

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

ORGANIZATION FOR COMPETITIVE  
MARKETS,

Plaintiff,

vs.

OFFICE OF INSPECTOR GENERAL,  
UNITED STATES DEPARTMENT OF  
AGRICULTURE,

Defendant

and

NATIONAL CATTLEMEN'S BEEF  
ASSOCIATION,  
9110 East Nichols Avenue, Suite 300  
Centennial, Colorado 80112

Proposed Defendant-  
Intervenor

**Civil Action No. 1:14-cv-1902-EGS**

**MOTION TO INTERVENE**

National Cattlemen's Beef Association ("NCBA"), by and through its undersigned counsel, hereby moves pursuant to Rule 24(a)(2) and, alternatively, Rule 24(b) of the Federal Rules of Civil Procedure to intervene in this action. Plaintiff Organization for Competitive Markets ("Plaintiff" or "OCM") brought the present action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to compel the Office of Inspector General ("OIG") of the United States Department of Agriculture ("USDA") to produce records relating to a 2013 OIG audit pertaining to the Agricultural Marketing Service ("AMS") and oversight of the Cattlemen's Beef Promotion and Research Board ("Beef Board"). Numerous of the USDA documents responsive to the FOIA request were originated by NCBA, and some currently undetermined number of

those documents contains NCBA's confidential business information. Whatever confidential business and proprietary information those documents may contain constitute NCBA's property which NCBA has a substantial interest in protecting from disclosure. Thus, NCBA has an interest in this litigation which it has a right to seek to protect.

NCBA's request is timely. While NCBA had heard rumors about a potential FOIA request several years ago, NCBA first confirmed the existence about the FOIA request in August 2016. NCBA has never been a party to this litigation and has not been informed of it by either party, despite the fact that many of the documents at issue originated from NCBA.

Finally, it is apparent that only NCBA has the ability to protect those interests. NCBA only learned about the existence of this litigation on September 6, 2016, and, upon review of the docket, learned that the Court had before it proposed orders to set a production schedule for those documents. Normally in a FOIA proceeding, NCBA, pursuant to USDA regulations, would have been given the right, some time ago, to review any of its documents that are subject to FOIA release in order to determine whether they contain confidential business or proprietary information, which NCBA has a substantial interest in keeping confidential. NCBA cannot rely on the USDA—which has neither informed it of this litigation nor consulted with it regarding an appropriate schedule for review and production of NCBA's documents—to adequately defend NCBA's interests. Because of the USDA's failure to follow its regulations, the burden of any order setting disclosure timelines would fall on NCBA, a non-governmental private entity not in the business of responding to FOIA requests, and its interests would be impaired by entry of an order compelling disclosure without giving NCBA a reasonable time to review and protect its documents. By its proposed intervention, NCBA seeks a right to participate in the Court's

determination of an appropriate production schedule and to protect its confidential business and proprietary information.

For these reasons, as more fully set forth in the attached Memorandum of Points and Authorities in Support of NCBA's Motion to Intervene, NCBA respectfully requests that this Court grant its motion to intervene.

Pursuant to D.D.C. Local Rule 7(m), counsel for NCBA has conferred with counsel for Plaintiff and the USDA. Both parties have indicated they would oppose NCBA's proposed intervention. In accordance with D.D.C. Local Rule 7(c) and 7(j), NCBA attaches a proposed order permitting intervention and a proposed answer to OCM's complaint.

Dated: September 13, 2016

Respectfully submitted,

/s/ Daniel C. Schwartz

Daniel C. Schwartz (D.D.C. Bar # 0017749)

Bryan J. Harrison (D.D.C. Bar # 1016187)

BRYAN CAVE LLP

1155 F Street, NW

Washington, D.C. 20004

Telephone: 202-508-6000

E-mail: dcschwartz@bryancave.com

E-mail: bryan.harrison@bryancave.com

*Attorneys for Proposed Defendant-  
Intervenor National Cattlemen's Beef  
Association*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 13th day of September 2016, a copy of the foregoing Motion to Intervene, along with a copy of the Memorandum of Points and Authorities in Support of NCBA's Motion to Intervene, Declaration of Douglas L. Evans, Proposed Order, Proposed Answer, and Local Rule 7.1 Certification were served via ECF on the following parties of record:

