Fighting for the U.S. Cattle Producer!
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R-CALF USA White Paper for Antitrust Complaint (Work in Progress)

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I. SUMMARY

The U.S. cattle industry is the largest segment of American agriculture. During the past five years cash receipts from the sale of cattle averaged $72 billion per year.[1]

There are 729,000 beef cattle operations (hereafter "cattlemen") remaining in the United States. These disaggregated cattlemen annually raise approximately 25 million slaughter-ready cattle (hereafter "fed cattle"), of which 85 percent are sold to just four large beef packers: Tyson, JBS, Cargill and National Beef. This beef packing cartel engages in anticompetitive practices and antitrust conduct to artificially lower prices paid to U.S. cattlemen.

Using their dominant market positions, the beef packing cartel colludes to suppress cattle prices by: 1) manipulating the cash market; 2) manipulating the entire market; 3) dividing and allocating territories; 4) engaging in unfair, unjustly discriminatory and deceptive practices; 5) manipulating the futures market; and, 6) injuring competition.

In early 2015 cattle inventories were the lowest in over 7 decades,[2] beef demand and beef consumption were strong,[3] domestic beef production was at a 23-year low,[4] and retail beef prices were increasing.[5] These favorable market fundamentals prompted government and private

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[1] *See* Cash Receipts by Commodity, 2010-2017F, USDA Economic Research Service (the average cash receipts from sales of cattle and calves for the past five years was more than $72 billion per year, considerably higher than the second-place commodity, corn, at about $56 billion), available at https://data.ers.usda.gov/reports.aspx?ID=17832.

[2] Cattle, USDA-NASS (Jan. 30, 2014), at 1 (lowest cow herd inventory since 1941), available at http://usda.mannlib.cornell.edu/usda/nass/Catt//2010s/2015/Catt-01-30-2015.pdf.

[3] *See* Annual Choice Beef Demand Index (1990=100) and Annual All Fresh Beef Demand Index (1990=100), Kansas State University, AgManager Info., available at http://www.agmanager.info/livestock-meat/meat-demand/annual-choice-beef-demand-index-1990100 and http://www.agmanager.info/livestock-meat/meat-demand/annual-all-fresh-beef-demand-index-1990100, respectively.

[4] *See* Beef: Supply and disappearance (carcass weight, million pounds) and per capita disappearance (pounds), USDA-ERS, available at http://www.ers.usda.gov/data-products/livestock-meat-domestic-data.aspx.

[5] *See*, Choice Beef Values and Spreads and the All-fresh Retail Value, USDA, ERS, (June 14, 2017), available at http://www.ers.usda.gov/data-products/meat-price-spreads.aspx. All fresh beef values during 2015 were higher than at any time in history.

market analysts alike to predict that domestic cattle prices would continue increasing through 2017, after which increased supplies were expected to begin gradually reducing prices.[6]

However, due to the anticompetitive practices and antitrust conduct discussed below, the U.S. cattle market collapsed through 2015 and 2016, costing U.S. cattlemen billions of dollars.[7]

II. THE BEEF AND CATTLE INDUSTRIES

Consumable beef is produced within a multi-segmented supply chain comprised of two distinct industries, each with its own supply-chain segmentation. The live cattle industry is the agricultural supply chain that provides raw material, *i.e.*, live cattle, downstream to the beef industry, which is the manufacturing industry that manufactures beef from live cattle.

A. The Live Cattle Industry

The live cattle industry consists of three distinct segments: At its foundation are 729,000 disaggregated cow/calf operations located in every state.[8] These operations maintain and breed mother cows to produce new calves each year. They produce about 35 million calves annually.[9] After birth, the new calves are raised by their mothers for about 6 months, at which time they will weigh about 600 pounds and will be weaned from their mothers and sold to the next downstream segment.

The next segment in the supply chain is the backgrounding or stocking segment. Here the 600-pound calves are placed in growing lots and fed a growing ration (backgrounding) or turned out to graze on pasture or winter wheat fields (stocking). Like cow/calf operations, backgrounders and stockers are widely dispersed across the United States. The calves are backgrounded or stocked for about six months at which time they will weigh about 900 pounds and will be sold to the third and final segment of the live cattle supply chain, the feeding sector. The cattle sold by cow/calf producers, backgrounders and stockers are known as feeder cattle, which are cattle, regardless of weight, that will eventually be fed in a feedlot before slaughter.

