

## UNDER SIEGE: THE U.S. LIVE CATTLE INDUSTRY

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*Although the largest U.S. agricultural sector—the live cattle industry—is still comprised of hundreds of thousands of independent producers, it is currently on a trajectory to become a vertically integrated supply chain controlled by just a handful of dominant meatpackers. This is the fate already suffered by the nation’s hog and poultry industries within which once competitive markets have been replaced with corporate command and control and opportunities for independent livestock businesses have largely disappeared. Only by renewing the nation’s long lost appetite for antitrust enforcement and other legal actions to preserve livestock market competition can the ailing cattle industry be revitalized for future generations.*

### I. AMASSING MARKET POWER

Following behind the hog and poultry industries that blazed the initial trail toward industrial livestock and poultry production, the U.S. live cattle industry is quickly succumbing to efforts by dominant meatpackers to capture control over the live cattle supply chain. With gross receipts averaging \$50 billion annually, the live cattle industry is the single largest segment of American agriculture and is, consequently, critically important to the prosperity of Rural America.<sup>1</sup> In many respects, the live cattle supply chain is the meatpackers’ “*Last Frontier*,” as it represents the last major U.S. livestock or poultry sector that continues to resist the birth-(or egg-)to-plate corporate control manifest under the industrialized livestock and poultry production model.<sup>2</sup>

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1. See ECON. RESEARCH SERV., USDA, U.S. FARM SECTOR CASH RECEIPTS FROM SALES OF AGRICULTURAL COMMODITIES, 2008-2012F (2012), *available at* [http://www.ers.usda.gov/datafiles/Farm\\_Income/US\\_Farm\\_Income\\_and\\_Wealth\\_Statistics\\_includes\\_the\\_US\\_Farm\\_Income\\_Forecast\\_2012/Cr\\_t3.pdf](http://www.ers.usda.gov/datafiles/Farm_Income/US_Farm_Income_and_Wealth_Statistics_includes_the_US_Farm_Income_Forecast_2012/Cr_t3.pdf). Average cash receipts from the sales of live cattle and calves from 2002-2011, at \$50 billion, far exceeds the average cash receipts for any other U.S. agricultural commodity during that period. *Id.*

2. See Timothy A. Wise and Sarah E. Trist, *Buyer Power in U.S. Hog Markets: A Critical Review of the Literature* 7 (Global Development and Environment Institute, Working Paper No. 10-04, 2010),

The live cattle supply chain is comprised of hundreds of thousands of disaggregated firms that independently birth, grow, and feed live cattle.<sup>3</sup> The interrelationships among and between these independent live cattle firms and the meatpackers that ultimately procure live cattle for slaughter have until now been defined by competitive market forces. This is because the live cattle industry, which seeks to sell cattle for the highest possible price, is a separate and distinct industry within the multi-segmented beef supply chain<sup>4</sup> and a clear demarcation point exists between it and the meatpacking industry, which seeks to buy cattle for the lowest possible price. The demarcation point between the live cattle industry and the meatpacking industry is so profound that often there is an inverse relationship between economic prosperity in the live cattle industry and economic prosperity in the meatpacking industry.<sup>5</sup>

In a society that values free markets, competition is the preferred method for reconciling the inherent economic antagonism between the two distinct though interdependent industries within the beef supply chain, where one is a seller and the other a buyer. And, for more than a century competitive market forces have so effectively and efficiently reconciled this inherent antagonism that the two competing industries have prospered.

However, now the dominant meatpackers intend to eliminate those historically efficient competitive market forces that have so effectively reconciled the inherent antagonism between the live cattle industry and the meatpacking industry and replace them with corporate command and control. Their strategy to accomplish this subterfuge is to capture control of the live cattle

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available at <http://www.ase.tufts.edu/gdae/Pubs/wp/10-04HogBuyerPower.pdf>. “Similar to trends in the poultry industry, contract production of hogs is now occurring all over the United States.” *Id.* at 7. Hog production contracts, whereby “[p]ackers may provide technical advice, dictate management techniques, and monitor the compliance of the grower[.] . . . covered only five percent of production in 1992, but grew to include 28 percent of operations and 67 percent of hog inventory in the United States by 2004.” *Id.* at 11 (citations omitted). Describing the corporate takeover of independent poultry businesses that occurred after the 1950s, Sparks Companies stated:

Over time, these independent businesses were combined by “integrators”, who reduced costs by coordinating the production of each stage. As a result, an industry once characterized by tens of thousands of small, specialized businesses became characterized by hundreds of vertically integrated firms. Through horizontal integration, however, that number was reduced to about 50 by the 1990’s.

SPARKS COS. INC., POTENTIAL IMPACTS OF THE PROPOSED BAN ON PACKER OWNERSHIP AND FEEDING OF LIVESTOCK 60 (2002), available at <http://www.r-calfusa.com/Competition/020318SparksStudy.packerBan.pdf>; see also *Packers and Stockyards Issues: Hearing Before the S. Comm. on Agric., Nutrition, and Forestry*, 107th Cong. 45 (2002) (statement of Herman Schumacher, Director of R-CALF USA).

3. See Nat’l Agric. Statistics Serv., 2012 USDA FARMS, LAND IN FARMS, AND LIVESTOCK OPERATIONS: SUMMARY 18 (2013), available at <http://usda01.library.cornell.edu/usda/current/FarmLandIn/FarmLandIn-02-19-2013.pdf> (showing 729,000 beef cattle operations in the U.S. in 2012).

4. See U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, 2012 *North American Industry Classification System*, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?chart=2012> (last modified Nov. 7, 2011). The live cattle industry (classified under sector 112) is a subset of the U.S. agriculture industry (sector 11), whereas beef packers (sector 3116) are a subset of manufacturers (sector 31-33). *Id.*

5. See SPARKS COS. INC., *supra* note 2, at 24. “Vertical integration often attracts investors because of the negative correlation between profit margins at the packing stage and the feeding stage.” *Id.*

supply chain through direct or indirect vertical integration or both.

#### A. CHANGED LEGAL FRAMEWORK

The U.S. Department of Justice (“DOJ”) considers vertical integration to be a non-horizontal merger (i.e., a merger of firms that do not operate in the same market).<sup>6</sup> Direct vertical integration occurs when the merger involves a change of ownership, such as when a cattle feedlot is acquired outright by a meatpacker.<sup>7</sup> But, the unique nature of the live cattle supply chain affords meatpackers considerable flexibility in their ability to achieve the control or leverage they seek over the live cattle supply chain without ever having to invest in land, brick, or chattels. As more fully discussed below, at least one major meatpacker publicly acknowledged that it had opted for an indirect form of vertical integration—formula-priced contracts—that accords meatpackers leverage over the live cattle supply chain comparable to that of ownership of firms that feed cattle but without having to actually acquire those firms.<sup>8</sup>

Vertical integration of the live cattle supply chain is a relatively new phenomenon because meatpackers were effectively barred from owning or controlling the critical elements of the marketing channels within the live cattle supply chain for most of the twentieth century.<sup>9</sup> In February 1920, the then Big Five<sup>10</sup> meatpackers and the United States entered a consent decree in the Supreme Court of the District of Columbia that, *inter alia*, enjoined and restrained the meatpackers from owning any public stockyard company and further required those that did to divest themselves of such ownership interests.<sup>11</sup> That consent decree remained in effect for over six decades, terminating in 1981 on a joint motion by the DOJ and Swift Independent Packing Company.<sup>12</sup>

Moreover, regulations to implement the 1921 Packers and Stockyards Act

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6. See U.S. DOJ, NON-HORIZONTAL MERGER GUIDELINES § 4.0, at 23 & n.25 (1984), available at <http://www.justice.gov/atr/public/guidelines/2614.htm>.

7. See, e.g., Grain Inspection, Packers and Stockyards Admin., 2009 USDA ANN. REP.: PACKERS AND STOCKYARDS PROGRAM 62 (2010), available at [http://www.gipsa.usda.gov/Publications/psp/ar/2009\\_9\\_psp\\_annual\\_report.pdf](http://www.gipsa.usda.gov/Publications/psp/ar/2009_9_psp_annual_report.pdf). In 2008, the world’s largest beef packer, Brazilian-owned JBS, purchased the U.S. feedlot company Five Rivers Ranch Cattle Feeding, LLC (“Five Rivers”), the largest feedlot company in the United States. *Id.*

8. See C. Robert Taylor, *Legal and Economic Issues with the Courts’ Rulings in Pickett v. Tyson Fresh Meats, Inc., a Buyer Power Case* 9 (The Am. Antitrust Inst., Working Paper No. 07-08, 2007), available at [http://www.antitrustinstitute.org/files/AAI\\_Taylor\\_WP07-08\\_033020070955.pdf](http://www.antitrustinstitute.org/files/AAI_Taylor_WP07-08_033020070955.pdf).

9. See DEMOCRATIC STAFF OF THE S. COMM. ON AGRIC., NUTRITION, AND FORESTRY, ECONOMIC CONCENTRATION AND STRUCTURAL CHANGE IN THE FOOD AND AGRICULTURE SECTOR: TRENDS, CONSEQUENCES AND POLICY OPTIONS 16 (2004), available at <http://www.sraproject.org/wp-content/uploads/2007/12/harkinconcentrationwhitepaper.pdf> (citing *United States v. Swift & Co.*, 286 U.S. 106, 111 (1932)).

10. *Swift & Co.*, 286 U.S. at 110 (identifying the Big Five meatpackers at the time as Swift & Co., Armour & Co., Morris Packing Co., Cudahy Packing Co., and Wilson & Co.).

11. See Government Printing Office, 1921 FTC ANN. REP. FOR THE FISCAL YEAR ENDED JUNE 30, 1921, at 42-43, available at <http://www.ftc.gov/os/annualreports/ar1921.pdf>; see also *Swift & Co.*, 286 U.S. at 111.

12. Robert M. Aduddell & Louis P. Cain, *A Strange Sense of Déjà Vu: The Packers and the Feds, 1915-82*, 11 BUS. & ECON. HIST. (2d s.) 49, 49 (1982), available at <http://www.h-net.org/~business/bhcweb/publications/BEHprint/toc111982.html>.

(“PSA”) were promulgated in 1974 by the U.S. Department of Agriculture (“USDA”) Grain Inspection, Packers and Stockyards Administration (“GIPSA”) to prohibit meatpackers from owning or financing custom feedlots and to prohibit custom feedlots from owning or financing meatpackers.<sup>13</sup> The aforementioned legal buttresses that protected the live cattle supply chain from meatpacker-initiated vertical integration were eliminated in 1984 during what former GIPSA Administrator J. Dudley Butler termed the “no regulations” era of the Reagan Administration.<sup>14</sup>

Since the 1980s, the legal framework that had effectively delineated the meatpacker’s proper role within the multi-segmented beef supply chain to that of a meatpacker and no more was from then on dismantled. As a result, meatpackers were then free to reengineer the relationship between the previously separate and distinct live cattle industry and meatpacking industry.

## B. CHANGED INDUSTRY STRUCTURE

### 1. Beef packer Concentration

During the 1980s, horizontal mergers in the beef packing industry accelerated at such a rapid pace that economists at the USDA applied the term “merger mania” to the beef industry.<sup>15</sup> The four-firm buyer concentration level in the fed cattle market increased from 35.7% in 1980 to 71.6% by 1990.<sup>16</sup> It did not stop there. By 2010, the four-firm buyer concentration level in the fed cattle market hit a new record of 85%,<sup>17</sup> meaning that just four firms slaughtered 85% of all the steers and heifers fed in U.S. feedlots.

From the 1980 onset of merger mania and through 2010, the number of U.S. beef packing plants declined by approximately 81%,<sup>18</sup> leaving the entire U.S. live cattle industry with only about 138 marketing outlets for its 33.6 million slaughter-ready cattle (i.e., steers, heifers, cows, and bulls) that are slaughtered annually at federally inspected plants in the United States.<sup>19</sup> In

13. 9 C.F.R. § 201.70a (1984) (repealed 1984).

14. 49 Fed. Reg. 33003 (Aug. 20, 1984) (to be codified at 9 C.F.R. pt. 201); J. Dudley Butler, *Ex-GIPSA Administrator J. Dudley Butler Speaks at NeFU Convention*, FARM AND RANCH LAW (Dec. 8, 2012), <http://farmandranchlaw.com/ex-gipsa-administrator-j-dudley-butler-speaks-at-nefu-convention/> (00:29:56) (last visited Feb. 03, 2013) (addressing the Nebraska Farmers Union).

15. KENNETH H. MATHEWS JR. ET AL., ECON. RESEARCH SERV., MKT & TRADE ECON. DIV., USDA, TB-1874, U.S. BEEF INDUSTRY: CATTLE CYCLES, PRICE SPREADS, AND PACKER CONCENTRATION 10 (1999), available at <http://www.ers.usda.gov/publications/tb-technical-bulletin/tb1874.aspx>.

16. See Grain Inspection, Packers & Stockyards Admin., 2006 USDA PACKERS AND STOCKYARDS STAT. REP. 44 tbl.27 (2008), available at [http://archive.gipsa.usda.gov/pubs/2006\\_stat\\_report.pdf](http://archive.gipsa.usda.gov/pubs/2006_stat_report.pdf).

17. See Grain Inspection, Packers & Stockyards Admin., 2011 USDA P&SP ANN. REP.: PACKERS AND STOCKYARDS PROGRAM 34 (2012), available at [http://www.gipsa.usda.gov/Publications/psp/ar/2011\\_psp\\_annual\\_report.pdf](http://www.gipsa.usda.gov/Publications/psp/ar/2011_psp_annual_report.pdf).

18. See Grain Inspection, Packers & Stockyards Admin., *supra* note 16, at 11 tbl.1; see also Grain Inspection, Packers & Stockyards Admin., *supra* note 17, at 33 fig.14.

19. See Nat’l Agric. Statistics Serv., USDA, LIVESTOCK SLAUGHTER: 2011 ANNUAL SUMMARY 17 (2012), available at <http://usda01.library.cornell.edu/usda/current/LiveSlauSu/LiveSlauSu-04-23-2012.pdf>. Federally inspected cattle slaughter during 2011 totaled approximately 33.6 million head. *Id.*

2011, however, due to the extremely high (85%) level of buyer concentration in the fed cattle market (i.e., the steer and heifer market) approximately 22.3 million of those 33.6 million (approximately 66%) annually slaughtered cattle were slaughtered in just 26 beef packing plants owned by the four largest beef packers.<sup>20</sup>

## 2. Feedlot Concentration

Also since 1980, the number of cattle feedlots declined by 32%, with over 36,000 feedlots exiting the industry.<sup>21</sup> Nearly all of the eliminated feedlots were those with capacities of less than 1,000 head,<sup>22</sup> the operators of which are commonly referred to as farmer-feeders. In fact, when distinguishing feedlots based on their size from small (capacity less than 1,000 head) to medium (capacity more than 1,000 head but less than 50,000 head) to large (capacity more than 50,000 head), the only segment within the U.S. feedlot industry that is not shrinking is that segment of large feedlots.<sup>23</sup> The 66 feedlots in this mega-feedlot category marketed approximately 32% of all cattle marketed from feedlots in 2011.<sup>24</sup>

Approximately 88% of all fed cattle marketed by feedlots in 2011 were fed in the 2,120 U.S. feedlots that have a capacity of more than 1,000 head.<sup>25</sup> The remaining 12% of cattle marketed from feedlots that year were marketed by the 75,000 farmer-feeders whose smaller feedlots have a capacity of less than 1,000 head.<sup>26</sup>

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20. See *id.* Approximately 26.3 million steers and heifers were slaughtered in federally inspected plants in 2011, and 85% of those steers and heifers is about 22.3 million. For the number of packing plants owned by the four largest packers, see *Our Locations – List*, TYSON FOODS, <http://www.tyson.com/Corporate/AboutTyson/Locations/ListPage.aspx> (last visited Mar. 9, 2013); *North American Beef Facilities*, CARGILL MEAT SOLUTIONS, [http://www.cargillmeatsolutions.com/about\\_us/tk\\_cms\\_about\\_loc\\_beef.htm](http://www.cargillmeatsolutions.com/about_us/tk_cms_about_loc_beef.htm) (last visited Mar. 9, 2013); *Locations*, JBS, <http://www.jbssa.com/Careers/Locations/default.aspx> (last visited Apr. 9, 2013); *Beef Processing*, NATIONAL BEEF, <http://www.nationalbeef.com/About/Business/Pages/Beef-Processing.aspx> (last visited Feb. 4, 2013).

21. The number of U.S. feedlots declined from 113,326 in 1980 to 77,120 in 2011. *Compare* Crop Reporting Bd., Econ. & Statistics Serv., JAN. 1981 USDA CATTLE ON FEED 12, available at <http://usda01.library.cornell.edu/usda/nass/CattOnFe//1980s/1981/CattOnFe-01-19-1981.pdf>, with Nat'l Agric. Statistics Serv., FEB. 2012 USDA CATTLE ON FEED 16, available at <http://usda01.library.cornell.edu/usda/nass/CattOnFe//2010s/2012/CattOnFe-02-24-2012.pdf>.

22. 36,182 of the 36,206 feedlots that exited the industry between 1980 and 202011 had a capacity of less than 1,000 head. *Compare* Crop Reporting Bd., *supra* note 21, at 11, with Nat'l Agric. Statistics Serv., *supra* note 21, at 16.

23. See Nat'l Agric. Statistics Serv., FEB. 2009 USDA CATTLE ON FEED 14, available at <http://usda01.library.cornell.edu/usda/nass/CattOnFe//2000s/2009/CattOnFe-02-20-2009.pdf>; Nat'l Agric. Statistics Serv., FEB. 2010 USDA CATTLE ON FEED 14, available at <http://usda01.library.cornell.edu/usda/nass/CattOnFe//2010s/2010/CattOnFe-02-19-2010.pdf>; Nat'l Agric. Statistics Serv., FEB. 2011 USDA CATTLE ON FEED 16, available at <http://usda01.library.cornell.edu/usda/nass/CattOnFe//2010s/2011/CattOnFe-02-18-2011.pdf>; Nat'l Agric. Statistics Serv., *supra* note 21, at 16; Nat'l Agric. Statistics Serv., FEB. 2013 USDA CATTLE ON FEED 16, available at <http://usda01.library.cornell.edu/usda/nass/CattOnFe//2010s/2013/CattOnFe-02-22-2013.pdf>.

24. See Nat'l Agric. Statistics Serv., *supra* note 21, at 16.

25. See *id.*

26. See *id.*

### 3. *Reduced Opportunities*

The data show that as the number of market outlets for feedlots (i.e., beef packers) declined, so too did the number of feedlots.<sup>27</sup> The marked reduction in competitive marketing options for feedlots and the decline in the number of feedlots themselves resulted in fewer competitive marketing options for persons that raise and sell lighter weight cattle to feedlots.<sup>28</sup> Indeed, independent live cattle producers lost more than 36,000 buyers for their lighter weight feeder cattle.<sup>29</sup> Not surprisingly, more than four of every ten U.S. beef cattle operations in business in 1980 are gone today.<sup>30</sup> The cattle industry is following, not leading, the systematic march toward the industrialized livestock and poultry production model, which eliminates competitive opportunities for hundreds of thousands of independent livestock producers.

