international trade and marketing issues.” See <<http://www.r-calfusa.com/Default.htm>>. OCM is a “membership based research and advocacy organization” focusing on “antitrust and trade policy in agriculture.” See <http://www.competitivemarkets.com/index.php?option=com_content&task=view&id=1&Itemid=5>.

² The submissions are available on R-CALF’s web site at <<http://www.r-calfusa.com/Competition/competition.htm>>. R-CALF will provide copies to the Court upon request.

³ A sample letter is attached as Ex. B. The letters are available on R-CALF’s web site at <<http://www.r-calfusa.com/Competition/competition.htm>>. R-CALF will provide copies to the Court upon request.

⁴ Additional letters are available on R-CALF’s web site at <<http://www.r-calfusa.com/Competition/competition.htm>>. R-CALF will provide copies to the Court upon request.

In addition, representatives from both R-CALF and OCM testified in May 2008 before the Antitrust, Competition Policy, and Consumer Rights Subcommittee of the U.S. Senate Judiciary Committee with respect to the anticompetitive impact of the proposed acquisition. (The written testimony of OCM's Michael Stumo and R-CALF's Bill Bullard are attached as Exhibits D and E.) The concerns raised by R-CALF and OCM in the hearing,⁵ were a major impetus behind the letter that the Subcommittee's chairman, Senator Herb Kohl, sent to the DOJ on June 24, 2008 (attached hereto as Exhibit F), urging the DOJ to take enforcement action to block the merger.

On October 20, 2008, the DOJ and thirteen states, including those to whom R-CALF and OCM submitted letters and reports, filed their action in this Court (No. 08-CV-5992) to enjoin the merger between JBS and National as unlawful under Section 7 of the Clayton Act, 15 U.S.C. § 18. An amended complaint adding four additional state plaintiffs (attached as Exhibit G) was filed in the Government Action on November 7, 2008.

On November 13, 2008, R-CALF and OCM filed their complaint (attached as Exhibit H) in the Cattle Ranchers Action (No. 08-CV-6528), which was assigned to the Honorable Judge William T. Hart.⁶ Like the Government Action complaint, the Cattle Ranchers Action complaint alleges that the proposed merger between JBS and National would violate Section 7 of the Clayton Act and should therefore be enjoined by the Court. Because the criteria under Fed. R. Civ. P. 42 and Local Rule 40.4 are satisfied, the Court should grant Cattle Rancher Plaintiffs' motion for reassignment of the Cattle Ranchers Action to this Court and consolidation with the Government Action.

⁵ The R-CALF and OCM representatives were the only witnesses who testified in opposition to the merger.

⁶ The Cattle Ranchers Action has been brought as an individual action and not as a class action.

II. ARGUMENT

A. Reassignment Of The Cattle Ranchers Action Is Proper

Local Rule 40.4 provides for reassignment of related cases, thereby “promot[ing] efficient use of judicial resources by minimizing duplication of effort on cases that have a great deal in common.” *Global Patent Holdings, LLC v. Green Bay Packers, Inc.*, No. 00 C 4623, 2008 WL 1848142, at *2 (N.D. Ill. April 23, 2008). Reassignment is appropriate where the requirements of Local Rule 40.4(a) and (b) are satisfied. *River Village West LLC v. Peoples Gas Light and Coke Co.*, No. 05 C 2103, 2007 WL 541948, at *1 (N.D. Ill. Feb. 14, 2007).

Local Rule 40.4(a) provides that civil cases are related under the Rule where one or more of the following conditions are met: “(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 the same.” The Rule “does not require complete identity of issues in order for cases to be considered related.” *Murry v. America’s Mortgage Bank, Inc.*, No. 03 C 5811, 2004 WL 407010, at *2 (N.D. Ill. Mar. 1, 2004).

Local Rule 40.4(b) further provides that a related action may be reassigned where each of the following criteria is met: (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.”