The feeding or feedlot sector is the final segment of the cattle industry and its live cattle supply chain. Feedlots fatten cattle on a finishing ration. There are 30,219 feedlots remaining in the

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[6] *See* Bill Bullard Letter to Senate Judiciary Committee, Jan. 5, 2016, at 1-2, available at https://www.r-calfusa.com/wp-content/uploads/2013/04/160420-Senate-Judiciary-GAO-Letter.pdf.
[7] *See, e.g.*, Profit Tracker: Packer Margins Near $200, Greg Henderson, Drovers, Jan. 19, 2016, available at http://www.cattlenetwork.com/news/markets/profit-tracker-packer-margins-near-200. "Sterling Marketing president John Nalivka calculates that feedyards lost a cumulative unhedged $4.7 billion in 2015, with average weekly losses of $239.26 per head."
[8] *See* Farms, Land in Farms, and Livestock Operations 2012 Summary, USDA, NASS, Feb. 2013, at 18-19, available at http://usda.mannlib.cornell.edu/usda/nass/FarmLandIn//2010s/2013/FarmLandIn-02-19-2013.pdf. There are approximately 729,000 beef cattle operations in the United States, a decrease of about 544,000 beef cattle operations since 1980.
[9] Cattle, USDA-NASS (Jan. 31, 2017), at 4, available at http://usda.mannlib.cornell.edu/usda/current/Catt/Catt-01-31-2017.pdf.

industry, the vast majority of which (28,000) are small feedlots with a capacity of less than 1,000 head.[10] These feedlots are typically independently owned and referred to as farmer-feeders. They feed only 13 percent of the 25 million fed cattle slaughtered each year.[11] There are 2,219 larger feedlots that feed 87 percent of the fed cattle slaughtered each year. Among this group are 73 mega-feedlots with capacities of more than 50,000 head.[12] Many of these mega-feedlots are owned by the nation's largest beef packers or are contractually aligned with one of the largest beef packers. These mega-feedlots feed about 34 percent of the fed cattle slaughtered each year.

It typically takes four to six months to finish cattle in a feedlot to the optimal weight of about 1,300 pounds. These finished cattle will be about 18 months old when they are ready for slaughter and are referred to as fed cattle.

At this weight the fed cattle are sold to the beef packer – the manufacturing sector, for slaughter.

Most of the larger feedlots are located in the southcentral region of the U.S. known as the beef belt. They are typically located within about 100 miles of one or more beef packing plants, but rarely more than 300 miles, because that distance is the outer bounds of an economically feasible transportation distance.[13]

B. The Beef Industry

Four large beef packers purchase and slaughter 85 percent of all fed cattle slaughtered in the United States. [14] Together, these four beef packers operate 27 packing plants in the U.S. (2013 data).[15]

Since 2002, the beef packing cartel has made it publicly known that they intend to capture the live cattle supply chain away from independent cattlemen by vertically integrating the U.S. live

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[10] Cattle on Feed, February 2017, USDA NASS, at 15, available at http://usda.mannlib.cornell.edu/usda/nass/CattOnFe//2010s/2017/CattOnFe-02-24-2017.pdf.

[11] *See* Livestock Slaughter, USDA NASS (January 2017), at 11 (the U.S. slaughtered 16.5 million fed steers and 7.7 million fed heifers in 2016), available at http://usda.mannlib.cornell.edu/usda/nass/LiveSlau//2010s/2017/LiveSlau-01-19-2017.pdf.

[12] *Supra*, fn. 11.

[13] *See* Under Siege: The U.S. Live Cattle Industry, Bill Bullard, South Dakota Law Review, Vol. 58, Issue 3, 2013, at 575-576, available at https://www.r-calfusa.com/wp-content/uploads/2013/04/130101UnderSiegeSDlAWrEVIEWBillBullard.pdf

[14] *See* 2013 Packers and Stockyards Administration Annual Report, USDA Packers & Stockyards Administratin, (2014), *available at* http://www.gipsa.usda.gov/psp/publication/ar/2013_psp_annual_report.pdf. *See also* Top 30 Beef Packers 2013, Cattle Buyer's Weekly, available at http://www.themarketworks.org/sites/default/files/uploads/charts/Top-30-Beef-Packers-2013.pdf. Tyson Fresh Beef with a daily capacity of 28,950 head controls about 26% of the fed cattle market. JBS with a daily capacity of 27,125 head controls about 24% of the fed cattle market. Cargill Beef with a daily capacity of 25,700 head controls about 23% of the fed cattle market. National Beef Packing Company with a daily capacity of 14,000 head controls about 12% of the fed cattle market.