Matthew Eric Penzer  
Humane Society of the United States  
1255 23rd Street, Suite 450  
Washington, D.C. 20037

*Attorneys for Plaintiff*

Rhonda Lisa Campbell  
Laura Emily Jennings  
U.S. Attorney's Office for the District of Columbia  
555 Fourth Street, N.W.  
Washington, D.C. 20530

*Attorneys for Defendant*

/s/ Daniel C. Schwartz

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF NCBA'S  
MOTION TO INTERVENE**

National Cattlemen's Beef Association ("NCBA"), in support of its Motion to Intervene, states the following:

Plaintiff Organization for Competitive Markets ("OCM" or "Plaintiff") seeks to compel the United States Department of Agriculture ("USDA") to produce documents related to USDA's Office of Inspector General's ("OIG") April 2013 and January 2014 audit reports. Only within the past month has NCBA had an opportunity to review about 500 of the apparently estimated 23,000 pages of such documents and can confirm that those 500 pages are NCBA documents, a large number of which contain NCBA's confidential and proprietary business information.

USDA has not communicated to NCBA how many of the remaining 23,000 pages are NCBA documents and, of course, NCBA cannot judge, without first seeing them, the extent to which they contain business confidential and proprietary information. The proposed order submitted to this Court by OCM (ECF No. No. 32) would create an undue if not impossible burden on NCBA, depending on the number of its documents that are involved, and would effectively deprive NCBA of its right to protect sensitive information. NCBA cannot evaluate the proposed order proposed by the USDA OIG (ECF No. 33) without knowing the extent of the documents that were originated by NCBA and what they contain.

Normally, in a FOIA proceeding, NCBA (and any private producer of documents in the government's hands) should not have this problem. Under the applicable Executive Order and USDA's regulations, USDA OIG should have promptly informed NCBA of the existence of the original FOIA request in 2013 and shared with NCBA the NCBA documents that it was considering to produce in response so that this process of review and redaction would have occurred, pursuant to the regulations, long ago. Under those regulations, NCBA should have had a reasonable time to review and comment on the documents before they were actually to be produced. That did not happen here, and any production schedule the Court orders in this case, without considering the impact on NCBA's desire to protect its confidential and proprietary information, would be unfair to NCBA and deprive it of its rights under the applicable Executive Orders and the USDA's regulations.

There is substantial precedent in this District to allow entities to intervene in FOIA litigation in order to protect their confidential business information. NCBA's application for intervention of right is timely, coming within days of learning of the litigation and within a month of confirming OCM's active FOIA request. NCBA has a strong interest in protecting the

disclosure of the information, as well as being provided an opportunity to review and object to the disclosures. NCBA's interests are not adequately represented in this litigation because neither current party has had, up to this moment, the incentive to inform much less consult with NCBA about its documents subject to possible production as a result of this litigation; in fact, both parties have indicated they would object to NCBA's motion to intervene to protect its interests in this matter. Furthermore, only NCBA can, in the first instance, determine which information it considers to be confidential or proprietary.

Alternatively, NCBA should be allowed to permissively intervene to ensure that that this Court does not require disclosure of confidential business information without giving NCBA a proper, reasonable opportunity to review and object to disclosures. NCBA's concerns share common questions of law and fact with Plaintiff's claims and intervention and USDA's defenses and will not unduly prejudice either Plaintiff or the USDA.

