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July 1, 2008

Hon. Lawrence L. Piersol
United States District Court for the District of South Dakota
400 South Phillips Ave., Room 202
Sioux Falls, SD 57104

Re.: *Ranchers Cattlemen Action Legal Fund, United Stockgrowers of America, et al. v. U. S. Dept. of Agriculture, et al.*, Civil Action No. 07-1023 – Notice of Supplemental Authority

Dear Judge Piersol:

The purpose of this letter is to inform the Court of new authority that supports Plaintiffs' pending motion for a preliminary injunction in the above-captioned action. On June 23, 2008, the Canadian Food Inspection Agency ("CFIA") announced that an additional case of BSE had been detected. On June 27, 2008, CFIA revealed that it was a five-year-old cow that was born and raised in the Province of British Columbia. See CFIA, "Latest Information (as of June 27, 2008 – 13:00 EST)," available at <http://www.inspection.gc.ca/english/anim/hesandisemala/bseesb/situatione.shtml> (last visited June 30, 2008).

This animal, which was born in 2003, is the second-youngest bovine found to have BSE in Canada and was born more recently than any other BSE-infected cattle identified in Canada. There have now been 14 reported cases of BSE in cattle born in Canada. Half of the BSE cases detected in Canadian-born cattle have been in cattle born after March 1, 1999 (the date that defendant United States Department of Agriculture ("USDA") concluded, in the rulemaking at issue in this case, was the date on which Canada's ban on ruminant protein in ruminant feed was effective to stop the spread of BSE). This is the eighth reported case that was born after the Canadian feed ban went into effect in 1997. It also is the third reported case that was born and raised in British Columbia province.

A revised version of the visual aid provided to the Court at the February 19, 2008 hearing on the preliminary injunction motion, reflecting this latest case of BSE reported in Canada, is enclosed.* Also enclosed is a revised version of the chart of Canadian BSE

* It also includes the additional case of BSE in Alberta province, reported February 26, 2008. See Post-hearing Comments of *Amicus Curiae* the Government of Canada at 2 n.2.

cases that was provided as Attachment 1 to Exhibit 1 to Plaintiffs' Reply in Support of Motion for Preliminary Injunction, updated to include the latest information from CFIA's website.

This development bears directly on Plaintiffs' likelihood of success on the merits of their complaint, in particular Plaintiffs' demonstration that USDA's conclusions that the Canadian feed ban was effective to stop the spread of BSE in Canada as of March 1, 1999 and that the prevalence of BSE in Canada has been and will be decreasing were speculative and inconsistent with the available information. *See* Motion for Preliminary Injunction at 15-16. It provides further support for the point, made e.g. at pp. 13, 14 of Plaintiffs' Response to Post-Hearing Comments of *Amici Curiae*, that there have been at least three generations of BSE-infected cattle in the Canadian indigenous herd (in addition to another generation of BSE infection in one or more cattle imported from the United Kingdom in the 1980s). The fact that there have now been 3 native-born BSE cases in British Columbia (in addition to 10 in Alberta and 1 in Manitoba) confirms Plaintiffs' assertion that BSE infectivity has been circulating in the Canadian feed supply more widely (geographically and over time) than USDA assumed. The relatively short incubation period for the latest identified case also supports Plaintiffs' argument that USDA's assertion that infectivity in Canada is low, based on BSE incubation periods, is contrary to the facts. *See id.* at 7-8.

The fact that this latest case of BSE announced this month was in a cow that could just as easily have died and been determined to have BSE in the United States, after importation into the United States under the regulation being challenged in this case, is further support for Plaintiffs' demonstration that they face an imminent threat of substantial, irreparable injury if the challenged regulation is not enjoined. *See, e.g.*, Motion for Preliminary Injunction at 20-21; Plaintiffs' Reply in Support of Motion for Preliminary Injunction at 18-21. This is also reinforced by another development since the February 19, 2008 hearing and the filing of post-hearing briefs: the dramatic demonstrations in recent weeks that Korean consumers are already fearful of U.S. beef because of concerns that it carries a higher risk of BSE than domestic cattle (based on the December 2003 discovery of BSE in an Alberta-born cow that died in Washington State and two subsequent cases in older U.S.-born cattle announced in June 2005 and March 2006).