[15] *Id.*

cattle industry.[16] In 2012, the former North American Meat Association stated the forces driving the packing industry's vertical integration efforts were stronger food safety regulations and demands from meat buyers.[17]

JBS, the nation's second largest beef packer, owns Five Rivers Ranch Cattle Feeding Company, the largest feedlot company in the United States. Cargill, the third largest beef packer, recently sold two of its four feedlots, which, together, were ranked as the nation's third-largest feedlot company.[18] Tyson, claims that it does not own feedlots but is believed to control large numbers of fed cattle through contracts and through financing arrangements.

III. THE RELEVANT MARKET

The value of live cattle from the time of their birth and throughout their entire life spans is the expected future value of those cattle when they are ultimately sold to a beef packer for slaughter. Therefore, any price manipulation or price distortion that occurs during the final sale of a fed animal between a cattleman and a packer will permeate the entire live cattle supply chain and adversely affect all 729,000 cattlemen, from cow/calf producers to backgrounders and stockers, to feedlots.

The direct harm to be alleged in a complaint against the cartel is the harm that arises when beef packers manipulate and distort the price they pay for fed cattle. While this harm is immediately felt by the fed cattle owner that offers cattle for sale to the beef packer, the sellers of younger, lighter weight cattle are likewise impacted on a real-time basis because beef packers are required to publicly report the prices they pay for fed cattle and those prices are publicly noticed.[19]

Although it is clear that all cattle markets are impacted by the price beef packers pay for fed cattle, this paper will focus on the market most directly impacted - the fed cattle market. The U.S. Department of Agriculture (USDA) recognizes five distinct marketing regions for fed cattle in the United States. They include: 1) Texas/Oklahoma/New Mexico; 1) Kansas; 3) Nebraska; 4) Colorado; and, 5) Iowa-Minnesota.[20]

A. The Cash Market

The cash or spot market is the price discovery market for the entire live cattle industry. It is also referred to as the negotiated market. The majority of cattle sold in the cash market are sold by feedlots that place slaughter-ready fed cattle on what is called a show list. This show list is then made available each week to the beef packing industry. Beef packers will subsequently offer bids

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[16] *See* Under Siege: The U.S. Live Cattle Industry, Bill Bullard, South Dakota Law Review, Vol. 58, Issue 3, 2013, at 566-567, available at https://www.r-calfusa.com/wp-content/uploads/2013/04/130101UnderSiegeSDlAWrEVIEWBillBullard.pdf.

[17] Reformer Warns of Ranchers' Peril, Mateusz Perkowski, Capitol Press, February 10, 2012, available from author at request.

[18] *See* Top 30 Cattle Feeders 2015, Cattle Buyers Weekly, available from author at request.

[19] Beef packers are required to report prices under the Livestock Mandatory Price Reporting Act of 1999.

[20] *See, e.g.*, Livestock Mandatory Reporting Purchase Type Breakdown by Region, USDA AMS Livestock, Poultry & Grain Market News, 2016, available from author upon request.

for cattle included on the show list either by phone or they may physically inspect the cattle at the feedlot and offer a verbal bid. In recent years, the bidding window during which the beef packers will offer bids for show list cattle has been relegated to about a one-half to one-hour window on Friday of each week. When cattle supplies are tight, this window may be expanded to include Thursday bids and, much more rarely, bids earlier in the week.

There are two types of beef packer bids made in this "show list" form of the cash market. The first is a live-weight bid in which the beef packer offers a price per hundredweight (cwt) based on the live weight of the animal before it is loaded onto a truck for delivery to the beef packer. The beef packer pays the transportation cost to the packing plant under a live-weight bid.

