

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AT AMARILLO

SWIFT AND COMPANY,

Plaintiff,

v.

IMMIGRATION AND CUSTOMS
ENFORCEMENT DIVISION OF THE
DEPARTMENT OF HOMELAND
SECURITY and JULIE L. MYERS,

Defendants

No. 2-06CV-314-J

**DEFENDANTS' MEMORANDUM IN
OPPOSITION TO PLAINTIFF'S
MOTION FOR PRELIMINARY
INJUNCTION**

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25	28 U.S.C. § 1491(a)(1)	12
26	28 U.S.C. § 2201	12
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The Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2153 (2002):

Section 441 15

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**DEFENDANTS' MEMORANDUM IN
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IMMIGRATION AND CUSTOMS
ENFORCEMENT DIVISION OF THE
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SECURITY and JULIE L. MYERS,

Defendants

Respondents respectfully submit this Memorandum in Opposition to Plaintiff's Motion for a Preliminary Injunction.

INTRODUCTION

Plaintiff, Swift & Company ("Swift"), seeks to enjoin Defendants from conducting a series of law enforcement actions designed to enforce the nation's immigration laws by identifying and detaining illegal immigrants who are working at several of Swift's worksites. Indeed, Swift's institution of this action is tantamount to an admission that it is illegally employing a substantial number of illegal aliens who are working illegally at those worksites and are also likely engaging in identity theft and fraud. Swift nonetheless contends that the United States Constitution and the 1996 immigration reforms prevent U.S. Immigration and Customs Enforcement ("ICE") from enforcing the immigration laws, and instead somehow require the government to cooperate with law breakers and proceed "slow[ly]" before executing its enforcement activities. Pl. Memorandum, at 22.

Needless to say, the government is not so hamstrung. Put simply, there is no constitutional or statutory right for anyone to continue violating the law, and the government need not work on a potential law violator's time-table, especially where, as here, doing so would severely undermine legitimate law enforcement operations. The immigration statute on which Swift relies provides no private cause of action that would permit this suit, and in any event Swift cannot establish that

1 ICE's workplace enforcement actions will violate that statute. As for Swift's due process claim,
 2 all that Swift can legitimately demand here is that ICE obtain warrants from neutral magistrates
 3 before entering Swift's premises, something that ICE has every intention of doing. This Court
 4 should reject Swift's unprecedented request to allow Swift – rather than ICE and the various
 5 judicial officers all across the country who will consider ICE's warrant applications – to set its
 6 own schedule for when, if it ever does, it will comply with the law.

7 Defendants respectfully request a decision from the Court on Wednesday, December 6,
 8 because ICE plans to execute the work enforcement action in the near future. ICE will need a few
 9 days for final preparation before the start of the action.

10 STATEMENT OF FACTS¹

11 This case had its genesis on February 14, 2006, when the ICE office in Des Moines, Iowa,
 12 opened an investigation into the Swift pork processing plant in Marshalltown, Iowa. Declaration
 13 of Matthew C. Allen ("Allen Decl.") at ¶ 4, submitted as Exhibit 1, Appendix 2. The investigation
 14 was prompted when ICE conducted interviews of illegal aliens in local jails who were Swift
 15 Marshalltown employees. *Id.* Thereafter, ICE served an administrative subpoena on Swift
 16 requiring that it provide the ICE Des Moines office with Employment Eligibility forms (Form I-9)
 17 concerning current employees. *Id.* (Appendix 2-3.) ICE's investigation and review of the forms
 18 raised the suspicion that a substantial number of Swift employees were illegal aliens and who had
 19 probably engaged in identity theft to secure employment with Swift, *id.* (Appendix 3), and thereby
 20 were unauthorized to work and were most likely illegally present in the United States.

21 ICE later served additional administrative subpoenas on Swift, which compelled Swift to
 22 produce I-9's from seven other plants located in the United States. *Id.* at ¶ 6. ICE agents then
 23 examined several thousand I-9 forms and noted similar suspect patterns to those discovered in the
 24 Marshalltown investigation. *Id.* As explained by ICE's Acting Deputy Assistant Director Allen,
 25 "These patterns suggested that, company-wide, a substantial number of Swift employees were
 26

27 ¹ In Plaintiff's Certificate of Interested Parties, Swift incorrectly alleges (with no support
 28 whatsoever) that ICE Assistant Secretary Julie L. Myers has a financial interest in the outcome
 of this case. Ms. Myers is sued only in her official capacity, and she has no financial interest
 of any kind in this lawsuit.

1 illegal aliens who had engaged in identity theft in order to obtain employment with the company.”

2 Id. In fact, in a letter to ICE, Swift’s Senior Vice President of Human Resources acknowledged
3 “some limitations in our hiring practices and policies, principally related to third-party document
4 fraud.” Id. And in a meeting with ICE representatives on September 21, 2006, Swift
5 representatives further acknowledged that there “might be some low level criminality within their
6 plants (referring to possible [illegal] document vendors).” Id.

7 ICE had reason to believe the illegal activity was far greater than Swift conceded and
8 therefore continued its investigation. See Allen Decl. at ¶ 7 (Appendix 3-4). In an extraordinary
9 gesture of cooperation, ICE agreed to meet with Swift again on October 19, 2006. Id. (Appendix
10 4). During that meeting, Swift asked if ICE was investigating all of its plants. ICE indicated that
11 the problem was large in scale and that Swift should begin to hire replacement workers. Id. After
12 these meetings, ICE sought Swift’s consent to engage in contemporaneous, consensual interviews
13 of Swift employees in Marshalltown; Worthington, Minnesota; Grand Island, Nebraska; Cactus,
14 Texas; Hyrum, Utah; and Greeley, Colorado. Id. Swift countered by requesting that ICE run a
15 small-scale operation, arresting only a few aliens at a time. Id. In addition, working with ICE, the
16 U.S. Attorney for the Southern District of Iowa requested further documentation from Swift, as
17 well as Swift’s consent to conduct contemporaneous interviews at Swift’s plants. Id. Swift agreed
18 to provide the documents to the U.S. Attorney’s Office, but it declined to consent to
19 contemporaneous consensual interviews. Id. Instead, Swift expressed its desire to have a phased
20 or “managed” interview approach. Id. When ICE asked Swift what this meant, the only
21 explanation Swift gave for such an approach was that it would involve addressing a single plant
22 at a time. Id. at ¶ 8.