### **FACTS**

NCBA is a membership organization with more than 26,000 members comprised of participants in all segments of the cattle and beef business. Declaration of Douglas L. Evans ("Evans Decl."), attached hereto as Exhibit A, at ¶ 2. As a membership organization with offices in Denver, Colorado and Washington, D.C., NCBA advocates on behalf of its members on a wide range of topics that affect the industry at the national level. *Id*

The Beef Research and Information Act, and the Beef Promotion and Research Order established and structured the Cattlemen's Beef Promotion and Research Board ("Beef Board") to carry out a program of generic beef promotion and research. 7 U.S.C. §§ 2901-2911; 7 C.F.R. §§ 1260.101-1260.640. The Beef Board is required to contract with approved, industry-related organizations, of which a primary contractor, currently, is NCBA. *See* 7 C.F.R. §§ 1260.113,

1260.168. NCBA manages and implements programs which are focused on research, as well as the marketing and promotion of beef and beef products. Evans Decl. at ¶ 2. The Beef Board also administers the beef checkoff program, which generates revenue through producer and importer assessments on cattle. The USDA provides oversight through the Agricultural Marketing Service ("AMS"). 7 C.F.R. § 2.22(a)(1)(viii)(X). AMS oversight is to ensure that the checkoff funds are used properly.

In 2011, the USDA initiated an audit to determine if AMS' oversight procedures were adequate to ensure that beef checkoff assessments were collected, distributed, and expended in accordance with federal law and regulations. *See* January 2014 OIG Report, Agricultural Marketing Service Oversight of the Beef Promotion and Research Board's Activities, available at <https://www.usda.gov/oig/webdocs/01099-0001-21.pdf> (last visited September 13, 2016) (the "Audit Report"). Plaintiff alleges it previously made a FOIA request to the USDA on April 11, 2013, which, according to Plaintiff, has not been responded to properly. Complaint, ECF No. 1 at ¶ 15. As a result, Plaintiff brought this litigation in November 2014 to seek information and documents pertaining to "conflict of interest allegations that permeate the beef checkoff and NCBA operations." *Id.*

Although vaguely aware that there may have been a FOIA request to AMS relating to the Audit Report, NCBA had not been consulted by the AMS FOIA office about this FOIA request until August 3, 2016, when NCBA received a communication from an AMS FOIA Specialist. Evans Decl. at ¶ 3. In that communication, the FOIA Specialist requested that NCBA review a single-page document that had been originated by NCBA for possible release in response to a FOIA request by OCM. *Id.* NCBA was not provided with the actual FOIA request. *Id.* In response to the FOIA Specialist's request, NCBA Chief Financial Officer Douglas L. Evans



marked information in that document he believed to be exempt from production under FOIA and returned it, within a few days, to the FOIA Specialist. *Id.* at ¶ 4. On August 30, 2016, the AMS FOIA office informed Mr. Evans that AMS agreed with NCBA's proposed redactions on the one-page document. *Id.* The next day, on August 31, 2016, NCBA received from the same AMS FOIA Specialist an additional approximately 500 pages of documents to review and was asked to respond by September 15, 2016. *Id.* at ¶ 5. NCBA is in the process of undertaking that review, but does not believe it can accomplish a proper and thorough review of all of those documents by September 15th. *Id.*

NCBA was first made aware of this litigation on September 6, 2016, when NCBA learned that these FOIA requests may be related to litigation, and its attorneys searched for and identified the case and the docket sheet. *Id.* at ¶ 6. NCBA has never been informed by either of the parties that the litigation exists even though a number of the documents at issue in the FOIA request that is the subject of this litigation are originally NCBA documents, a number of which appear to contain confidential and proprietary business information. *Id.*

Following an August 23, 2016 status hearing, the existing parties recently submitted proposed orders outlining suggested disclosure timing and requirements. *See* ECF Nos. 32, 33. Plaintiff's proposed order requires completion and production of records within 30 days of the date of the order. ECF No. 32. USDA's proposed order provides that production will be made in due course, but does not explicitly provide to NCBA a reasonable opportunity to review and object to disclosure of its business documents, instead referencing a Declaration of William Allen and suggesting that review from "affected companies or entities" can be done in 30 days. ECF Nos. 33-1 at 1; ECF No. 33-2 at ¶ 16.