The second bid type for show list cattle is a carcass-weight bid in which the packer offers a price per cwt based on the carcass weight of the animal after the animal is delivered to the beef packer and slaughtered, skinned, and eviscerated. The cattleman must pay the transportation cost to the packing plant under a carcass-weight bid. Carcass-weight bids are sometimes associated with grid pricing, which offers certain quality-based premiums and discounts applied to the bid after the carcass is evaluated for grade and yield. Some cattlemen refer to this grade and yield arrangement as "grade and steal" because they believe their cattle were inaccurately evaluated.

Less common forms of cash market sales are sales that occur in livestock auction yards and sales over video auctions. Most auction yard sales involve small lots of fed cattle that are typically offered by smaller farmer-feeders. Auction yard sales are exclusively based on live-weight bids.

In 2005 more than half (52 percent) of all fed cattle were sold in the price-discovering, national cash market.[21] By 2015, the year cattle prices began their unprecedented collapse, the volume remaining in the national cash market fell to less than 22 percent, while the volume in the TX/OK/NM regional cash market fell to less than 3 percent.[22]

B. The Contract Market

The reason the price-discovering cash market has grown so thin is because beef packers have coaxed large volumes of cattle out of the price discovery market and into some form of contractual arrangement. Most of these cattle were shifted into formula contracts. About 57 percent of fed cattle are now sold under a formula contract.[23] Typically, a formula contract is an unpriced contract in which the cattlemen agree to commit fed cattle to a particular packer. The price the packer pays for those committed cattle is then based on a formula applied after the animals have been delivered and slaughtered. The formula is typically linked directly to the cash-market price established in the particular fed cattle region the week prior to the cattle's delivery. For example, a formula contract may specify that the base price for cattle delivered today will be last week's average cash price reported in the region by the USDA; or it could be the average price the packer actually paid for cattle last week.

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[21] *Id*.
[22] *Id*.
[23] *Id*.

A former head buyer for Tyson (then IBP), claimed that Tyson gained as much leverage over the live cattle supply chain using formula contracts as other beef packers gained from owning and feeding their own cattle.[24]

C. The Futures Market

Fed cattle are publicly traded on the privately-owned Chicago Mercantile Exchange (CME Group). The futures value for cattle discovered in the CME Group's futures market is linked to the cattle price discovered in the cash market. Speculators and hedgers alike attempt to assign premiums and discounts to the current cash price based on circumstances expected to occur in the future to arrive at an estimated future value for cattle.

While the futures market typically follows the cash market, in recent years there has been a dramatic disconnect between cash prices and futures prices.[25]

Based on information and belief, the largest beef packers are sophisticated traders in the fed cattle futures market, often participating as commercial speculators as well as bona fide hedgers. Conversely, cattlemen typically use the futures market to hedge the feeder cattle they purchase to reduce the risk that fed cattle prices may decline while they are feeding their cattle.

D. The Price Collapse

The USDA Economic Research Service (ERS) projected in February 2015 that the average annual 5-market steer price of $154.41 per cwt realized in 2014 would steadily increase over the ensuing three years to $159.50 per cwt in 2015, $163.70 per cwt in 2016, and $165.03 per cwt in 2017.[26] Beginning in 2018, the ERS predicted that 5-market steer prices would begin a gradual decline, with year-to-year price reductions averaging a modest $2.51 per cwt during the anticipated five-year decline.[27]

Industry analysts widely agreed with the ERS' predictions. In January 2015, Kansas State University agricultural economist Glynn Tonsor reportedly announced that cattle prices in 2015 would likely be just as promising as they were in 2014 and that such stronger prices are expected to remain for a couple of years.[28] In February, CattleFax reportedly announced that fed cattle

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[24] *See* Under Siege: The U.S. Live Cattle Industry, Bill Bullard, South Dakota Law Review, Vol. 58, Issue 3, 2013, at 581-582, available at https://www.r-calfusa.com/wp-content/uploads/2013/04/130101UnderSiegeSDlAWrEVIEWBillBullard.pdf.
[25] 2016 personal conversation between the author and a CME Group analyst.
[26] USDA Agricultural Projections to 2024, Interagency Agricultural Projections Committee, U.S. Department of Agriculture (USDA), Economic Research Service (ERS), Long-term Projections Report, OCE-2015-1 (February 2015) at 81, available at http://www.ers.usda.gov/media/1776036/oce151.pdf.
[27] *See id*.
[28] Glynn Tonsor Optimistic for Strong Cattle Prices in 2015, Farms.com (January 20, 2015), available at http://www.farms.com/news/glynn-tonsor-optimistic-for-strong-cattle-prices-in-2015-86870.aspx.

