IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA, et al.,	
Plaintiffs,	Case No. 08 C 5992
v.	Honorable Elaine E. Bucklo
JBS S.A. and NATIONAL BEEF PACKING CO., LLC,	Honorable Arlander Keys
Defendants.	

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR EXPEDITED TREATMENT

I. INTRODUCTION

Plaintiffs, the United States and thirteen states, oppose the Defendants' request to rush this matter to judgment. With more than $50 billion in commerce at stake, the case raises significant competitive issues that would affect cattle producers, wholesale purchasers of beef, and ultimately U.S. consumers. Plaintiffs seek to enjoin JBS S.A.'s ("JBS") acquisition of National Beef Packing Company, LLC ("National"), the fourth largest beef packer in the United States. The acquisition would make JBS the largest U.S. beef packer and leave JBS and two other firms in control of over 80% of U.S. fed cattle slaughter capacity.

Plaintiffs propose a disciplined pre trial schedule, with fact discovery closing on March 20, 2009, expert discovery finished by April 17, 2009, and a trial on the merits to follow as soon as possible in light of the Court's docket. Plaintiffs view this schedule as

an ambitious but reasonable timetable given the issues in this case and the parties' need to prepare for a trial on the merits.

In contrast, citing to a contract provision that they imposed on themselves, Defendants propose that a full trial on the merits begin in less than three months – a schedule that would be barely adequate for a preliminary injunction proceeding in a case such as this one. Purely private commercial concerns -- particularly those that are wholly within the control of the merging parties -- should not trump the public interest in protecting competitive markets and ensuring that the Court has the evidence and time necessary to evaluate the issues presented by the proposed acquisition.

Plaintiffs agree that a status conference is appropriate to resolve the continuing disagreement between the parties regarding the length of the pre trial discovery period in this case. Once the Court has resolved this dispute, Plaintiffs will work with the Defendants to reach agreement on the details of a proposed Joint Scheduling and Case Management Order for consideration by the Court.

II. BACKGROUND

1. In early March, 2008, JBS publicly announced that it had reached agreements to acquire both National and Smithfield Beef Group, Inc. ("Smithfield") – combining the third, fourth and fifth largest beef packers in the United States. Among them, the parties to these two proposed transactions operate beef packing plants in ten states with a combined capacity to process close to 40,000 head of cattle per day. The parties employ hundreds of corporate level employees and have annual sales of close to $14 billion. In addition to beef packing facilities, one or more of the parties also operates trucking interests, feedlots, and further processing facilities.

2. On April 24, 2008, the Antitrust Division of the U.S. Department of Justice issued requests for additional information to Smithfield, JBS, and National to assess whether the JBS/National and the JBS/Smithfield transactions were likely to raise competitive concerns.

3. The Defendants did not produce the bulk of their documents, data and written responses to these requests until late June and early July. National and Smithfield certified compliance with the requests on July 11, 2008, and JBS certified as of July 14, 2008. The Antitrust Division moved quickly to review the available information, because a timing agreement with Defendants provided that the Defendants could choose to close their transactions as early as 51 days after this compliance. The Division took depositions of two National executives and four JBS executives in August and the beginning of September.

4. On September 12, 2008, JBS gave the Antitrust Division notice of its intent to close both transactions as early as October 7, 2008, unless the Division filed a Complaint to enjoin the transactions. With that, the Antitrust Division directed its efforts towards reaching a final enforcement decision. Subsequently, the parties for the first time asked the Antitrust Division to separately consider the antitrust merits of the two transactions.

5. On October 20, 2008, the United States and thirteen states filed this action to enjoin JBS's acquisition of National. Plaintiffs have alleged that the proposed transaction will likely significantly reduce competition in two product markets: the purchase of high quality grain-fed cattle ("fed cattle") and the production and sale of the resulting beef

products ("boxed beef"). On the same day, the United States notified JBS that it would not seek to block its acquisition of Smithfield.

6. Also on October 20, 2008, Plaintiffs provided counsel for Defendants with a courtesy copy of the Complaint, a draft proposed Joint Scheduling and Case Management Order, and a draft proposed Confidentiality Order. The schedule proposed by Plaintiffs provided for reciprocal discovery rights with fact discovery to close by March 20, 2009, with expert discovery finished by April 17, 2009, and a trial on the merits to follow as soon as possible in light of the Court's docket. Ex. A.