Other livestock industries already have lost the vast majority of their independent participants, with about nine of every ten hog producers and about eight of every ten dairy producers culled from their respective industries since 1980.<sup>31</sup>

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27. See *supra* Parts B.1-2.

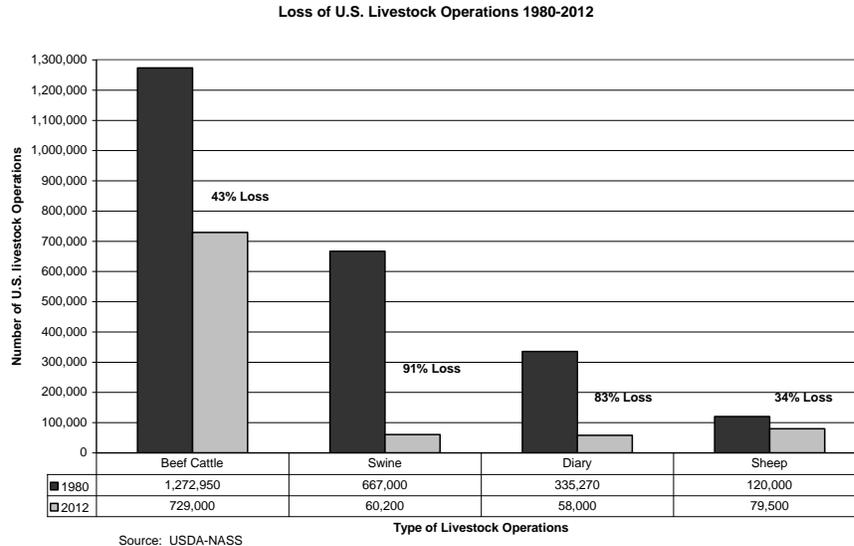
28. Persons that raise and sell lighter weight cattle include cow/calf producers, backgrounders, and stockers. Cow/calf producers typically maintain a breeding cow herd year round and annually market one calf per cow when the calf reaches about four to six months of age. Backgrounders typically purchase calves from cow/calf producers, grow them for several months on a predominantly forage-based diet, and then market them to stockers when they are approximately eight to twelve months of age, or to feedlots when they are about twelve to fifteen months of age. Stockers typically purchase calves from cow/calf producers or from backgrounders, and they run them on either tame or native pastures or winter wheat fields prior to marketing them to feedlots when they are about twelve to fifteen months of age.

29. Compare Crop Reporting Bd., *supra* note 21, at 11, with Nat'l Agric. Statistics Serv., *supra* note 21, at 16.

30. Compare Crop Reporting Bd., Econ. & Statistics Serv., JAN. 1981 USDA CATTLE 16, available at <http://usda01.library.cornell.edu/usda/nass/Catt//1980s/1981/Catt-01-30-1981.pdf>, with Nat'l Agric. Statistics Serv., *supra* note 3, at 18.

31. See 72 Fed. Reg. 44,681 (Aug. 8, 2007) (to be codified at 7 C.F.R. pt. 59); see also *infra* Chart 1. Compare Crop Reporting Bd., *supra* note 30, at 16, with Nat'l Agric. Statistics Serv., *supra* note 3, at 18-19.

Chart 1



### C. EVIDENCE OF INTENT

In a relatively recent attempt to prevent meatpackers from vertically integrating the cattle supply chain through direct ownership and control, the U.S. Senate approved an amendment to the 2002 Farm Bill that would have prohibited dominant meatpackers from owning, controlling, or feeding livestock for more than fourteen days before slaughter.<sup>32</sup> Several legal and economic scholars defended the Senate amendment by addressing the claims of harm proffered by the opposing meatpackers. The scholars concluded, *inter alia*, that the meatpackers' claims of harm "arising from the amendment are largely not credible, and certainly less significant than the potential benefit to the marketplace."<sup>33</sup>

In rebuttal, the meatpackers' largest trade association—American Meat Institute—issued a public statement defending the meatpackers' desire to vertically integrate the live cattle industry:

The entire U.S. economy - from manufacturers to service providers - has moved towards both vertical and horizontal integration as a means of survival and striving for excellence. Barring one sector of the economy, meatpackers, from utilizing this model is unfair, punitive and lacking in

32. See S. 1731, 107th Cong. § 1021(a)(2)(f) (2001); 147 CONG. REC. S13,093 (daily ed. Dec. 13, 2001).

33. JOHN CONNOR, PETER C. CARSTENSEN, ROGER A. MCEOWEN & NEIL E. HARL, THE BAN ON PACKER OWNERSHIP AND FEEDING OF LIVESTOCK: LEGAL AND ECONOMIC IMPLICATIONS 13 (2002), available at <http://www.econ.iastate.edu/sites/default/files/publications/papers/p7173-2002-03-01.pdf>.

any credible evidence.<sup>34</sup>

Legislation to prevent the direct vertical integration of the livestock industry also was passed by the U.S. Senate in the Senate's version of the 2008 Farm Bill,<sup>35</sup> which prompted even more admissions by the meatpackers regarding their desire to control the live cattle supply chain. The meatpackers and their allies including the National Cattlemen's Beef Association ("NCBA") argued:

In order to meet customer requirements, packers must own some *or all* of their livestock to ensure a steady, adequate supply of the particular type of livestock they need for their product mix, whether these livestock are fed in a particular way, raised organically, or have a certain quality profile.<sup>36</sup>

## II. EXERCISING MARKET POWER

Dominant beef packers have amassed tremendous market power that now reaches far upstream into the live cattle supply chain. Predicated not just on their huge market shares gained through horizontal mergers, this market power both emanates from and is strengthened by the beef packers' progressive capture of the live cattle supply chain through vertical integration. And, as the hundreds of thousands of cattle producers exited the industry in the wake of this horizontal and vertical consolidation, they further helped to intensify the beef packers' market power by enabling them to focus their growing market power on fewer and fewer industry participants. This ongoing conquest has forced the live cattle industry into a new paradigm for its relationship with the beef packing industry. The relationship once based predominantly on competitive market forces is increasingly becoming marked by a corporate command-and-control regime that the beef packers' attempt to justify in the name of market efficiency and consumer convenience.

### A. DEFINING THE NEW PARADIGM

#### 1. *Maintaining a Favorable Legal Framework*

Amazingly, the beef cattle industry, which was comprised of well over one million small business entrepreneurs (i.e., family farmers and ranchers who raise and sell cattle) just three decades ago, remains relatively silent while hundreds of thousands of its small business components are eliminated at a rate exceeding seventeen thousand per year.<sup>37</sup> This same anomalous silence is manifest in the

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34. See J. PATRICK BOYLE, AM. MEAT INST., STATEMENT OF THE AMERICAN MEAT INSTITUTE ON AG ECONOMISTS' DEBATE OVER PACKER OWNERSHIP BAN (2002), available at <http://www.meatami.com/ht/d/ReleaseDetails/i/3000>.

35. See Prohibition on Packers Owning, Feeding, or Controlling Livestock, H.R. 2419, 110th Cong. § 10207 (2007).

36. Letter from American Meat Institute, Cargill, National Beef, National Cattlemen's Beef Association, National Meat Association, Swift & Co., and Tyson Foods, Inc. et al., to Tom Harkin, Chairman, S. Comm. on Agric., Nutrition, & Forestry (Oct. 18, 2007), available at <http://www.nppc.org/2007/10/farm-bill-livestock-mark-letter> (emphasis added).

37. To put this rate of loss of family cattle ranches in perspective, the U.S. lost 538,950 beef cattle

hog and dairy industries, each of which went through dramatic structural changes associated with the loss of hundreds of thousands of their component businesses since 1980, as indicated above in Chart 1.<sup>38</sup> An examination of the meatpacking industry's unconventional exercise of market power sheds at least some light on this perplexing issue.

To accomplish its objective of gaining control over the live cattle supply chain, the meatpacking industry must ensure that the legal framework that establishes the rules of the marketplace does not hinder its exercise of supply-chain control. Thus, it must ensure that the pre-1980s restrictions on meatpacker ownership and control of livestock marketing channels are not reinstated and that other initiatives designed to promote marketplace competition between producers and meatpackers are defeated. To gain control over the live cattle supply chain, the major meatpackers have colluded to transform their manifest market power into political power to influence both Congress and public opinion. In fact, the meatpacking industry is working aggressively to generate false perceptions that meatpackers already control the live cattle supply chain and the false belief that what is good for the meatpacking industry is also good for the live cattle industry.

For example, the four largest beef packers, their two national trade associations, and several other meat packing, processing, and producer-oriented groups attempted to prevent the introduction of an amendment to the 2008 Farm Bill that would have, among other things, clarified that a producer need not prove competitive injury under all circumstances when seeking protection under the Packers and Stockyards Act. They falsely claimed to a member of Congress that they represent "a vast majority of the livestock, poultry, and meat producers in the U.S. . . ." and their objective is "to preserve the profitability of U.S. livestock and meat producers . . . ."<sup>39</sup> The effect of the meatpackers' tactic to

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ranches from 1980-2011, representing a loss rate of over 17,000 ranches per year for 31 years. The loss of 17,000 ranches per year is the equivalent of losing more beef cattle ranches per year than there are in each of the entire states of Arizona, California, Colorado, Idaho, Minnesota, Montana, North Dakota, South Dakota, Wyoming, and many other states considered to be "cattle" states. See Nat'l Agric. Statistics Serv., USDA, 2008 USDA FARMS, LAND IN FARMS, AND LIVESTOCK OPERATIONS: SUMMARY 18 (2009), available at <http://usda01.library.cornell.edu/usda/nass/FarmLandIn/2000s/2009/FarmLandIn-02-12-2009.pdf>.

38. See *supra* Chart 1. For Example, in February 2008, the USDA stated, "The structure of the U.S. hog production industry has changed dramatically in the past 25 years." MILDRED M. HALEY, ECON. RESEARCH SERV., USDA, LDP-M-164, LIVESTOCK, DAIRY, & POULTRY OUTLOOK 14 (Feb. 2008), available at <http://usda01.library.cornell.edu/usda/ers/LDP-M/2000s/2008/LDP-M-02-15-2008.pdf>. Similar to that of the cattle industry, this "dramatically" changed structure of the hog industry includes the consolidation of the industry, where "fewer and larger operations account for an increasing share of total output." William D. McBride & Nigel Key, *Hog Operations Increasingly Large, More Specialized*, AMBER WAVES, February 2008, at 8, available at [http://webarchives.cdlib.org/sw1vh5dg3r/http://ers.usda.gov/AmberWaves/February08/PDF/AW\\_February08.pdf](http://webarchives.cdlib.org/sw1vh5dg3r/http://ers.usda.gov/AmberWaves/February08/PDF/AW_February08.pdf).

39. Letter from American Meat Institute, Cargill, National Beef, National Meat Association, Swift & Co., and Tyson Foods, Inc. et al., to Leonard Boswell, Chairman, House Agric. Subcomm. on Livestock, Dairy, and Poultry (May 23, 2007), available at <http://www.r-calfusa.com/Competition/070523-MeatandPoultryPromotionCoalitionLetter.pdf>. The foregoing corporations are the nation's four largest beef packers that control 85% of the fed cattle market and their two trade associations. Packers and their trade association had joined the letter, suggesting direct collusion.

masquerade before Congress not only as representatives of livestock producers, but rather, as *the* livestock producer, is an abuse of market power that facilitates their objective to supplant competitive market forces with a corporate command-and-control regime within the live cattle supply chain.

Another unconventional use of the meatpacking industry's market power to influence Congress and public opinion is its successful infiltration into the governance of producer trade associations, which enables the meatpacking industry to cajole, if not coerce, producer trade associations into supporting policies that benefit meatpackers even if those policies are detrimental to the association's producer-members. For example, the NCBA proclaims to its members, the public, and Congress that it is "the largest association of cattle producers";<sup>40</sup> it "is *the* national trade association representing U.S. cattle producers";<sup>41</sup> and it represents "cattle breeders, producers and feeders."<sup>42</sup> However, the NCBA is the corporate progeny of a merger that occurred in 1996 between the former producer trade association, the National Cattlemen's Association, and the former meatpacker trade association, the Beef Industry Council.<sup>43</sup> Since 1996, the NCBA has had meatpackers seated on its governing board.<sup>44</sup> The meatpacking industry's influence helps explain why the NCBA sided with the meatpackers and the meatpackers' trade associations to oppose pro-competition initiatives, such as country of origin labeling, legislation to ban packer ownership of livestock, legislation to ban un-priced formula contracts, and rulemaking to implement and clarify producer protections contained in the PSA, among other initiatives.<sup>45</sup>

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40. News Release, National Cattlemen's Beef Association, NCBA Statement on Canadian WTO Complaint against U.S. COOL Law, October 7, 2009 (on file with South Dakota Law Review).

41. *About Us*, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, <http://www.beefusa.org/aboutus.aspx> (last visited Feb. 6, 2013) (emphasis added).

42. *Id.*

43. *See National Cattlemen's Association*, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, <http://www.beefusa.org/nationalcattlemensassociation.aspx> (last visited Feb. 6, 2013).

44. *See Board of Directors - Policy Division*, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, <http://www.beefusa.org/boardofdirectors-policydivision.aspx> (last visited Feb. 6, 2013). NCBA Director Ken Bull from Wichita, Kansas was Cargill's Vice President for Cattle Procurement. Press Release, Nat'l Cattlemen's Beef Ass'n, National Competition Honors Cattle Auctioneer and Dairy Producers (Jan. 28, 2010), available at <http://www.beefusa.org/newsreleases1.aspx?newsid=2211>; *Speakers, Beef Quality Summit*, BEEF MAGAZINE, <http://beefmagazine.com/sitefiles/beefmagazine.com/files/archive/beefmagazine.com/BEEFQualitySummit/Speakers.pdf> (last visited Feb. 6, 2013); *see also Ken Bull, Cargill VP of Beef Procurement, To Retire*, BEEF MAGAZINE, <http://beefmagazine.com/ken-bull-cargill-vp-beef-procurement-retire> (last visited Feb. 6, 2013). NCBA Director Todd Allen is the President of cattle feeding operations for Cargill Beef. *Livestock Producers Elect Allen, Smith to Leadership Posts*, CATTLE TODAY (Dec. 9, 2008), <http://cattletoday.com/archive/2008/December/CT1820.shtml>. The NCBA and the National Pork Producers Council ("NPPC") each joined with the National Meat Association in opposition to the proposed GIPSA rule and each had meatpackers seated on their governing boards, such as Ken Bull and Todd Neff. Former NPPC Director Todd Neff from Dakota Dunes, South Dakota is Vice President for Pork Procurement for Tyson Fresh Meats, Inc. Press Release, Nat'l Pork Producers Council, NPPC Elects New Officers, Board Members at Pork Forum (Mar. 12, 2010), available at <http://www.nppc.org/2010/03/for-the-week-ending-march-12-2010>; *see* Letter from Todd Neff, Vice President of Pork Procurement, to Valued Hog Supplier (Oct. 25, 2010), available at [http://www.tysonfoods.com/Business-to-Business/Fresh-Meats/~/\\_media/4D99FCD464ED4F57A887E8FC931435AA.ashx](http://www.tysonfoods.com/Business-to-Business/Fresh-Meats/~/_media/4D99FCD464ED4F57A887E8FC931435AA.ashx).

45. *See, e.g.*, Letter from American Meat Institute, Cargill, National Beef, National Meat

Through collusion in political matters and infiltration of producer trade associations, the meatpacking industry has succeeded in forestalling marketplace reforms designed to preserve competition between the live cattle industry and the meatpacking industry. It also has successfully perpetuated the myth that what is good for the meatpacking industry is likewise good for the live cattle industry. In short, the meatpackers have used their market power to gain political control over each segment of the multi-segmented beef supply chain, from cow/calf producers to packers to processors, and they have used this control to ensure that the legal framework that defines the rules of the marketplace is tilted in their favor.

## 2. *Capturing the Live Cattle Supply Chain*

The live cattle supply chain remains the meatpackers' last frontier because the very nature of cattle and concomitant nature of cattle production make it less adaptable to the highly concentrated livestock production model already perfected in the hog, poultry and dairy industries. Unlike hogs that annually produce litters of piglets, chickens that lay numerous eggs, and dairy cows that produce milk daily, beef cows typically give birth to only one calf per year, and a calf has the longest biological cycle of any meat animal.<sup>46</sup> This characteristic created the historical phenomenon known as the cattle cycle. According to the USDA, the cattle cycle "arise[s] because biological constraints prevent producers from instantly responding to price."<sup>47</sup> It takes approximately fifteen to eighteen months to rear cattle to slaughter weight, and cattle consume a considerable volume of grass and forage from grazing during that time. The long life cycle of cattle makes the cattle industry much less adaptable to the more concentrated, industrialized production model now commonplace in the corporate hog-rearing, milk producing, and poultry-rearing industries. Unfortunately, however, this formidable and innate obstacle to the industrialization of cattle production applies only to the early stages of the life cycle (about the first year of life) for cattle.

After cattle reach approximately one-year of age, they weigh approximately 700 to 900 pounds. They then become suited to a more concentrated production regime. Subsequently, the cattle can be finished to a slaughter weight of approximately 1,250 pounds in large, concentrated feedlots where they are fed

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Association, Swift & Co., and Tyson Foods, Inc. et al., to Tom Harkin, Chairman, S. Comm. on Agric., Nutrition, & Forestry, *supra* note 36; News Release, John Queen, President, Nat'l Cattlemen's Beef Ass'n, NCBA Editorial: Government meddling threatens cattle industry's future (Nov. 8, 2007) (opposing packer ownership ban), *available at* <http://www.beefusa.org/newsreleases1.aspx?newsid=1505>; News Release, National Cattlemen's Beef Association, *supra* note 40; News Release, National Cattlemen's Beef Association, NCBA: Vilsack Ignores Bipartisan Attempt to Help Cattle Industry (Oct. 20, 2010), *available at* <http://www.beefusa.org/newsreleases1.aspx?NewsID=2136> (opposing GIPSA rule on grounds it would further inject the federal government into the market).

46. U.S. GEN. ACCOUNTING OFFICE, GAO-02-246, ECONOMIC MODELS OF CATTLE PRICES: HOW USDA CAN ACT TO IMPROVE MODELS TO EXPLAIN CATTLE PRICES 30 (2002), *available at* <http://www.gao.gov/assets/160/157218.pdf>.

47. *Cattle & Beef: Background*, ECON. RESEARCH SERV., USDA, <http://www.ers.usda.gov/topics/animal-products/cattle-beef/background.aspx> (last updated May 26, 2012).

predominantly a grain ration for about 120 to 160 days. Here, at the final feeding stage in which cattle are fed in feedlots, meatpackers have intensely focused their vertical integration efforts.