prices would remain strong in 2015, ranging from near $140 per cwt at the lows to near $170 per cwt at the highs.[29]

Even the more pessimistic analyses of 2015 market fundamentals portended only gradual changes to the market, suggesting that cattle prices would not collapse in 2015, "barring any outside market shocks like drought or a U.S. economic recession."[30]

The ERS prediction was nearly spot-on during the first half of 2015, with the 5-market steer price averaging $159.50 per cwt from January through June 2015.[31] But then something went awry. The 2015 third-quarter price was $14.77 per cwt below the first half of the year's average.[32] The average price during the month of November fell to $128.20 per cwt, a full $31.30 per cwt decline from the average price realized during the first half of the year.[33] Prices during the first two weeks in December continued their march into the abyss, falling to $118.15 per cwt during the week ending Sunday, Dec. 13, 2015.[34] This marked an unbelievable $41.35 per cwt price decline since the first half of 2015.

To put this price decline into perspective, a $41.35 per cwt price decline equates to a loss of $516.88 per head for each animal sold, based on a typical 1,250 pound steer. This alarming price decline is confirmed by Kansas State University (KSU), which projected losses of $547.24 per head on steers sold in November.[35]

But this wasn't the end, cattle prices continued to fall through most of 2016. By October 2016 the price of cattle had fallen $67 per cwt, representing a loss of $837.50 per head. The October 2016 price for live cattle was about the same price cattlemen received for their cattle in the fall of 2010, but with a big difference. In the fall of 2010 retail beef prices were about $4.12 per pound. However, in October 2016 retail beef prices were over $5.63 per pound.[36]

While cattle prices collapsed and consumers continued paying near-record prices for beef, the share of the consumer's beef dollar received by cattlemen fell to an historical low. In October

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[29] CattleFax Predicts Strong Prices to Remain in 2015, Drovers Cattle Network (February 6, 2015), available at http://www.cattlenetwork.com/advice-and-tips/cowcalf-producer/cattlefax-predicts-strong-prices-remain-2015.

[30] Livestock Monitor, A Newsletter for Extension Staff, Livestock Marketing Information Center, State Extension Services in Cooperation with USDA (Jan. 12, 2015), available at http://economics.ag.utk.edu/market/monitor/2015/monitor011215.pdf.

[31] *See* Choice Beef Values and Spreads and the All-fresh Retail Value, USDA, ERS, (December 15, 2015), available at http://www.ers.usda.gov/data-products/meat-price-spreads.aspx.

[32] *See id*.

[33] *See id*.

[34] 5-Area Weekly Weighted Average Direct Slaughter Cattle, USDA Market News Service, LM_CT150 (Dec. 14, 2015), available at http://www.ams.usda.gov/mnreports/lm_ct150.txt.

[35] Historical and Projected Kansas Feedlot Net Returns, Glynn T. Tonsor, Kansas State University (December 2015), at 1, available at http://www.agmanager.info/livestock/marketing/outlook/newsletters/FinishingReturns/FeedlotReturns_Dec_15.pdf.

[36] *See Supra*, fn. 31 (update June 14, 2017).

1016 U.S. cattlemen received only 38 cents from each dollar consumers spent on beef.[37] Just two years before, in 2014, the cattlemen were receiving 56 cents from each consumer dollar.[38]

IV. ANTICOMPETITIVE PRACTICES AND ANTITRUST CONDUCT

A 2011 study by Kyle Stiegert et al., University of Wisconsin, found that oligopolistic packers switch between cooperating and competing depending on whether short-term cattle supplies are tight (competition phase) or plentiful (cooperation phase).[39] Beginning in 2015, the year after U.S. cattle supplies were extraordinarily tight, cattle supplies were just beginning to become more plentiful. The results of Stiegert's study appear to have played out in the U.S. cattle market in spades.

In the U.S. cattle market, as exemplified beginning in 2015, the beef packing cartel used its dominant market positions to suppress cattle prices in the following manners.