In reviewing the docket, NCBA learned for the first time that the response to the FOIA request may involve as many as 23,000 pages of documents that likely include many NCBA documents. Evans Decl. at ¶ 7. At this time, NCBA does not know how many of its documents are included among the approximately 23,000 pages, or the extent to which they may include information properly exempt from production. Furthermore, NCBA does not know when it will receive from the AMS FOIA office responsive documents for it to review or how much time it will be given to review those documents and, as necessary, mark them and justify, as appropriate, their redaction from the documents. *Id.*

NCBA has a small administrative staff and does not have any staff members experienced in reviewing documents and determining which information is exempt under FOIA. Evans Decl. at ¶ 8. In addition, NCBA does not employ in-house legal counsel or a FOIA officer. *Id.* Reviewing large volumes of documents for possible FOIA exemptions is beyond NCBA's usual workload and expectations. To do any such review properly and without significant disruption will require a tremendous learning curve, shifting of workloads, and other adjustments. *Id.*

NCBA is justifiably concerned that the Court, hearing only from the two named parties to this case, will issue a scheduling order for production of documents in response to the FOIA request which does not take into account the requirements any such order will impose on NCBA to ensure that its business confidential and proprietary information is properly excluded from production. *Id.* at ¶ 9. NCBA seeks to intervene so that its views are before the Court in considering a timetable that would allow it to review all of these documents so as to protect from disclosure its business confidential and proprietary information.

### **USDA FOIA REQUIREMENTS**

In accordance with Executive Order 12,600, it is the policy of the USDA to "obtain and consider the views of the submitter of the information and to provide the submitter with an opportunity to object to any decision to disclose the information." 7 C.F.R. § 1.12. USDA regulations require that when a FOIA request contains information from a private business, the USDA agency shall "[p]rovide the business information submitter with prompt notification of a request for that information." 7 C.F.R. § 1.12(a). The USDA agency must also "[a]fford business information submitter reasonable time in which to object to the disclosure of any specified portion of the information." *Id.*

### **ARGUMENT**

"The right of intervention conferred by Rule 24 implements the basic jurisprudential assumption that the interest of justice is best served when all parties with a real stake in a controversy are afforded an opportunity to be heard." *Hodgson v. United Mine Workers of Am.*, 473 F.2d 118, 130 (D.C. Cir. 1972). Here, NCBA has a real stake in this controversy, which pertains to the possible disclosure by USDA of NCBA's confidential and proprietary business information without USDA first providing prompt notification of the FOIA request to NCBA or affording NCBA reasonable time to object to the disclosure of any specified portion of the information.

This Court regularly permits entities to intervene in FOIA actions where the FOIA request would require disclosure of confidential and privileged business information. *See, e.g., 100Reporters, LLC v. United States Dep't of Justice*, 307 F.R.D. 269, 287 (D.D.C. 2014); *Pub. Citizen v. U.S. Dep't of Health and Human Servs.*, 975 F.Supp. 2d 81, 88, 91 (D.D.C. 2013); *Appleton v. Food and Drug Admin.*, 310 F.Supp. 2d 194, 196-97 (D.D.C. 2004).

**I. NCBA is Entitled to Intervene as a Matter of Right under Rule 24(a)**

Rule 24(a) provides that

[u]pon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a); *see also Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003). An "applicant seeking to intervene as of right under Rule 24(a) must possess Article III standing to participate in the lawsuit." *100Reporters*, 307 F.R.D. at 274 (citing *Jones v. Prince George's Cnty., Md.*, 348 F.3d 1014, 1017 (D.C. Cir. 2003)).

**A. NCBA's Application is Timely**

NCBA's application to intervene as a matter of right is timely. The timeliness of a motion to intervene must be "judged in consideration of all the circumstances." *Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001) (citing *United States v. AT&T*, 642 F.2d 1285, 1295 (D.C. Cir. 1980)). While "the time elapsed since the inception of the suit is relevant, measuring the length of time passed is not in itself the determinative test." *Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014). The timeliness requirement is "aimed primarily at preventing potential intervenors from unduly disrupting litigation, to the unfair detriment of the existing parties." *Id.* In situations where a would-be-intervenor could have intervened sooner, "a court must weigh whether any delay in seeking intervention unfairly disadvantaged the original parties." *Id.*

Here, NCBA is seeking to intervene within a month of receiving communication from the FOIA Specialist at the USDA AMS indicating there was at least one NCBA document that may be produced in response to a FOIA request. Moreover, this motion is made within days of