After the Korean government recently announced plans to resume imports of U.S. beef, tens of thousands of Korean citizens demonstrated in protest, out of fear that U.S. beef carries an unacceptable risk of BSE, forcing the government to reconsider its decision. *See, e.g.*, *International Herald Tribune*, "New protests in Seoul stop deal on U.S. beef," June 22, 2008, available at <http://www.iht.com/articles/2008/06/22/asia/beef.php> (last visited June 30, 2008); *Dallas Morning News*, "Korea's beef with America," June 18, 2008, available at http://www.dallasnews.com/sharedcontent/dws/dn/opinion/editorials/stories/DN-beef_18edi.ART.State.Edition1.4d4d1c4.html (last visited June 30, 2008). These developments in Korea, previously an \$800 million/year market for U.S. beef, based on the discovery of a couple of cases of BSE discovered in the United States several years

That case was included in a revised visual aid submitted as Exhibit 1 to Plaintiffs' Response to Post-Hearing Comments of *Amici Curiae*.

ago, bear directly on the reasonableness of USDA's speculation in the preamble to the challenged rule that the economic impact of the discovery of additional cases of BSE in the United States "will likely be minimal." See Motion for Preliminary Injunction at 21. The developments in Korea can be viewed with the knowledge now that two of the three BSE cases discovered since the challenged rule went into effect could have been imported legally into the United States from Canada under the challenged rule before they succumbed to BSE.

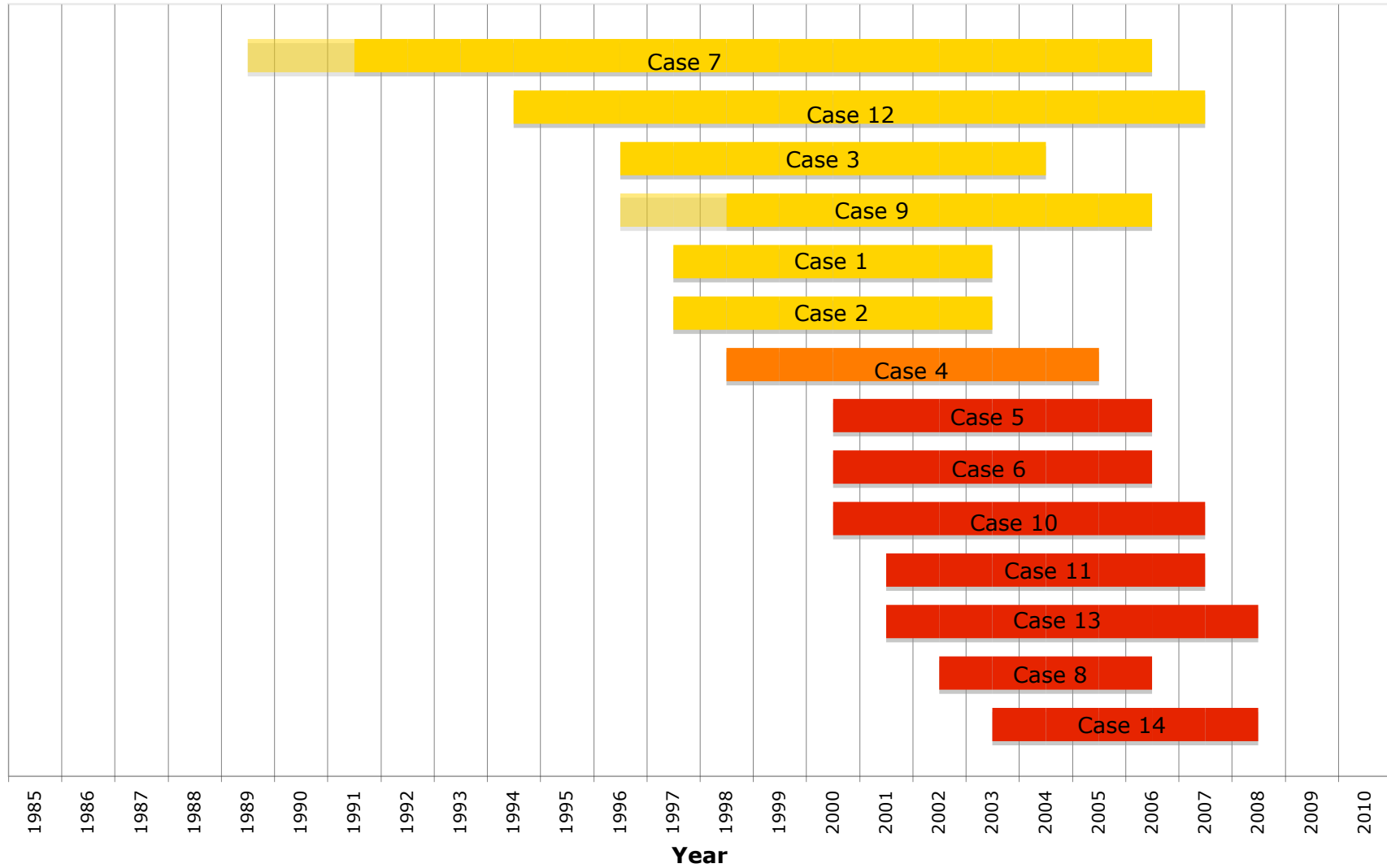
Respectfully submitted,
Russell S. Frye
Attorney for Plaintiffs
(admitted *pro hac vice*)