A. Cash Market Manipulation

The beef packing cartel has colluded to create market access risk for cattlemen, *i.e*., the risk of not having timely access to the market for their highly perishable fed cattle.[40] By creating this risk, the cartel has gained a significant unfair advantage over disaggregated cattlemen, enabling it to suppress cattle prices. The cartel has created this risk by:

1. Colluding to reduce the weekly bidding window for fed cattle to a short period on Fridays, though from time-to-time they have had to initiate bids on Thursdays and, more rarely, earlier in the week. Restricting bidding time-periods gives the cartel tremendous buying leverage over disaggregated producers.
2. Colluding to shun the cash market altogether for extended periods, e.g., during the entire week of September 7-11, 2015, the USDA reported that for only the second time in the history of mandatory price reporting, there was no cash trade in the Texas/Oklahoma/New Mexico feeding region.[41]
3. Colluding to make only low bids to drive down prices.
4. Colluding not to offer a competitive bid if another cartel member has already offered a bid.
5. Colluding to deceptively inform cattle feeders that packers have all the cattle supplies they need for weeks or months into the future and, therefore, will not need to bid on cattle.

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[37] *Id*.
[38] *Id*.
[39] Regime switching and oligopsony power: the case of U.S. beef processing, Xiaowei Cai, Kyle Stiegert and Stephen Koontz, Agricultural Economics 42 (2011) 99–109, available from the author upon request.
[40] *See* Under Siege: The U.S. Live Cattle Industry, Bill Bullard, South Dakota Law Review, Vol. 58, Issue 3, 2013, at 575, available at https://www.r-calfusa.com/wp-content/uploads/2013/04/130101UnderSiegeSDlAWrEVIEWBillBullard.pdf.
[41] E-mail communication from the Agricultural Marketing Service, Livestock, Poultry and Grain Marketing Division, USDA Agricultural Marketing Service (AMS), Sept. 14, 2015, available upon request to the author.

6. Colluding to announce that kill weeks will be shortened to reduce demand for fed cattle sold in the cash market.
7. Colluding to refrain from offering bids until after the close of mandatory price reporting requirements to prevent an increase in the average fed cattle cash price during a given week.
8. Colluding to refuse to bid on show list cattle in close proximity to its plants and, instead, purchasing cattle outside the region to which its formula cattle are linked to the cash market price.
9. Colluding to refuse to take delivery of cattle sold in the cash market for two, three, or more weeks, which causes cattle to be overfed thus increasing the pounds of beef produced from each animal and reducing demand for fed cattle.
10. Colluding to overfeed cattle purchased for slaughter by replacing fed cattle in feedlots to increase the pounds of beef produced from each animal thus reducing demand for fed cattle.
11. Colluding to substitute imported beef for domestic beef to reduce demand for fed cattle.
12. Colluding to trade cattle between themselves to reduce demand for fed cattle.
13. Colluding to refuse to offer bids on a live-weight basis thereby forcing cattlemen to pay the transportation costs to the plant and increasing the uncertainty regarding the value of the cattle.
14. Colluding to reduce, if not eliminate, competition in the cash market, e.g., a daily fed cattle market commentator *The Beef* lamented that "[p]ackers no longer compete against each other to buy fed cattle each week,"[42]
15. Colluding to call-in their contracted cattle and killing their packer-owned cattle when prices are increasing for the purpose of lowering the cash market price and depressing demand for fed cattle.
16. Colluding to manipulate the output and price of competing proteins poultry and pork, which the same cartel members control, to reduce the demand for beef and, hence, fed cattle.
17. Colluding to imposing restrictive product specifications on cattle to divert certain cattle to a certain packer.
18. Colluding by and through their aligned and controlled feedlot companies to encourage cattlemen to shun the cash market to reduce competition for fed cattle.
19. Colluding to engaging in irrational buying behavior such as purchasing cattle from outside their buying regions (including from Canada) to avoid stimulating the average price in their region that would impact the price of their contracted cattle.
20. Colluding to strategically use imports and committed cattle supplies to reduce demand for cattle sold by U.S. cattlemen.