NCBA first learning of OCM's lawsuit against the USDA. *See* Evans Decl. at ¶ 6. Such prompt filing militates towards permitting intervention. *See Appleton*, 310 F.Supp. 2d at 197 (motion for intervention filed within two months of notification of the action was timely). To date, there has not been a Rule 26(f) conference or scheduling order issued, nor has there been any discovery related to the litigation, and it would appear a document production schedule is only now being considered. Furthermore, while the USDA, within the past month, has provided NCBA with documents for review incident to the FOIA request, allowing NCBA to intervene would not unduly disrupt the litigation or pose an unfair detriment to the existing parties. *See 100Reporters*, 307 F.R.D. at 275 (finding intervention timely where applicant filed its motion to intervene "just a few weeks" after it learned of the FOIA lawsuit and before setting a briefing schedule or filing of dispositive motions).

**B. NCBA has an Interest in this Action**

A prospective intervenor "must demonstrate a legally protected interest in the action." *SEC v. Prudential Sec. Inc.*, 136 F.3d 153, 156 (D.C. Cir. 1998). Courts have recognized that "preventing the disclosure of commercially-sensitive and confidential information is a well-established interest sufficient to justify intervention under Rule 24(a)." *100Reporters*, 307 F.R.D. at 276 (citing *Pub. Citizen Health Research Grp. v. FDA*, 185 F.3d 898, 900 (D.C. Cir. 1999) (remaining string citation omitted)). NCBA has a clear interest in the subject of this action because OCM has requested that USDA release materials that include NCBA's confidential and proprietary business information. *See* Complaint, ECF No. 1, at ¶¶ 10-14, 15. In fact, in its complaint, OCM specifically seeks information from the USDA pertaining to NCBA. *Id.* at ¶15.5 ("OCM quickly filed a FOIA request for records" because OCM was "[d]isturbed . . . [by] the conflict of interest allegations that permeate beef checkoff and NCBA operations."). It is

NCBA's understanding that some number, perhaps many of the 23,000 pages of documents, are NCBA documents. Evans Decl. at ¶ 7. NCBA's interest in this litigation is that it be afforded—as USDA's regulations require—the opportunity to have a reasonable time in which to review these documents and object to the disclosure of any portion of its information which may be disclosed.

**C. Disclosure of NCBA's Confidential and Proprietary Business Information and Disclosure of NCBA Documents Without Allowing NCBA Reasonable Time to Review Impairs NCBA's Ability to Protect Its Interests**

In determining whether an applicant's interests will be impaired, courts "look to the 'practical consequences' that the applicant may suffer if intervention is denied." *100Reporters*, 307 F.R.D. at 278-79 (citing *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 909 (D.C. Cir. 1977)). One such practical consequence is that disclosure of materials in a FOIA action impairs the applicant's ability to protect trade secrets or confidential information. *See Appleton*, 310 F.Supp.2d at 197. In addition, NCBA's ability to protect its interests is impaired by the USDA's failure to comply with its FOIA regulation allowing NCBA reasonable time to review and object to potential disclosures. In this regard, while NCBA has seen so far only about 500 of the potentially thousands of pages of its documents that may be subject to disclosure, it appears that over half of the documents NCBA has seen so far may include confidential business information exempt from disclosure under FOIA.

NCBA has a small administrative staff and does not have any staff members who are experienced in reviewing documents incident to a FOIA request, does not employ in-house legal counsel, or have a FOIA officer. *See* Evans Decl. at ¶ 8. The practical impact denying intervention and instead ordering production without considering NCBA's concerns is significant: any review by NCBA likely would be either rushed or incomplete, it would cause

severe disruption of NCBA and its normal functions, and could result in inadvertent disclosure of confidential information because of NCBA's inability to review the documents within a reasonable time. *Id.*

**D. NCBA's Interests are Not Adequately Represented by the Existing Parties**

The adequate representation requirement of Rule 24(a) "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972). The standard for meeting the requirement is "not onerous." *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986). Indeed, the D.C. Circuit has "often concluded that governmental entities do not adequately represent the interests of aspiring intervenors." *Fund for Animals*, 322 F.3d at 736. There is a particular divergence of interests in FOIA litigation where "plaintiff's interest lies in disclosure," the government entity's "interest lies in responding appropriately to the plaintiff's request," and the intervenor's interest lies in "protecting [its] trade secrets and confidential information." *100Reporters*, 307 F.R.D. at 279-80 (citing *Appleton*, 310 F.Supp. 2d at 197).