23 In ICE’s judgment, proceeding in the manner proposed by Swift would enable a substantial
24 number of illegal employees and the perpetrators of identity theft to avoid detection. Id. at ¶ 9
25 (Appendix 4-5). As ICE’s Acting Deputy Assistant Director Allen states in his declaration, “based
26 upon experience and information available to ICE, the initiation of interviews by ICE agents at
27 one plant would only serve to alert illegal aliens and identity theft perpetrators employed at other
28 locations.” Id. Indeed, in ICE’s judgment, initiating interviews at only one plant would lead to

1 the disappearance of both illegal aliens and stolen identities. *Id.* (Appendix 5). Because Swift was
 2 unwilling to cooperate, ICE planned to seek administrative warrants in each of the districts in
 3 which a targeted worksite is present. *Id.* at ¶ 2 (Appendix 2). ICE developed a considered
 4 operational plan to conduct the workplace enforcement actions in a way that minimized
 5 disruptions nad ensured the safety of Swift employees and federal agents. *Id.* at ¶ 10 (Appendix
 6 5). To this end, it coordinated its planning with the U.S. Department of Agriculture to obtain
 7 information about plant operations, schedules, and safety considerations. *Id.* ICE also coordinated
 8 with the Food Safety Inspection Service within the Department of Agriculture to plan on
 9 conducting the operation with the minimum risk of product contamination within the plants. *Id.*
 10 "All ICE agents and managers participating in the operation have been, and will continue to be,
 11 thoroughly briefed and trained with respect to the planned operational concerns." *Id.* These
 12 concerns informed ICE's decision to continue to engage in discussions to negotiate a coordinated
 13 operation with Swift management, even after the instant action was initiated. *Id.* at ¶ 8 (Appendix
 14 4).

15 ARGUMENT

16 I. SWIFT HAS FAILED TO MAKE THE HIGH SHOWING NECESSARY FOR A 17 PRELIMINARY INJUNCTION.

18 In determining whether to grant a preliminary injunction, the Court considers: (1) a
 19 substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury to
 20 plaintiff if an injunction is not granted; (3) the extent to which the balance of hardships favors
 21 plaintiff; and (4) whether the public interest will be disserved by the injunction. Clark v. Prichard,
 22 812 F.2d 991, 993 (5th Cir.1987); Canal Authority of State of Florida v. Callaway, 489 F.2d 567,
 23 572 (5th Cir.1974) (*en banc*). "In considering these four prerequisites, the court must remember
 24 that a preliminary injunction is an extraordinary and drastic remedy which should not be granted
 25 unless the movant clearly carries the burden of persuasion." Canal Authority, 489 F.2d at 573.
 26 These requirements are not balanced, but rather each one must be met before the court can grant
 27 emergency injunctive relief. Mississippi Power & Light Co. v. United Gas Pipe Co., 760 F.2d
 28 618, 621 (5th Cir.1985). Because Swift cannot meet a *single one* of these factors, the Court should
 deny the request for a preliminary injunction.

1 Most significantly, Swift cannot show any likelihood, let alone a significant likelihood, of
 2 success on the merits for at least five reasons. First, the statutes upon which Swift relies do not
 3 create a private cause of action. See Section A.1, infra. Second, Swift has failed to show that ICE
 4 is violating the Basic Pilot Program Statute. See Section A.2, infra. Third, Swift has failed to
 5 show that ICE is violating Swift's Due Process rights. See Section A.3, infra. Fourth, the Court
 6 lacks jurisdiction to enter an injunction against the arrest and detention of illegal aliens. See
 7 Section A.4, infra. Fifth, the Court lacks authority to enjoin judicial officers in other judicial
 8 districts. See Section A.5, infra.

9 In addition, Swift cannot satisfy any of the other requirements for obtaining a preliminary
 10 injunction. Swift cannot demonstrate irreparable harm because the only harm it alleges is the loss
 11 of business – apparently generated in large measure by its employment of illegal aliens – resulting
 12 from legitimate law enforcement activities. When laws are enforced, law violators (here the
 13 illegally employed workers and those employing them) suffer harm, but that does not permit a
 14 court to enjoin legitimate law enforcement activities. See Section B, infra. Moreover, the
 15 Government's law-enforcement activities and interest will suffer substantial harm from an
 16 injunction. Those harms far outweigh the harms feared by Swift. See Section C, infra. For the
 17 same reason, the public interest strongly disfavors granting the requested preliminary injunction.
 18 Not only is the public interest served by allowing enforcement of the immigration laws, but
 19 permitting ICE to proceed with the planned workforce actions benefits the public interest by
 20 detaining – and eventually removing – a large number of illegal aliens who, in addition to violating
 21 our immigration laws, are likely engaging in identity fraud by unlawfully assuming the identity
 22 of United States citizens. See Section D, infra. Any contrary ruling would create a "safe harbor"
 23 for illegal activity by crediting the claim that enforcing our nation's laws is too burdensome on
 24 businesses with illegal employees.

25 A. SWIFT HAS NOT DEMONSTRATED A SUBSTANTIAL LIKELIHOOD OF
 26 SUCCESS ON THE MERITS.

27 1. The Statutes On Which Swift Relies Do Not Create A Private Cause Of Action.