7. On October 23, 2008, Defendants responded with an alternative schedule that provided for the conclusion of all party discovery by November 17, 2008, all non-party discovery by December 8, 2008, and all expert discovery by December 16, 2008. Ex. B. Defendants originally proposed a trial on the merits to commence after January 5, 2009, and have since proposed that a trial should begin on or about January 20, 2009.

8. On October 24, 2008, the parties met and conferred but failed to reach agreement on a proposed schedule.

III. ARGUMENT

A. Plaintiffs' Proposal Allows for the Development of An Appropriate Trial Record

By their nature, antitrust cases typically involve complex legal, factual, and economic matters. As Defendants note, there are numerous "key issues that will be before the Court in this trial" (Def. Mem. at 3), including the definition of the relevant product and geographic markets and the likelihood of competitive harm in those markets, the ability of entry or expansion by competing beef packers to be timely, likely and sufficient to deter or counteract any such competitive harm, and the assessment of any

cognizable, merger-specific efficiencies that the Defendants claim will result from the acquisition.

The parties will need to conduct discovery to develop the record -- and to develop admissible evidence -- as to these numerous "key issues," including discovery from each other and from marketplace participants such as competing packers (*i.e.*, Tyson and Cargill), suppliers of cattle, and purchasers of boxed beef. Moreover, expert discovery will include pre-trial exchange of reports, depositions of testifying experts, and any related motions practice. [1] While the Plaintiffs propose a reasonable but ambitious schedule to conduct such discovery, the Defendants would require that all discovery, including fact discovery, expert discovery, and motions on discovery disputes, be completed in advance of a January 20, 2009 trial date. Defendants' proposal simply does not take into account the extensive discovery that will occur. [2]

Plaintiffs propose to have a trial on the merits at the Court's convenience after the close of discovery. The Defendants, however, state that they are "willing" to have a one-week trial starting around January 20, 2009, in order to "allow the Court up to four weeks to consider the evidence and issue an opinion prior to the merger agreement's termination date." Def. Mem. at 2. Defendants' position is unrealistic. A five-day hearing does not provide adequate time to submit a comprehensive record that would allow for meaningful consideration of the issues in the case. Such a truncated proceeding would be insufficient

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[1] The Defendants' initial proposal calls for the submission of any *Daubert* motions by December 22, 2008 and a court hearing on the motions on January 2, 2009. Ex. B at ¶ 15.

[2] The Defendants recognize that such discovery will be extensive. In fact, they originally proposed that the Defendants would be entitled to take an "unlimited" number of party and non-party depositions and serve an "unlimited" number of interrogatories on the Plaintiffs (while limiting the Plaintiffs to no more than 10 depositions and interrogatories). (Ex. B at ¶¶ 6 & 7). Plaintiffs proposed thirty-five fact depositions per side.

for a preliminary injunction,[3] much less for the full trial on the merits that the Defendants request. The Court should not allow the Defendants' contract termination date to limit the time that the Court believes would be necessary to consider the evidence and issue a ruling. Cf. FTC v. Whole Foods Market, Inc., 533 F.3d 869, 882 (D.C. Cir. 2008) ("We appreciate that the district court expedited the [preliminary-injunction] proceeding as a courtesy to the defendants, who wanted to consummate their merger just thirty days after the hearing..., but the court should have taken whatever time it needed to consider the FTC's evidence fully.").

B. The "Expedited Treatment" Sought by Defendants is Not Warranted

1. Defendants' "Expedited" Schedule is Not Justified by their Private Commercial Dispute

The primary justification for Defendants' proposed rush to judgment is the private commercial agreement between the parties that would permit, *but not require*, National to terminate the agreement if it has not closed by February 23, 2009. If National terminates the agreement upon that date, it can collect a fee of $25 million from JBS.

National's implied threat to terminate the agreement and extract $25 million from JBS is a purely private matter that should not be permitted to outweigh the public interest in having the merits of this case decided on the basis of a fully developed record. The self-imposed "deadline" and potential break-up fee are provisions agreed to by the parties that can be changed with the stroke of a pen.[4]

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[3] In United States v. UPM Kymmene Oyj, et al., No. 03-C2528, (N.D. Ill., Apr. 21, 2003)(Zagel, J.), a case on which Defendants rely (Def. Mem. at 4), the hearing for a preliminary injunction – not a trial on the merits – lasted two weeks.