Neither of the existing parties have the same incentive as NCBA to protect its confidential and proprietary information or to permit NCBA reasonable time to object to the disclosure of particular information. Although the USDA may claim it can properly represent NCBA's interests, that claim is belied by USDA's failure to provide NCBA with "prompt notification of a request for" information as required by its own regulations. 7 C.F.R. § 1.12(a). Despite the fact that this FOIA request was first made in 2013 and this litigation has been pending since November 2014, only in the last month has NCBA confirmed the existence of OCM's FOIA request and learned that it was still active. *Evans Decl.* at ¶¶ 3, 4. Furthermore,

only by happenstance did NCBA learn of this litigation within the past few days and the potentially voluminous amount of information from NCBA that the USDA may potentially produce to Plaintiff. *Id.* at ¶¶ 6, 7. NCBA is in the best position to review these documents, redact exempt information in them, and, if necessary, explain to the Court why disclosure of certain information at issue is confidential and would cause harm to NCBA. The USDA has "neither the incentives nor the information necessary to represent fully" NCBA's "commercial and competitive interests during this FOIA litigation." *100Reporters*, 307 F.R.D. at 281.

#### **E. NCBA has Standing**

The standing analysis for intervention as of right "is treated as equivalent to determining whether the intervenor has a 'legally protected' interest under Rule 24(a)." *Jones*, 348 F.3d at 1018 ("Article III's 'gloss' on Rule 24 requires an intervenor to have a 'legally protectable' interest." (citations omitted)). Thus, an applicant must establish injury, causation, and damages. *See Safari Club Int'l v. Salazar*, 281 F.R.D. 32, 37-38 (D.D.C. 2012). Here, the disclosure of NCBA's confidential and proprietary business information will result in injury, as will a disclosure without first allowing NCBA reasonable opportunity to review and object. A favorable ruling from this Court, permitting reasonable opportunity for review and objections by NCBA, will enable NCBA to protect its property and information and prevent that potential harm. Thus, NCBA's standing is established. *See Appleton*, 310 F.Supp. 2d at 197 ("As for standing, the applicants have shown that FDA's disclosure of [confidential business information] would cause them to suffer an injury-in-fact that intervention to defend against disclosure could redress.").



**II. Alternatively, NCBA May Permissively Intervene Under Rule 24(b)**

Rule 24(b) authorizes intervention for an applicant who files a timely motion and "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Rule 24(b) requires that intervention not unduly delay or prejudice the rights of the existing parties. *See* Fed. R. Civ. P. 24(b). Here, NCBA raise common questions of fact and law in this motion and proposed answer to Plaintiff's complaint. Any delay resulting from NCBA's intervention will result in a better execution of the laws and regulations regarding the disclosure of information under FOIA while protecting NCBA's confidential information. In fact, it will allow an interested party the opportunity to present its arguments at the same time before the issuance of a scheduling order or the filing of dispositive motions. *See 100Reporters*, 307 F.R.D. at 386-87. Accordingly, NCBA is entitled to permissive intervention under Rule 24(b) as well.

**CONCLUSION**

For the foregoing reasons, NCBA respectfully requests that the Court grant its motion to intervene in this action.

Dated: September 13, 2016

Respectfully submitted,

/s/ Daniel C. Schwartz

Daniel C. Schwartz (D.D.C. Bar # 0017749)

Bryan J. Harrison (D.D.C. Bar # 1016187)

BRYAN CAVE LLP

1155 F Street, NW

Washington, D.C. 20004

Telephone: 202-508-6000

E-mail: dcschwartz@bryancave.com

E-mail: bryan.harrison@bryancave.com

*Attorneys for Proposed Defendant-  
Intervenor National Cattlemen's Beef  
Association*