28 As an initial matter, Swift has failed even to state a cause of action. The Supreme Court
 has reaffirmed that:

1 private rights of action to enforce federal law must be created by Congress. The
 2 judicial task is to interpret the statute Congress has passed to determine whether it
 3 displays an intent to create not just a private right but also a private remedy.
 4 Statutory intent on this latter point is determinative. Without it, a cause of action
 5 does not exist and courts may not create one

6 Alexander v. Sandoval, 532 U.S. 275, 286-87 (2001) (citations omitted). The starting point for
 7 such an analysis is the "text and structure" of the statute at issue. Id. at 288; see also Touche Ross
 8 & Co. v. Redington, 442 U.S. 560, 568 (1979).

9 Although Swift's Complaint is less than clear, the most generous reading of it is that Swift
 10 is asserting a cause of action under both the Declaratory Judgment Act and the Illegal Immigration
 11 Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). But like the statute at issue in
 12 Touche Ross, neither statute "purport[s] to create a private cause of action in favor of anyone."
 13 Id. at 569. Indeed, the Supreme Court has already ruled that the Declaratory Judgment Act does
 14 not itself create an independent cause of action. See Skelly Oil Co. v. Phillips Petroleum Co., 339
 15 U.S. 667, 671-72 (1950) (Declaratory Judgment Act provides discretionary procedural remedy but
 16 does not confer or otherwise expand jurisdiction to hear a claim); see also Schilling v. Rogers, 363
 17 U.S. 666 (1960) (same).

18 Likewise, IIRIRA says nothing about any right to sue to enforce its provisions, and this
 19 silence is determinative. Even if IIRIRA's requirements concerning the Basic Pilot program were
 20 somehow construed as bestowing rights upon an interested employer, and even if an immigration
 21 enforcement action against employees would burden those rights (a point the Government does
 22 not concede), such a construction would not automatically give rise to a private right of action that
 23 would allow an employer to enforce its provisions. The Supreme Court has emphasized that "the
 24 fact that a federal statute has been violated and some person harmed does not automatically give
 25 rise to a private cause of action in favor of that person." Touche Rosse, 442 U.S. at 568, quoting
 26 Cannon v. University of Chicago, 441 U.S. 677, 688 (1979). Congress still must express an intent
 27 in the statutory scheme to provide for a private cause of action. See Alexander, 532 U.S. at 290
 28 (even "statutes that admittedly create substantive private rights" do not provide private cause of
 action absent Congressional intent). In this case, the statutes at issue do not evince any such intent
 to create substantive private rights, let alone a private cause of action.

2. Swift Cannot Demonstrate That ICE Is Violating The Basic Pilot Program Statute And Agreement.

Even if IIRIRA authorized Swift to bring this action, Swift cannot establish a likelihood of success on its IIRIRA claims. First, Swift contends that ICE's planned enforcement action would violate IIRIRA, Complaint at 27-30; Pl. Memorandum at 7, 13-16, but nothing in IIRIRA prevents workplace enforcement actions or precludes ICE from obtaining a warrant to enter plaintiff's facilities and arrest (and detain) illegal aliens.

As relevant to this case, IIRIRA created the Basic Pilot Program Employment Eligibility Verification system ("Basic Pilot"), a web-based system that helps employers determine whether newly hired employees are authorized to work. Allen Decl. at ¶ 3 (Appendix 2); Plaintiff's Appendix at 218, Basic Pilot Memorandum of Understanding, Art. I. Contrary to Swift's claims, Basic Pilot is not a blanket prohibition on workplace enforcement actions. To the contrary, an employer who signs the Memorandum of Understanding ("MOU") to participate in Basic Pilot affirmatively agrees to allow DHS (or its authorized agents or designees) to make periodic visits to the employer for the purpose of "reviewing Basic Pilot-related records, i.e., Forms I-9, SSA Transaction Records, and Department of Homeland Security verification records, that were created during the Employer's participation in the Basic Pilot Program." MOU, Art. II(C)14. Further, under the MOU, "[t]he Department of Homeland Security reserves the right to conduct Form I-9 compliance inspections during the course of the Basic Pilot, as well as to conduct any other enforcement activity authorized by law." MOU, Art. II(C)6 (emphasis added).

Despite the plain terms of the MOU, Swift contends that, as a participant in the program, it is shielded from workplace enforcement actions. But Swift's only argument is based on a provision that is wholly irrelevant to this dispute. Specifically, Swift relies on a section that says a participant cannot be "civilly or criminally liable under any law for any action taken in good faith reliance on information provided through the confirmation system." See MOU Art. II(C)(6)(5) (emphases added); see also 110 Stat. 663 (1996). For two reasons, this provision is inapposite.

First, ICE's workplace enforcement action does not impose "civil[] or criminal[] liab[ility]" on Swift. "Civil liability" is the "amenability to civil action as distinguished from amenability to criminal prosecution. A sum of money assessed either as general, special, or liquidated damages;

1 may be either single, double or treble for violation such as overcharges." Black's Law Dictionary
 2 (5th ed. 1979) at 223. Unquestionably, ICE's actions of entering Swift's premises, talking to the
 3 workers, and rooting out illegal aliens is the initiation of a civil action, and does not make Swift
 4 "civilly liable."

5 Indeed, if such actions constituted a "civil liability," then the MOU would be internally
 6 inconsistent. As noted, the MOU expressly permits DHS "to conduct Form I-9 compliance
 7 inspections [of employer premises]. . . as well as to conduct any other enforcement activity
 8 authorized by law." MOU, Art. II(C)6. Conveniently, Swift omits and ignores this language,
 9 which immediately follows the MOU text that Swift asserts is determinative, and which cannot
 10 be reconciled with Swift's unnatural interpretation of "civil liability." Far from prohibiting the
 11 workplace enforcement action, the MOU recognizes DHS's right to conduct it.

