

COWTOWN CARTEL: HOW THE BEEF CARTEL HAS MANIPULATED THE INDUSTRY TO EXPLOIT BEEF PRODUCERS AND CONSUMERS

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ABSTRACT

Beef—it’s what’s for dinner. Or at least for a premium. The beef cartel has turned up the heat on consumers over the past nine months by taking advantage of the coronavirus pandemic to sway the markets in its favor. This impact on markets comes as no surprise to producers and consumers as the cartel has exhibited this kind of economic behavior for decades. Although the Packers and Stockyards Act of 1921 was enacted to protect producers and consumers from anticompetitive

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practices, the “Big 4” have found a way to dominate the beef industry and escape punishment. Lawsuit after lawsuit against the beef cartel has been dismissed because of allegations of inadequate facts to support a claim for relief. Complainants, unfortunately, have had a hard time establishing sufficient facts under both the Sherman Act and the Packers and Stockyards Act for their lawsuits to survive into discovery. Today, the viability of the most recent lawsuit, Samuels v. Cargill Incorporated, hangs in the balance as the lawsuit preceding it was tentatively dismissed by a 12(b)(6) motion under the Federal Rules of Civil Procedure. Action needs to be taken before the beef cartel runs many lifelong beef producers out of business. A new pleading standard must be set to bring these packing plants into the court room, as these legislative acts – the Packers and Stockyards Act and the Sherman Act – are insufficient to unravel the anti-competitive and monopolistic activities by the Big 4. The pleading standard required for these cases is ripe for review, and ought to be considered provided that beef—it’s what’s for dinner.

I. INTRODUCTION

2020 has been a crazy year, from a toilet paper shortage, a global pandemic, widespread fires, and a highly contested election.¹ When the coronavirus pandemic began, shelves were empty, people were panicking, and everything shut down—everything except the farms and ranches of America.² Farmers and ranchers are the backbone of America. They put food on the tables of almost every American citizen.³ Unfortunately, America’s farmers and ranchers are riveted by industry-wide cartels.⁴ The Big 4 beef cartel is one of several agricultural syndicates

1. Jackie Salo, *2020 Events: Yep, These Things All Happened in the Year from Hell*, N.Y. POST (Dec. 31, 2020), <https://nypost.com/list/major-2020-events/> [https://perma.cc/JKW9-3VAE].

2. See Brent Schrotenboer, *US Agriculture: Can It Handle Coronavirus, Labor Shortages and Panic Buying?*, USA TODAY (Apr. 6, 2020, 2:52 PM), <https://www.usatoday.com/story/money/business/2020/04/04/coronavirus-tests-americas-food-supply-agriculture/5096382002/> [https://perma.cc/NH9R-2ZNN].

3. See generally Mark Tassler, *How Many People Does One Farmer Feed?*, KXRB (Oct. 19, 2018), <https://kxrb.com/how-many-people-does-one-farmer-feed/#:~:text=One%20single%20farmer%20produces%20enough,1970's%20it%20was%2073%20people> [https://perma.cc/9H9K-382C] (“One single farmer produces enough food to feed 155 people.”).

4. See Keith Mudd, *Subsidies Help Grain Cartel Much More Than Farmers*, INST. FOR AGRIC. & TRADE POL’Y (Dec. 14, 2001), <https://www.iatp.org/news/subsidies-help-grain-cartel-much-more-than-farmers> [https://perma.cc/52CL-SZUG]; Stephanie Pagonis, *Tyson, Cargill Among Meatpackers That Practiced ‘Cartel’-Like Price Fixing: Lawsuit*, FOX BUS. (June 10, 2020), <https://www.foxbusiness.com/lifestyle/tyson-cargill-meatpackers-price->

jeopardizing the livelihood of many families who work tirelessly throughout the year to put food on the table.⁵ The Big 4 consists of Tyson Foods, Inc. (Tyson), Cargill, Inc. (Cargill), JBS USA Food Company Holdings (JBS), and National Beef Packing Company (National Beef).⁶ These packing companies are considered the Big 4 because they control over 80% of the beef packing industry.⁷

On September 29, 2020, the Big 4 persuaded a federal judge in Minneapolis to “tentatively toss [the] antitrust claims over their alleged industry wide scheme to widen the ‘meat margin.’”⁸ Judge John R. Tunheim dismissed the case because the allegations in the complaint did not provide a sufficient factual basis as to how the individual defendants acted in a way as to create and maintain a conspiracy.⁹ This recent dismissal may have detrimental effects on another lawsuit filed against the Big 4.¹⁰ Producers in the cattle industry have taken this blow too many times! It is time for a change.¹¹

This article will first discuss the history of the cattle industry in the United States, including the significance of the Packers and Stockyards Act, along with Sections 1 and 2 of the Sherman Act. The most recent case brought against the Big 4, and its importance, will complete the background section of this article. The analysis section will discuss why the most recent dismissal should be reversed and explain why changes should be implemented by Congress to help protect against the beef cartel. Finally, the impacts of the pandemic and meat-market scheme on producers across the country will be addressed.

fixing-lawsuit [<https://perma.cc/2CPN-28LF>] (identifying the collaboration between several meatpackers as “‘cartel’-like”).

5. See generally Jim Mundorf, *The Bedfellows, How the Beef Packing Cartel Is Screwing Everybody*, LONESOME LANDS (Jan. 15, 2020), <https://www.lonesomelands.com/new-blog/2020/1/15/the-bedfellows-how-the-beef-packing-cartel-is-screwing-everybody> [<https://perma.cc/LW2J-GC6K>].

6. Pagonis, *supra* note 4.

7. See *id.*

8. *Meat Packing Giants Avoid Antitrust Cartel Suit, For Now*, COMPETITION POL’Y INT’L (Sept. 29, 2020), <https://www.competitionpolicyinternational.com/meatpacking-giants-avoid-antitrust-cartel-suit-for-now/> [<https://perma.cc/C3D2-34TN>].

9. *Id.*

10. See generally Class Action Complaint at 4, *Samuels v. Cargill, Inc.*, No. 0:20-cv-01319-NEB-KMM (D. Minn. June 6, 2020).

11. See generally *id.*

II. BACKGROUND

A. *The Cattle Industry from the Beginning*

Everyone loves a good old-fashioned cattle drive. In the early nineteenth century, American vaqueros raised longhorn cattle on the open range.¹² Texas eventually became an independent state in 1836, and farmers claimed the cattle left behind as their own.¹³ The 1850s brought wealth to many ranchers as the price of beef began to rise.¹⁴ When the Civil War broke out in 1861, many ranchers left to fight for the Confederate Army.¹⁵

The economy in the South was destroyed due to the war.¹⁶ With the cattle market in the North skyrocketing, ranchers in the South struggled to get their cattle moved to the North.¹⁷ Joseph McCoy, a livestock trader in Chicago, Illinois, built the first cowtown to accommodate the large number of cattle driven into smaller towns in Abilene, Texas.¹⁸ 1867 marked the beginning of the “beef bonanza,” with more than 2 million cattle sent from Abilene, Texas, to Chicago, Illinois.¹⁹ “The cattle industry was at its peak from 1867 until the early 1880s.”²⁰

The creation of the refrigerated railcar helped double the number of cattle on Western ranches between 1880 and 1900.²¹ Many producers had to find a way to maximize the profit from their cattle because at that time they were not selling the cattle for meat.²² Cross breeding, stockyards and feedlots, processing and packing

12. Scott M. Rank, *American West – The Cattle Industry*, HIST. ON THE NET (Apr. 2, 2021, 2:57 PM), <https://www.historyonthenet.com/american-west-the-cattle-industry> [<https://perma.cc/3RYV-H7B4>].