Here, the requirements of Local Rule 40.4(a) and (b) are easily met. Both the Cattle Ranchers Action and the Government Action seek to enjoin JBS’s proposed acquisition of

National, allege that the merger would violate Section 7 of the Clayton Act, and name the same two defendants, thereby satisfying not just one, but the first three, of the conditions set forth in Local Rule 40.4(a): the cases involve the same property, involve many of the same issues of fact and law, and grow out of the same occurrence. Cases are clearly related under the Rule where, as here, “any resolution of both disputes will necessarily require a determination of the legality of the same defendant’s actions under the same statutes....” *Murry*, 2004 WL 407010 at *2.

The requirements set forth in Local Rule 40.4(b) are satisfied here as well. Both cases are pending in the Northern District of Illinois. Because of the significant similarities between the two cases, a substantial saving of judicial time and effort will result from having the same judge preside over both cases. *See, e.g., River Village West*, 2007 WL 541948, at *2 (granting motion for reassignment, observing that “given the similarities among the three cases, it is clear that substantial judicial resources will be saved”); *Teacher’s Retirement System of Louisiana v. Black*, No. 04 C 834, 2004 WL 1244236, at *2 (N.D. Ill. June 3, 2004) (“Where the cases are as closely related as these three, it conserves resources to have them all determined by a single judge.”) .

Moreover, the Government Action has not progressed to the point where reassignment of the Cattle Ranchers Action would result in substantial delay in the Government Action, which was only filed a month ago and is barely underway.⁷ *See, e.g., River Village West*, 2007 WL 541948 at *2 (reassignment proper where “cases are in the earliest possible stages of discovery, so there will be no delay to any of the cases”); *Freeman v. Bogusiewicz*, No. 03 C 2908, 2004

⁷ On October 30, 2008, the Court denied the motion for expedited treatment filed by defendants JBS and National, which had been opposed by plaintiff DOJ and the plaintiff states. The schedule entered by the Court provides that fact discovery will close on March 20, 2009 and expert discovery will close on April 17, 2009. *See* October 30, 2008 Minute Order (Docket No. 39). Cattle Rancher Plaintiffs are willing to abide by those deadlines and any other imposed by Court such that no delay will be occasioned by reassignment of the Cattle Ranchers Action.

WL 1879045, at *2 (N.D. Ill. Aug. 11, 2004) (reassignment granted where “both actions are in the early stages of the proceedings”); *Teacher’s Retirement System of Louisiana*, 2004 WL 1244236, at *2 (Rule 40.4(b) satisfied where each of the cases was “in its infancy” and thus the court could not “detect any substantial delays that would result from the reassignment”).

In light of the similarities between the two cases, it is also clear that they are susceptible of disposition in a single proceeding. *See, e.g., Freeman*, 2004 WL 1879045 at *2 (“The facts and issues in both cases are similar in nature and can be handled more efficiently in one proceeding. Accordingly, this court finds that the cases are susceptible of disposition in a single proceeding.”); *Teacher’s Retirement System of Louisiana*, 2004 WL 1244236 at *2 (“As these three cases ... originate from the same core of facts, it is clear that they are susceptible of disposition in a single proceeding.”).

Because the requirements of Local Rule 40.4 are met, the Court should grant Cattle Rancher Plaintiffs’ motion for reassignment in the interest of promoting judicial economy.⁸

B. Consolidation Of The Government And Cattle Ranchers Actions Is Proper

Federal Rule of Civil Procedure 42(a) provides that if “actions before the court involve a common question of law or fact, the court may (1) join for hearing or trial any or all matters at

⁸ Although Rule 40.4(c) provides that “[i]n order that all parties to a proceeding be permitted to respond on the questions of relatedness and possible reassignment, such motions should not generally be filed until after the answer or motions in lieu of answer have been filed in each of the proceedings involved” the Rule has not been interpreted as precluding motions for reassignment prior to the filing of answers or motions in lieu of answer where all parties to all proceedings are given the opportunity to present their views on the motion for reassignment. *See Freeman*, 2004 WL 1879045 at *1 (concluding that a motion for reassignment was properly asserted where all parties were given the opportunity to respond, noting that the rule states only that the motion “should not *generally* be filed until after the answer or motions in lieu of answer have been filed”) (emphasis in original). Cattle Rancher Plaintiffs have served all parties in the Cattle Ranchers and Government Actions with the Cattle Rancher Plaintiffs’ Complaint and the motion for reassignment and consolidation.

issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay.”