12 In an effort to avoid this language, Swift attempts to conflate the terms "irreparable harm,"
 13 "de facto penalty" and "de facto taking," with the term "civil liability." Pl. Memorandum at 14-16.
 14 with the . Unsurprisingly, Swift cites no authority equating these terms. Nor does Swift attempt
 15 to make an argument that the MOU or IIRIRA intended to displace the common understanding
 16 of "civil liability."² Thus, under the plain terms of the MOU and the statute, Swift's claim fails.

17 Second, ICE's workplace enforcement action is not predicated on "information provided
 18 through the confirmation system." 110 Stat. 663. As explained by ICE's Acting Deputy Assistant
 19 Director Allen, "Basic Pilot data is not used as the basis for worksite enforcement activity. . . .
 20 [I]nformation ICE obtained and used in analyzing Swift's workforce was neither derived from nor
 21 based on Basic Pilot data." Allen Decl. at ¶ 3 (Appendix 2) (emphasis added). Because ICE's
 22 assessment that a substantial number of Swift employees had likely lied about their identities to
 23 secure employment and any resulting investigative or enforcement activity was "not based on any
 24 Basic Pilot information," *id.* at ¶ 5 (Appendix 3), Swift cannot demonstrate as likelihood of
 25 success on this claim.
 26
 27

28 ² Understandably, Swift does not contend that ICE's civil workplace enforcement action is
 "criminal liability."

3. Swift Cannot Demonstrate A Likelihood Of Success On Its Due Process Claim.

Swift's only other claim is that ICE's anticipated workplace enforcement action violates the Due Process Clause of the Fifth Amendment. According to Swift, that action will deprive Swift of a property interest, and thus "there must be notice of [the action] and an expedited hearing prior to such action." Pl. Memorandum at 19 (emphasis in original). This claim is wholly without merit – and thus Swift cannot demonstrate a likelihood of success on this claim – for several reasons.

First, and most fundamentally, no Constitutional right requires the Government to provide notice of a planned law enforcement action to a person or company that may be violating the law. See, e.g., Naegele Outdoor Advertising Co. of Louisville v. Moulton, 773 F.3d 692, 694 (6th Cir. 1985) ("[T]here is no federally guaranteed constitutional right to a hearing or other process before the issuance and execution of a search warrant beyond the demands of the Fourth Amendment."); Carter v. Baltimore County, Maryland, 95 Fed. Appx. 471, 478 (4th Cir. 2004) (finding no due process violation in an arrest and detention on a properly-issued warrant). But Swift's argument, if credited, would require such notice any time that a planned law enforcement action – such as serving a search warrant on a company suspected of price-fixing, or on a sweatshop – might have an adverse effect on a business. That is not and cannot be the law, and not surprisingly, Swift points to no case requiring such notice.

Instead, the Constitution is satisfied when, prior to such an enforcement action, the Government procures a warrant authorizing that action.³ A warrant requires review by a neutral and detached magistrate or judge and does not merely rely upon a determination of the existence

³ None of the many circuit or Supreme Court cases approving the use of *ex parte* administrative warrants have even hinted that the very practice approved might actually violate the Constitution. See, e.g., Marshall v. Barlow's, Inc., 436 U.S. 307, 320-21 (1978); Stoddard Lumber Co. v. Marshall, 627 F.2d 984, 989-90 (9th Cir. 1980); National-Standard Co. v. Adamkus, 881 F.2d 352, 362-63 (7th Cir. 1989) ("[E]x parte proceedings are the normal means by which warrants are obtained in both criminal and administrative actions . . ."). Moreover, a number of cases uphold the government's authority to seek administrative inspection warrants *ex parte* under various statutes. See, e.g., Bunker Hill Co. Lead & Zinc Smelter v. EPA, 658 F.2d 1280, 1285 (9th Cir. 1981) (Clean Air Act); In re Establishment Inspection of Keokuk Steel Castings, 638 F.2d 42, 45 (8th Cir. 1981) (Occupational Safety and Health Act); In Re Alameda County Assessor's Parcel Nos. 537-801- 2-4 & 537-850-9, 672 F. Supp. 1278, 1287 (N.D. Cal. 1987) (Clean Water Act); In re Stanley Plating Co., Inc., 637 F. Supp. 71, 73 (D. Conn. 1986) (Resource Conservation and Recovery Act).

1 of probable cause by an officer "engaged in the often competitive enterprise of ferreting out
2 crime." Johnson v. United States, 333 U.S. 10 (1948). ICE has every intention of seeking and
3 obtaining a warrant from a neutral magistrate, supported by probable cause, prior to moving
4 forward with any significant enforcement action aimed at identifying illegal aliens. Allen Decl.
5 at ¶ 2 (Appendix 2). Further, it is well established that ICE, like any other law enforcement
6 agency, may seek and obtain a warrant ex parte. See Marshall v. Barlow's, Inc., 436 U.S. 307,
7 320-21 & n.15 (1978); Stoddard Lumber Co. v. Marshall, 627 F.2d 984, 989 (9th Cir. 1980); cf.
8 Midwest Growers Co-op Corp. v. Kirkemo, 533 F.2d 455, 464 n.21 (9th Cir. 1976) (obtaining
9 administrative warrant ex parte does not constitute bad faith because this is the "traditional
10 method" for obtaining warrants). Indeed, the use of civil orders to authorize the entry upon
11 premises where illegal aliens are believed to be present and to permit their questioning and arrest
12 has longstanding judicial approval. See Blackie's House of Beef, Inc. v. Castillo, 569 F.2d 1211,
13 1219-27 (D.C. Cir. 1981), cert. denied, 455 U.S. 940 (1982).⁴