[4] Tellingly, the Defendants never state that the transaction will be abandoned after February 23; they state only that it "may be terminated." Def. Mem. at 5. Faced with similar arguments that a transaction might be abandoned, the D.C. Court of Appeals stated:

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2. Plaintiffs' Pre-Filing Investigation is Not a Substitute for Civil Discovery in Advance of a Trial on the Merits

Defendants assert that a "highly compressed time frame" is warranted because the government had the "benefit" of conducting an investigation. Def. Mem. at 4. The Antitrust Division, however, uses the investigation period to reach an informed decision about whether to initiate a legal challenge to a proposed transaction, not to gain a litigation advantage. Much of the relevant information that is gathered during the investigation phase is not collected in a form that would be admissible in a trial on the merits. Significant time is spent learning how a particular industry operates so that an accurate decision can be reached about the likely impacts of the transaction. Typically, a portion of investigation is spent on issues that ultimately are not found to merit legal challenge. Here, the Antitrust Division concurrently investigated JBS's proposed acquisition of Smithfield, a transaction the Antitrust Division ultimately elected not to challenge.

Courts have recognized that time spent by the government investigating whether to bring an action is not a substitute for pre-trial discovery. See SEC v. Sargent, 229 F.3d 68, 80 (1st Cir. 2000). In SEC v. Saul, 133 F.R.D. 115, 118 (N.D. Ill. 1990)(Rovner, J.), the District Court recognized the importance of adequate post-Complaint discovery under comparable circumstances:

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> [A]lthough the appellees state that if an injunction pending appeal is granted they may abandon the merger, they do not unequivocally state that they will do so. . . . Moreover, even if the current merger plans were abandoned, the evidence does not establish that the efficiencies the appellees urge could not be reclaimed by a renewed transaction following success on appeal.

F.T.C. v. H.J. Heinz Co., 2000-2 Trade Cases ¶ 73,090; 2000 WL 1741320, at *2 (D.C. Cir. Nov. 8, 2000).

> [T]he Court finds considerable merit in the [agency]'s contention that once it has completed its investigation and filed suit, it is entitled to review its investigation and avail itself of its discovery rights in order to prepare its case for trial. . . . Once the complaint has been filed and the defendants have answered, the issues requiring resolution have been clarified, and all parties must be afforded the opportunity to conduct discovery and prepare for trial with those issues in mind.

Defendants point to cases that they suggest show that "trial schedules" in merger litigation generally proceed in highly compressed time frames. As Defendants acknowledge, however, several of the cases cited were not trials at all, but were hearings on the government's motions for preliminary injunctions. See e.g. FTC v. Whole Foods Mkt., Inc., 502 F. Supp. 2d 1 (D.D.C. 2007) (Friedman, J.); United States v. UPM Kymmene et al., No. 03-C2528 (N.D. Ill. April 21, 2003) (Zagel, J.).[5]

The discovery schedule proposed by the Plaintiffs is consistent with the approach used in judicial review of many other mergers.[6] Other than the contractual provisions that they have imposed on themselves, the Defendant have not suggested why a disciplined but reasonable scheduled such as that proposed by Plaintiffs is not appropriate here.

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[5] Similarly, the United States' challenge to Oracle acquisition of PeopleSoft took place in the context of a hostile corporate take-over, which is far different from the circumstances here.

[6] See e.g. United States v. Lockheed Martin Corp., et al., No. 98-CV-00731 (D.D.C. filed Mar. 23, 1998) (168 days from complaint to hearing); United States v. NW Airlines Corp., et al., No. 98-74611 (E.D. Mich. filed Oct. 23, 1998) (740 days from complaint to trial on the merits on consummated transaction); United States v. Carilion Health Sys., et al., 707 F. Supp. 840, 841 (W.D. Va. 1989), aff'd, No. 89-2625, 1989 WL 157282 (4th Cir. Nov. 29, 1989) (trial commenced more than six months after complaint filed); United States v. Primestar, Inc. et al., No. 98-CV-01193 (D.D.C. filed May 12, 1998) (263 days from complaint to trial on the merits).

IV. CONCLUSION

Plaintiffs respectfully request that the Court deny Defendants' Motion for Expedited Treatment of the litigation and direct the parties to meet and confer to develop a schedule consistent with the discovery deadlines proposed by Plaintiffs.

Dated this 28th day of October, 2008.

Respectfully Submitted,
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