Many of the hundreds of thousands of cow/calf producers, backgrounders, and stockers are largely unaware of the meatpackers' efforts to vertically integrate the live cattle supply chain because the meatpackers' integration efforts focus on the feedlot sector of the industry, and the vast majority of cattle are fed in only 2,120 feedlots.<sup>48</sup> However, the fed cattle market where slaughter-ready cattle are sold directly from feedlots to the beef packer (the feedlot-to-meatpacker cattle market) is the price-making market for the entire U.S. cattle industry. This is because the price for slaughter-ready steers, heifers, cows, and bulls is transferred, at least in part, backward throughout the live cattle production chain, impacting seed stock producers, cow/calf producers, backgrounders, and stockers. Put another way, the present value of unfinished (unfed) cattle is based on the expected future value of finished (fed) cattle, and any distortion or manipulation of the price for finished cattle is transferred, at least in part, to the present value of all cattle. Thus, the feedlot-to-meatpacker cattle market is the portal through which market-power induced price distortions can invade and cripple the entire U.S. live cattle industry.

Even a small competition reduction or small price manipulation in the feedlot-to-meatpacker market has a profound, negative impact on the welfare of the hundreds of thousands of remaining independent cattle producers and the rural communities that they support. The reduced competition and reduced price reverberates and compounds throughout the entire industry. Oklahoma State University economist Clement E. Ward addressed the issue of seemingly small price impacts on the cattle industry and found that “[r]esearch to date suggests price impacts from packer concentration have been negative in general, but small.”<sup>49</sup> He stated that while most studies found price distortions of 3% or less, “even seemingly small impacts on a \$/cwt. basis may make substantial difference to livestock producers and rival meatpacking firms operating at the margin of remaining viable or being forced to exit an industry.”<sup>50</sup>

In 1999, an economist at Utah State University found it “surprising, especially in the face of greatly increased packer concentration” that many studies found “no or very limited ability of packers to exploit feeders/ranchers and consumers.”<sup>51</sup> These researchers found that most of the studies used to

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48. See Nat'l Agric. Statistics Serv., *supra* note 21, at 16.

49. CLEMENT E. WARD, OKLA. COOP. EXTENSION SERV., DIV. OF AGRIC. SCIS. & NATURAL RES., OKLA. STATE UNIV., PACKER CONCENTRATION AND CAPTIVE SUPPLIES 554-5, available at <http://pods.dasnr.okstate.edu/docushare/dsweb/Get/Rendition-6018/AGEC-554web.pdf>.

50. Clement E. Ward, *A Review of Causes for and Consequences of Economic Concentration in the U.S. Meatpacking Industry*, CURRENT AGRIC. FOOD AND RESOURCE ISSUES, no. 3, 2002, at 2, available at <http://caes.usask.ca/cafri/search/archive/2002-ward3-1.pdf>. Dollar per hundredweight is symbolized as “\$/cwt.”

51. Lynn Hunnicutt, *Market Power in the Beef Packing Industry: Is It Time For a New Approach?* 10-11 (Economic Research Study Paper, Paper 207, 2000), available at <http://digitalcommons.usu.edu/cgi/viewcontent.cgi?article=1206&context=eri>.

identify market power (reduced-form modeling approaches) focused on market outcomes and “overlooked important elements of the competitive process in the beef packing industry.”<sup>52</sup> This limitation highlights the need to develop new tools to assess the potential exploitation arising from the concentrated meatpackers’ ongoing efforts to reduce or eliminate through vertical integration the buyer-seller competition in the feedlot-to-meatpacker cattle market.

## B. THE PROCESSES OF VERTICAL INTEGRATION

### 1. *Direct Acquisitions of Feedlots*

The process of direct vertical integration through the acquisition of feedlots by meatpackers is relatively straightforward. The nation’s second largest meatpacker, Cargill Meat Solutions, owns the third largest U.S. feedlot company, Cargill Cattle Feeders, LLC.<sup>53</sup> Also, the nation’s third largest meatpacker, Brazilian-owned JBS-USA, owns the largest U.S. cattle feeding company, JBS Five Rivers Ranch (“Five Rivers”).<sup>54</sup> Together, according to the report, these two packer-owned feedlots marketed approximately 20% of the fed cattle in 2006.<sup>55</sup>

On May 7, 2008, prior to Brazilian-owned JBS’s purchase of Fiver Rivers cattle feeding company, the U.S. Senate Committee on the Judiciary, Subcommittee on Antitrust, Competitive Policy and Consumer Rights held a hearing to examine the competitive issues surrounding the proposal by JBS to acquire National Beef Packing Co. and Smithfield Beef Group, which incorporated the purchase of Fiver Rivers. Upon completion of examination, the Senate Subcommittee found that the acquisitions would increase JBS’s market power and “greatly diminish competition.”<sup>56</sup> Senate Subcommittee Chairman Herb Kohl, on June 24, 2008, sent a formal letter to then U.S. Assistant Attorney General Thomas Barnett urging the DOJ to bring an antitrust enforcement action to block all of JBS’s proposed acquisitions.<sup>57</sup> Importantly, Chairman Kohl specifically recognized the particularly egregious harm to competition that would occur if JBS were allowed to acquire Five Rivers. Chairman Kohl stated:

Should the [Justice] Department not seek to block these acquisitions, however, at a minimum it should seek the divestiture of Five Rivers Ranch Cattle Feeding LLC (“Five Rivers”). JBS Swift seeks to acquire

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52. *Id.* at 1.

53. See RENÉE JOHNSON, CONG. RESEARCH SERV., LIBRARY OF CONG., NO. 7-5700, RECENT ACQUISITIONS OF U.S. MEAT COMPANIES 2 tbl.1 (2009), available at <http://www.nationalaglawcenter.org/assets/crs/RS22980.pdf>. “The proposed JBS acquisition of Five Rivers Ranch Cattle Feeding, which was part of the Smithfield deal, also took place, making JBS the largest cattle feeder in the United States.” *Id.* at 2. Cargill Cattle Feeders, LLC, was ranked as the third largest cattle feeding company in 2006, marketing approximately 6% of the nation’s fed cattle. *Id.* at 2 tbl.1.

54. *Id.*

55. See *id.*

56. Letter from Herb Kohl, Chairman, Subcommittee on Antitrust, Competition Policy and Consumer Rights, to Thomas Barnett, Assistant Attorney General (June 24, 2008), available at <http://www.r-calfusa.com/Competition/080624SenHerbKohlLetter2DoJ.pdf>.

57. *Id.*

Five Rivers, the nation's largest cattle feedlot, marketing approximately two million cattle annually. The acquisition of Five Rivers would give JBS Swift an enormous captive supply of cattle. JBS Swift could strategically slaughter this captive supply at certain times without needing to purchase cattle on the spot market. Such conduct could substantially depress prices paid to independent ranchers. Many academic studies have shown that captive supplies depress cattle prices, and allowing JBS Swift to gain such a large captive supply by virtue of its Five Rivers acquisition could have dangerous consequences for independent producers. I therefore urge that you obtain the divestiture of Five Rivers should the Justice Department decline to block the acquisitions as a whole.<sup>58</sup>

Unfortunately, the DOJ, then under the leadership of former President George W. Bush, did not heed Chairman Kohl's advice, and JBS was allowed to acquire Five Rivers. As a result, JBS Swift is one of the three largest beef packers that collectively control approximately 67% of the U.S. fed cattle market.<sup>59</sup> JBS is the single largest cattle feeder that, together with the twenty-nine other largest cattle feeding operations, was the subject of a prediction by beef industry analyst Harlan Ritchie, PhD.<sup>60</sup> Ritchie estimated that those top 30 feedlots would control over 50% of all fed cattle feeding in the United States by 2010.<sup>61</sup> USDA data do not show that this prediction has materialized. The data show that in 2011, the 66 feedlots with capacities of at least 50,000 head marketed about 8.2 million of the approximately 25.7 million fed cattle that were marketed during that year.<sup>62</sup> These 66 feedlots, therefore, fed and marketed nearly one third of all the fed cattle in 2011.<sup>63</sup>

Unrestrained by a lack of enforcement of antitrust laws and emboldened by the government's disinterest in prohibiting anticompetitive mergers, the dominant beef packers and dominant feedlot companies, which today are becoming increasingly indistinguishable,<sup>64</sup> are radically changing the structure of the U.S. cattle industry.

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58. *Id.*

59. See Johnson, *supra* note 53, at 2 tbl.1. The percentage was estimated by adding the post-merger market shares of JBS USA and Smithfield Beef Group to the market shares of Tyson Foods and Cargill Meat Solutions.

60. See generally Harlan Ritchie, *What's Ahead for the Beef Industry?*, BEEF MAGAZINE, Sept. 1, 2004, available at [http://beefmagazine.com/mag/beef\\_whats\\_ahead\\_beef/](http://beefmagazine.com/mag/beef_whats_ahead_beef/). "Meanwhile, the top 30 cattle feeding companies account for about 40% of the fed cattle [in 2004]. That could be more than 50% by 2010." *Id.*

61. *Id.*

62. Nat'l Agric. Statistics Serv., *supra* note 21, at 16.

63. See *id.*

64. Johnson, *supra* note 53, at 2 ("The proposed JBS acquisition of Five Rivers Ranch Cattle Feeding, which was part of the Smithfield deal, also took place, making JBS the largest cattle feeder in the United States."); see also *id.* at tbl. 1 (Cargill Cattle Feeders, LLC, was ranked as the third largest cattle feeding company in 2006, marketing approx. 6% of the nation's fed cattle). Based on information and belief, Cactus Feeders, Inc., and Friona Industries, LP, which also are listed in Table 1 as among the largest cattle feeding companies, are considered captive feedlots and predominantly market their cattle to only one meatpacker.

## 2. Indirect Acquisitions of Feedlots and Cattle

The process of capturing the live cattle supply chain via indirect vertical integration incorporates several recognizable features. These features facilitate the meatpackers' exercise of market power, which enables them to create disincentives for feedlots that market fed cattle in the competitive cash market and incentives for feedlots to enter some other form of marketing arrangement, most notably formula priced contracts. Features that facilitate the meatpackers' exercise of market power and concomitant capture of the live cattle supply chain include: Market Access Risks, Captive Supply Contracts, and Virtual Feedlot Ownership.

### i. Market Access Risk

For meatpackers to control the live cattle supply chain at the feedlot-to-meatpacker interface without actually owning one or more feedlots, they must control a sufficient market share to act effectively as a gatekeeper to the market. As gatekeeper, the meatpacker decides who has timely access to the marketplace. The outcome of the merger mania that began in the 1980s has enabled the four largest meatpackers, who now control 85% of the fed cattle market nationally, to decide who shall have timely access to the market. When a meatpacker has little or no buying competition in a fed cattle marketing region and periodically chooses not to bid on cattle or otherwise provide market access for that region, that meatpacker is a market gatekeeper with accorded power to create a new economic risk for feedlots—the risk of not having timely access to the marketplace. The meatpacker achieves the status of market gatekeeper when the many cattle sellers have too few cattle buyers, and meatpacker concentration facilitates this imbalance.

Recent evidence suggests that meatpackers control access to fed cattle markets. In 2010, the DOJ and the USDA jointly held a workshop on livestock competition in Ft. Collins, Colorado. Bruce Cobb, General Manager of Consolidated Beef Producers, a fed cattle marketing cooperative, testified before the workshop.<sup>65</sup> He described the results of his company's assessment of meatpacker buying conduct in the Texas, Oklahoma and New Mexico fed cattle markets during the previous fifty-two weeks. During that period, he stated there were:

18 weeks in which there was only one market participant [meatpacker buyer],[and] four weeks in which there were none . . . . So we consistently can see region by region where we had a presence where the region is dominated by one buyer, clear and simple.<sup>66</sup>

The fed cattle market is not the only highly concentrated market in the

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65. *Public Workshops Exploring Competition Issues in Agriculture: Livestock Workshop Before the U.S. Department of Justice and U.S. Department of Agriculture*, 206, 210-11 (2010), available at <http://www.justice.gov/atr/public/workshops/ag2010/colorado-agworkshop-transcript.pdf> (statement of Jim MacDonald, Econ. Research Serv., U.S. Dep't of Agric.).

66. *Id.* at 210-12 (statement of Bruce Cobb, General Manager of Consolidated Beef Producers).

cattle industry. The four-firm concentration level for slaughter cows and bulls increased from just over 30% in 2000 to just over 50% in 2010.<sup>67</sup> As would be expected, the high concentration on the buyer side of the meatpacking industry is mirrored on its seller (or wholesale) side. The latest available data from GIPSA indicate that the largest four firms controlled over 84% of the nation's wholesale-boxed beef market in 2006.<sup>68</sup> Oklahoma State University Economist Clement E. Ward asserted in early 2000 that concentration levels in the U.S. meatpacking industry were among the highest of any industry in the United States "and well above levels generally considered to elicit non-competitive behavior and result in adverse economic performance."<sup>69</sup>

Using its gatekeeper prowess to restrict timely access to the marketplace is one example of non-competitive behavior elicited from the highly concentrated meatpacking industry. The 2007 GIPSA Livestock and Meat Marketing Study ("LMMS") defines market access risk as "the availability of a timely and appropriate market outlet."<sup>70</sup> This risk is particularly significant because fed cattle are perishable commodities that must be sold within a fairly narrow time frame, otherwise they will decrease in value.<sup>71</sup>

In addition to the perishable nature of cattle, other factors intrinsic to the cattle industry exacerbate the anti-competitive effects of meatpacker-induced market access risk, which provides meatpackers with superior and unfair bargaining power over cattle sellers. Transportation constraints are one such other factor. Fed cattle are neither storable agricultural commodities nor suited for long distance travel. The feasibility of transporting cattle long distances decreases as cattle approach slaughter weight. Researchers have found that the seller's distance from the slaughtering plant influences the choice of cattle procurement methods.<sup>72</sup> In particular, "most cattle are purchased for a specific plant from within a 100-mile radius of that facility, whether the owning firm had one or several slaughtering plants."<sup>73</sup> The researchers found that cattle transportation costs over long distances limit the procurement area for meatpacking plants, resulting in higher packer concentration within certain states compared to national concentration.<sup>74</sup> These researchers identified nine cattle procurement regions based on the geographic proximity of packing plants and the procurement area for those packing plants.<sup>75</sup> They defined the general

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67. See Grain Inspection, Packers & Stockyards Admin., *supra* note 17, at 34 fig.15.

68. See Grain Inspection, Packers & Stockyards Admin., *supra* note 16, at 50 tbl. 33.

69. Ward, *supra* note 50, at 1.

70. RTI INT'L, GIPSA LIVESTOCK AND MEAT MARKETING STUDY, VOLUME 3: FED CATTLE AND BEEF INDUSTRIES FINAL REPORT 5-4 (2007), available at [http://www.gipsa.usda.gov/Publications/psp/ivemarketstudy/LMMS\\_Vol\\_3.pdf](http://www.gipsa.usda.gov/Publications/psp/ivemarketstudy/LMMS_Vol_3.pdf).

71. *Id.*

72. Oral Capps, Jr. et al., *Examining Packer Choice of Slaughter Cattle Procurement and Pricing Methods*, 28 AGRIC. & RESOURCE ECON. REV. 11, 21 (1999), available at <http://ageconsearch.umn.edu/bitstream/31491/1/28010011.pdf>.

73. *Id.* at 15.

74. *Id.* at 16.

75. *Id.*

procurement area as around a 300-mile radius of packing plants based on a finding that packing plants regularly purchase some cattle from 100 to 300 miles away.<sup>76</sup>

While researchers have found that the wholesale beef market is national in scope, transportation costs combined with the concentration of beef packers limit the national scope of the fed cattle market. According to a study by John R. Schroeter, “The wholesale beef market . . . is essentially national in scope and insulated, to some extent, from the vagaries of the terms and volume of trade in a single regional fed cattle market.”<sup>77</sup> Thus, it appears that transportation constraints are unique to the live cattle segment of the beef supply chain and far less a concern for the wholesale beef market.

Another factor intrinsic to the cattle industry that exacerbates the anticompetitive effects of meatpacker-induced market access risk is that meatpacker demand for live cattle is bounded on a weekly basis by available slaughter capacity, also known as shackle space, which effectively sets the limit for weekly slaughter cattle-marketing.<sup>78</sup> As a result, meatpackers can suppress the weekly demand for cattle offered in the domestic cash market by finishing off their weekly supply needs with green cattle (i.e., cattle that have not yet reached their optimal slaughter weight) pulled from their captive supply holdings or by finishing off their week with imported cattle. The effect of this practice is to hold down or lower domestic prices and prevent a higher starting price for the beginning of each subsequent week.

Meatpacker-induced market access risk does not appear to be unique to the cattle industry. A bipartisan group of eight U.S. Senators including both Senators from South Dakota, North Dakota, Montana, and Wyoming were concerned that concentrated meatpackers improperly restricted market access for independent lamb feeders, causing them financial harm. In late 2012, the group requested that U.S. Agriculture Secretary Tom Vilsack initiate an investigation to determine if meatpackers had unlawfully manipulated lamb prices by restricting market access for independent lamb feeders. The Senators wrote:

Further, it appears that packer ownership of an excessive number of feeder lambs resulted in a market manipulation because privately owned feeder lambs were unable to be marketed and delivered to packing plants because the packers were killing only the lambs they owned and had contracted to be fed out.<sup>79</sup>

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76. *Id.* at 15.

77. John R. Schroeter, *Captive Supplies and Cash Market Prices for Fed Cattle: A Dynamic Rational Expectations Model of Delivery Timing* 16 (Dep’t of Econ., Iowa State Univ., Working Paper No. 07002, 2007), available at <http://www.econ.iastate.edu/sites/default/files/publications/papers/p3863-2007-01-18.pdf>.

78. See KEVIN GRIER & LARRY MARTIN, GEORGE MORRIS CTR, SPECIAL REP.: BEEF PRICING AND OTHER CONTENTIOUS INDUSTRY ISSUES 1 (2004), available at <http://ageconsearch.umn.edu/bitstream/18143/1/sr04gr02.pdf> (providing an analysis of the live versus beef price disparity in Canada).

79. Letter from John Thune, Max Baucus, John Hoeven, Tim Johnson, Mike Enzi, Jon Tester, John Barrasso, and Kent Conrad, U.S. Senators, to Tom Vilsack, Agriculture Secretary (Oct. 17, 2012), available at <http://www.thune.senate.gov/public/index.cfm/press-releases?ID=753ae86e-473f-42a4-a065-772e8ebf969b>.

The Senators' argument is that packer-owned and packer-contracted lambs facilitated the packers' exercise of their manifest market power to create market access risk for privately owned feeder lambs.<sup>80</sup> Both in the sheep industry and in the cattle industry, the ability to create market access risk is manifested by horizontal integration. However, the meatpackers' exploitation of market access risk is subsequently facilitated by other external factors such as packer-owned and other pre-committed livestock and exacerbated by such factors as the perishable nature of fed cattle, transportation constraints, and weekly demand limitations.

Yet another factor that compounds the problem of market access risk is regional competition for raw products, which would include competition for fed cattle. Competition for raw products is inherently less intense than competition for processed food products.<sup>81</sup> Thus, the competition for fed cattle is inherently fragile, even without the added burden of market power abuses from concentrated meatpackers that wield considerable monopsony power.