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* (“McCoy built a hotel, stockyard, office and bank in the village. . . .”); KAN. HIST. SOC’Y, *Cowtowns*, (Feb. 2013), <https://www.kshs.org/kansapedia/cowtowns/15598> [<https://perma.cc/QNT6-LR2X>] (noting that many of these cowtowns had their own hotels, stables, saloons, and even police).

19. Rank, *supra* note 12 (explaining that McCoy’s reputation for reliability is where the expression “the real McCoy” began).

20. *Id.*

21. *A Timeline of Changes: Beef Cattle Farming in North America*, ARROWQUIP (June 6, 2017), <https://arrowquip.com/blog/cattle-research/timeline-of-changes-beef-cattle-north-america> [<https://perma.cc/WY9E-2HPX>].

22. *See id.*

facilities, and the federal highway system were all important factors in the advancement of the cattle industry.²³

Today, corn-based diets implemented in stockyards and feed yards allow producers to pack more muscle and fat onto cattle in a shorter period of time.²⁴ Because of the improved feeding technologies and health practices, the overall number of cattle has declined, but more beef has been produced than ever before.²⁵ The evolution of boxed beef enabled packing plants to sell higher priced beef to more consumers, including specialty meats grocers and restaurants.²⁶

The number of producers in the cattle industry has decreased over the years.²⁷ The reduction of smaller operations has led to the increase of large feedlot operations.²⁸ In the 1980s, Iowa Beef Processors (IBP), an industrial powerhouse, worked to “force[] the competition either to copy its methods or quit the business.”²⁹ These tactics used by IBP have encouraged industry consolidation.³⁰ Competitors who consolidate have learned how to dominate markets, which

23. *Id.* Many British breeds of cattle were introduced to America to cross with longhorn herds around the nation. *Id.* Midwestern cities, like Chicago and Kansas City for example, were hotspots in the railroad infrastructure that could keep cattle in stockyards and finish them out in feedlots. *Id.* The extra muscle mass created in a short span of time during the finishing process allowed distributors to sell more meat per head. *Id.* Packaging centers developed in the Midwest between the 1920s and the 1960s, and refrigeration technology ensured the freshness of packaged beef making it easier and cheaper to ship than live cattle. *Id.* The expansion in the 1950s of the federal highway system led to another explosion in the beef industry. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* (noting that “the cattle farming sector of the industry has seen a decline of almost 175,000 operations, 144,000 of which had a cattle inventory of under 50 head.”)

28. *Id.* (“The decline of 1,000-head-capacity operations has been met with an increase in 16,000 and 32,000-head feedlots over the same time period.”)

29. Thomas L. Freidman, *Iowa Beef Revolutionized Meat-Packing Industry*, The N.Y. Times (June 2, 1981), <https://www.nytimes.com/1981/06/02/business/iowa-beef-revolutionized-meat-packing-industry.html>.

30. *Id.* These tactics are also explained in Upton Sinclair’s novel, *The Jungle*, which uncovered the terrible conditions within the meat packing plants in the early 1900s. *See* Upton Sinclair, *THE JUNGLE* (1985). IBP was able to utilize these tactics and undercut the competition, giving them the “powerhouse” label. *See id.* “Operating on slim profit margins, increasing worker speed and productivity, and cutting labor costs” are examples of how IBP cut their way to the top. *Id.* These undercutting tactics “encouraged industry consolidation, increased hazards for workers, and renewed resistance to employee organizing efforts.” *Id.*

includes the meat packing market.³¹ By the late 1990s, the top four companies utilized consolidation, and accounted for over 80% of all domestic beef production.³² This trend continued and by 2013 only four companies produced 85% of the beef in the United States.³³ Today, the Big 4 process 85% of all beef in the United States, and it seems inevitable that this percentage will continue to rise.³⁴

B. Development of Antitrust Laws to Help Agriculture Producers

The next two sections will give a brief overview of current law meant to protect cattle producers that has unfortunately become just words on paper.³⁵

1. The Packers & Stockyards Act of 1921

In 1921, lawmakers designed an Act to ensure competition and integrity in livestock, meat, and poultry markets by enacting the Packers and Stockyards Act of 1921 (PSA).³⁶ The PSA is considered remedial legislation, which “should be

31. *How to Profit When Your Competitors Consolidate*, CSSP (Apr. 2, 2021, 3:01 PM), <https://www.cssp.com/how-to-profit-when-your-competitors-consolidate/> [https://perma.cc/JM3H-MVWB]. Market power is a key to consolidation profitability. *Id.* Some consolidations will have market power that fails to produce better profits; however, the Big 4 have figured out how to exploit this market power to their advantage. *See id.* Purchasing power is another tactic that consolidation of the packing industry has utilized to increase profits. *See id.*

32. *See generally* Alan Barkema et al., *The New U.S. Meat Industry*, FED. RSRV. BANK KAN. CITY (2001), <http://la.utexas.edu/users/hcleaver/357k/357kNewMeatIndustry.pdf> [https://perma.cc/WQ8N-K585].

33. *A Timeline of Changes: Beef Cattle Farming in North America*, *supra* note 21.

34. Jacqui Fatka, *Time to Look at Packer Consolidation*, FEEDSTUFFS (Apr. 30, 2020), <https://www.feedstuffs.com/news/time-look-packer-consolidation> [https://perma.cc/MYL5-LNPB].

35. *See infra* Sections II.B.1 & 2.

36. 7 U.S.C. §§ 181-231; *The Packers and Stockyards Act: An Overview*, NAT’L AGRIC. L. CTR. (Apr. 2, 2021, 3:04 PM), <https://nationalaglawcenter.org/overview/packers-and-stockyards/> [https://perma.cc/F6LR-BJTQ] (explaining that lawmakers enacted the Act in response to concerns of the “Big Five” (Swift & Company, Armour & Company, Cudahy Packing Company, Wilson & Company, and Morris & Company) engaging in anticompetitive practices that had detrimental effects on producers and consumers); Christopher R. Kelley, *An Overview of the Packers and Stockyards Act*, NAT’L AGRIC. L. CTR. 3 (Apr. 2003), https://nationalaglawcenter.org/wp-content/uploads/assets/articles/kelley_packers.pdf [https://perma.cc/BE7F-SDS8] (noting that before the PSA was enacted, “[t]he [Federal Trade Commission] FTC recommended governmental ownership of the stockyards and their related facilities.” However, Congress chose to create and enact the PSA in 1921); *see also* NEIL E. HARL & ROBERT P. ACHENBACH, JR., *AGRICULTURAL LAW* § 71.02 (Matthew Bender 2021) (1980) (discussing the historical development of PSA extensively).