“A court has discretion to consolidate related cases, which involve common questions of fact and law under Fed. R. Civ. P. 42(a), ‘under the policy that considerations of judicial economy strongly favor simultaneous resolutions of all claims growing out of one event.’” *Dollens v. Zions*, Nos. 01 C 5931, 01 C 2826, 2001 WL 1543524, at *2 (N.D. Ill. Dec. 4, 2001) (quoting *Ikerd v. Lapworth*, 435 F.2d 197, 204 (7th Cir. 1970)). *See also United States v. Knauer*, 149 F.2d 519, 520 (7th Cir. 1945), *aff’d*, 328 U.S. 654 (1946) (“Rule 42(a) of the Federal Rules of Civil Procedure ... was designed and intended to encourage such consolidation where possible”); *BP Products North America, Inc. v. Bulk Petroleum Corp.*, Nos. 07-C-1085, 07-C-1090, 2008 WL 4066106, at *5 (E.D. Wis. Aug. 27, 2008) (“Consolidation is preferred to avoid unnecessary duplication of efforts in related cases and promote judicial economy and efficiency.”).

As discussed above, the Cattle Ranchers and Government Actions share many common questions of law and fact, thereby making consolidation of the two cases proper under Rule 42(a). Consolidation of the two actions, which are both in the very early stages of litigation, would not result in any delay. Nor would any party to either action be prejudiced by consolidation at this stage. Consolidation is appropriate where, as here, joining the actions would promote judicial economy and efficiency. *See Midwest Community Council, Inc. v. Chicago Park District*, 98 F.R.D. 491, 499 (N.D. Ill. 1983) (noting that “the purpose of joining actions is to promote convenience and judicial economy” and that “[i]f two cases appear to this court to be of like nature and relative to the same question, if a joint trial of them would avoid

unnecessary costs and delay, and it is reasonable to try them together, it is within this court's discretionary power to order consolidation.”).

Opposition by one or more of the parties does not preclude the Court from joining the actions under Rule 42(a).⁹ See, e.g., *In re Nuveen Fund Litigation*, No. 94 C 360, 1994 WL 505294, at *2 (N.D. Ill. Sept. 15, 1994) (noting that “consolidation of an action may be ordered despite the objection of one or more parties”); *Midwest Community Council*, 98 F.R.D. at 499 (observing that “despite the objection of one party, or despite opposition of all parties, this court can order consolidation of the cases”) (citations omitted).

Cattle Rancher Plaintiffs are aware of a case in which the court denied a motion to consolidate private actions with a government enforcement action. In *United States v. Dentsply Int'l, Inc.*, 190 F.R.D. 140 (D. Del. 1999), the court denied defendant's motion for consolidation of two private actions with a government action seeking to enjoin defendant's violations under the Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. The court concluded that consolidation was precluded by public policy considerations, analogizing to the exclusion of government antitrust suits from multidistrict transfer and consolidation under 28 U.S.C. § 1407(g).

Even were *Dentsply* correctly decided,¹⁰ however, its holding does not preclude consolidation here. In *Dentsply*, the court emphasized that consolidation was inappropriate

⁹ As set forth in the accompanying motion, counsel for Cattle Rancher Plaintiffs has contacted counsel for the parties in the Government Action and Cattle Ranchers Action to determine whether those parties object to the motion. Counsel for the DOJ indicated that the DOJ intends to object. Counsel for the other parties said they are still considering their position on the motion.