14 In this case, ICE will not proceed with the anticipated workplace enforcement action (or any
15 other type of search without Swift's consent) in a particular plant unless and until ICE obtains a
16 warrant from a magistrate judge.⁵ Allen Decl. at ¶ 2 (Appendix 2). The impact that the workplace
17 enforcement action will have on Swift is one of the many factors that the magistrate judge will
18 consider before issuing the warrant. See Johnson, 333 U.S. at 14 ("[A] magistrate must judge the
19 reasonableness of every warrant in light of circumstances of the particular case, carefully
20 considering the description of the evidence sought, the situation of the premises, and the position
21 and the situation of the owner or occupant."). Critically, then, a process already exists in which
22 a neutral judge will independently balance particularized facts regarding the anticipated workplace
23 enforcement action. That is all the Constitution requires. This litigation is nothing more than an
24

25
26 ⁴ The investigation may also produce information which will lead to the criminal
prosecution of some aliens.

27 ⁵ It is well settled that the Immigration and Nationality Act (INA) authorizes ICE Special
28 Agents to question any alien or person believed to be an alien regarding his or her immigration
status and their right to be present in the United States. See INA § 287(a)(1), 8 U.S.C.
§ 1357(a)(1).

1 attempt by Swift to forestall that consideration by requesting an adjudication of the potential harms
2 without consideration of the specific facts to be provided by ICE to the magistrate.

3 Second, even if Swift had some right to be given notice of the workplace enforcement action
4 (which it does not), it can hardly claim lack of notice in this case. Indeed, according to Swift's
5 own pleadings, notice was given to Swift of the planned workplace survey on at least two
6 occasions, on November 17, 2006 and again on November 20, 2006. See Complaint, ¶ 15. Thus,
7 Swift's claim that it was not provided notice is simply false as Swift has received far more notice
8 and consideration than required. In fact, in an effort to work out a compromise process, ICE
9 contacted Swift regarding the scheduled action, sought Swift's consent, outlined the proposed
10 measures it would take to ensure the safety of workers, and provided Swift with sufficient time
11 to rearrange workflow and deliveries to lessen the impact on production. Allen Decl. at ¶ 7
12 (Appendix 3-4). Swift declined to consent to the workplace enforcement action, citing economic
13 concerns. Id. (Appendix 4).

14 Third, the effects of the anticipated workplace enforcement action that Swift fears are related
15 to the loss of employees who are illegally working in the United States. There is no taking of
16 Swift's property, as Swift has no property interest in its employees. Nor does Swift have a
17 privilege to employ illegal workers by virtue of the Basic Pilot program once the illegal nature of
18 those employees is discovered. The alleged costs of the ICE workplace enforcement action to
19 Swift do not constitute a deprivation of property in the constitutional sense. Cf., e.g., FTC v.
20 Standard Oil Co. of California, 449 U.S. 232, 242-43 (1980) (the cost of defending against an
21 investigation, "even substantial and unrecoverable cost, does not constitute irreparable injury"). In
22 conclusion, a process is already in place – the warrant process – which provides an independent
23 balance of particularized facts regarding the potential search, and thus Swift's claims of a due
24 process violation must fail.

25 Also relevant under the Mathews v. Eldridge balancing test, 424 U.S. 319, 334 (1976) is the
26 burden on the Government of providing additional process. As set forth below, the Government
27 (and public) would suffer substantial harm as a result of Swift's proposed approach.
28

4. INA § 242(f) Deprives Courts Of Jurisdiction To Enter An Injunction Against The Operation of INA § 236.

On top of all this, courts simply do not have jurisdiction to issue the injunction that Swift seeks. Under the plain text of the Immigration and Nationality Act ("INA"), "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter." INA § 242(f), 8 U.S.C. § 1252(f). Part IV of the relevant subchapter, aptly titled "Inspection, Apprehension, Examination, Exclusion, and Removal," includes INA § 236, which provides that "an alien may be arrested or detained pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a) (emphasis added).

Swift nonetheless requests that the Court enjoin ICE's planned efforts to apprehend and detain illegal immigrants employed and located at their facilities. Indeed, Swift concedes that ICE's planned workplace enforcement action is a "removal action," and that this action is intended to identify possible illegal aliens "for further questioning and possible deportation." Complaint at ¶ 5. These the actions that Swift seeks to enjoin – the apprehension and detention of aliens working at their facilities pending removal – are specifically authorized by INA § 236. See, e.g., Baldwin Metals Co., Inc., v. Donovan, 642 F.2d 768, 773 n.9 (5th Cir. 1981) ("Were an employer given the power to invoke the district court's jurisdiction on the eve of a scheduled hearing before the Review Commission whenever an inspection warrant is challenged on constitutional grounds, we might well sunder the statutory balance between swift abatement of dangerous conditions and due process protections.") (quoting Babcock & Wilcox Co. v. Marshall, 610 F.2d 1128, 1140 (3d Cir. 1989)). Accordingly, INA § 242(f) specifically prohibits this Court from granting Swift's requested injunction against those actions.⁶

⁶ In addition, Swift fails even to plead a valid jurisdictional basis for this suit in the first place. It is beyond peradventure that the federal courts are courts of limited jurisdiction, and the burden is on the plaintiff to demonstrate proper jurisdiction. Swift has failed this most elementary burden. As discussed supra, Swift pleads jurisdiction under two federal statutes – 28 U.S.C. § 1491(a)(1) and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202 – neither one of which vests this Court with jurisdiction. The first statute involves the jurisdiction of the United States Court of Federal Claims, while the Declaratory Judgment Act "is not an independent ground for jurisdiction [and] permits the award of declaratory relief only when other bases for jurisdiction are present." Jones v. Alexander, 609 F.2d 778, 781 (5th Cir.