liberally construed to further its life and fully effectuate its public purpose.”³⁷ By prohibiting monopolistic and predatory practices, the Act is designed to protect producers and consumers from antitrust violations by packing companies.³⁸ For many years the administrator of the Grain Inspection, Packers and Stockyards Administration (GIPSA) had the responsibility of administering the PSA.³⁹ In 2017, the United States Department of Agriculture (USDA) realigned several offices thereby shifting the responsibilities from GIPSA to the Agricultural Marketing Service (AMS).⁴⁰

The PSA applies to anyone engaging in the business of marketing livestock, meat, and poultry in interstate or foreign commerce.⁴¹ Due to the reduction in the need for stockyards in cities and close to the railroad system, feedlots located closer to packing houses, but further from cities, have become very popular.⁴² Because feedlots are exempted from the PSA, this exemption gives packing companies opportunities they did not have in the past.⁴³ By buying directly from

37. *Rice v. Wilcox*, 630 F.2d 586, 589 (8th Cir. 1980) (quoting *Bruhn’s Freezer Meats of Chi., Inc. v. U.S. Dep’t of Agric.*, 438 F.2d 1332, 1336 (8th Cir. 1971)); *United States v. Donahue Bros., Inc.*, 59 F.2d 1019, 1023 (8th Cir. 1932) (“One of the purposes of this act was to protect the owner and shipper of livestock, and to free him from the fear that the channel through which his product passed, through discrimination, exploitation, overreaching, manipulation, or other unfair practices, might not return to him a fair return for his product.”); see also *Denver Union Stock Yard Co. v. Producers Livestock Mktg.*, 356 U.S. 282, 286 (1958) (defining sections of the PSA); *Stafford v. Wallace*, 258 U.S. 495 (1922) (explaining the same).

38. See *Kelley*, *supra* note 36. Although the Act is designed to protect producers and consumers from unlawful practices, packing companies still find a way to weasel their way out of trouble using different aspects of the law. See 7 U.S.C. § 192(d) (“It shall be unlawful for any packer . . . to . . . [s]ell or otherwise transfer to . . . any article for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition . . . or of restraining commerce. . .”).

39. *The Packers and Stockyards Act: An Overview*, *supra* note 36.

40. *Id.*

41. *Id.* Packers, swine contractors, stockyard owners, market agencies, dealers, and live poultry dealers are under the PSA scrutiny. *Id.* Individuals who market their own livestock and buy livestock for their individual benefit are not regulated under the PSA. *Id.*

42. See *id.*

43. *Id.* Packers began to buy directly from producers, creating the need for the 1958 amendment to the PSA to include all dealers. *Solomon Valley Feedlot, Inc. v. Butz*, 557 F.2d 717, 718 (10th Cir. 1977). Custom feedlots had not been considered by the USDA as a dealer until 1974. *Id.* Because the PSA does not include feedlots, expressly or impliedly, the court concluded that custom feedlots are not subject to the PSA. *Id.* at 721. Packers can take advantage of purchasing directly from feedlots or using packing-owned trucks to guarantee shrinkage of the cattle. Claire Kelloway, *JBS Shortchanges Nebraska Ranchers, Violating the Packers & Stockyards Act*, FOOD & POWER (Jan. 3, 2019),

different feedlots, packing companies are able to limit the amount of cattle being bought in the open market.⁴⁴ As a result of this serious legislative loophole, packers continue to take advantage of the market by using the technical terms of the PSA to create a de facto monopolistic cattle market.⁴⁵ In fact, the industry is substantially more concentrated today than it was at the time of the passing of the PSA.⁴⁶

2. *The Sherman Act of 1890*

The Sherman Act of 1890 prohibits activities that restrain trade or commerce in the marketplace.⁴⁷ The monopolization of a market is forbidden by Section 2 of the Sherman Act.⁴⁸ Furthermore, collusion is illegal under Section 1 of the Sherman Act.⁴⁹

<https://www.foodandpower.net/latest/2019/01/03/jbs-shortchanges-nebraska-ranchers-violating-the-packers-stockyards-act> [<https://perma.cc/KX7Z-6AGA>]. (“There’s no transparency and [the packers] are the ones who are valuing the carcass ... Farmers have no way of knowing whether they are getting a fair price or not, they just have to take the check.”).

44. See ShayLe Stewart, *Call the Market: Readily Available Fed Cattle, Packing Plant Closures Affect the Producers*, PROGRESSIVE FARMER (April 15, 2020, 1:11 PM), <https://www.dtnpf.com/agriculture/web/ag/news/article/2020/04/15/readily-available-fed-cattle-packing> [<https://perma.cc/JDH9-Q9YB>] (explaining that cow-calf operations breed and raise calves who then get sold to feedlot operations for the finishing process. Once the cattle get to their finishing weight, the feedlot will sell the cattle to the packers, who then process the cattle and sell them into the retail market. Cow-calf producers are at the mercy of feedlot owners—if the feedlot owners do not have a viable market to sell the finished calves, they are reluctant to buy from the cow-calf producers).

45. See generally 7 U.S.C. §§ 181-231; Kelloway, *supra* note 43 (noting that in the past, farmers would sell their cattle at live auctions, watch their cattle go through the ring, and then walk away with a pocket full of cash, leaving any shrinkage loss in the pockets of the packer. Today, packers either buy directly from feedlots or purchase live cattle from large producers).

46. See generally 7 U.S.C. §§ 181-231.

47. 15 U.S.C. § 1.

48. *Id.* at § 2.

49. See *id.* at § 1; David Turetsky, Deputy Assistant Att’y Gen., Address Before the Montana Stockgrowers Association: Antitrust Enforcement in the Meat Packing Industry (June 6, 1996), <https://www.justice.gov/atr/speech/antitrust-enforcement-meat-packing-industry-0> [<https://perma.cc/C2TR-7AMB>] [hereinafter Address Before the Montana Stockgrowers Association: Antitrust Enforcement in the Meat Packing Industry] (explaining that price fixing, agreements to allocate markets, and agreements to boycott are all agreements that involve collusion. Price fixing includes agreeing to a specific price and agreeing to an increase or decrease of price levels or agreeing to follow formulas intended to raise or decrease price levels. Allocation of markets includes dividing up geographic areas and dividing up customers or suppliers within an area. Group boycotts include agreements among competitors to deal with customers on terms).

Today's beef markets would seem to fall within the ambit of both of these sections.⁵⁰ Claims that arise under Section 1 of the Sherman Act are seen within almost every antitrust claim filed in federal court.⁵¹ All activities of collusion are "flatly illegal," and United States businesses should not engage in them.⁵² In the livestock industry, proving a case of collusion requires evidence of an agreement between companies.⁵³ This standard of proof is difficult for complainants to establish, for many lawsuits brought against packing plants are dismissed before discovery.⁵⁴

As stated above, section 2 of the Sherman Act prohibits the creation of monopolies within a market.⁵⁵ A monopolized market gives one entity complete control of the market.⁵⁶ This entity controls the price by controlling the goods of that market.⁵⁷ Monopolization is relevant to the agriculture industry.⁵⁸ Both restrictive conduct and a very high market share must be proven to show a monopoly within the market.⁵⁹ Many lawsuits brought against the Big 4 allege violations of the Sherman Act; however, courts have frequently dismissed them, holding the allegations to be unproven.⁶⁰

The Department of Justice Antitrust Division is in charge of handling investigations in the antitrust sector, including cattle.⁶¹ The Antitrust Division maintains close contact with GIPSA.⁶² However, GIPSA does not have authority

50. See 15 U.S.C. §§ 1-2.

51. See Turetsky, *supra* note 49.

52. *Id.* ("If we find evidence in any industry, including the livestock industry, that leads us to believe these laws have been violated, we will prosecute.")