¹⁰ Rule 42(a) does not contain any restriction against consolidation with government antitrust enforcement actions comparable to 28 U.S.C. § 1407(g). The court's analogy to 28 U.S.C. § 1407(g) is also inapt because the transfer and consolidation of actions under the multidistrict statute invariably involves delay of the actions while the motion for transfer is being briefed, argued and considered by the Judicial Panel on Multidistrict Litigation – delay that does not occur where, in *Dentsply* and as here, the related actions are already pending in the same district.

because the private actions were “private antitrust damages suits.” 190 F.R.D. at 144. The legislative history of 28 U.S.C. § 1407(g) also makes clear that the concern in passing the provision was to prevent private “treble damage suits” from causing substantial delays in government enforcement actions seeking injunctive relief. *See* H.R. Rep. No. 90-1130, *reprinted in* 1968 U.S.C.C.A.N. 1898 at 1905. Here, Cattle Rancher Plaintiffs seek only the same injunctive relief as do the DOJ and state plaintiffs.¹¹

The court in *Dentsply* also pointed to the legislative history of 28 U.S.C. § 1407(g) as expressing concern that private plaintiffs would be encouraged to file actions “merely to ride along on the Government’s cases.” 190 F.R.D. at 144 (citing H.R. Rep. No. 90-1130, *reprinted in* 1968 U.S.C.C.A.N. 1898 at 1902, 1905). As discussed above, however, Cattle Rancher Plaintiffs are not just along for the ride. They have devoted considerable time and resources in opposing the merger between JBS and National. They have worked since the merger was announced and conducted their own investigations into the anticompetitive impact of the acquisition. They testified before Congress in opposition to the merger and presented detailed materials to the DOJ and state plaintiffs.

Cattle Rancher Plaintiffs were, in fact, influential if not instrumental in the decision by the DOJ and states to challenge the merger. Far from hindering the government’s case, as was the concern with the private damage suits in *Dentsply*, Cattle Rancher Plaintiffs’ participation in a consolidated action will benefit the DOJ’s enforcement of the antitrust laws. Cattle Rancher Plaintiffs, who are closer to the cattle market than the DOJ and plaintiff states, will be able to

¹¹ Any argument that the DOJ might assert that its enforcement efforts would be slowed down by the addition of Cattle Rancher Plaintiffs as parties is also undercut by the existence of the seventeen state plaintiffs.

supply additional perspective, as well as important information that would be beneficial to the Court's evaluation of the proposed merger.¹²

Consolidation of private actions with a government action where all the actions challenged a merger and sought only injunctive relief was deemed appropriate by the court in *Community Publishers, Inc. v. Donrey Corp.*, 892 F. Supp. 1146, 1149 (W.D. Ark. 1995), *aff'd*, 139 F.3d 1180 (8th Cir. 1998) (ordering rescission of a merger "in a consolidated antitrust case in which the United States and private plaintiffs are challenging the purchase of a local daily newspaper"). In *Community Publishers*, the DOJ moved for consolidation of the two actions, noting in their brief in support of the motion (attached hereto as Exhibit I) that because the private and government actions alleged violations of Section 7 of the Clayton Act, arose from the same factual circumstances, and sought the same injunctive relief, the actions were "particularly appropriate for consolidation." The same reasoning supports consolidation here.

III. CONCLUSION

For the reasons stated above, the Court should grant Cattle Rancher Plaintiffs' motion for reassignment and consolidation.

Dated: November 19, 2008

Respectfully submitted,

By: /s/ Mary Jane Fait
Mary Jane Fait, Esq.
Theodore B. Bell, Esq.
**WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLC**

¹² It is because of their unique perspective and knowledge of the cattle market that Cattle Rancher Plaintiffs filed their own action rather than merely relying on the DOJ and plaintiff states to represent their interests. The DOJ and state plaintiffs, with their broad constituencies, represent a variety of different interests, whereas Cattle Rancher Plaintiffs will be able to focus on the impact of the merger on its cattle rancher members.

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 Ranchers-Cattlemen Action
Legal Fund, United Stockgrowers of
America and the Organization for
Competitive Markets (“Cattle Rancher
Plaintiffs”)*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of November, 2008 service of the foregoing document was accomplished pursuant to ECF as to Filing Users and I shall comply with LR 5.5 by serving the foregoing document via overnight delivery to:

Claude Scott
U.S. Department of Justice
Antitrust Division
1401 H. Street N.W., Suite 8000
Washington, DC 20530

John M. Snyder
U.S. Department of Justice
Antitrust Division
450 5th Street, N.W., Suite 4100
Washington, DC 20530

/s/ Mary Jane Fait
Mary Jane Fait