1 5. The Court Ought Not Enjoin Judicial Officers In Other Judicial Districts.

2 Finally, this Court should not enjoin judicial officers in other judicial districts. Prior to
 3 entering, ICE will obtain a judicial warrant authorizing entry, unless Swift decides to consent to
 4 entry. Allen Decl. at ¶ 2 (Appendix 2). By seeking to enjoin ICE's enforcement efforts, Swift
 5 essentially requests that the Court enjoin those judicial officers, in other districts, from
 6 independently reviewing ICE's warrant request and determining the propriety of issuing such
 7 warrants. But principles of comity counsel that this Court ought not enjoin or restrain judicial
 8 officers in other districts from proceeding with their review of ICE's warrant requests. Cf. Society
 9 of Separationists, Inc. v. Herman, 939 F.2d 1207, 1219 (5th Cir.1991), rev'd en banc on other
 10 grounds, 959 F.2d 1283 (5th Cir.1992) (stating that principles of "comity and decorum" suggest
 11 that federal courts should not enjoin state judges unless necessary). "The 'federal-comity doctrine'
 12 is defined as '[t]he principle requiring federal district courts to refrain from interfering in each
 13 other's affairs.'" In re Repurchase Corporation, Debtor, 329 B.R. 832 (N.D. Ill. 2005) (citing
 14 Black's Law Dictionary (8th ed. 2004)). The federal courts long have recognized that the principle
 15 of comity requires federal district courts – courts of coordinate jurisdiction and equal rank – to
 16 exercise care to avoid interference with each other's affairs. West Gulf Maritime Ass'n. v. Ila
 17 Deep Sea Local 24, 751 F.2d 721 (5th Cir. 1985).

18 In Saleh v. Titan Corp., 353 F. Supp. 2d 1087 (S.D. Cal. 2004), plaintiffs, who were
 19 individuals detained and allegedly abused in Iraqi prisons under United States control, asked the
 20 court to enjoin an action in another district. Plaintiffs moved to enjoin a subsequently-filed action
 21 by other putative class members. The court stated that "[w]hen an injunction sought in one
 22 federal proceeding would interfere with another federal proceeding, considerations of comity
 23 require more than the usual measure of restraint, and such injunction should be granted only in the

24 _____
 25 1980).

26 Moreover, the controversy must be "definitive and concrete." Aetna Life Ins. Co. Of
 27 Hartford, Conn. v. Haworth, 300 U.S. 227, 228-241 (1937). The court must examine whether
 28 the facts demonstrate that a substantial controversy exists, between parties having adverse legal
 interests, of sufficient immediacy and reality to warrant the issuance of a declaratory
 judgment." Id. Here, there is no controversy because Swift and ICE agree that Swift
 employees have evaded the Basic Pilot verification program and may have engaged in identity
 theft and fraud; and Swift is only seeking a remedy. Complaint at ¶¶ 5-7, 11.

1 most unusual cases.” *Id.* at 1089 (citing Bergh v. State of Washington, 535 F.2d 505 (9th Cir.
 2 1976)). The court also noted, citing another Ninth Circuit opinion, that as a matter of comity, a
 3 federal court injunction against proceedings in another federal court will rarely be granted. *Id.*
 4 (citing Del Mar Avionics v. Quinton Instruments Co., 645 F.2d 832 (9th Cir. 1981)). The district
 5 court in this case determined that it did not have the authority to enjoin putative class members
 6 from pursuing a subsequently-filed action in another federal forum. *Id.* at 1094.

7 **B. SWIFT HAS NOT ESTABLISHED THAT IT WILL SUFFER IRREPARABLE HARM.**

8 In any event, even if Swift had shown a substantial likelihood of success on the merits, it
 9 failed to demonstrate a substantial threat of irreparable injury. Swift’s claim of harm is
 10 inextricably tied to its refusal to cooperate fully with the United States Government in ridding its
 11 own chosen workforce of illegal aliens and in allowing the apprehension of those who engage in
 12 identity theft and fraud. Its hands are unclean, and the Court should decline to ratify the alleged
 13 harm. Anytime there is law enforcement action, those who violate the law will suffer harm. But
 14 that of course is no reason to enjoin law enforcement and allow Swift to provide a sanctuary to
 15 illegal aliens who have also engaged in identity and document fraud.

16 Moreover, Swift falls far short of demonstrating actual or potential irreparable harm because
 17 its affidavits are self-serving, unsupported by independent evidence, and contain nothing more
 18 than speculation. See generally Declaration of Jack Shandley (in Plaintiff’s Appendix) at ¶¶ 49-
 19 51, 61, 63-64. For example, Swift merely notes without foundation that it “believes that it would
 20 suffer serious, irreparable injury,” *id.* ¶ 49, and similarly “believes” (again without foundation) that
 21 it would take two months to mitigate these speculative harms by hiring new employees, *id.* ¶ 51.
 22 Swift also avers that it “appears that” at least one production day will be lost at its plants. *Id.* ¶ 61.
 23 Finally, Swift notes a mass removal of identity thieves “could cause” Swift a parade of horrors.
 24 *Id.* ¶ 63. Thus, as the tentative language of Swift’s own self-serving declaration indicates, it has
 25 failed its burden to establish a likelihood of injury that is certain and irreparable (much less legally
 26 actionable), not merely speculative. And such claims of “speculative injury [are] not sufficient”
 27 to justify a preliminary injunction. Holland Am. Ins. Co. v. Succession of Roy, 777 F.2d 992, 997
 28 (5th Cir. 1985); see also Humana, Inc. v. Jacobson, 804 F.2d 1390, 1394 (5th Cir. 1986) (requiring

1 a showing of a "significant threat of injury" or that "injury is imminent" before injunctive relief
 2 will be granted). On this ground alone, the Court should deny Swift's motion for emergency
 3 injunctive relief. See Enterprise Intern. v. Corporacion Estatal Petrolera Ecuatoriana, 762 F.2d
 4 464, 472 (5th Cir. 1985).