53. *Id.* (noting patterns of bid changes over time or attendance at various auction barns are examples of evidence used to prove collusion).

54. See *infra* Sections III.A & B.

55. 15 U.S.C. § 2.

56. See *Definition of 'Monopoly'*, THE ECON. TIMES (April 2, 2021, 3:06 PM), <https://economictimes.indiatimes.com/definition/monopoly#:~:text=Definition%3A%20A%20market%20structure%20characterized,goods%20with%20no%20close%20substitute> [<https://perma.cc/VZP3-6N4N>]. Using this framework, the Big 4 could be considered one entity because they have consolidated into one giant industry. See *id.*

57. *Id.*

58. See Turetsky, *supra* note 49 (Monopolization occurs when one packing plant attempts "to drive other packers out of business by interfering with their ability to engage in the business").

59. See *id.*

60. See *infra* Section III.A.

61. See Turetsky, *supra* note 49.

62. *Id.*

to enforce the Sherman Act, as GIPSA only has authority to enforce the PSA.⁶³ However, if GIPSA finds conduct that may violate antitrust laws, the Department of Justice Antitrust Division may get involved.⁶⁴

III. LAWSUITS AGAINST THE BIG 4

A. Fresh Off the Kill Floor: Peterson et al., v. JBS USA Food Company Holdings et al.

Rarely do lawsuits against packing companies make it through the pleading stage and into discovery. As an example, one lawsuit, filed in April 2019, alleged four meatpacking defendants and Agri Stats conspired to increase meatpacking margins.⁶⁵ The lawsuit claimed “meat works like the mafia,” and the alleged conspiracy was that the Big 4 was used to fix, raise, maintain, and stabilize the price of beef.⁶⁶ The result of this lawsuit is one that cattle producers have seen over and over again; dismissed by a 12(b)(6) motion under the Federal Rules of Civil Procedure.⁶⁷ Three lawsuits were filed in 2019 against the Big 4 for alleged

63. *Id.* (noting that the PSA extends beyond conduct that violates antitrust laws).

64. *See id.*

65. Demand for Jury Trial at 1, *Peterson v. Agri Stats, Inc.*, No. 0:19-cv-01129 (D. Minn. Filed Apr. 26, 2019).

66. *See id.* (quoting an unnamed “industry insider familiar with the operations of the Meatpacking Defendants”).

67. *See In re Cattle Antitrust Litig.*, No. CV 19-1222, 2020 WL 5884676, at *8 (D. Ct. Minn. Sept. 29, 2020). The court must consider “all facts alleged in the complaint as true to determine if the complaint states a claim for ‘relief that is plausible on its face.’” *Id.* at *4 (citing *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009)). The Supreme Court’s decision in *Bell Atl. Corp. v. Twombly* moved away from a previous hesitancy to dismiss antitrust claims before discovery, and instead moved toward permitting dismissal unless a heightened plausibility standard is satisfied. *See* 550 U.S. 544, 555-556 (2007) (holding that “stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made”). Many cases against meatpackers take place in the Eight Circuit, which has adopted a stricter view that has, in turn, hurt cattle producers. *See In re Cattle Antitrust Litig.*, 2020 WL 5884676, at *5.

Given the unusually high cost of discovery in antitrust cases, the limited success of judicial supervision in checking discovery abuse, and the threat that discovery expense will push cost-conscious defendants to settle even in anemic cases[,] the federal courts have been reasonably aggressive in weeding out meritless antitrust claim at the pleading stage.

Id. at *4 (quoting *Insulate SB, Inc. v. Advanced Finishing Sys., Inc.*, 797 F.3d 538, 543 (8th Cir. 2015)); *see also Twombly*, 550 U.S. 544 at 555 (stating that a complaint must allege more than just labels and conclusion, but less than detailed facts to overcome a 12(b)(6) motion to dismiss); *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (establishing a plausibility factor to the short plain statement required by Fed. R. Civ. Pro. 8(a)(2)). The factual content within the

antitrust violations.⁶⁸ Those lawsuits were all consolidated into one action, which met its fatal destiny on September 29, 2020—a 12(b)(6) motion to dismiss.⁶⁹

The consolidated complaint filed by the plaintiffs was over 70 pages long.⁷⁰ The complaint alleged coordination amongst the Big 4 to slash slaughter volumes and curtail their purchases of fed cattle on the cash market.⁷¹ The defendants' profitability is driven by the "meat margin."⁷² The meat margin is the spread between packer price and the price packer's charge.⁷³ A witness within the complaint asserted the defendants expressly agreed to "periodically restrain or reduce slaughter numbers so as to reduce demand for fed cattle."⁷⁴ The cattle market is highly conducive to collusion.⁷⁵ The consolidation of packing plants, high barriers to entry, and easily accessible means of communication among defendants collectively demonstrate the likelihood of conspiracy.⁷⁶

The defendants' coordination in purchasing cash cattle is another aspect of the conspiracy.⁷⁷ By collectively enforcing an "antiquated queuing convention via

complaint must allow the court to draw a reasonable and plausible inference that the defendant committed the allegations, not just a possibility. *See id.* at 678.

68. *See* Class Action Complaint, Ranchers Cattleman Action Legal Fund United Stockgrowers of America v. Tyson Foods, Inc., No. 1:19-cv-02726 at 24-25 (N.D. Ill. Apr. 23, 2019) (alleging a conspiracy between Big 4 to depress cattle prices and inflate their own margins); *see also* Wright v. Tyson Foods, Inc., No. 0:19-cv-01350 at 20-21 (D. Minn. May 22, 2019) (asserting conspiracy claims against the Big 4 that led consumers to pay more for beef); Sevy v. Tyson Foods, Inc., No. 0:19-cv-01243 (D. Minn. May 9, 2019) (contending the Big 4 conspired to drive down cattle prices by a live cattle futures trader); *see generally* Greg Henderson, *Drovers: Packer Lawsuits Will Be Consolidated Into One*, A BROTHERS MOB (July 15, 2019), <https://abrothersmob.com/drovers-packer-lawsuits-will-be-consolidated-into-one-including-jbs/> [<https://perma.cc/H3W5-UXC2>].

69. *In re Cattle Antitrust Litig.*, 2020 WL 5884676, at *1.

70. *See* Class Action Complaint, *In re Cattle Antitrust Litigation*, No. CV 19-1222 (D. Minn. July 12, 2019).

71. *Id.* at 2. The conspiracy was confirmed by witness accounts, trade records, and economic evidence. *Id.* at 8.

72. *See id.* at 2.

73. *Id.* (explaining that by reducing slaughter volumes, packers can depress the price of fed cattle and increase their "meat margin.").