Further, the Regional Herfindahl-Hirschman Indices ("RHHI") are already exceedingly high in all nine cattle procurement regions. In studying regional differences in procurement and pricing methods (resulting in part from transportation constraints) researchers calculated the RHHI for nine regional procurement areas for meatpacking plants.<sup>82</sup> Values for RHHI in the nine regions ranged from a low of 2,610 to a high of 4,451, though the RHHI values in three regions were deleted to avoid disclosure.<sup>83</sup> The research found that "[a] 1% increase in regional firm concentration as measured by the RHHI raises the probability" that packers would use packer fed arrangements by 3.18%.<sup>84</sup> These findings suggest that meaningful competition in the fed cattle market may well be nonexistent in procurement regions where the RHHI was exceedingly high, such as the region that Bruce Cobb found to be lacking in competitive buyers.

## ii. Captive Supply Contracts

Soon after they subjected the feedlot sector to market access restrictions, meatpackers offered to resolve the problem they themselves created by guaranteeing timely market access in return for the cattle feeder's willingness to commit cattle to the meatpacker long before they were ready for slaughter. This would initially appear to be a win-win arrangement, as cattle feeders would avoid market access risk, and meatpackers would be better able to schedule their procurement needs. Researchers, however, have found evidence indicating that cattle feeders are subjected to market power and forego revenues to avoid market access risk. For example, the LMMS found that "[t]ransaction[] prices

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80. *Id.*

81. See Mingxia Zhang & Richard J. Sexton, *Captive Supplies and the Cash Market Price: A Spatial Markets Approach*, 25 J. AGRIC. & RESOURCE ECON. 88, 90 n.7 (2000), available at [http://www.r-calfusa.com/industry\\_info/2008\\_JBS\\_merger/080409-Exhibit6\\_ZhangandSexton2000.pdf](http://www.r-calfusa.com/industry_info/2008_JBS_merger/080409-Exhibit6_ZhangandSexton2000.pdf).

82. See Oral Capps, Jr. et al., *supra* note 72, at 16.

83. See *id.* at 16 tbl.1.

84. See *id.* at 21.

associated with forward contract transactions are the lowest among all the procurement methods,” and proffered that “[t]his result may suggest that farmers who choose forward contracts are willing to give up some revenue *in order to secure market access* and to fix the price at least 2 weeks before delivery.”<sup>85</sup>

Cattle owned by or committed to a meatpacker more than fourteen days before slaughter, which would include packer-owned cattle and cattle procured by forward contracts, are considered captive supplies.<sup>86</sup> The use of captive supply arrangements has increased in recent years, and new forms of captive supply have evolved.<sup>87</sup> A subsequent variation to the forward contract form of captive supply was the “formula” priced contract that guarantees market access to cattle feeders but does not specify a firm base price at the time the cattle are committed to the meatpacker.<sup>88</sup> In other words, formula pricing requires cattle feeders to commit to deliver their cattle to a meatpacker, but the base price for the cattle is not established until after the cattle are delivered. The base price is then “typically tied to spot market prices paid the week prior to the week of delivery . . . .”<sup>89</sup>

As meatpackers continually coax feedlots to opt into captive supply arrangements, particularly formula-priced contracts, to avoid market access risk, the cattle industry’s price discovery market (i.e., the cash or spot market) grows dangerously thin. So thin, in fact, that its shrinking volume is increasingly insufficient to discover a competitive price for fed cattle, even though it continues to serve as the determinant of the base price for the growing volume of cattle procured through formula contracts. And, worse, the ultra-thin price discovery market is highly susceptible to meatpacker manipulation.

In a report prepared for the 2010 joint DOJ and USDA workshops on agriculture competition, Auburn University economist C. Robert Taylor, Ph.D., and attorney David A. Domina explain that captive supplies allow meatpackers to avoid participation in the price discovery market “to the extent it [the meatpacker] has already captured the supplies it needs well in advance.”<sup>90</sup> They

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85. See RTI INT’L, *supra* note 70, at 2-36 (emphasis added).

86. See GRAIN INSPECTION, PACKERS & STOCKYARDS ADMIN., CAPTIVE SUPPLY OF CATTLE AND GIPSA’S REPORTING OF CAPTIVE SUPPLY 2 (2002).

87. See, e.g., *infra* Chart 2.

88. C. ROBERT TAYLOR & DAVID A. DOMINA, EVALUATING THE FARMER’S-SHARE-OF-THE-RETAIL-DOLLAR STATISTIC: REBUTTAL, *available at* <http://www.r-calfusa.com/Competition/101105EvaluatingFarmersShareofRetailDollarTaylor.pdf>. Taylor and Domina discussed formula priced contracts:

Distorted incentives for large packer-buyers with marketing agreements has been widely recognized by many economists since the advent of the “formula” by Tyson’s CEO, Bob Peterson, and Paul Engler, Tyson’s largest supplier and Tyson executive before becoming a feeder. Briefly, about 80% of captive agreements have a base price tied either to an announced USDA cash price the week before actual slaughter, or to an in-plant average price. For a big buyer this obviously distorts buying incentives, increasing the marginal cost of buying on the cash market.

*Id.* at 11.

89. Schroeter, *supra* note 77, at 4.

90. DAVID A. DOMINA LAW AND C. ROBERT TAYLOR, ORGANIZATION FOR COMPETITIVE MARKETS RESTORING ECONOMIC HEALTH TO BEEF MARKETS 6 (2010), *available at* <http://ocm.srclabs.com/wp-content/uploads/2012/02/restoringbeefmarkets.pdf> (citing C. Robert Taylor,

further state:

Captive supply gives the processor an additional incentive to depress the cash price downward since the ultimate formula price to be paid for cattle may be impacted by the cash price. As one representative of a packer said to a feeder upon declining to pay a premium price for premium quality cattle: ‘In the old days I would have been able to offer you \$67.50 for these cattle (on a \$66 market), but now paying more would screw up 20,000 formula cattle. . . .

Packers, with their contract supplies of cattle, are literally on both sides of the weekly cash market. They procure a few cattle in the cash market as buyers. But, they push the cash market down because they already control other cattle more favorably priced if the cash price is lowered, and in that sense, they are suppliers motivated to drive price downward. A packer with excessively-committed captive supply cattle is a seller of the extra cattle.<sup>91</sup>

Meatpackers are now shifting unprecedented volumes of cattle from the cash market to their captive supply schemes, most notably to formula contracts. As shown in Chart 2 below, the USDA reports that the volume of cattle procured in the national cash market has fallen from over 52% in 2005 to only 26% in 2012, while formula volumes increased during this period from less than 34% to nearly 55%.

Chart 2

National Breakdown by Purchase Type								
	2005	2006	2007	2008	2009	2010	2011	2012
Cash	52.1%	49.4%	47.3%	42.6%	38.8%	37.4%	32.6%	26.0%
Formula	33.2%	34.3%	37.4%	39.1%	43.7%	43.1%	47.4%	54.8%
Forward Contract	4.8%	7.2%	6.8%	11.2%	9.5%	11.9%	13.2%	12.0%
Negotiated Grid	9.9%	9.0%	8.5%	7.1%	8.0%	7.6%	6.7%	7.2%

Source: USDA Market News

Captive supplies have been shown to increase the instability of prices for cattle producers and hold down cattle prices.<sup>92</sup> Over the past 20 years studies have supported the idea that buyer concentration in cattle markets systematically suppressed prices, with price declines found to range from 0.5% to 3.4%.<sup>93</sup> Researchers also have found that individual producers within the U.S. cattle

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The many faces of Power in the Food Systems, Presentation at DOJ/FTC Workshop on Merger Enforcement (2004)).

91. *Id.* at 6-7; see also Taylor, *supra* note 8, at 8.

92. See John M. Connor, *The Changing Structure of Global Food markets: Dimensions, Effects, and Policy Implications* 7-8 (Dep’t of Agric. Econ., Purdue Univ, Staff Paper No. 3-02, 2003), available at <http://ageconsearch.umn.edu/bitstream/28675/1/sp03-02.pdf>.

93. See *id.*

industry will agree to sign captive supply contracts even while knowing that the aggregate effect of captive supply contracts is to depress the cash market price and make all producers, including themselves, worse off.<sup>94</sup> The researchers explained that it is the producer's inability to coordinate action that enables a meatpacker to obtain acceptance for exclusionary contracts; "as long as the producer is offered at least as much as could be received in the spot market in the equilibrium with captive supplies, the producer's equilibrium strategy is to ACCEPT the contract."<sup>95</sup> Based on this finding, U.S. live cattle producers are defenseless against the monopsony power exercised by the beef packers to shift ever increasing volumes of cattle from the cash market to one or more of the beef packers' captive supply procurement options.

The dramatic structural changes in the U.S hog industry, which is farther down the vertical integration trail, could be an informative analog for analysis by cattle industry participants. The LMMS found that between October 2002 through March 2005, the pork packing industry procured 20% of its slaughter-ready hogs through direct packer ownership, about 57% through other captive supply arrangements, and fewer than 9% through the cash or price discovery market.<sup>96</sup> The LMMS stated, "Based on tests of market power for the pork industry, we found a statistically significant presence of market power in live hog procurement."<sup>97</sup> Further, the LMMS concluded that there was a causal relationship between the increased use of non-cash hog procurement methods and lower prices for hogs:

Of particular interest for this study is the effect of both contract and packer-owned hog supplies on spot market prices; as anticipated, these effects are negative and indicate that an increase in either contract or packer-owned hog sales decreases the spot price for hogs. Specifically, the estimated elasticities of industry derived demand indicate

- a 1% increase in contract hog quantities causes the spot market price to decrease by 0.88%, and
- a 1% increase in packer-owned hog quantities causes the spot market price to decrease by 0.28%.

A higher quantity of either contract or packer-owned hogs available for sale lowers the prices of contract or packer-owned hogs and induces packers to purchase more of the now relatively less expensive hogs and purchase fewer hogs sold on the spot market.<sup>98</sup>

The LMMS found that procurement practices that facilitated the exercise of market power by the concentrated pork packing industry are currently less developed in the concentrated beef packing industry. For example, the 2007

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94. Zhang & Sexton, *supra* note 81, at 97.

95. *Id.*

96. See RTI INT'L, GIPSA LIVESTOCK AND MEAT MARKETING STUDY, VOLUME 4: HOG AND PORK INDUSTRIES FINAL REPORT 2-12 tbl.2-3 (2007), available at [http://archive.gipsa.usda.gov/psp/issues/livemarketstudy/LMMS\\_Vol\\_4.pdf](http://archive.gipsa.usda.gov/psp/issues/livemarketstudy/LMMS_Vol_4.pdf). The percentage of market hogs procured through other captive supply arrangements is the sum of procurement or marketing contracts, forward contracts, and marketing agreements. *Id.* at 2-13.

97. *Id.* at ES-3.

98. *Id.* at ES-2 to -3 (emphasis omitted).

study found that only 5% of live cattle were procured through packer-ownership and only 33.3% of cattle were procured through other captive supply arrangements, leaving nearly 62% of the cattle procured through the price discovery cash market.<sup>99</sup> Like in the hog market, the price discovery cash market continues to set the base price for all marketed cattle.

Similar to its hog market findings, the LMMS found a causal relationship between the increased use of captive supply cattle procurement methods and a decrease in the cash market price for fed cattle under the contemporaneous structure of the beef packing industry.<sup>100</sup> The LMMS then found that a 10% shift of the volume of cattle procured in the open market to any one of the alternative procurement methods “is associated with a 0.11% decrease in the cash market price.”<sup>101</sup> According to C. Robert Taylor, the comprehensive econometric analysis documented in *Pickett v. Tyson Fresh Meats, Inc.*,<sup>102</sup> which covered the period 1994-2004, showed an even greater sensitivity to shifts in cattle procurement. The analysis showed that for each 1% increase in captive supply cattle, cattle prices decreased 0.155%.<sup>103</sup>

The meatpacking industry itself provides a most insightful explanation regarding the problems with captive supply arrangements. A working paper by C. Robert Taylor states that an affidavit contained in the *Pickett v. Tyson* litigation record reveals an acknowledgement by former IBP, now Tyson Fresh Meats, Inc. (“Tyson”), CEO Bob Peterson on how captive supply arrangements provide meatpackers with significant market leverage over cattle feeders. Peterson stated in a 1988 discussion with the Kansas Livestock Association:

These (forward) contracts coupled with packer feeding could represent a significant percentage of the fed cattle during certain times of the year . . . . We believe that it’s having a significant impact . . . on the cash market place.:

. . . we believe that some of those who are feeding cattle and using forward contracting are creating aberrations within the market place by coming in and out of the market; that is not reflecting the true value of the cash market.

But with the packers in the feeding business and forward contracting, there’s going to be a major, major shift against the leverage system.

In my opinion the feeder can’t win against the packer in the real fair play if we go into the feeding and the hedging program.

Do you think that if we had a million cattle on feed and we thought cattle were going to get higher we’d kill ours first and wait for yours until last?

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99. See RTI INT’L, *supra* note 70, at ES-4. The other captive arrangements are the sum of marketing agreements and forward contracts. See *id.*

100. See *id.* at ES-5. The price discovery volume decreased from 62% in 2007 to 26% in 2012. Compare *id.* at ES-4, with *supra* Chart 2.

101. *Id.*

102. 315 F. Supp. 2d 1172 (M.D. Ala. 2004).

103. E-mail from C. Robert Taylor, Alfa Eminent Scholar and Professor of Agricultural and Resource Policy, Auburn University, to author (Jan. 16, 2008) (on file with South Dakota Law Review). See generally *Pickett*, 315 F. Supp. 2d 1172 (discussing captive supply transactions to acquire fed cattle for slaughter).

Or do you think we'd kill yours first and wait for ours until last? Do you think if it's going down we're going to buy yours and wait for ours until last? This is pretty basic. Boy Scouts and Girl Scouts are nice, but when you get back to money in the bank and the facts, I'm telling you the facts.<sup>104</sup>

Then, after IBP entered into widespread captive supply arrangements in 1994, Peterson expressed:

[N]ot formula cattle but packer-fed cattle, which can be killed early or late to fill a particular time frame, be it a day or a week grant the packer far greater flexibility to move in and out of the market. On the way down (in price), he kills his cattle first and on the way up, last.<sup>105</sup>

Peterson also explained how formula contracts give beef packers comparable, if not superior, leverage in the market when compared to packer-owned cattle. In July of 1994, Peterson stated:

I don't know if we should be proud or ashamed but I'm telling you we started formula pricing. Why did we do it? So we have the same leverage our competition had. And we feed cattle through the process of formula pricing.

Well, we aren't going to change. We will have formula—that is our way of feeding cattle.<sup>106</sup>

In December of 1994, Peterson said:

I told your industry right here at the KLA convention (in 1988) that if it allowed packers to feed their own cattle, IBP (Tyson) would do whatever was necessary to level the playing field. Ladies and gentlemen, the leveling is called formula and contract buying. Thus far, we have been able to partially offset the leverage our competitors have by the use of formula cattle and contract buying. Will we stop doing it? No. Will we feed cattle? If we have to. As most of you know, our recent purchase of Lakeside Farm Industries in Canada includes a feedyard. I am only trying to tell you one thing. IBP (Tyson) will do whatever is necessary to remain competitive.<sup>107</sup>

These meatpacking-industry quotations do not support assertions made by meatpackers and their trade associations that formula contracts and other captive supply arrangements were developed not by meatpackers but rather by cattle feeders who wanted additional marketing options. Instead, these quotations vividly describe and explain the decisive advantage that captive supply contacts accord meatpackers to the financial detriment of cattle feeders.

### iii. Virtual Feedlot Ownership

Recent news articles support the contention that meatpackers somehow acquire exclusive or near exclusive rights to cattle in certain feedlots, which should raise antitrust concerns regarding collusion in the purchase of cattle,

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104. C. Robert Taylor, *supra* note 91, at 7 (citations omitted).

105. *Id.*

106. *Id.* at 9.

107. *Id.* (citations omitted).

agreements to limit bidding, agreements to divide territories, or conduct to otherwise reduce competition.

A 2010 Associated Press article, for example, describes an instance in which meatpacker Swift and Co. (now JBS) had purchased the vast majority of cattle from former Ainsworth, Nebraska, feedlot owner Bob Sears by 2009.<sup>108</sup> Thereafter, the Sears feedlot became known as a “Swift yard” and other meatpackers stopped competing for his cattle.<sup>109</sup> The article described another instance whereby a particular meatpacker acquired most of the cattle at certain feedlots even if the meatpacker offered “low-ball” prices.<sup>110</sup> A third instance was described in which meatpacker National Beef Packing Co., LLC had consistently acquired the majority of cattle from a feedlot even though the feedlot received bids from at least three companies.<sup>111</sup> Also in 2010, a Reuters news article reported that Hitch Enterprises, one of the top 15 largest feedlot companies in the U.S., had entered into an indefinite “hand-shake” agreement to sell “100%” of the cattle fed in its 160,000 one-time capacity feedlots to National Beef Packing Co., LLC.<sup>112</sup>

The foregoing are examples of possible collusion by meatpackers to reduce, if not eliminate, competition in the fed cattle market. The DOJ stated in its 2012 report on the series of joint DOJ and USDA workshops on agriculture competition that “agreements to limit bidding competition or divide territories would trigger antitrust scrutiny.”<sup>113</sup> To date, no known enforcement action has commenced.

### 3. Acquisitions of Product Substitutes

#### i. Domestic Product Substitutes

Beef, pork, and poultry are substitute food protein products that compete head-to-head for market share in the consumer meat market. Consequently, the supply and price of competing proteins such as pork and poultry influence the demand and price for cattle.<sup>114</sup> The USDA has found that beef prices are particularly susceptible to increased poultry supplies, such as poultry broilers at relatively lower prices.<sup>115</sup> The USDA further found “if the price of beef goes up

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108. *AP Impact: Beef Industry Woes May Mean Poorer Meat*, ASSOCIATED PRESS/NPR, Oct. 19, 2010, available at [http://www.r-calfusa.com/in\\_the\\_news/2010/n101019-impact.htm](http://www.r-calfusa.com/in_the_news/2010/n101019-impact.htm).

109. *Id.*

110. *See id.*

111. *See id.*

112. Bob Burgdorfer, *Hitch in Cattle Deal with National Beef*, REUTERS, Jan. 21, 2010, available at <http://www.agcanada.com/manitobacooperator/2010/01/21/hitch-in-cattle-deal-with-national-beef>.

113. U.S. DOJ, COMPETITION AND AGRICULTURE: VOICES FROM THE WORKSHOPS ON AGRICULTURE AND ANTITRUST ENFORCEMENT IN OUR 21ST CENTURY ECONOMY AND THOUGHTS ON THE WAY FORWARD 24 (2012), available at <http://www.justice.gov/atr/public/reports/283291.pdf>.

114. *See* LELAND SOUTHARD, ECON. RESEARCH SERV., USDA, LIVESTOCK, DAIRY AND POULTRY OUTLOOK 9 (2004), available at <http://usda01.library.cornell.edu/usda/ers/LDP-M//2000s/2004/LDP-M-06-29-2004.pdf> (“Given the present strength in the fed cattle market . . . increased supplies of competing meats . . . would push breakevens into the red quickly.”).