5 Moreover, while Swift conjures up a worst-case scenario, it has failed to work with ICE to
 6 craft a plan that would reduce the magnitude of the disruption to their business. Allen Decl. at
 7 ¶¶ 7-8 (Appendix 3-4). By contrast, ICE has taken significant efforts to minimize any harm to
 8 Swift's facilities and operations. Id. at ¶¶ 7, 10 (Appendix 3, 5). ICE has even coordinated with
 9 the Department of Agriculture and with the Food Safety Inspection Service to reduce the risk of
 10 product contamination in the plants and to increase the safety factor to both the employees and
 11 agents. Id. at ¶ 10 (Appendix 5). Both the logistics and timing of the operation are intended to
 12 increase safety. Id. ICE's prudent actions in preparation render even more remote the likelihood
 13 of significant, irreparable harm to Swift. Notably, Swift's claim contains an ironic twist, asking
 14 the Court to consider the deprivation in earnings it will suffer if it is not allowed to continue to
 15 profit through the use of illegal and unauthorized employees.

16 C. THE BALANCE OF HARMS TIPS AGAINST SWIFT.

17 In addition to Swift putting forth no legally cognizable claims or irreparable harm, the
 18 balance of harms required by the preliminary injunction analysis tips sharply against Swift. The
 19 preliminary injunction requested by Swift will have a profound negative impact on defendants by
 20 adversely affecting this and other investigations. As an initial matter, "[i]t is not for the courts to
 21 interfere with Congress' broad authority to govern immigration." Gunaydin v. INS, 742 F.2d 776,
 22 779 (9th Cir. 1984). As the Supreme Court has recognized, "Congress designs the immigration
 23 laws, and it is up to Congress to temper the laws' rigidity if it so desires." INS v. Phinpathya, 464
 24 U.S. 194, 196 (1984).

25 Congress vested DHS, and more specifically, ICE, with the authority for and responsibility
 26 of immigration enforcement. See The Homeland Security Act of 2002, Pub. L. No. 107-296,
 27 § 441, 116 Stat. 2153 (2002); Allen Decl. at ¶ 11 (Appendix 5). The decision whether to
 28 investigate a case and refer it for enforcement proceedings is, in the ordinary course, committed

1 to the discretion of the investigative agency. See Lewis v. U.S., 70 F.3d 597, 601 (Fed. Cir. 1995).
 2 In the absence of statutory directions as to the manner in which an investigation must be conducted
 3 by an administrative agency or official, the nature and extent of an investigation are matters within
 4 the sound discretion of administrative officials, and courts give substantial deference to the
 5 methods chosen by an agency to fulfill its responsibility. See Former Employees of Alcatel
 6 Telecommunications Cable v. Herman, 134 F. Supp. 2d 445, 448 (Ct. Int'l Trade 2001).

7 The "phased approach" recommended by Swift "would alert illegal aliens in the Swift
 8 workforce to the ICE investigation, allowing them to disappear from Swift plants and elude law
 9 enforcement." Allen Decl. at ¶¶ 9, 11 (Appendix 4-5). ICE has a duty to apprehend illegal aliens
 10 and remove them from this country. Id. at 11 (Appendix 5). Further, the illegal aliens in Swift's
 11 workforce appear to have obtained their employment through identity fraud, making the
 12 apprehension and detention of these aliens an even greater concern. See id. at ¶ 12. Issuance of
 13 an injunction prohibiting the planned worksite surveys would allow many of these aliens to
 14 disappear and move elsewhere within the United States, negatively impacting ICE's ability to
 15 locate and remove them. Id. at ¶¶ 11-12. Swift acknowledges as much in its "Motion for Leave
 16 to File Under Seal," averring that absent a sealed record, "unauthorized workers may leave and
 17 thus frustrate the goal of identifying and removing unauthorized workers from Swift's work
 18 force."

19 ICE has already planned the transportation and logistical accommodations for federal law
 20 enforcement agents who have been designated to participate in the operation, in addition to
 21 training the agents and managers in plant operations, safety concerns, and ways to reduce product
 22 contamination during the survey. Id. at ¶¶ 10, 13 (Appendix 5-6). United States citizens who have
 23 needlessly suffered varied financial harms and indignities because their identities were stolen by
 24 unauthorized workers, and thereafter approved by Swift for employment, will be subject to further
 25 losses unless these identity thieves can be apprehended in Swift plants. ICE's effectiveness in
 26 apprehending illegal aliens and the adverse effects on the investigation are concrete harms that
 27 would result from a preliminary injunction. Accordingly, the balance of harms favors Defendants.
 28

1 D. THE PUBLIC INTEREST CLEARLY FAVORS THE GOVERNMENT'S ABILITY
2 TO ENFORCE IMMIGRATION LAW.

3 Should an injunction enter, the harm to the public interest reaches beyond the immediate
4 effects of halting the planned operation with respect to Swift. As the Secretary of Homeland
5 Security has concluded:

6 Illegal immigration hurts everyone. It flouts the rule of law, and it allows criminal
7 elements to enter our country. It undercuts those who patiently pursue legal
8 immigration proceedings. It places heavy economic strains on towns...[a]nd it
9 threatens the lives of the migrants themselves. The human smugglers and
10 traffickers...who bring them to the country all too often rob them, abuse them and leave
11 them for dead. In addition to this human cost, these smugglers also traffic in guns and
12 narcotics, a threat to the stability of both the United States and Northern Mexico. [I]f
13 we can not control our borders, we leave the way open for terrorists hoping to do us
14 harm.