74. *Id.* at 23.

75. *Id.* at 7.

76. *Id.* Some of these communications come through "field buyers" for each packing plant. *Id.* A cattle buyer (or field buyer) goes around to different feedlots or sale barns for their respective employer and will exchange this information between each other. *Id.* The information shared was highly sensitive and surely made its way back to the head office at each company. *Id.*

77. *Id.* at 2.

threats of boycott,” the defendants actively participated in the conspiracy.⁷⁸ Threats of retaliation by defendants to producers enforced strict adherence to protect the producers’ livelihood.⁷⁹ The Big 4 would limit the purchases of cash cattle and conduct all of their cash cattle trade for a short period of time on Fridays, effectively manipulating the market.⁸⁰ The Big 4 successfully expanded their margins through this manipulation.⁸¹ The gradual price increase that occurred throughout the time alleged in the complaint was consistent with the seasonal rise in fed cattle prices.⁸² However, experts say those numbers should have been higher.⁸³ Many witness accounts of correspondence between defendants show they were all collaborating to increase their margins, regardless of what it did to the market.⁸⁴

Many other allegations by the plaintiffs were established by facts throughout the complaint.⁸⁵ The antitrust violations by the defendants not only violated the PSA, but also the Sherman and Clayton Acts.⁸⁶ The plaintiffs laid out their claim for relief for violations under each Act.⁸⁷ The facts alleged in the complaint are detailed and supported by corroborating evidence.⁸⁸ Nevertheless, on September 29, 2020, a federal judge tentatively dismissed the case in favor of the defendants.⁸⁹ The dismissal documents note that the Eighth Circuit adopted a rule for cases involving parallel conduct: plaintiffs must also plead plus factors.⁹⁰ The complaint

78. *Id.* at 27 (explaining how the convention works by way of boycott).

79. *Id.*

80. *Id.* at 4.

81. *See id.* at 34.

82. *Id.* at 37.

83. *Id.* (“But for the glut in slaughter-ready cattle created by Packing Defendants’ coordinated actions, prices would have risen significantly in response to the Defendants’ dramatic increase in year-on-year slaughter numbers.”).

84. *See id.* at 2.

85. *See generally id.* at 16.

86. *Id.* at 14. Because this comment deals only with Sherman Act violations and PSA violations, the Clayton Act will not be discussed.

87. Class Action Complain, *supra* note 70.

88. *See generally id.* at 41.

89. *In re Cattle Antitrust Litig.*, No. CV 19-1222, 2020 WL 5884676, at *8 (D. Ct. Minn. Sept. 29, 2020). In the order granting the dismissal, the judge gave the plaintiffs 90 days to amend their complaint with more detailed facts to overcome the *Twombly* and *Iqbal* standards. *Id.*

90. *Id.* at *5 (“These plus factors might include (1) a shared motive to conspire; (2) action against self-interest; (3) market concentration; and (4) a substantial amount of interfirm communication in conjunction with the parallel conduct.”). The complaint must include “(1) direct evidence of a conspiracy or (2) both concerted action (including parallel conduct) and at least one plus factor.” *Id.*

contains a significant amount of plus factors, but they were not enough to overcome the standard set by the Eighth Circuit.⁹¹ The plus factors provided by the plaintiffs were strong; however, because of the group pleading, the court could not distinguish any of the Big 4's affirmative actions.⁹² Specific pleading is important when it comes to parallel conduct because the court can conclude "whether the allegations are plausible in the face of an 'obvious alternative explanation.'"⁹³ Because of the alternative economic explanations offered by the defendants, the court granted the motion to dismiss in their favor.⁹⁴

Not only was Section 1 of the Sherman Act dismissed by the judge, so were the claims relating to the PSA.⁹⁵ Section 202 (e), (f), and (g) of the PSA require pleading a conspiracy to survive dismissal, and because the court dismissed the Sherman Act claim, he dismissed this claim as well.⁹⁶ Bringing a claim under §202(a) of the PSA was the plaintiffs last chance to move on with the current pleading.⁹⁷ The "mere[] cutting back slaughter volume in a single year cannot itself serve as the anticompetitive basis for a claim under §202(a)."⁹⁸ Even with the broader scope of the PSA compared to the Sherman Act, the complaint purportedly did not contain enough detailed information to pass the pleading stage.⁹⁹

91. *Id.* at *6. The court compares the plus factors laid out in the complaint for *In re Pork Antitrust Litigation*, No. 18-1776, at 7 (D. Minn. 2019). *In re Cattle Antitrust Litig.*, 2020 WL 5884676, at *6. The court notes the high concentration within the fed-cattle market with only four packers making up 83% of the market compared to the pork processing market where there are eight companies. *Id.* The communication amongst defendants at numerous trade association conferences is another plus factor mentioned. *Id.* "The market-wide change in pricing practices from cash sales to formula contracts also serve as a plus factor." *Id.* The court even notes how the plus factors identified within the complaint are "undoubtedly strong and are of the type often used to support an inference of an agreement." *Id.* (quoting *In re Pork Antitrust Litigation*, No. 18-1776).

92. *Id.* The most specific allegations within the complaint were from 2015. *Id.* Any other allegations relied on "almost exclusively [] industry-wide data..." *Id.* The court declined to take that information to infer that each defendant contributed to the allegations "simply because they make up most of the industry." *Id.*

93. *Id.* (quoting *Twombly*, 550 U.S. at 567-68).

94. *Id.* ("[T]he Court sees nothing more than 'a sheer possibility that a defendant has acted unlawfully.'") (quoting *Iqbal*, 556 U.S. at 687).

95. *Id.* at *7.

96. *Id.*

97. *Id.* Section 202(a) of the PSA refrains packers from "engag[ing] in or use any unfair, unjustly discriminatory, or deceptive practice or device." *Id.* The Eighth Circuit requires this to mean the violations must "have at least the potential to suppress or reduce competition." *Id.* (citing *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999)).

98. *Id.*

99. *Id.*

The current pleading standards have been fatal for producers against the beef cartel.¹⁰⁰ It is time to see change before producers run out of steam and the world runs into a bigger problem.

B. Hope on the Horizon: Samuels et al. v. Cargill, Incorporated

The Big 4 have the fundamentals of supply and demand manipulation down to a science, creating a vulnerable beef market and successful cartel formation and operation.¹⁰¹ This cartel formation led to a class action complaint filed on June 6, 2020, by Howard B. Samuels, the trustee for Central Grocers, Incorporated, against Cargill, JBS, National Beef, and Tyson, for their anticompetitive behaviors over the last 5 years.¹⁰² The complaint notes the defendants as the “world’s largest meat processing and packing companies.”¹⁰³ Since 2015, the Big 4 have exploited their market power “by conspiring to limit the supply of, and to fix the prices of, beef sold to Central Grocers and others in the [United States’] wholesale market (the ‘Conspiracy’).”¹⁰⁴ The principal component of the alleged conspiracy was the “concerted scheme to artificially constrain the supply of beef entering the domestic supply chain.”¹⁰⁵ An investigation by the Department of Justice and USDA, triggered by the spike in beef prices since the COVID-19 outbreak, probed each packing company and sought information about their pricing practices.¹⁰⁶ A witness—previously employed by one of the defendants—confirmed that each of the defendants “expressly agreed to reduce its cattle purchase and slaughter volumes with the purpose and effect of increasing their margins.”¹⁰⁷ In a market

100. *Id.* at *6.