115. *See* MILDRED M. HALEY, ECON. RESEARCH SERV., USDA, LIVESTOCK, DAIRY AND POULTRY

while the price of chicken remains lower than beef, consumers will likely buy less of the relatively more expensive beef and buy more of the relatively less expensive chicken.”<sup>116</sup>

Researcher Desmond A. Jolly in discussing the relationships between beef and its competing food proteins (i.e., pork and chicken) found that consumer demand for each of these competing proteins responds to consumer income, the price of the product, the price of substitutes, and other factors.<sup>117</sup> Kansas State University researchers found that the decline in retail beef demand experienced from 1980 through 1998 contributed to the reduced size of the U.S. cattle industry, “particularly in relation to competing meat sectors” such as poultry and pork.<sup>118</sup> The same researchers found in an earlier study that “[w]hen beef demand increases (i.e., shifts up), say as a result of an increase in the price of poultry that causes consumers to substitute beef for poultry, the result is higher beef prices . . . .”<sup>119</sup> Researchers at the University of Nebraska–Lincoln found that “Pork and poultry are generally considered substitute sources of protein for beef.”<sup>120</sup> A literature review by the USDA reveals that the average response to competing meat price changes is such that a 1% decrease in poultry prices would result in a 0.13% decrease in beef consumption.<sup>121</sup>

U.S. cattle producers collectively are obligated to pay tens of millions of dollars each year to the government-run beef checkoff program,<sup>122</sup> and a significant portion of these assessments are devoted to enhancing the competitiveness of beef over poultry.<sup>123</sup> For example, in listing its top 20

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OUTLOOK 8 (2006), available at <http://usda01.library.cornell.edu/usda/ers/LDP-M/2000s/2006/LDP-M-01-19-2006.pdf> (“Large supplies of competing meats at relatively lower prices, particularly broilers, are also expected to pressure beef prices . . . .”); see also *id.* at 7 (“Improved grading prospects and larger numbers of cattle on feed will pressure the market, as will larger supplies of competing meats at relatively lower prices.”).

116. Kuo S. Huang, *Price and Income Affect Nutrients Consumed From Meats*, FOODREVIEW, January–April 1996, at 37–38 (FOODREVIEW was replaced by AMBER WAVES following the Winter 2002 issue).

117. See Desmond A. Jolly, *Reasons for the Decline in Beef Consumption*, CALIFORNIA AGRICULTURE, May–June 1983, at 14–15, available at <http://ucce.ucdavis.edu/files/repositoryfiles/ca3705p14-70831.pdf> (Desmond A. Jolly is an Economist, Cooperative Extension, and Adjunct Lecturer, Dep’t of Agric. Econ., Univ. of Cal., Davis.).

118. GLYNN TONSOR ET AL., DEP’T OF AGRIC. ECON., KAN. STATE UNIV., U.S. BEEF DEMAND DRIVERS AND ENHANCEMENT OPPORTUNITIES (2009), available at <http://krex.k-state.edu/dspace/bitstream/handle/2097/2606/BeefDemandDrivers2009.pdf?sequence=1>.

119. James Mintert et al., *Focus on Beef Demand*, in MANAGING FOR TODAY’S CATTLE MARKET AND BEYOND 1–2 (March 2002), available at <http://ag.arizona.edu/arec/wemc/cattlemarket/Focusonbeefdemand.pdf>.

120. Dillon Feuz, *Improved Beef Demand Benefits Nebraska Cattle Producers*, CORNHUSKER ECON., September 27, 2000, available at <http://www.r-calfusa.com/Competition/091002%20Exhibit%2005,%20Improved%20Beef%20Demand%20Benefits%20Nebraska%20Cattle%20Producers,%202000.pdf>.

121. See *Commodity and Food Elasticities: Demand Elasticities from Literature Results*, USDA ECON. RESEARCH SERV., <http://www.ers.usda.gov/data-products/commodity-and-food-elasticities/demand-elasticities-from-literature.aspx> (using beef as the commodity and poultry as the cross commodity) (last visited Apr. 11, 2013).

122. \$82.8 million was assessed in 2007.

123. See *Combined Statement of Beef Checkoff Activities for the Fiscal Years Ended During 2007, 2006, 2005 and 2004*, MYBEEFCHECKOFF.COM, <http://www.beefboard.org/financial/files/State->

accomplishments during the beef checkoff program's first 20 years, the government-run program included producer-paid research that expressly distinguished the superiority of beef over competing chicken for purposes of stimulating consumers to buy more beef.<sup>124</sup> The government-run beef checkoff program maintains a plethora of documents that are designed to persuade producers that their mandatory assessments are necessary in order for beef to compete effectively against poultry. For example, a producer-paid advertisement touted by the beef checkoff program explains why the producer-funded beef checkoff program is critically important to the beef industry.<sup>125</sup>

Moreover, the U.S. Supreme Court case involving the government-run beef checkoff program recently litigated by the DOJ unequivocally determined that beef and poultry are competitors. In the *amici curiae* brief from the states, it was acknowledged that poultry is a competing product to beef.<sup>126</sup>

Despite the obvious reduction in competition that occurs among and between the competing proteins (i.e., beef, pork, and chicken) when dominant firms control the production, output, and price for each competing protein, dominant meatpackers nevertheless remain unrestrained in their capture of control over each competing protein. For example, the 2007 concentration study by Mary Hendrickson and William Heffernan found that Tyson, Swift & Co., and Cargill were among the nation's largest beef packers and pork packers; additionally, Tyson and Cargill were among the largest broiler producers and turkey producers, respectively.<sup>127</sup> More recently, the DOJ declined to initiate antitrust enforcement action against the acquisition by Brazilian-owned JBS S.A., the world's largest beef packer, of Pilgrim's Pride Corp., who controls

National%20Financials.pdf (last visited Apr. 11, 2013).

124. See *Beef Checkoff Program Recognizes Top 20 Accomplishments Of 20 Years*, MYBEEFCHECKOFF.COM (Sept. 25, 2006), [http://www.beefboard.org/news/Release\\_2006\\_09\\_25\\_c.asp](http://www.beefboard.org/news/Release_2006_09_25_c.asp). The checkoff program advertised:

Beef Nutrition. Checkoff-funded RESEARCH has confirmed that, calorie for calorie, lean beef packs a punch. A nutrition parity study between beef and chicken revealed that a 3-ounce cut of lean beef has, on average, only one more gram of saturated fat than the same size serving of a skinless chicken breast. After that, there's no comparison. That 3-ounce serving of lean beef delivers eight times more vitamin B12, six times more zinc and three times more iron than the chicken.

*Id.* (emphasis omitted).

125. See CATTLEMEN'S BEEF PROMOTION & RESEARCH BOARD, YOUR BEEF CHECKOFF 2006 BEEF BOARD ANNUAL REPORT 11 (2006), available at <http://www.beefboard.org/uDocs/cbbannualreport2006>

6. "In 2006, increased placements and heavier carcass weights, combined with a significant supply of *inexpensive poultry products* and closed large export markets, make summertime beef promotion more crucial than ever." *Id.* (emphasis added.)

126. See Brief of Texas et al. as Amici Curiae Supporting Petitioners at 19, *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005) (No. 03-1164, 03-1165), 2004 WL 1900729, available at <http://www.beefboard.org/uDocs/Amicus%20briefs%20on%20merit%20-%20filed%20by%20state%20AGs.pdf>. The amici curiae stated: "Likewise, state beef councils cannot promote a message that disparages a competing product, such as poultry . . . because the government—in contrast to the beef industry—has an interest in the success of competing agricultural sectors." *Id.*

127. See MARY HENDRICKSON & WILLIAM HEFFERNAN, DEP'T OF RURAL SOCIOLOGY, UNIV. OF MO., COLUMBIA, CONCENTRATION OF AGRICULTURAL MARKETS: APRIL 2007 (2007), available at <http://www.foodcircles.missouri.edu/07contable.pdf>.

approximately 22% of the U.S. poultry broiler market.<sup>128</sup>

Due to the long biological cycle of cattle, the cattle industry is particularly susceptible to exploitation by firms that control the production and output of other competing protein sources, such as hogs and poultry. Those animals have much shorter biological cycles that enable their respective industries to respond much more quickly to changes in price by adjusting production and output. In addition, because the meats from these competing protein sources are a market substitute for beef, multiple-protein firms can control the output and price of the competing proteins to manipulate both the demand and price for cattle while the cattle industry remains constrained from responding due to cattle's prolonged biological cycle.

For example, if a multiple-protein meatpacker, such as any of the three largest U.S. beef packers—JBS, Tyson or Cargill—were dissatisfied with the level of profits earned in its beef packing operation, it could increase its poultry production and/or reduce its poultry prices in order to reduce consumption of beef, which would reduce both the demand and price for live cattle. The response by the cattle industry would be limited to liquidation, which likely would accelerate the ongoing liquidation of the U.S. cattle herd and the exodus of U.S. cattle producers from the industry. When the price of cattle falls to the meatpacker's preferred level, the firm can quickly restore higher poultry prices and reduce the volume of poultry production. That action enables the firm to maximize its profits from the sales of both competing proteins until dissatisfaction returns and the cycle can be unilaterally restarted. Given the long biological cycle of cattle, the firm could enjoy several years' worth of maximized profits—a period when both cattle producers and beef consumers would likely be exploited.

Control by the dominant beef packing firms over the production and wholesaling of competing proteins (i.e., pork and poultry) should raise antitrust concerns because such control facilitates price manipulation. Such control also reduces, if not eliminates, competition between the competing proteins, as well as between the farmers and ranchers who produce cattle, hogs, chickens, and turkeys.

This loss of competition and commensurate increase in market power facilitates the multi-protein meatpackers' ability to exercise market power to the detriment of both U.S. cattle producers and U.S. meat consumers. Beef, pork, and poultry are competing, substitute protein products in the consumer market, and meatpackers in control of each substitute can arbitrarily increase or decrease the production and prices of poultry and pork within their fully integrated respective divisions to manipulate both the demand for beef and the price for live cattle.

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128. See STEVE MEYER, CME GROUP, DAILY LIVESTOCK REPORT (2009), available at <http://www.dailylivestockreport.com/documents/dlr%2009-02-09.pdf> (Vol. 7, No. 169).

## ii. Foreign Product Substitutes

As confirmed by the United States International Trade Commission (“USITC”), the U.S. cattle market is highly sensitive to even slight changes in cattle supplies. The USITC found that the farm level elasticity of demand for slaughter cattle is such that “each 1 percent increase in fed cattle numbers would be expected to decrease fed cattle prices by 2 percent.”<sup>129</sup> Researchers at the University of Nebraska–Lincoln found that fed cattle prices were even more susceptible to supply changes and stated that a 1% increase in fed cattle supplies would be expected to reduce fed cattle prices by up to 2.5%.<sup>130</sup> Because of this extreme price sensitivity to increased supplies, domestic cattle prices are susceptible to manipulation from the meatpackers’ strategic importation of live cattle from foreign sources, which are substitute products that compete directly with domestic cattle for the meatpacker’s weekly available shackle space.

Recent experience shows that nominal U.S. fed cattle prices jumped to the highest level in the industry’s history within just five months after the importation of live cattle into the U.S. from Canada ceased. The importation was temporarily curtailed due to the discovery of bovine spongiform encephalopathy (“BSE”) in the Canadian herd. As shown in Chart 3, the price for domestic cattle increased a remarkable \$26 per cwt between May 2003, the month when Canadian cattle imports were curtailed, and October 2003, just five months later. This domestic price increase occurred even after beef imports from Canada were resumed in August 2003. This price increase represents an unprecedented per head increase of \$325 for an average Nebraska Direct Choice steer weighing 1,250 pounds.

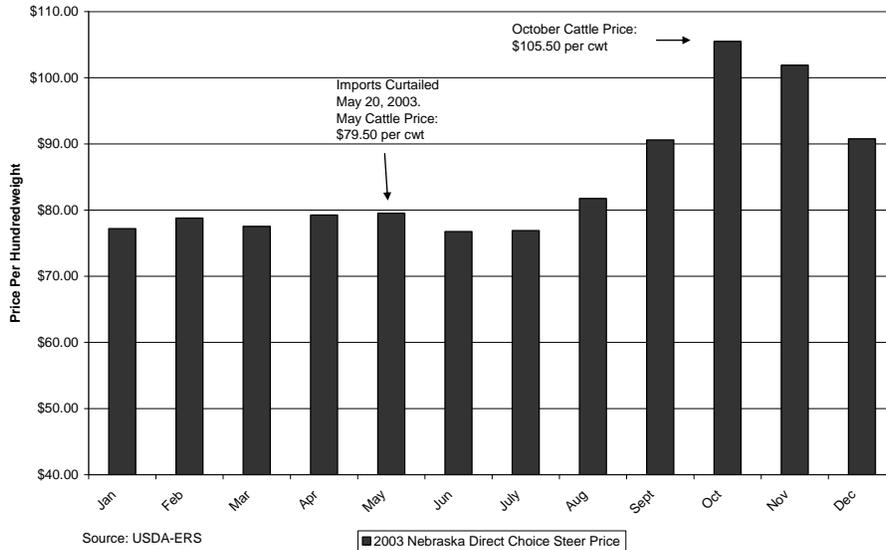
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129. ARONA M. BUTCHER ET AL., U.S. INT’L TRADE COMM’N, U.S.-AUSTRALIA FREE TRADE AGREEMENT: POTENTIAL ECONOMYWIDE AND SELECTED SECTORAL EFFECTS 44 n.26 (2004), available at <http://www.usitc.gov/publications/332/pub3697.pdf>.

130. Dillon Feuz, *The Economics of Carcass Weight: A Classic Micro-Macro Paradox in Agriculture*, CORNHUSKER ECON., Mar. 20, 2002.

Chart 3

## 2003 Cattle Price Response to Curtailment of Canadian Imports



Apparently, the USDA does not have the modeling capability to evaluate accurately the price impact on the U.S. cattle industry caused by the meatpackers' strategic timing of live cattle imports. When the USDA issued its 2005 final rule to allow the resumption of imports of Canadian cattle younger than 30 months of age into the United States, it projected the largest decline in U.S. fed cattle prices would occur in the first or second quarter of the year following such resumption. The USDA estimated price declines during the first and second quarter ranging from a low of \$3.10 per cwt to a high of \$6.05 per cwt.<sup>131</sup> However, during the third and fourth quarters following the resumption of Canadian cattle imports, U.S. fed cattle prices fell from \$96.50 per cwt in December 2005 to \$79.10 per cwt in May 2006, a dramatic decline of \$17.40 per cwt—nearly three times greater than what the USDA projected for the upper boundary of expected losses.<sup>132</sup>

These wild and dramatic price swings coinciding with the curtailment and resumption of live cattle imports suggest that imported cattle have a much more severe impact on domestic cattle prices than currently estimated by the USDA or

131. See ANIMAL & PLANT HEALTH INSPECTION SERV., USDA, ECONOMIC ANALYSIS FINAL RULE: BOVINE SPONGIFORM ENCEPHALOPATHY: MINIMAL RISK REGIONS AND IMPORTATION OF COMMODITIES 24 (2004), available at <http://www.r-calfusa.com/BSE/041220EconAnalysisBSEFinalRule.pdf>. See generally Bovine Spongiform Encephalopathy; Minimal-Risk Regions and Importation of Commodities, 70 Fed. Reg. 460 (Jan. 4, 2005) (to be codified at 9 C.F.R. pts. 93-96).

132. See ECON. RESEARCH SERV., USDA, HISTORICAL PRICE SPREAD DATA FOR BEEF AND THE ALL-FRESH BEEF PRICE (last updated Feb. 21, 2013), [http://www.ers.usda.gov/datafiles/Meat\\_Price\\_Spreads/history.xls](http://www.ers.usda.gov/datafiles/Meat_Price_Spreads/history.xls). To arrive at the live cattle price, select the "beef" tab and multiply the "gross farm value" for the given year by the ERS conversion factor of 2.4, which represents the number of pounds of live animal to equal 1 pound of retail beef. See *id.*

any other contemporary cattle industry analyst. Moreover, imported cattle appear to defy the transportation constraints that researchers found to limit shipments of fed cattle when distances to the slaughter plant exceeded approximately 300 miles.<sup>133</sup> Based on information and belief, fed cattle from Canada's Alberta Province are frequently transported in excess of 600 miles to be slaughtered in Greeley, Colorado. United States meatpackers may well be slaughtering these imported cattle at a considerable financial loss in order to satisfy their weekly demands for live cattle, thereby enabling them to avoid bidding more aggressively for domestic cattle. If this is, in fact, occurring, then meatpackers are likely more than making up their losses from the procurement of the relatively few imported cattle by generating greater savings from holding prices below what a competitive market would otherwise dictate for the much greater volume of domestic cattle. An investigation is sorely needed to assess more fully the impacts on domestic cattle prices arising from the meatpackers' procurement practices for imported cattle.

### C. CAPTIVE SUPPLY MANIPULATION

In June 2009, R-CALF USA filed a formal complaint with GIPSA alleging that meatpackers were aggressively engaged in at least a dozen anticompetitive buying practices that were facilitated, at least in part, by their manipulation of captive supplies.<sup>134</sup> The complaint alleged that meatpackers were harming domestic cattle feeders by: (1) giving preferences to Canadian cattle imports; (2) bypassing slaughter-ready cattle owned by independent cattle feeders in favor of procuring cattle from further distances; (3) providing direct, unreported premiums to larger feedlots in the form of secret sweetheart deals; (4) circumventing price-reporting requirements; (5) dividing-up territories and honoring the unwritten code that whichever packer bids first on an open pen of cattle shall not be outbid by another packer operating in the same territory; and (6) providing certain market information only to their preferred cattle suppliers.<sup>135</sup>

In July 2009, GIPSA responded to R-CALF USA's complaint and indicated an investigation would proceed into the allegations of anticompetitive practices.<sup>136</sup> As part of that investigation, affidavits were taken from this author, certain cattle feeders, and other persons knowledgeable about meatpacker buying practices. In the affidavit provided by this author, additional allegations stated meatpackers were:

- i. imposing disparate discounts for similar quality specifications;
- ii. subdividing the cattle market by denying access to the market for certain subclasses of cattle;

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133. See Capps et al, *supra* note 72, at 15-16.

134. See Memorandum from R-CALF USA to GIPSA, Anticompetitive Practices Occurring in the U.S. Cattle Industry (June 30, 2009) (on file with South Dakota Law Review).