15 Statement of Secretary Michael Chertoff, Comprehensive Immigration Reform II, before the
16 United States S. Judiciary Comm. (2005), submitted as Exhibit 2, Appendix 7-13.

17 Moreover, both Swift and ICE believe that illegal aliens in the Swift workforce are engaging
18 in identity theft. Such identity theft is a real and substantial harm to the public at large. See Pl.
19 Appendix at 178-91 (GAO, Identity Fraud, Prevalence and Links to Alien Illegal Activities);
20 Arnold Hamilton, Business of Fake Documents Is Booming: Innocent People Often The Victims
21 Of ID Theft, Dallas Morning News (Nov. 17, 2006), submitted as Exhibit 3, Appendix 14-16.
22 Identity theft includes the use of fraudulent identity documents, which have been used in
23 connection with narcotics trafficking and terrorism. Pl. Appendix at 178-79, 187-89. Likewise,
24 the 9/11 Commission recognized that "[f]or terrorists, travel documents are as important as
25 weapons." National Commission on Terrorist Attacks Upon the United States, 2004 WL 1634832
26 at 351. Moreover, the use of a United States citizen's identity by an illegal alien to obtain
27 employment is not a victimless crime, as the individual citizens may be faced with debt collection
28 enforcement, credit denials, and other harms. See Pl. Appendix at 113-41 (GAO, Identity Fraud,
Prevalence and Cost Appear to Be Growing); Arnold Hamilton, Business of Fake Documents Is
Booming: Innocent People Often The Victims Of ID Theft, Dallas Morning News (Nov. 17,
2006), Appendix 14-16. Accordingly, the public interest favors the identification and
apprehension of those involved in identity theft, and would be adversely impacted by the requested
injunction.

1 If the Court grants Swift's request for a preliminary injunction, it will cripple ICE's ability
2 to execute its Congressional mandate of enforcing the nation's immigration laws and removing
3 illegal immigrants. See CRS Report for Congress, Border Security: Key Agencies and Their
4 Missions (2004), submitted as Exhibit 4, Appendix 17-22. ICE is the largest investigative branch
5 of DHS, which was created after the terrorist attacks of September 11, 2001, to more effectively
6 enforce our immigration and customs laws and to target the people, money, and materials that
7 support terrorist and criminal activities. See U.S. Immigration and Customs Enforcement website,
8 at <http://www.ice.gov/about/index.htm>, submitted as Exhibit 5, Appendix 23-24. Effective
9 worksite enforcement plays an integral role in ICE's fight against illegal immigration and, more
10 broadly, in ICE's efforts to promote national security, protect critical infrastructure, and ensure
11 fair labor standards. See U.S. Immigration and Customs Enforcement website, at
12 <http://www.ice.gov/pi/worksite>, submitted as Exhibit 6, Appendix 25. A large aspect of worksite
13 enforcement efforts focuses on preventing access to critical infrastructure sectors and sites to
14 prevent terrorism and to apprehend those individuals who aim to do harm to the United States.
15 See Immigration Enforcement at the Workplace: Learning From the Mistakes of 1986, before the
16 United States S. Comm. On the Judiciary, Subcomm. on Immigration, Border Security and
17 Citizenship (2006) (statement of Julie L. Myers, Assistant Secretary, U.S. Immigration and
18 Customs Enforcement, U.S. Department of Homeland Security), submitted as Exhibit 7, Appendix
19 26-30. The nation's food supply is part of that critical infrastructure. In addition to critical
20 infrastructure protection, worksite enforcement also combats alien smuggling, human trafficking,
21 financial crimes, commercial fraud, export violations, and document fraud. Id. Hence, a ruling
22 to temporarily enjoin ICE from enforcement efforts in this case would hinder ICE's mandate to
23 enforce the nation's laws at worksites, laws that it is charged with enforcing. See Savoury v. U.S.
24 Attorney General, 449 F.3d 1307, 1320 (11th Cir. 2006) (citing INS v. Hibi, 414 U.S. 5, 8 (1973)).

25 Granting the requested injunction would be tantamount to inviting any business that fears
26 investigation to seek a civil remedy to prevent lawful worksite enforcement: any company that
27 fears investigation will be en route to the courthouse in an effort to delay, minimize, dictate, or
28 eliminate the prospect of enforcement action. Moreover, these same tactics could be employed

1 by any business seeking to avoid investigations conducted by other federal law enforcement
2 agencies. It is beyond question that such limitations on lawful government action would seriously
3 harm the public interest.

4 Indeed, any order that enjoins a governmental entity from enforcing statutes enacted by the
5 duly elected representatives of the people constitutes an irreparable injury that weighs heavily
6 against the entry of injunctive relief. See Coalition for Economic Equity v. Wilson, 122 F.3d 718,
7 719 (9th Cir. 1997) (citing New Motor Vehicle Bd. v. Orrin W. Fox Co., 434 U.S. 1345, 1351
8 (1977) (Rehnquist, J., in chambers)); INS v. Miranda, 459 U.S. 14, 19 (1982) (noting the
9 "increasingly important interest, implicating matters of broad public concern [that] is involved in
10 cases of this kind [that involve] [e]nforcing the immigration laws . . ." and thus refusing to estop
11 the government). Accordingly, the public interest strongly disfavors the requested injunction, and
12 Swift's demands to frustrate this process should fail.

13 CONCLUSION

14 Plaintiff's case fails every test for preliminary injunctive relief, and Plaintiff's motion should
15 therefore be denied for any or all the reasons set out above.

16 Dated: December 4, 2006

17 Respectfully submitted,

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CERTIFICATE OF SERVICE

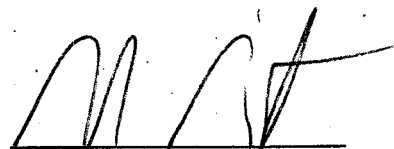
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