101. *Id.* at *2. By purchasing fewer cattle than the competitive market would demand and running their plants at less than available capacity, defendants illegally and successfully collaborated to reduce beef supplies in the United States. *Id.* The surplus in the cattle market and shortage in wholesale beef market drove down the prices packers paid for cattle and skyrocketed the prices for beef. *Id.* Thus, the defendants achieved higher meat margins. *Id.*

102. Class Action Complaint at 1, *Samuels v. Cargill, Inc.*, No. 0:20-cv-01319-NEB-KMM (D. Minn. June 6, 2020) (alleging that defendants (the Big 4) violated Section 1 of the Sherman Act by conspiring to constrain beef supplies, thus inflating domestic beef prices paid by direct purchasers).

103. *Id.* at 1-2 (“Collectively, they controlled approximately 81-85% of the domestic cattle processed . . . [t]he next largest meatpacker had only a 2-4% market share.”).

104. *Id.* at 2.

105. *Id.* (arguing that the restraints on beef supply artificially inflated beef prices, forcing Central Grocers to pay higher prices than they would have in a competitive market).

106. *Id.* at 2-3 (“[T]he difference between prices for live cattle and prices for wholesale boxed beef was ‘historically high.’”).

107. *Id.* at 3. Evidence reported by the “Big 4” to the USDA corroborated the witness’s account. *Id.* “Their vital role is to purchase cattle from the nation’s farmers and ranchers, slaughter and pack cattle into beef and sell beef to Central Grocers and other Class Members.

free of collusion, a competitor who reduces its purchase of cattle will be shoved out by others who pick up the slack and increase their market shares.¹⁰⁸ “Only *colluding* meatpackers would expect to benefit by reducing their purchases and slaughter of cattle.”¹⁰⁹

The complaint lays out the foundations of how the beef industry is a highly cartelized market.¹¹⁰ A highly concentrated market is a breeding ground for cartelization.¹¹¹ It costs an investment of at least \$250 million to enter the beef-packing industry, creating large barriers to entry and keeping new competitors from entering the market.¹¹² Boxed beef is a commodity traded on the Chicago Mercantile Exchange.¹¹³ The demand for such commodities depends on price as opposed to quality.¹¹⁴ Cartel members can easily monitor compliance and detect defectors because of the quality aspect of the market.¹¹⁵ Demand for beef is relatively insensitive to change in quantity, making it easy for the cartel to raise prices without losing customers to substitutions and lost sales revenues.¹¹⁶

Many antitrust violations were plead within the complaint.¹¹⁷ The first witness produced direct evidence that the defendants “periodically agreed to reduce their slaughter volumes, resulting in wholesale prices above competitive levels.”¹¹⁸ While the agreement between defendants was in effect, the kill capacity at each plant was reduced from 5,500-6,000 per day to around 4,800-5,200 per

Defendants’ gatekeeping role has enabled them to collusively control both upstream and downstream beef pricing throughout. . . .” *Id.*

108. *Id.* at 8 (stating that a competitive market would not “cut its purchases and suffer lost sales with any hope of increasing its profit margin.”).

109. *Id.*

110. *See id.* at 13 (showing that producer concentration, high barriers to entry, commodity product, and inelastic demand are the four characteristics in the beef cartel market).

111. *See id.* (explaining that the absence of an outside competitive presence in a cartel-controlled market means the members of the cartel can easily monitor each other’s actions related to supply and pricing. *Id.* at 14).

112. *Id.* at 14-15 (“[B]arriers to entry help to facilitate the formation and maintenance of a cartel.”).

113. *Id.* at 15 (“Markets for commodity products are susceptible to for collusion.”).

114. *Id.* at 15-16.

115. *Id.* at 16.

116. *Id.* (arguing that demand must be inelastic at competitive prices for a cartel to profit from raising prices above competitive levels.)

117. *Id.*

118. *Id.* at 17. The witness learned of the agreement between the Defendants from a fabrication manager who knew about the conspiracy. *Id.* When asked if the number of kills were being reduced in other defendants’ plants, the fabrication manager answered “Yes, they are. We have had that agreement that we don’t kill while prices are up for a while.” *Id.* at 18.

day.¹¹⁹ Each of the defendants idled, which resulted in closed plants and the cessation of any processing capacity expansion.¹²⁰ The defendants coordinated their conspiracy during their discussions with each other during earnings calls.¹²¹ Finally, the market shares of each defendant remained stable, suggesting cooperation acting as an effective cartel.¹²²

The cartel-like actions of the defendants were outlined in detail within the pleading.¹²³ A competitive market would have an equal volume of cattle purchased compared to the demand/marginal revenue product curve.¹²⁴ The defendants “exercised their monopsony power to compel cattle ranchers to accept the price [d]efendants offered, thus driving down the market price.”¹²⁵ These restrictions created a downstream effect on direct purchasers, such as Central Grocers.¹²⁶ The harms suffered by Central Grocers is the type of harm antitrust laws were designed to prevent and punish.¹²⁷ Violations of Section 1 of the Sherman Act by the

119. *Id.* at 19

120. *Id.* at 21. Cargill shut down its Plainview, Texas, plant in 2013, cutting its slaughter capacity by 4,650 head per day. *Id.* at 21-22. Tyson reported a reduction in live cattle processed that same day in its Q1 2013 Form 8-K. *Id.* at 22. JBS acquired an inactive plant in Nampa, Idaho, in April 2013, which it has kept idle as of the writing of the complaint. *Id.* at 22. In June 2014, National Beef closed its Brawley, California plant-reducing slaughter capacity by 2,000 head per day. *Id.* Many other closures by each defendant occurred over the next several years. *Id.* at 22-25.

121. *See id.* at 25-28 (listing the multiple times defendants discussed the conspiracy publicly).

122. *See generally id.* at 16-28.

123. *See id.* at 35 (“The cattle market is an oligopsony consisting of the Defendants which purchase more of the cattle for slaughter and produce most of the beef sold in the wholesale market. When Defendants colluded to restrict supply, the market effectively became a monopsony that left cattle ranchers with no choice but to accept whatever price Defendants offered.”).

124. *See id.*

125. *Id.* The monopsony power of the defendants enabled them to maximize profit by purchasing fewer cattle at a lower price. *Id.*

126. *Id.* (explaining that, with the downstream market power established by the defendants, they could maximize their profits by colluding to produce volumes based on marginal revenue instead of market demand, increasing the wholesale prices paid by Central Grocers).