B. Whole Market Manipulation

By shifting large volumes of fed cattle out of the price-discovering cash market and into the cartel's cache of formula-contracted cattle, and yet linking the base price of all those formula-

[42] Whatever Happened to a Fair Fight, Cassie Fish, The Beef, Consolidated Beef Producers (Nov. 10, 2015), available at http://www.thebeefread.com/2015/11/10/whatever-happened-to-a-fair-fight/.

contracted cattle back to the fast shrinking cash market, the cartel creates for itself both the means and incentive to suppress prices paid for all cattle. It does this by using the tactics described immediately above. When the cartel successfully lowers the cash market price, it reduces the aggregate price it pays for all its formula-contracted cattle, thus suppressing prices for all cattle.

Indeed, any action that suppresses prices in the cash market will lower the aggregate price of all cattle sold in America. This is significant. In the TX/OK/NM market in 2015, 88.5 percent of all fed cattle procurement occurred in the cash market (2.6 percent) and in the formula contract market (85.9 percent).[43]

The cartel realizes huge savings from their actions. For example, the cartel typically slaughters about 600,000 fed cattle each week.[44] For each $1.00 per cwt cattle prices are reduced, the cartel is rewarded with savings of $7.8 million per week in the cost of cattle (based on a 1,300-lb. live weight).

C. Dividing and Allocating Territories

The cartel divides and allocates territories among and between its members. Cattle feeders have reported that they received the winning bid for all their cattle from one packer for several months and then another packer emerged as the winning bidder for all the cattle for the next several months and then the rotation would continue.

Cartel members gain exclusive rights to particular feedlots and those feedlots become known as a particular packer's feedlot, such as a "Tyson" feedlot, even though those feedlots and the cattle they feed are independently owned.[45] In other circumstances, feedlots have made public pronouncements that they are a supplier for a particular packer.[46]

The cartel appears to have divided the five fed cattle marketing regions defined by the USDA and have effectively reduced competition in those regions. For example, In the 2010 joint U.S. Department of Justice and USDA workshop on livestock competition held in Fort Collins, Colorado, Bruce Cobb, General Manager of Consolidated Beef Producers, a fed cattle marketing cooperative, testified that his company conducted an assessment of the packers' buying conduct in the Texas/Oklahoma/New Mexico fed cattle markets during the previous fifty-two weeks. During the period studied, he stated there were:

[43] *See* Livestock Mandatory Reporting Purchase Type Breakdown by Region, USDA AMS Livestock, Poultry & Grain Market News, 2016, available from author upon request.
[44] *See, e.g.*, Actual Slaughter Under Federal Inspection, USDA Market News Service, July 13, 2017, available at https://www.ams.usda.gov/mnreports/sj_ls711.txt.
[45] *See* Under Siege: The U.S. Live Cattle Industry, Bill Bullard, South Dakota Law Review, Vol. 58, Issue 3, 2013, at 582-583, available at https://www.r-calfusa.com/wp-content/uploads/2013/04/130101UnderSiegeSDlAWrEVIEWBillBullard.pdf.
[46] *Id.: see also* recent news reports regarding Cargill's feedlot sales to Friona Enterprises.

> 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.[47]

To achieve this level of buying power (meaning there is little to no competition from rivals) in fed cattle marketing regions, their likely are agreements not to poach cattle from another cartel members' territory. Otherwise, it would benefit rival packers to purchase cattle in those regions where competition for fed cattle is scarce or nonexistent.

D. Unfair, Unjustly Discriminatory and Deceptive Practices

The cartel engages in unfair buying practices that harm independent U.S. cattle producers, such as discounting prices on certain cattle even though the beef and beef products derived from those cattle are undifferentiated from any other beef or beef products.

The cartel, in its ongoing quest to vertically integrate the live cattle supply chain, is engaged in practices intended to force smaller feedlots out of business. These practices include:

1. Offering sweetheart contracts to preferred cattlemen to reduce the competitiveness of non-aligned cattlemen.
2. Running-up bids for lighter-weight feeder cattle to force rival cattle feeders to pay more for cattle than is economically feasible for them to stay in business.
3. Sharing both marketing information and carcass evaluation data with aligned cattlemen to reduce the competitiveness of non-aligned cattlemen.
4. Blackballing certain cattlemen who refuse to align themselves with a particular packer or who are associated with organizations the packers dislike. For example, in 2004 Cargill publicly announced in Canada that it would not purchase cattle from cattlemen who were members of R-CALF USA.[48]
5. Granting preferences to certain cattle sellers to cause excessive shrink for non-aligned cattlemen.