William L. Miller
Attorney for Plaintiffs
(admitted *pro hac vice*)

/s/ Thomas P. Tonner
Thomas P. Tonner
Local Counsel for Plaintiffs

cc: Counsel of Record
Attachment

Lifespans of Known BSE-Positive Canadian-Born Cattle



Matrix of Known Canadian BSE Cases

Prepared by
Bill Bullard, CEO, R-CALF USA
 Revised June 30, 2008

Case	Type	Birth	Presented	Age (months)	Location
1	Beef	Imported from UK in 1987	December 1993	Unknown	(Alberta)
2	Beef	MAR1997	JAN03	70	Slaughterhouse (Alberta)
3	Dairy	APR1997	DEC03	80	Washington State Slaughterhouse (Alberta Origin)
4	Dairy	OCT1996	DEC04	98	Farm (Alberta)
5	Beef	MAR1998	JAN05	81	Farm (Alberta)
6	Dairy/Beef cross	APR2000	JAN06	69	Farm (Alberta)
7	Dairy	APR2000	APR06	71	Farm (British Columbia)
8	Beef	1989-90	JUN06	16-17 YRS	Farm (Manitoba)
9	Dairy	APR2002	JUL06	50	Farm (Alberta)
10	Beef	1996-98	AUG06	8-10 YRS	Farm (Alberta)
11	Beef bull	JUN2000	FEB07	79	Farm (Alberta)
12	Dairy	NOV2001	MAY07	66	Farm (British Columbia)
13	Beef	MAR1994	DEC07	165 (13 YRS)	Farm (Alberta)
14	Dairy	DEC2001	FEB08	74	(Alberta)
15	Dairy	2003	JUN08	5 YRS (approx 60 mos.)	(British Columbia)

Data Sources:

Data for Case 1 were obtained from the following sources: *Risk Assessment on Bovine Spongiform Encephalopathy in Cattle in Canada*, Animal Health Risk Analysis, Animal, Plant and Food Risk Analysis Network (APFRAN), Canada, December 2002, at 36; *Canada's Assessment of the North American BSE Cases Diagnosed From 2003-2005, Part II*, Canadian Food Inspection Agency, January 23, 2006, available at <http://www.inspection.gc.ca/english/anima/heasan/disemala/bseesb/eval2005/evale.shtml>; *Technical Overview of BSE in Canada – March 2005*, Canadian Food Inspection Agency,

available at

<http://www.inspection.gc.ca/english/anima/heasan/disemala/bseesb/200503canadae.shtml>.

Data for Cases 2 through 5 were obtained from the Declaration of USDA expert witnesses William D. Hueston, Guy H. Loneragan, and Srinand Sreevatsan, in *R-CALF USA v. USDA*, June 7, 2005, at 26.

Origin of Case 3 and data for Cases 6 through 10 were obtained from the Canadian Food Inspection Agency, "Completed Investigations," available at <http://www.inspection.gc.ca/english/anima/heasan/disemala/bseesb/comenqe.shtml#1>.

Data for Case 11 was obtained from the Canadian Food Inspection Agency website, "Latest Information (as of March 6, 2007 – 16:30 EST)," available at <http://www.inspection.gc.ca/english/anima/heasan/disemala/bseesb/situatione.shtml>.

Data for Case 12 was obtained from the Canadian Food Inspection Agency website, "Latest Information (as of July 25, 2007 – 13:30 EST)," available at <http://www.inspection.gc.ca/english/anima/heasan/disemala/bseesb/situatione.shtml>.

Data for Case 13 was obtained from the Canadian Food Inspection Agency website, "Latest Information (as of April 16, 2008 – 15:00 EST)," available at <http://www.inspection.gc.ca/english/anima/heasan/disemala/bseesb/situatione.shtml>.

Data for Case 14 was obtained from the Canadian Food Inspection Agency website, "Latest Information (as of February 26, 2008 – 11:00 EST)," available at <http://www.inspection.gc.ca/english/anima/heasan/disemala/bseesb/situatione.shtml>.

Data for Case 15 was obtained from the Canadian Food Inspection Agency website, "Latest Information (as of June 27, 2008 – 13:00 EST)," available at <http://www.inspection.gc.ca/english/anima/heasan/disemala/bseesb/situatione.shtml>.