135. See *id.*

136. See Letter from GIPSA to R-CALF USA (July 10, 2009) (on file with South Dakota Law Review).

- iii. coercing producers to waive their rights under the Packers and Stockyards Act (“PSA”);
- iv. bidding not to buy cattle, i.e., offering a low bid with no intention to buy, but rather, with the intent to lower prices for live cattle;
- v. offering preferential agreements with captive suppliers for prices and terms not available to other sellers of comparable cattle;
- vi. entering into strategic alliances that contain special agreements for preferential access to the market and/or special prices; and,
- vii. exercising undue influence over national commodities markets, potentially eliminating this hedging tool for U.S. cattle producers.<sup>137</sup>

Based on information and belief, the investigation into meatpacker buying practices initiated by GIPSA in 2009 was completed in 2012 and is undergoing an internal agency clearance process at the time of this paper’s publication.<sup>138</sup> Based also on information and belief, the investigative GIPSA report is purported to be 1,382 pages in length and titled, “The Effects of Packers’ Usage of Committed Supply.” Pending GIPSA’s issuance of this long anticipated and presumptively comprehensive expose on meatpacker buying practices, observable anecdotal and empirical market information can be used to demonstrate that meatpackers are exploiting the ever-thinning cash market with their ever-growing volumes of captive supplies.

In its official National Feeder & Stocker Cattle Summary report for the two weeks ending July 13, 2012, the USDA issued a dire warning to the U.S. cattle industry regarding the meatpackers’ increased use of captive supplies. The report stated:

The fed cattle cash market lost [\$]2.00 this past week to [\$]115.00 with negotiated [cash] sales now routinely making up less than 20 percent of the weekly slaughter. Over 60 percent of the weekly movement is formula-priced off the scant cash trade that is more like a dictatorship than a democracy. Soon, cattle feeders may be forced to ship their cattle with only a ballpark idea of what their check will look like – similar to the sheep industry.<sup>139</sup>

As a presumptive example of how public market information is suppressed by the politically powerful, captive-supply wielding meatpackers, and how even the USDA appears complicit in withholding relevant market information to the cattle industry, the above referenced report was scrubbed of the above quoted information by the USDA after the original report had been publicly issued and subsequently published by the agricultural trade press.<sup>140</sup>

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137. Affidavit from Bill Bullard, Chief Executive Officer R-CALF USA to GIPSA 7 (July 17, 2009) (on file with South Dakota Law Review).

138. Telephone Interview with Larry Mitchell, GIPSA Administrator (Dec. 5, 2012).

139. USDA-MO, DEPT. OF AG MARKET NEWS, NATIONAL FEEDER & STOCKER CATTLE SUMMARY – TWO WEEKS ENDING 07/13/2012 (2012), available at [http://search.ams.usda.gov/mndms/2012/07/SJ\\_LS85020120713.TXT](http://search.ams.usda.gov/mndms/2012/07/SJ_LS85020120713.TXT) (original before USDA scrubbing).

140. See, e.g., *Feeder Cattle Review: Calf Prices Fell Before Holiday Break*, DROVERS CATTLE NETWORK (July 13, 2012), <http://www.cattlenetwork.com/cattle-news/markets/feeder-cattle/Feeder-cattle-review-Calf-prices-drop-8-15-lower-before-holida-162401246.html> (an example of the publication of the original report in the agricultural trade press) (last visited Feb. 20, 2013); see also USDA-MO, DEPT. OF AG MARKET NEWS, *supra* note 139 (scrubbed USDA report with caption “correction to

A classic example of how the meatpackers deploy their captive supplies to engage in coordinated conduct to drive down fed cattle prices surfaced in 2006 when the U.S. cattle industry witnessed a coordinated withdrawal from the cash cattle market by the major meatpackers. In early February 2006, all four major beef packers—Tyson, Cargill, Swift (now JBS), and National—withdrawed from the cash cattle market for longer than two weeks.<sup>141</sup> A market analyst wrote that cash cattle trade in the Central and Southern Plains during the period was “very light to non-existent” and that packers reportedly were “leaning on committed supplies [captive supplies] to keep the plants operating at full capacity” and were “cut[ting] slaughter rates to control inventories.”<sup>142</sup> Another analyst reported that the reduction in slaughter rates indicated “the determination by beef packers to regain control of their portion of the beef price pipeline.”<sup>143</sup> One of the analysts stated that the packers were determined to lower cattle prices and their “determination to buy [cattle] for less is evident.”<sup>144</sup>

Indeed, the effect of the beef packers’ coordinated action is manifest. The major beef packers adroitly reduced demand for live cattle by reducing slaughter rates rather than entering the cash market. Cattle slaughter fell from 608,500 head of cattle during the last week in January 2006 to only 545,000 during the week ending February 17, 2006, which also was down significantly from the 571,000 cattle slaughtered during the same time the previous year.<sup>145</sup> And, in Dodge City, Kansas, fed steer prices that were \$94.83 per cwt during the last week in January 2006, cowed to the meatpacker-induced reduction in the demand for live cattle and fell to \$89.03 per cwt during the week ending February 17, 2006, representing a loss to independent cattle feeders of \$5.80 per cwt, or \$72.50 per head for every 1,250 lb. steer sold.<sup>146</sup>

Thus, the major beef packers acted in a coordinated manner to reduce output, and they used their captive supplies to enable them to shun the cash market for an extended period of time, which effectively harmed independent cattle producers by driving fed cattle prices lower. Not only did this coordinated

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narrative”).

141. See Jim Cote, *DJ CME Cattle Outlook: Seen Down Slightly; Standoff Continues*, DOW JONES NEWSWIRES, Feb. 17, 2006, available at <http://www.r-calfusa.com/Competition/060217JimCoteDowJonesArticle.pdf> (“the price standoff between cattle owners and beef packers continues into a third week.”).

142. Lester Aldrich, *DJ US Cash Cattle Pre-Open: Trading Standoff Continues*, DOW JONES NEWSWIRES, Feb. 17, 2006, available at <http://www.r-calfusa.com/Competition/060217LesterAldrichDowJonesArticle.pdf>.

143. Cote, *supra* note 141.

144. Aldrich, *supra* note 142.

145. See DEP’T OF AGRIC. ECON., KANSAS STATE UNIV., LIVESTOCK & MEAT MARKETING: LIVESTOCK DATABASES (last visited May 1, 2013), <http://www.agmanager.info/livestock/marketing/database/default.asp#> (select “Download” hyperlink from the row titled “Weekly Cattle Slaughter Data” in the “Cattle and Beef Databases” table). Column “D” in the spreadsheet includes the relevant category “FICATSLT,” which represents federally inspected cattle slaughter.

146. See *Weekly Dodge City Feeder Cattle and Western Kansas Slaughter Cattle Prices*, Cattle and Beef Databases, AgManager info, Kansas State University, available at <http://www.agmanager.info/livestock/marketing/database/default.asp#Cattle and Beef Databases> (Column “K” in the spreadsheet includes the relevant category “DCST1113,” which represents Dodge City Steers weighing 1,100-1,300 lbs.)

action drive cattle prices lower, but it also precluded independent cattle feeders from securing timely access to the market for their cattle. Apparently, none of the major beef packers would “break ranks” to purchase at higher prices than the other beef packers. No buyer did so until prices began to fall. In fact, beef packers were willing to cut production rather than break ranks and purchase on the cash market. Clearly, the beef packers’ strategy was to drive prices downward, and their purchases did not resume until prices began to fall.

The coordinated action in February 2006 was not isolated and was soon followed by a second, coordinated action. During the week that ended October 13, 2006, three of the nation’s four largest beef packers—Tyson, Swift, and National—announced simultaneously that they would all reduce cattle slaughter, with some citing, among other things, high cattle prices and tight cattle supplies as the reason for their cutback.<sup>147</sup> During that week, the packers reportedly slaughtered an estimated 10,000 fewer cattle than the previous week, but 16,000 more cattle than they did the year before.<sup>148</sup> Fed cattle prices still fell between \$2 to \$3/cwt and feeder prices fell between \$3 to \$10/cwt.<sup>149</sup> By Friday of the next week, October 20, 2006, the beef packers reportedly slaughtered 14,000 more cattle than they did the week before and 18,000 more cattle than the year before, indicating they did not cut back slaughter like they said they would.<sup>150</sup> Nevertheless, live cattle prices kept falling, with fed cattle prices down another \$1 to \$2 per cwt and feeder cattle prices were down another \$4 to \$8 per cwt.<sup>151</sup>

The anticompetitive behavior exhibited by the beef packers’ coordinated market actions caused severe reductions to U.S. live cattle prices on at least two occasions in 2006. This demonstrates that the exercise of market power is already manifested in the U.S. cattle industry.

Another aspect of captive supplies that warrants antitrust scrutiny is the beef packers’ practice of accumulating captive supplies, particularly through cattle ownership and feeding, which enable them to perform two conflicting marketplace roles. In addition to being on both sides of the weekly fed cattle cash market as previously discussed,<sup>152</sup> the beef packer competes with independent cattle feeders in the feeder cattle market for lighter-weight cattle to

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147. See *National Beef Cuts Hours at Two Kansas Plants*, KANSAS CITY BUSINESS JOURNAL, Oct. 10, 2006, available at <http://www.bizjournals.com/kansascity/stories/2006/10/09/daily12.html>; Bob Burgdorfer, *Struggling U.S. Beef Industry Cuts Production*, R-CALF USA (Oct. 10, 2006), [http://www.r-calfusa.com/industry\\_info/2008\\_JBS\\_merger/080409-Exhibit12\\_ReutersTysonCutsBack.pdf](http://www.r-calfusa.com/industry_info/2008_JBS_merger/080409-Exhibit12_ReutersTysonCutsBack.pdf) (archived from Reuters); *Swift to Stay with Reduced Production at U.S. Facilities*, R-CALF USA (Oct. 10, 2006), [http://www.r-calfusa.com/industry\\_info/2008\\_JBS\\_merger/080409-Exhibit13\\_MeatpoultrySwift.pdf](http://www.r-calfusa.com/industry_info/2008_JBS_merger/080409-Exhibit13_MeatpoultrySwift.pdf) Meatpoultry.com (archived from meatpoultry.com).

148. See *Livestock Market Briefs*, R-CALF USA (Oct. 13, 2006), [http://www.r-calfusa.com/industry\\_info/2008\\_JBS\\_merger/080409-Exhibit14\\_BrownfieldAgNetworkOct132006.pdf](http://www.r-calfusa.com/industry_info/2008_JBS_merger/080409-Exhibit14_BrownfieldAgNetworkOct132006.pdf) (archived from Brownfield Ag Network).

149. See *id.*

150. See *Livestock Market Briefs*, R-CALF USA (Oct. 20, 2006), [http://www.r-calfusa.com/industry\\_info/2008\\_JBS\\_merger/080409-Exhibit15\\_BrownfieldAgNetworkOct202006.pdf](http://www.r-calfusa.com/industry_info/2008_JBS_merger/080409-Exhibit15_BrownfieldAgNetworkOct202006.pdf) (archived from Brownfield Ag Network).

151. See *id.*

152. See *supra* Part II.B.2.ii.

place on feed. The beef packer then becomes the independent cattle feeders' buyer after the cattle are finished by the feeder, and the prior competitor may be the independent cattle feeders only fed cattle buyer.

The antitrust concern is that meatpackers who compete as buyers in both the feeder cattle market and fed cattle market are strategically positioned to drive independent cattle feeders out of business. This can be accomplished by beef packers knowingly overbidding for feeder cattle, forcing smaller feeders to pay higher than competitive prices in order to fill their feedlots. Though both the packer and the smaller feeder would suffer financial losses as a result of such action, the long-term effect would be the exodus of smaller feeders from the industry, leaving the packer-feeder with even greater buying power in the feeder cattle market. Moreover, when the packer-feeder's higher priced feeder calves are ready for slaughter, the packer-feeder can use these captive supply cattle to avoid purchasing fed cattle in the final cattle market. The effect would be to further depress fed cattle prices, which likely would enable the beef packer to recoup any losses resulting from the purchase of higher-priced feeder cattle. Though this type of predatory purchasing would benefit feeder cattle sellers in the short term, the long-term results would be disastrous as the feeding sector would become even more concentrated and both the final cattle market and the feeder cattle market would become even less competitive.

### III. HARM TO COMPETITION

The beef packers and their allied trade associations have long justified their ongoing attempts to capture the live cattle supply chain with claims of increased efficiencies through economies of scale. They rationalize the adverse consequences of their actions (e.g., the exodus of industry participants and the dwindling cow herd) with claims of increased productivity and benefits to consumers that, they say, negate the need for the industry's previous numbers of either cattle producers or cattle. For example, in written testimony before the July 16, 2002 United States Senate Agriculture Committee hearing on packer ownership of livestock, the meatpacking industry's trade association, the American Meat Institute testified: "Demand for consistent quality product has led many firms to exert greater control over the supply chain." Also, in its written testimony before the same July 16, 2002 Senate hearing, the NCBA attached the executive summary of the Sparks Study, which it commissioned, to its testimony. Specifically, the Sparks Study states, "Packers use ownership of livestock to help control unit costs in a variety of ways. If this management tool is restricted, unit costs can be expected to increase (without increasing the value of the final product)."<sup>153</sup>

The Sparks Study asserts that direct ownership of livestock limits the packers' market risk, arguing that the futures market is insufficient for this purpose. Therefore, according to the Sparks Study, one of the few tools available to packers to offset the smaller margins associated with higher

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153. SPARKS COS. INC., *supra* note 2, at 40.

livestock prices is through direct ownership of raw production materials, like livestock, which enables them to reduce their margin risk. The Sparks Study states, “The pressures to reduce costs force the search for low-cost livestock supplies (often at the expense of producer returns) . . . .”<sup>154</sup>

The Sparks Study adds additional insight into the packing industry’s rationale for supporting packer ownership of livestock as well as other means that contribute to vertical integration of their industry, acknowledging:

For many meat packers, integration between the packing and feeding stages of livestock production is seen as an effective vehicle to reduce market risk exposure and loss of such a valuable tool increases their costs . . . .

Vertical integration often attracts investors because of the negative correlation between profit margins at the packing stage and the feeding stage.<sup>155</sup>

The foregoing discussions in Parts I and II above demonstrate that beef packers enjoy an unfair, unjust, and disproportionate pricing advantage over independent cattle feeders; and, this pricing advantage is disrupting the competitiveness of the U.S. cattle industry. Independent cattle feeders have an inherent disadvantage when beef packers participate as buyers in both the feeder cattle market and the fed cattle market. The beef packers that bid against the independent cattle feeder for the purchase of feeder cattle likely will be the only beef packers to offer a bid later to purchase those same feeder cattle after they are fed and offered for sale in the fed cattle market. The independent cattle feeder must compete against the same beef packers in the feeder cattle market as they will later sell to in the fed cattle market.

The overall impact of the unfair, unjust, and disproportionate pricing advantage enjoyed by dominant beef packers is that competition in the U.S. cattle market has been harmed and, consequently, the U.S. cattle market is now severely broken. Evidence of the severely broken U.S. cattle market, in the form of identifiable and measurable market failures, includes:

#### A. THE CATTLE PRODUCERS’ LOST SHARE OF THE CONSUMERS’ BEEF DOLLAR IS EVIDENCE OF MARKET FAILURE

In 1980, U.S. cattle farmers and ranchers who sold cattle in the fed cattle market received 63% of each dollar paid by consumers for retail beef cuts derived from a “standard animal, cut up in a standard way at the packing plant, and sold in standard form through the retail store.”<sup>156</sup> This percentage is referred to as the producers’ share of the consumers’ beef dollar. As shown in Chart 4 below, by 2009, the producers’ share of the consumers’ beef dollar had fallen to 43%, a full 20% decline since 1980. It was not until after 2009, when

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154. *Id.* at 22.

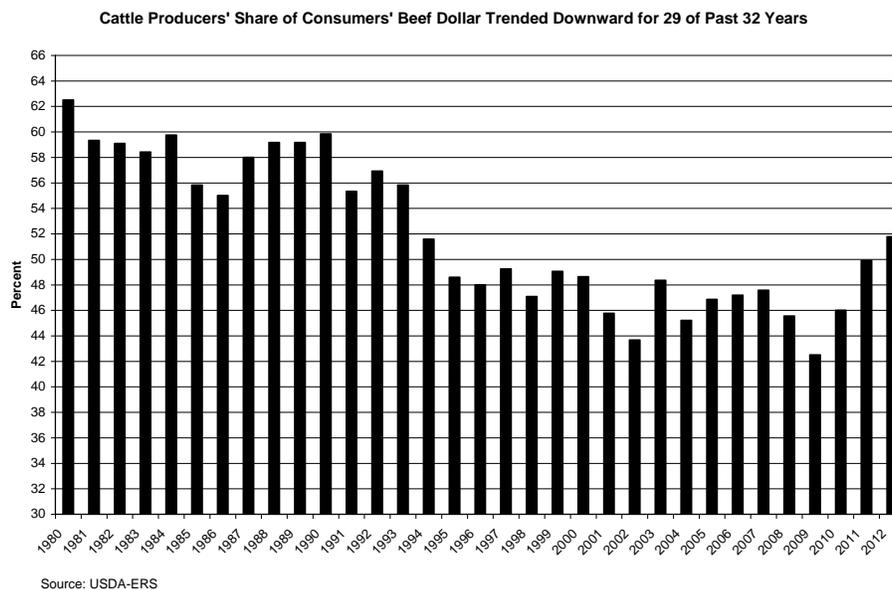
155. *Id.* at 24.

156. WILLIAM HAHN, ECON. RESEARCH SERV., USDA, BEEF AND PORK VALUES AND PRICE SPREADS EXPLAINED 4 (May 2004), available at <http://naldc.nal.usda.gov/download/38951/PDF> (citation omitted).

U.S. cattle inventories had fallen to historical lows, did the producers' share of the consumers' beef dollar begin to return to levels not seen since the early 1990s.

These price-spread data calculated by the USDA Economic Research Service ("ERS") are not influenced by an increase in value-added beef products.<sup>157</sup> The ERS emphatically states, "Analysts who cite increasing value-added as a factor in pork and beef price spreads misunderstand how these are calculated."<sup>158</sup> Thus, the producers' lost share of the consumers' beef dollar indicates that someone in the beef supply chain is capturing the cattle producers' competitive market share of the value of retail beef. This is evidence of severe market failure caused by abusive monopsony power.

Chart 4



#### B. THE EVER-INCREASING BEEF PRICE SPREAD BETWEEN THE RANCH GATE AND RETAIL COUNTER IS EVIDENCE OF MARKET FAILURE

In addition to the clarification that its price spread data is not influenced by increased value-added beef products, the ERS further states that its price spread data can be used to "measure the efficiency and equity of the food marketing system[.]"<sup>159</sup> and "[i]ncreasing price spreads can both inflate retail prices and deflate farm price."<sup>160</sup> The price spreads between ranch gate prices, including fed cattle prices, and retail prices, including consumer paid prices, have been

157. *See id.* at 2.

158. *Id.*

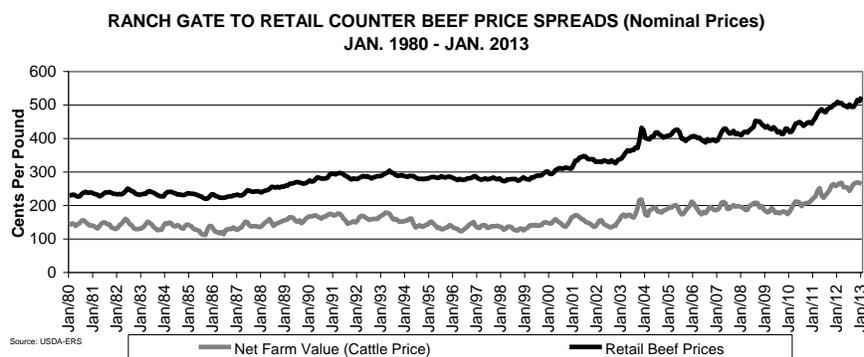
159. *Id.* at 3.