127. *See id.* at 36. Defendants’ collective monopsony power and anticompetitive conduct had the following effects, among others: Price competition in the beef market was restrained or eliminated; Prices for beef sold by defendants, their divisions, subsidiaries, and affiliates, and all their co-conspirators, and, in turn, by other beef producers, were raised and fixed at artificially high, noncompetitive levels throughout the United States; Direct purchasers of beef were deprived of free and open competition; and Direct purchasers paid artificially inflated prices. *Id.*

defendants include: “[f]ixing, raising, and stabilizing the wholesale price of beef; and [a]llocating among themselves and collusively reducing the production of beef.”¹²⁸ The fifty-two page complaint uses specific instances and dates that allege per se violations of federal antitrust laws violated by defendants.¹²⁹ Unfortunately, the destiny of this suit may have taken a fatal blow with the recent dismissal of *In re Cattle Antitrust Litigation*.¹³⁰

IV. ANALYSIS

A. Why the Recent Dismissals Were Legally Misguided

Attorneys who file antitrust lawsuits are no stranger to the dreaded 12(b)(6) motion to dismiss based on the “plausibility” standard established in *Twombly* and *Iqbal*.¹³¹ *Twombly* is the landmark antitrust case that established the *plausibility* standard, which defeats many claims.¹³² Following *Twombly*, a complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”¹³³ Any antitrust lawsuit that alleges a conspiracy case under Section 1 of the Sherman Act is susceptible to a *Twombly* review.¹³⁴ Without overcoming the initial round of 12(b)(6) motions, the suit will not move into discovery, and plaintiffs will not be able to deeply investigate their claims.¹³⁵ Additionally, plaintiffs who are successful in the initial dismissal motions must be ready for

128. *Id.* at 49-50. “Price competition in the sale of beef has been restrained, suppressed, and eliminated in the United States.” *Id.* at 50. Prices of beef sold by defendants have been “fixed, raised, stabilized, and maintained at artificially high, non-competitive levels throughout the United States.” *Id.* Class members who directly purchased beef from defendants were “deprived of the benefits of free and open competition in the purchase of beef.” *Id.*

129. *See generally id.*

130. *See In re Cattle Antitrust Litig.*, No. CV 19-1222, 2020 WL 5884676, at *8 (D. Ct. Minn. Sept. 29, 2020); *supra* Section II.C.2.

131. *See Joshua Stokes & Jordan Ludwig, Pleading an Antitrust Conspiracy in a Post-Twombly World*, 24 J. ANTITRUST & UNFAIR COMPETITION L. 120, 120 (2015) (establishing each circuit’s pleading standards along with numerous cases as examples of 12(b)(6) dismissals).

132. *See Bell Atl. Co. v. Twombly*, 550 U.S. 544, 570 (2007).

133. Fed. R. Civ. P. 8(a)(2).

134. Stokes & Ludwig, *supra* note 131, at 120, 124 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (noting that the *Twombly* review must nudge a plaintiff’s claims “across the line from conceivable to plausible.”)).

135. *See generally* Fed. R. Civ. P. 12(b)(6) (establishing motion to dismiss for failure to state a claim and general provisions governing discovery).

summary judgment motions to follow.¹³⁶ This section will discuss the importance of the tentative dismissal in *In re Cattle Antitrust Litigation* and why cases like these should be allowed to dive into discovery before a 12(b)(6) dismissal.

Time and time again, the beef packers get away with manipulating the markets to increase their margins while weaseling their way out of court to keep their secrets hidden.¹³⁷ By utilizing the Federal Rules of Civil Procedure and the cases discussed within, the Big 4 have essentially excused themselves from discovery, while stopping lawsuits in their tracks.¹³⁸ Looking at the complaint in *In re Cattle Antitrust Litigation*, the plaintiffs allege a lot of detailed information regarding the activities that point to the evidence of collusion.¹³⁹ Even with the details of the collusion, the court was not satisfied, which was apparent through their grouping of the defendants, instead of individually defining each defendant's action.¹⁴⁰

So, what is a "plausible" claim in an antitrust case?¹⁴¹ Any claim looking to surpass a 12(b)(6) motion must be plausible in a way for the court to "draw [a] reasonable inference that the defendant is liable for the misconduct alleged."¹⁴² The problem for plaintiffs filing suit against the Big 4 is the complaint must make sufficient factual allegations to make it plausible, not merely state a theory.¹⁴³ The

136. See generally Fed. R. Civ. P. 56 (governing summary judgment motions); C. Paul Rogers III, *Summary Judgements in Antitrust Conspiracy Litigation*, 10 LOY. U. CHI. L.J. 667, 667 (1979).

137. See *supra* Sections II.C.1, 2.

138. See *id.*

139. Class Action Complaint at 41, *In re Cattle Antitrust Litigation*, No CV 19-1222 (D. Minn. July 12, 2019). (establishing the following economic facts that support the existence of a conspiracy between the packing plants:

"(a) Supply and demand drivers of fed cattle prices, and other commonly proffered explanations, do not explain the 2015 collapse in fed cattle prices or the low prices that have prevailed since then; and (b) [f]ed cattle prices have been artificially depressed by an average of 7.9% in the three years since January 2015").

140. See *In re Cattle Antitrust Litig.*, No. CV 19-1222, 2020 WL 5884676, at *1 (D. Ct. Minn. Sept. 29, 2020).

141. See Paul Ferrer, *Civil Procedure: Pleading a "Plausible" Claim in Federal Court: The Proper Application of the Plausibility Requirement*, NAT'L LEGAL RSCH. GRP., INC (Oct. 7, 2013, 12:10 PM), <https://www.nlr.org/legal-content/the-lawletter/bid/95672/civil-procedure-pleading-a-plausible-claim-in-federal-court-the-proper-application-of-the-plausibility-requirement> [<https://perma.cc/8PG5-WLHV>].

142. *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) (explaining the plausibility standard is not the same thing as a probability requirement but asks for more than a sheer possibility of the defendant's actions).

143. See *id.* (noting this standard creates a burden for the plaintiffs to prove more than just a theory).

court is supposed to give the benefit of the doubt to the plaintiff.¹⁴⁴ The pleading stage is not to determine whether there is a plausible alternative to their theory.¹⁴⁵ Precedent in antitrust litigation has created immense difficulties for plaintiffs to establish sufficiently plausible facts to constitute a conspiracy.¹⁴⁶ The ever-evolving judicial system now regards certain circumstantial evidence as “equally consistent” with conspiracy and non-conspiracy, making the evidence insufficient to support an inference of a conspiracy set forth in *Twombly*.¹⁴⁷ This standard essentially turns judges presiding over these cases into fact finders pre-discovery.¹⁴⁸ Yet, the plaintiffs in *In re Cattle Antitrust Litigation* alleged many acts of collusion between defendants, including witness accounts and factual market information.¹⁴⁹ The plausibility of evidence that the Big 4 were colluding with one another is high.¹⁵⁰ A reasonable inference the defendants acted together to manipulate the meat market and become a monopoly should be established by a judge.¹⁵¹

144. See generally *id.*

145. *Id.*

146. See generally *id.*

147. See *In re Ry. Indus. Emp. No-Poach Antitrust Litig.*, 395 F. Supp. 3d 464, 487 (W.D. Pa. 2019) (setting precedent that requires more facts at the pleading stages about market structure and defendants’ collusive behavior, as well as the impact on the class in order to survive a motion to dismiss); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 124 (3d Cir. 1999) (reasoning that oligopolies exhibit patterns and plaintiff failed to show parallel pricing went beyond interdependence and was so unusual without an agreement, no reasonable firm would have done it); *Kleen Prods. LLC v. Int’l Paper*, 276 F. Supp. 3d 811, 822 (N.D. Ill. 2017) (lacking direct evidence to establish how each defendant acted the court granted the motion for summary judgement); *In re Packaged Seafood Prods. Antitrust Litig.*, No. 15-MD-2670 JLS (MDD), 2017 WL 35571, at *12 (S.D. Cal. Jan. 3, 2017) (concluding circumstantial evidence insufficient because each allegation was susceptible to a non-conspiracy interpretation by showing parallel behavior).