E. Manipulating the Futures Market

Based on information and belief, the beef packing cartel uses the cattle futures market to suppress cattle prices by strategically shorting that market prior to entering the cash marketplace to purchase its residual cattle needs.

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[47] Statement of Bruce Cobb, General Manager of Consolidated Beef Producers, *Public Workshops Exploring Competition Issues in Agriculture: Livestock Workshop Before the U.S. Department of Justice and U.S. Department of Agriculture*, 210-12 (2010), *available at* http://www.justice.gov/atr/public/workshops/ag2010/colorado-agworkshop-transcript.pdf.

[48] Playing Both Sides of the Field, The Alberta Express, Aug. 23, 3004, available at https://www.r-calfusa.com/wp-content/uploads/2013/04/08-23-04-CDN-Cargill-Wont-Process-Cattle-Owned-by-RC-Members-S-Read-The-Alberta-Express.pdf. Cargill spokesman Robert Meijer stated, 'We will not knowingly purchase or take on or do business with cattle directly or indirectly associated with R-CALF members or those affiliated with R-CALF.'

For example, R-CALF USA requested an investigation into the unexplained collapse of the cattle futures market that occurred in October 2009[49] and beef packer JBS was found to be involved in a cattle futures transaction that resulted in the Commodity Futures Trading Commission (CFTC) ordering futures commission merchant Newedge USA, LLC (Newedge), to pay more than $220,000 for violating speculative position limits in live cattle future trading.[50] In its order, the CFTC described the unlawful transaction in part by explaining:

> On Friday, October 9, 2009, Newedge and JBS, a live cattle end user, agreed that JBS would sell Newedge 4,495 contract long October 2009 live cattle futures position. Newedge would hedge the purchase with a short position in an underlying swap in live cattle and sell JBS a live cattle swap.[51]

The CFTC further stated that Newedge agreed to this transaction to assist JBS and that the transaction caused Newedge to exceed the speculative limit for trading live cattle.[52]

It is believed that this is just the tip of the iceberg, that JBS and other cartel members have devised sophisticated strategies for leveraging their extraordinary market power against the cattle futures market. Circumstances in 2015, manifested by a completely dysfunctional futures market, suggest the cartel has become more brazen in its manipulation of the cattle futures market. One trade publication indicated the cattle futures market was a fundamental failure and a prominent market commentator indicated the cattle futures market was out of control.[53]

F. Injuring Competition

Some, but not all, of the above allegations constitute an injury to competition. Based on information and belief, the beef packing cartel also causes injury to competition by engaging in the following anticompetitive practices:

1. Sharing cattle buyers to reduce competition for fed cattle.
2. Preventing competing packers from entering the market by shuttering plants and refusing to sell those plants to potential competitors.

[49] *See, e.g.*, R-CALF USA's letter to the Department of Justice and the USDA, February 10, 2011 (mentioning R-CALF USA's earlier complaint to GIPSA concerning the October 2009 cattle futures anomaly), available at https://www.r-calfusa.com/wp-content/uploads/competition/110210LetterButlerJBSUnlawfulTransaction.pdf.
[50] CFTC Orders Chicago-Based Futures Commission Merchant Newedge USA, LLC to Pay More than $220,000 for Violating Speculative Position Limits in Live Cattle Futures Trading, U.S. CFTC, Feb. 07, 2011, available at http://www.cftc.gov/PressRoom/PressReleases/pr5981-11.
[51] Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, Making Findings and Imposing Remedial Sanctions, U.S. CFTC, Feb. 07, 2011, available at http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfnewedgeorder020711.pdf.
[52] *See id*.
[53] *See* Bill Bullard Letter to Senate Judiciary Committee, Jan. 5, 2016, at 3, 7, available at https://www.r-calfusa.com/wp-content/uploads/2013/04/160420-Senate-Judiciary-GAO-Letter.pdf.

3. Engaging in predatory pricing of wholesale beef to prevent new entrants from entering the market.
4. Converting cattle sold in the cash market into the packers' committed supplies to reduce competition in future weeks.
5. Manipulating the wholesale/retail price of beef to reduce demand for fed cattle

V. POTENTIAL CAUSES OF ACTION