160. *Id.* at 2.

steadily increasing over time.<sup>161</sup> According to ERS, “[h]igher price spreads translate into lower prices for livestock.”<sup>162</sup> Also, innovative technologies can reduce price spreads, and when price spreads drop, economic efficiency increases.<sup>163</sup> Lastly, “[b]oth consumers and farmers can gain if the food marketing system becomes more efficient and price spreads drop.”<sup>164</sup>

Both consumers and producers are being harmed by the current system that increases price spreads, which means it is costing more than ever before to bring the raw product (i.e., cattle) to the consumer in the form of edible beef. This indicates the marketplace is becoming increasingly inefficient. The USDA found in 2004 that “the total price spreads show a weak upward trend when corrected for inflation.”<sup>165</sup> This upward trend has only worsened since 2004. The ever-increasing price spread between ranch gate values for cattle and retail prices for beef is evidence of market failure caused by the exercise of market power that is exploiting both consumers and producers.

Chart 5



### C. LONG-RUN LOSSES IN THE FINAL CATTLE MARKET WHILE RETAIL BEEF PRICES CONTINUALLY REACH NEW RECORD-HIGH LEVELS IS EVIDENCE OF MARKET FAILURE

According to the USDA’s High Plains Cattle Feeding Simulator, U.S. cattle feeders have suffered prolonged and horrendous losses that reached as high as \$25.52 per cwt in July 2012.<sup>166</sup> Based on a typical fed steer weight of 1,250 pounds, this translates into a loss per steer of \$319.00. Ironically, the USDA data show that retail values of choice beef increased from \$4.75 per pound to

161. See *infra* Chart 5.

162. HAHN *supra* note 156, at 8.

163. *Id.* at 3.

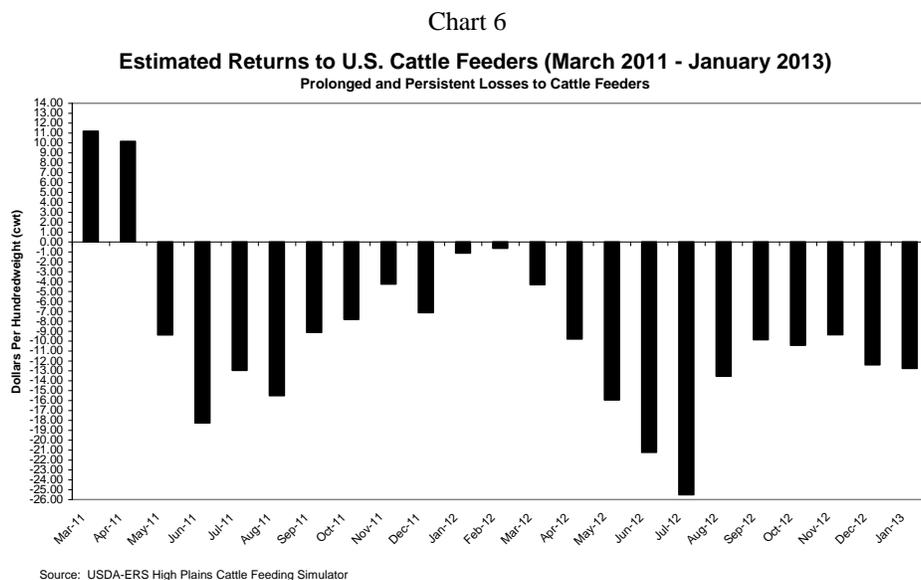
164. *Id.*

165. See *id.* at 10.

166. See ECON. RESEARCH SERV., USDA, DATA SETS, HIGH PLAINS CATTLE FEEDING SIMULATOR (last updated Aug. 27, 2012), <http://www.ers.usda.gov/data-products/livestock-meat-domestic-data.aspx> (select “High plains cattle feeding simulator” hyperlink, then refer to “Net margin”).

\$5.24 per pound during the period from March 2011 through Jan 2013,<sup>167</sup> the same period depicted below in Chart 6 that shows the horrendous losses suffered by cattle feeders.

These persistent losses likely have forced thousands, if not tens of thousands, more farmer-feeders to exit the feeding industry since early 2011. The smaller farmer-feeders are less likely to have the deep pockets that their larger, corporate feedlot counterparts have to withstand such persistent and severe losses. These horrendous losses to cattle feeders while consumers continue to pay at or near record prices for beef are evidence of market failure caused by abusive monopsony power.



#### D. THE DISRUPTION OF THE U.S. CATTLE CYCLE IS EVIDENCE OF MARKET FAILURE

The General Accounting Office explains that the U.S. cattle industry is subject to a historical cycle, which “refers to increases and decreases in herd size over time and is determined by expected cattle prices and the time needed to breed, birth, and raise cattle to market weight, . . .”<sup>168</sup> These factors are complicated by the fact that “[c]attle have the longest biological cycle of all meat animals.”<sup>169</sup> The cattle cycle historically occurred every 10 to 12 years, a function of the long biological cycle for cattle. The USDA reports that during the cycle, cattle numbers expand for about 6 to 7 years, consolidate for 1 to 2

167. See ECON. RESEARCH SERV., USDA, BEEF VALUES AND PRICE SPREADS (last updated Feb. 21, 2013), [http://www.ers.usda.gov/datafiles/Meat\\_Price\\_Spreads/beef.xls](http://www.ers.usda.gov/datafiles/Meat_Price_Spreads/beef.xls).

168. U.S. GEN. ACCOUNTING OFFICE, *supra* note 46, at 30.

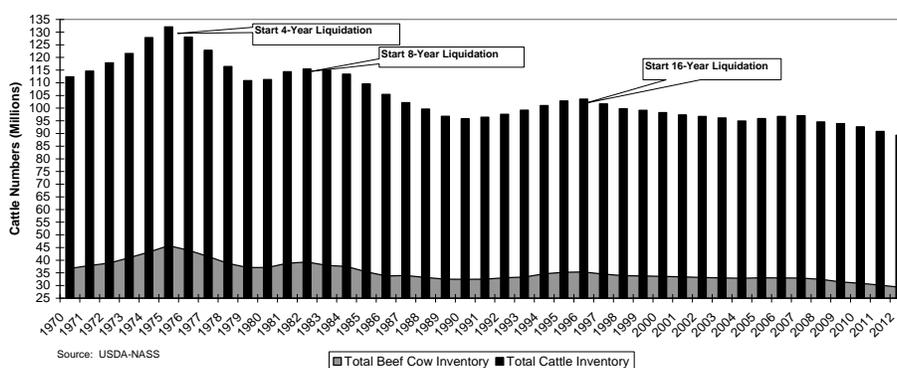
169. *Id.*

years, and then decline for 3 to 4 years before the next expansion begins again.<sup>170</sup> In 2002, the USDA acknowledged, “The last cattle cycle was 9 years in duration; the present cycle is in its thirteenth year, with two more liquidation years likely.”<sup>171</sup>

Given its historical responsiveness to the competitive forces of supply and demand, the cattle cycle is the bellwether indicator of the competitiveness of the U.S. cattle industry. As shown in Chart 7, the last normal liquidation phase of the U.S. cattle cycle began in 1975 and ended in 1979, lasting the typical four years. The next liquidation phase began in 1982 and ended in 1990, lasting an unprecedented eight years. The liquidation phase that began in 1996 is ongoing today and has lasted an unprecedented 16 years, though it unsuccessfully tried to recover from 2005 to 2007 in response to the anomalous curtailment of Canadian cattle imports. In late 2007, the USDA began cautioning the industry, stating that “[s]ome analysts suggest the cattle cycle has gone the way of the hog and dairy cow cycles.”<sup>172</sup>

Chart 7

Total U.S. Cattle Inventory and Beef Cow Inventory, January 1



The historical cattle cycle is now disrupted, and the obvious trend since 1975 is an ever-shrinking cattle herd. The competition-induced demand/supply signals that once led to expectations about changes in cattle prices are no longer functioning properly. While cattle industry analysts ponder this phenomenon, in February 2008, the USDA attributed a similar disruption that was occurring in the U.S. hog cycle to the hog industry’s new structure.<sup>173</sup> The USDA declared that the “New Hog Industry Structure Makes Hog Cycle Changes Difficult To Gauge,” and stated, “The structure of the U.S. hog production industry has

170. MATHEWS, *supra* note 15, at 3.

171. INTERAGENCY AGRIC. PROJECTIONS COMM., OFFICE OF THE CHIEF ECONOMIST, USDA, WAOB-2002-1, USDA AGRICULTURAL BASELINE PROJECTIONS TO 2011 (2002), available at <http://usda.mannlib.cornell.edu/usda/ers/94005/2002/waob-2002-1.pdf>.

172. MILDRED M. HALEY, ECON. RESEARCH SERV., USDA, LDP-M-162, LIVESTOCK, DAIRY, & POULTRY OUTLOOK 5 (Dec. 2007), available at <http://usda01.library.cornell.edu/usda/ers/LDP-M/2000s/2007/LDP-M-12-19-2007.pdf>.

173. HALEY, *supra* note 38, at 14.

changed dramatically in the past 25 years.”<sup>174</sup> This “dramatically” changed structure includes the consolidation of the industry, where “fewer and larger operations account for an increasing share of total output.”<sup>175</sup>

As was the case in the hog industry, the USDA recognized a functioning cattle cycle itself as an indicator of a competitive market. The USDA succinctly explained:

The cattle cycle refers to cyclical increases and decreases in the cattle herd over time that arise because biological constraints prevent producers from instantly responding to price. In general, the cattle cycle is determined by the combined effects of cattle prices; the time needed to breed, birth, and raise cattle to market weight, and climatic conditions. If prices are expected to be high, producers slowly build up their herd sizes; if prices are expected to be low, producers reduce their herds.<sup>176</sup>

The disrupted cattle cycle is clear evidence of market failure caused by abusive monopsony power.

#### E. A SHRINKING CATTLE INDUSTRY WITH STAGNANT PRODUCTION IN THE FACE OF GROWING DOMESTIC BEEF CONSUMPTION IS EVIDENCE OF MARKET FAILURE

As shown in Chart 8, total domestic beef consumption peaked in 1976, subsided, and then increased significantly after 1993. In a competitive cattle industry, production would be expected to increase when beef consumption increases. However, the production of beef produced from cattle exclusively born, raised, and slaughtered in the United States has not kept pace with the nation’s appetite for beef. Since 1996, domestic beef production has remained relatively stagnant, though beef consumption has risen in recent years to nearly its peak level back in 1976. In fact, from 2004 through 2007, the U.S. cattle industry experienced the largest shortfall in its history between its domestic beef production and the nation’s beef consumption.

The shortfall in domestic production is being satisfied with imported beef and beef derived from imported cattle slaughtered in the United States. Thus, a growing shortfall in domestic production means the U.S. cattle industry is losing market share in its own market, and U.S. production is being systematically supplanted by foreign production. The domestic cattle industry would not be constrained from meeting the increase in consumption in its own market if the industry were competitive. The cattle industry is so constrained, as evidenced by ongoing cattle herd liquidation and stagnant production coinciding with increased consumption. This constraint is evidence of severe market failure caused by abusive monopsony power.

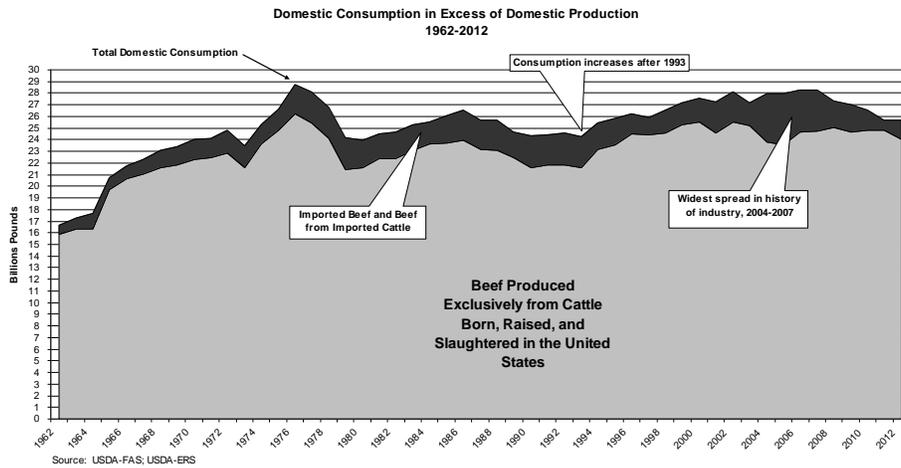
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174. *Id.*

175. McBride & Key, *supra* note 38, at 8.

176. *Cattle & Beef: Background*, *supra* note 47.

Chart 8



#### IV. ANTICOMPETITIVE BEHAVIOR

The following are examples of known or suspected practices by beef packers that constitute anticompetitive behavior and/or suspected violations of antitrust statutes and the Packers and Stockyards Act:

##### A. COERCIVE THREATS TO CATTLE PRODUCERS TO ADVANCE BEEF PACKERS' POLITICAL GOALS

Nearly a decade ago, the beef packing industry exacted its market power on the U.S. cattle industry for purposes of influencing national public policy; and, in doing so, imposed unnecessary costs and burdens on U.S. cattle producers. U.S. producers could not avoid these costs and burdens without eliminating or severely limiting their marketing options. In March 2003, beef packer IBP, Inc. (now Tyson) notified U.S. cattle producers that it would require producers to “[p]rovide IBP, Inc. access to your [producers’] records so that [IBP] can perform random producer audits...” and “[p]rovide third-party verified documentation of where the livestock [IBP] purchase[s] from you [producers] were born and raised.”<sup>177</sup> IBP initiated this thinly veiled threat for the express purpose of coercing producers to help IBP contact “Senators or members of Congress,” to whom producers were asked to express their concerns regarding plans to impose such onerous conditions on their industry.<sup>178</sup> This was IBP’s response to Congress’ passage of the mandatory country-of-origin labeling (“COOL”) law.<sup>179</sup> This abuse of market power was initiated months *before* the USDA even published its October 30, 2003 proposed rule to implement the

177. Letter from Bruce Bass, Senior Vice President, Cattle Procurement, and Gary Machan, Vice President, Hog Procurement, IBP, Inc., to Producers (March 2003); *see also* Cong. Rec. S14,114 (daily ed. Nov. 6, 2003) (statement of Sen. Talent).

178. *Id.*

179. *See* 149 Cong. Rec. S14,114 (daily ed. Nov. 6, 2003) (statement of Sen. Talent).

COOL law.<sup>180</sup>

#### B. IMPOSITION OF ARBITRARY PRODUCTION SPECIFICATIONS THAT LEAD TO PRODUCER DISCOUNTS AND FACILITATE PREFERENTIAL TREATMENT

In addition to the application of price premiums and discounts for contract or grid-priced cattle, based on standardized USDA yield and quality grades, Tyson and Smithfield (now JBS) had each established different price premiums and discounts for additional factors, such as muscle scoring. For example, Smithfield discounted certain muscle scores between \$5.00 per cwt and \$10.00 per cwt, and Tyson uses muscle scores to apply varying discounts under a different system.<sup>181</sup> These discounts and premiums are purported to reflect consumer preferences,<sup>182</sup> but whether a \$120 discount (e.g., from \$10 per cwt. applied to a 1,200 lb. animal) reflects the actual discount the beef packer receives upon the sale of the beef, or whether the discount represents a windfall for the beef packing industry, is undeterminable without additional information. Nevertheless, the ability to impose such discounts, without knowing if they are legitimate, is currently facilitated by the limited marketing outlets available to U.S. cattle producers.

In addition, producers that sell cattle “in-the-meat” (i.e., they agree to receive payment after the packer slaughters the cattle and evaluates the animal’s carcass traits) rather than “live” (i.e., they receive payment based on the live weight of the animal), are literally at the mercy of the beef packer for determinations of carcass traits. Packers impose a host of discounts for “in-the-meat” sales, including discounts for hard bone, dark cutters, overweight, underweight and overage. But, the beef packer applies discounts for such factors without the producer being present to contest the beef packers’ determination. This practice seriously disadvantages producers and is ripe for abuses, including preferential treatment whereby some producers may not be assessed the same discounts assessed to others.

Anecdotal information suggests at least three means of packer abuse. First, some beef packers in some regions do not give cattle producers a choice between selling “in-the-meat” or “live” and only offer bids for “in the meat” sales. Also, beef packers can use discount schemes to grant preferences to certain cattle feeders by, for example, paying preferred feeders an average, non-discounted price for low quality cattle while taking deeper discounts from non-preferred feeders that sell higher quality cattle. Lastly, beef packers pass over some feeders (that is, do not offer a bid for cattle on the feeder’s show list) until the feeder’s cattle become overweight, at which time the beef packer offers a bid with significant discounts for the heavier-weight cattle. These discounts

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180. Mandatory Country of Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities, and Peanuts, 68 Fed. Reg 61944 (Oct. 30, 2003) (to be codified at 7 C.F.R. pt. 60).

181. See Nexus Mktg., Muscle Scoring Provides Important Production Tips 1 (2008), available at [http://www.r-calfusa.com/industry\\_info/2008\\_JBS\\_merger/080409-Exhibit9\\_MuscleScoring.pdf](http://www.r-calfusa.com/industry_info/2008_JBS_merger/080409-Exhibit9_MuscleScoring.pdf).

182. See *id.*

facilitate preferential treatment.

### C. PROCUREMENT PRACTICES LEAD TO PRICING ANOMALIES THAT BENEFIT BEEF PACKERS

An investigation is needed to determine if the pricing strategies of the concentrated beef packers, such as that described in the examples above, are among the reasons for the pricing anomalies disclosed in the LMMS study. When comparing the price differences between cattle sold on a carcass weight basis with a grid valuation and cattle sold on a live weight basis, the LMMS study found that “compared with direct trade transactions with live weight valuation, . . . direct trade transactions with carcass weight dependent on grid valuation are 1.8 cents lower, holding other explanatory variables in the model fixed.”<sup>183</sup>

This outcome whereby cattle sold to meatpackers on a carcass weight basis with a grid valuation brought less money than cattle sold on a live weight basis is contrary to competitive market fundamentals. Selling on a carcass weight basis with a grid, otherwise known as grade and yield,<sup>184</sup> has been represented to cattle feeders as a means to receive quality premiums for their higher quality cattle.<sup>185</sup> However, this finding, as well as the findings of many cattle feeders who have sold on a grade and yield basis, suggests that the largest meatpackers have designed their grids not only to transfer price risk from the meatpacker to the producer,<sup>186</sup> but also, to depress the prices paid for a large number of cattle procured from producers.<sup>187</sup> It is no wonder that many independent cattle producers refer to the grade and yield valuation method as “Grade and Steal.”

### D. CURRENT PROCUREMENT PRACTICES FACILITATE A DIVISION OF THE MARKET THAT MAY ELIMINATE COMPETITION FOR CERTAIN SUBCLASSES OF CATTLE IN CERTAIN REGIONS

Tyson recently issued new terms and conditions under which it will purchase cattle for slaughter.<sup>188</sup> Tyson states that it “does not typically accept for processing at its facilities” cattle that exceed 58 inches in height, cattle that exceed 1,500 pounds, or cattle with horns longer than 6 inches in length.<sup>189</sup> The imposition of such restrictions presents a number of competition-related concerns. First, for example, if Tyson is one of only two buyers in the marketing

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183. RTI INT’L, *supra* note 70, at 2-39.

184. *Id.* at 5-10, 5-11.

185. *See id.* at 1-15 (explaining that grids offer premiums and discounts based on carcass grade classifications).

186. *Id.* at 5-2, 5-3.

187. *See id.* at ES-3 (“88% of large packers purchased cattle based on carcass weight with grids”); *see also id.* at ES-4 (“Packers in the West purchased more than half of their cattle using carcass weight with grid valuation, while packers in the High Plains and Cornbelt/Northeast used this valuation method for 42% and 44% of their purchases, respectively.”).

188. *Cattle Terms and Conditions*, TYSON (Jan. 3, 2011) <http://www.tysonfoods.com/Business-to-Business/Forms-and-References/Cattle-Terms-and-Conditions.aspx>.

189. *Id.*

region where such restricted cattle could become available, cattle are approaching but have not yet exceeded any of Tyson's restrictions, and if the other buyer imposed no comparable restrictions, then the other buyer would have an incentive not to bid on such cattle. If Tyson subsequently did not purchase, the cattle would then be available for sale at a discount as soon as Tyson's restrictions were exceeded. In fact, Tyson would have an incentive to lowball these same cattle before they exceed restrictions knowing that if the producer did not sell to Tyson quickly, there would be no competition for the cattle after the restrictions were exceeded. Second, for cattle that already exceed Tyson's restrictions, regardless of the demand for beef, the producer would have significantly fewer market outlets for the cattle. Third, the beef packers can manipulate the weight of cattle simply by limiting market access to a cattle feeder, such as bypassing cattle feeders with slaughter-ready cattle.<sup>190</sup>

The imposition of certain restrictions on the type of cattle a beef packer will purchase could constitute an outright denial of access to the marketplace for producers with only one or two packer buyers. Otherwise, it could result in the division of the marketplace if, for instance one beef packer were to accept only steers, only heifers, only Holsteins, or only hornless cattle. If this were to occur, or if it is occurring, the marketplace could be sufficiently divided by the few beef packers to severely limit competition for each subclass of cattle, if not eliminate competition altogether.

#### E. THE BEEF PACKERS' DOMINANCE IN THE CASH MARKET IS MIRRORED IN THE FUTURES MARKET, WHERE THEY ALSO CAN EXERCISE MARKET POWER

Beef packers are able to significantly influence the commodities futures market, rendering it unsuitable for managing the risks of independent cattle producers. Practices such as shorting the market to drive down both cash and futures prices, particularly on the last trading day of the month before futures contracts expire, are a form of market manipulation. For example, the October 2009 futures board broke the limit down on the last trading day in October, causing an unprecedented number of live cattle deliveries to occur.<sup>191</sup> Based on information and belief, the manipulative practices by the beef packers in the commodities futures market has created a disinterest among speculators who would otherwise participate in long speculative positions in the market. The lack of speculative long positions in the market may well be depressing the cash and futures market by several dollars per cwt and reducing the utility of the commodity futures market as a risk management tool for cattle producers.

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190. See *supra* Part II.A.2.

191. See, e.g., MO. DEP'T OF AGRIC. MARKET NEWS SERV., USDA, NATIONAL FEEDER & STOCKER CATTLE SUMMARY - WEEK ENDING 10/30/2009 (2009), available at [http://search.ams.usda.gov/mndms/2009/10/SJ\\_LS85020091030.TXT](http://search.ams.usda.gov/mndms/2009/10/SJ_LS85020091030.TXT) ("Nearly 800 loads of CME Live Cattle deliveries at the northernmost delivery points helped pull the cash market from a 3.00 discount to an eventual near 6.00 premium after October live cattle closed limit down on Friday's final session.").

F. CONCENTRATED BEEF PACKERS ARE UNIQUELY POSITIONED TO  
MANIPULATE BEEF DEMAND TO PREVENT U.S. CATTLE PRICES FROM  
RESPONDING TO TIGHT DOMESTIC SUPPLIES

The mandatory COOL law implemented in 2009 was expected to allow a consumer preference for USA beef to translate directly into an increased demand for cattle born, raised, and slaughtered in the United States. However, the nation's beef packers resisted the COOL law and began labeling exclusively USA beef with a multi-country label, such as "Product of Mexico, Canada and the U.S." The effect of this action was to thwart consumer demand for exclusively domestic beef from translating into a demand for USA cattle, thus enabling beef packers to continue satisfying only a generic demand for beef and sourcing the cattle needed to satisfy that generic demand from any country.

In addition to the discussion above regarding the beef packers' ability to manipulate beef consumption through its control over the price and output of competing proteins, just as the concentrated beef packers are the gatekeepers to the slaughter market for fed cattle, their tremendous market dominance also makes them gatekeepers to the flow of beef to retail stores and consumers. Either unilaterally or in concert with retailers, beef packers can suppress domestic demand for beef by maintaining high beef prices. The effect of this action would be to suppress the U.S. cattle market even when cattle supplies are at an all-time low. This appears to be what is taking place in the marketplace today: consumer beef prices are being held at or near record levels and despite the tight cattle supply situation, cattle prices are highly volatile. A more thorough investigation of the beef packers' wholesale and retail selling practices is needed to determine the extent to which the beef packing industry is manipulating beef demand, hence the price and demand for U.S. cattle.

G. COMPLAINTS BY INDEPENDENT CASH MARKET CATTLE FEEDERS

Below are specific complaints regarding ongoing anticompetitive practices by meatpackers operating in the fed cattle cash market that independent cattle feeders have forwarded to the DOJ. The cattle feeders assert that these practices are reducing, if not eliminating, their opportunity to maintain profitable cattle feeding operations. Currently, however, the DOJ has not taken action to restore the integrity of their markets.

- (1) Independent cattle feeders will receive bids for their pen(s) of cattle only from one packer for an extended time period, and for the next extended time period, a different packer will step in to offer the only bid, and then the rotation continues. This rotation of packer bids means there is no competition for the cattle feeders' pen(s) of cattle and even though there is more than one beef packer buying cattle in the feedlot, each beef packer is able to offer a take-it-or-leave-it bid to cattle feeders for each pen of cattle. And, this lack of competition in the cash market translates to a reduced price for all cattle contracted under alternative marketing agreements.

- (2) Independent cattle feeders will receive only below market-price bids for high-quality, fed cattle from a beef packer that continually passes them over while offering either higher bids for similar or even lower quality cattle, or offering the same bid for green cattle, all of which cattle are a farther distance from the beef packer's plant. The beef packer will then return after a week or even longer to offer the cattle feeders a market-price bid when the cattle are known to be overfed, which effectively reduces the profitability for the cattle feeders.
- (3) Independent cattle feeders may have more than one beef packer buying cattle in the feedlot, but only one beef packer will offer a live-weight bid, which is below market price, while the other beef packer will bid market price only on a grade and yield basis. To receive market price, feeders must choose grade and yield, which not only requires them to pay transportation costs to the plant, but also, it allows the beef packer to apply deep price discounts to the cattle without the beef packer having to provide any dispositive justification for the discounts. As a result, cattle feeders receive an even lower price for their cattle than if they had sold their cattle at the below-market bid offered by the only beef packer that would offer a live-weight bid.
- (4) Independent cattle feeders will receive a bid for a pen of slaughter-ready cattle from a beef packer that owns more than one packing plant. And, even though one or more of the beef packers' other packing plants, which are located about the same distance from the feedlot, are offering a higher bid, the beef packer offers the cattle feeders only a lower bid and asserts the feeders cannot deliver cattle to the plants were the higher bids are being offered, even though the feeders have previously sold similar quality cattle to the other plants. As a result, the feeders must accept the lower bid in order to timely market their cattle. And, this lower price paid to cattle feeders in the cash market translates into lower prices for all the cattle contracted under alternative marketing arrangements.
- (5) Independent cattle feeders may have more than one beef packer buying cattle in the feedlot, but will only receive a bid reflective of the market price from one beef packer that, in return for offering the current market price for cattle that have reached their optimal slaughter weight, requires the feeders to delay delivery of the cattle for as long as three weeks. As a result, the cattle feeders' profitability is reduced because they must continue feeding their cattle after they have reached their optimal weight (a period when feed efficiency is drastically reduced) and the cattle feeders are responsible for the additional feeding costs.
- (6) Independent cattle feeders have agreed to sell their cattle at a top-of-the-market price. However, after the sale is consummated and cattle are being loaded on trucks for delivery to the beef packer, the beef packer demands that a group of cattle be held back and exempted from the sale. Then, a week or longer later, after cattle prices have fallen, the same beef packer returns to purchase the group of previously exempted cattle at the lower

price. As a result, the cattle feeders' average price for their pen(s) of cattle is effectively reduced, thus reducing, if not eliminating, their profits.

- (7) Independent cattle feeders have received only below-market-price bids for their cattle for extended periods of time and have been informed that the beef packers have adequate supplies of captive supply cattle to enable them to stay out of the cash market for several weeks. As a result, the cattle feeder is forced to accept the below-market-price bid if he is to gain timely access to the marketplace, (i.e., before his cattle become overfed). Because the beef packers' captive supply cattle are tied to the cash market price, this below-market-price sale effectively lowers the price for all captive supply cattle—all the other cattle committed to the packer through alternative marketing arrangements.
- (8) Independent cattle feeders have sold high quality cattle on a carcass weight basis to a beef packer that subsequently applied substantial discounts to their cattle while the beef packer was simultaneously buying lesser quality cattle from a preferred feedlot without subjecting the cattle from the preferred feedlot to any comparable discounts.

The anticompetitive practices described above are believed to be rampant in today's cash market for fed cattle. However, because these practices directly affect the profitability of individual cattle feeders without necessarily causing direct injury to the competitiveness of the entire cattle industry, cattle feeders subjected to these anticompetitive practices have no recourse under the conventional interpretations of antitrust laws and the Packers and Stockyards Act.

For these anticompetitive practices to be enjoined, individual cattle feeders must be exempted from the burden of proving harm to competition in the entire cattle industry in addition to proving the packers' practices caused them irreparable harm. Until such an exemption is provided, these and other serious anticompetitive practices will continue to drive independent cattle feeders out of business and will continue reducing the volume of cattle sold in the price discovery market, which will result in lower-than-competitive prices for all cattle feeders, regardless of whether they sell cattle in the cash market or through alternative marketing arrangements.

In addition to the serious problems in the cash market for fed cattle, U.S. cow/calf producers also have experienced a severe reduction in competition in the cash market for their cull cows and bulls. In the Midwest and West, several beef packers have joined together to share a single cattle buyer for all of their plants. As a result, rather than having three or more beef packers bidding for the ranchers' cull cows and bulls, only a single buyer was seated in the auction yards bidding for all the cattle needed by all the beef packers. This eliminated competition for cull cows and bulls and the beef packers were able to purchase their cattle without having to bid against one another, thus reducing the price paid to U.S. ranchers for their cull cows and bulls.

## VI. SUMMARY AND CONCLUSION

An early twentieth century legal framework preserved competition between the live cattle industry and the beef packing industry by delineating proper roles for industry competitors. It ensured, for example, that dominant meatpackers could not expropriate the cattle feeding sector from the live cattle industry's supply chain to eliminate competition between themselves—the concentrated buyers—and widely dispersed cattle feeders—the independent sellers. The importance of that competition at the interface between the live cattle industry and the beef packing industry cannot be overstated; here, fundamental price discovery occurs for all cattle reared by all livestock producers, be they cow/calf producers, backgrounders, stockers, or feeders.

Throughout the ensuing decades, the competition preserved by that early legal framework fostered the growth of the largest single segment of American agriculture. The recently vibrant live cattle industry once comprised well over one million small businesses, each of which had made crucial, if not irreplaceable, contributions to the economic wellbeing of rural communities all across America. Similarly, the very competition preserved at the interface between the live cattle industry and the beef packing industry, along with the then concomitant national disdain for beef packer monopolization, encouraged the growth of many hundreds of widely dispersed, hence, decentralized, beef packing and processing wholesale (distribution) firms, which likewise greatly benefited Rural America's economy.

As the twentieth century waned, however, so too did the nation's resolve to preserve competition in the live cattle industry and defy monopolization in the beef packing industry. Beginning in the 1980s, key competitive protections were allowed to expire, chief among them were prohibitions against beef packer ownership and control of the live cattle industry's marketing channels. Antitrust enforcement was idled, thus sparking a merger mania in the beef packing industry. In three short decades, the beef packers attained an unprecedented level of market concentration, which conferred upon a handful of them the power to circumvent competition by restricting cattle feeders' access to the marketplace. This eliminated marketing opportunities for tens of thousands of cattle feeders who, by exiting the industry, helped fuel the rapid concentration and consolidation of the cattle feeding sector. This rapid feeding sector concentration and consolidation, in turn, eliminated marketing opportunities for hundreds of thousands of cattle producers, including cow/calf producers, backgrounders and stockers who likewise exited the industry.

The live cattle industry now finds itself traversing the same path toward the industrial livestock production model that was previously blazed by the now fully integrated poultry industry and near-fully integrated hog industry. This circumstance relegates the U.S. cattle industry to the meatpacking industry's *Last Frontier*.

So brazen have the powerful beef packers become since vigilance over competition ended that they recently infiltrated and then enlisted producer trade

associations to join them as they collude to lobby Congress. Their objective is to perpetuate a relaxed legal framework that will help them propel their vertical integration plan for the live cattle industry. Their plan involves the substitution of their corporate command-and-control scheme for the element of the free market system that America cherishes most: competition.

Today, the beef packers are well on their way to capturing the live cattle supply chain. Competition at the interface between the live cattle industry and the beef packing industry is all but destroyed. The remaining vestige of a competitive marketplace—the price-discovery cash market—is far too thin to predict a competitive value for fed cattle and is growing thinner, thus causing harm to competition for all cattle producers. To perfect their ability to manipulate the fed cattle market, the beef packers have deployed a mix of market leveraging strategies that involve captive supplies, which are cattle committed to the beef packer long before they are slaughtered. Beef packers accumulate large volumes of captive supplies via direct acquisitions of feedlots and cattle and through contractual arrangements that often include un-priced or formula pricing. In this century, beef packers demonstrated how their captive supplies can harm competition when they engaged in coordinated actions to use their captive supply cattle to shun the cash cattle market long enough to cause national cattle prices to decline

Less obvious among market leveraging strategies, though no less damaging to competition, is the reported phenomenon whereby packers gain preferential buying rights at certain feedlots by virtue of past buying patterns, thus giving them virtual ownership of certain feedlots. Also less obvious is the additional market power conferred on those concentrated beef packers that also control the production and output of the principal market substitutes for beef—primarily pork and chicken—and that control the timing of procurement for product substitutes for domestic cattle: imported cattle. The exercise of these and other strategies facilitated by their extraordinary market power has enabled the concentrated beef packers to gain significant control over the live cattle supply chain.

But, harm to competition is but one injury inflicted on the remaining participants in the live cattle industry. Other injuries are targeted more and involve the beef packers' exercise of their superior and unfair bargaining power over individual producers. One example involves a beef packer that bypasses slaughter-ready cattle owned by independent cattle feeders in favor of procuring cattle from farther distances that are not yet ready for slaughter. However, the beef packer later returns to buy the independent cattle feeder's cattle only after they had become over-fed and, therefore, less valuable.

Beef packers and their allies find no problem with the loss of competition in the U.S. cattle industry and dismiss any claims of anticompetitive conduct or antitrust violations on grounds that their integration of the U.S. cattle industry is justified by efficiencies gained through economies of scale. However, such a justification cannot withstand the evidence that shows severe market failure in the U.S. cattle industry and U.S. beef industry. For example, it now costs more

than at anytime in recent history to bring the raw cattle product to the consumers' dinner plate; the U.S. cattle industry has been contracting, and its production has remained stagnant even in the face of growing beef consumption; the U.S. cattle industry's cattle cycle—the industry's historical bellwether indicator of industry competitiveness—has been seriously disrupted; and, the marketplace is allocating a smaller share of the consumers' beef dollar back to the cattle feeder than it did in 1980, when competition was known to be robust.

After years of neglect by Congress, antitrust enforcers, and Packers and Stockyards Act enforcers, the U.S. cattle industry's fed cattle market is seriously broken. Immediate action must be taken to restore robust competition at the interface between the live cattle industry and the beef packing industry. If immediate action is not taken, the U.S. cattle industry will soon succumb to the same fate as the previously captured hog and dairy industries that lost 91 percent and 82 percent of their industry participants just since 1980, respectively.

As an initial matter, dominant beef packers must be barred from using their collective market power to lobby Congress for purposes of perpetuating a legal framework that facilitates their ongoing capture of the U.S. live cattle supply chain. If this initial step is not achieved, thereby leaving the beef packers' current level of congressional influence unchanged, prospects for achieving any meaningful reforms will remain extremely slim.

Presuming an opportunity to overcome the beef packers' collective influence over public policy, public policies must be changed to force beef packers to relinquish their control over the live cattle supply chain and their proper role in the multi-segmented beef supply chain must again be limited to that of beef packer and nothing more. Specifically, beef packers must be prohibited from owning, controlling or feeding cattle prior to slaughter, and the most egregious of captive supply contracts, the un-priced formula contracts, must likewise be prohibited.

Concurrent with banning their access to captive supply cattle, dominant beef packers also must be enjoined from engaging in unfair and unjust buying practices that injure individual cattle producers. Unless dominant beef packers are so enjoined from such anticompetitive conduct, they will continue to possess the power to accelerate the concentration and consolidation of the cattle feeding sector by forcing independent cattle feeders out of business one at a time.

A significant problem associated with restoring competition to the U.S. cattle industry's fed cattle market, which has been held under siege with impunity for at least three decades, is that the dominant beef packers' antitrust activities and anticompetitive conduct are now so deeply engrained as to be institutionalized. As a result, participants within and policy makers outside the cattle industry have become desensitized to practices that, for most of the twentieth century, would have been immediately recognized as contrary to the principles of a free market.

Notwithstanding the significant obstacles that impede reform, cattle producers, their attorneys, advisors and advocates, along with their congressional representatives, must immediately engage themselves and their resources to

restore robust competition to the U.S. fed cattle market. Only then can the ailing U.S. live cattle industry be reinvigorated to attract new generations of independent producers who, like their forefathers, will appreciate their roles as independent businessmen and women whose businesses are uniquely suited to serve as the crucial economic cornerstones for rural communities all across America.