148. See ROGER M. MICHALSKI, ASSESSING IQBAL (2021), <https://harvardlpr.com/online-articles/assessing-iqbal/> [<https://perma.cc/XKY5-SLVT>] (explaining how *Iqbal* has supplanted the traditional fact-finding role of the jury to the administration of justice).

149. See Complaint, *In re Cattle Antitrust Litig.*, No. 19-1222 (D. Minn. 2019) (establishing how the Big 4 used the markets to increase their margins).

150. See Complaint, *In re Cattle Antitrust Litig.*, No. 19-1222 (D. Minn. 2019); Mundorf, *supra* note 5 (“Farmers buy retail, sell wholesale, and pay the freight both ways.”). The problem with the witness’ testimony in the complaint is that there is no evidence to support what is said. *Id.* Maybe if the complaint would contain how many people were impacted by the cartel’s manipulation of the beef market. *Id.*

151. According to the FTC, monopolistic power comes after the firm has 50% of the sales of a particular product within a geographic area. See *Monopolization Defined*, FED. TRADE COMM’N (April 2, 2021, 3:20), <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/monopolization-defined> [<https://perma.cc/3DSY-3JWV>]. The Big 4 control 85% of the beef packing market. See Complaint, *In re Cattle Antitrust*

Some antitrust plaintiffs have been successful in reaching discovery and going to trial.¹⁵² Unfortunately, most of these plaintiffs have not been successful on their Sherman Act or PSA claims.¹⁵³ *Pickett v. Tyson Fresh Meats, Incorporated* is a prime example of a plaintiff surviving the pleading stage but losing on appeal.¹⁵⁴ Without getting to the discovery stage, plaintiffs can only hope for evidence to support what the witnesses in the complaint said before the amending period expires.¹⁵⁵ One way the legal system can help these plaintiffs is for the federal government to get involved.¹⁵⁶ If the Department of Justice can find any antitrust violation, they are empowered to investigate and hopefully turn up information for plaintiffs trying to prevail in a lawsuit against the Big 4.¹⁵⁷ The results of this probe have not yet been established, so the producers must hang on

Litig., No. 19-1222 (D. Minn. 2020). Although the FTC does not regulate the cattle market, the market power established by the Big 4 should spur the interest of the FTC and the Department of Justice to investigate the monopolistic power. *Id.* The recent lawsuit *Samuels v. Cargill, Inc.*, No. 0:20-cv-01319-NEB-KMM (D. Minn. June 6, 2020) sparked an interest by President Donald Trump, and the Department of Justice. See Jennifer M. Latzke, *Justice Department subpoenas big 4 packers in market manipulation investigation*, HIGH PLAINS J. (June 8, 2020), https://www.hpj.com/latzke/justice-department-subpoenas-big-4-packers-in-market-manipulation-investigation/article_fd732cf8-a9a6-11ea-a39b-6fbab5e36f1f.html [<https://perma.cc/49XM-8KK3>].

152. See generally *In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148 (5th Cir. 1979) (holding the Clayton Act violations by defendants were successfully pleaded).

153. See *id.* at 1156. However, this case was not against the Big 4 so it may not be as persuasive, but it nevertheless demonstrates that it is possible for plaintiffs to get past the pleading stage in antitrust cases. *Id.* at 1148.

154. *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1288 (11th Cir. 2005). This case involved a rancher who contends that Tyson used marketing agreements to deflate fed cattle prices on the cash market. *Id.* at 1274. The reduced cash-market price benefits Tyson. *Id.* at 1277. “Tyson is able to obtain the cattle that it still purchases on the cash market at a lower price. Second, because the price Tyson pays for marketing agreement cattle is pegged to the average cash-market price, it pays less for those cattle too.” *Id.* Even though the jury found for the plaintiff, on appeal the court found that no reasonable jury could find that Tyson had no competitive justification for using the market agreements. *Id.* at 1287.

155. See generally Stokes & Ludwig, *supra* note 131, at 122.

156. See generally Lillianna Byington, *Report: 4 Major Meatpackers Subpoenaed in DOJ Antitrust Investigation*, FOOD DIVE (June 5, 2020), <https://www.fooddive.com/news/report-4-major-meatpackers-subpoenaed-in-doj-antitrust-investigation/579266/> [<https://perma.cc/DZ2N-6HMN>] (noting that President Trump issued an executive order to keep meat packing plants open during the height of the pandemic).

157. See *id.* (“Price-fixing and antitrust accusations and investigations have gone on across the food industry in recent years...[m]any of these cases have ended with guilty defendants and large settlements.”).

and try to wait for answers.¹⁵⁸ Hopefully this probe will turn something up before the 90 day limit.¹⁵⁹

B. Action Needs to be Taken Against the Cartel

The PSA was meant to protect producers from anticompetitive practices by the packers. One of the main concerns was price manipulation.¹⁶⁰ Recently, courts have tried to determine “whether the statutory language requires a producer to prove that a packer’s conduct had an adverse impact on competition.”¹⁶¹ The failure of these plaintiffs has led courts to limit violations of Section 202 of the PSA to those plaintiffs who can show the defendant’s “practice injured or was likely to injure competition.”¹⁶² The obvious intent of the PSA was to protect producers against the very actions pled in almost every case against the Big 4.¹⁶³

158. See Press Release, Steve King, Congressman, King Seeks DOJ/USDA Investigation of Illegal Price Manipulation in Cattle Meatpacking Industry (April 13, 2020) (Steve King sent a letter to the Attorney General asking him to investigate the “current structure of the beef meat packing industry and investigate potential market and price manipulation, collusion, restrictions on competition and/or other unfair and deceptive practices under the United States antitrust laws and the Packers and Stockyards Act.” Within this letter, he explained that he agrees “with the beef producers, and it looks . . . like the prices they are receiving do not reflect market conditions . . . Many beef producers are suggesting the prices are being artificially manipulated by the packers. If this is correct, the cattle meatpacking industry could be engaging in practices that violate federal law. These are serious allegations that are supported by the evidence of unexplainable price discrepancies, and the USDA and DOJ have an obligation to investigate the matter.”).

159. Kitt Tovar, *Antitrust and the Meatpacking Industry*, IOWA STATE UNIV. (April 7, 2021), <https://www.calt.iastate.edu/article/antitrust-and-meatpacking-industry> [<https://perma.cc/3WTH-8DTG>]. Ironically, the 90-day amending period expires after the election. See *id.*

160. See 7 U.S.C. § 192(a), (e). (making it “unlawful for any packer . . . to [e]ngage in or use any unfair, unjustly discriminatory or deceptive practice or device...or create[] a monopoly in the acquisition of, buying, selling or dealing any article in restraint of commerce. . .”).

161. Roger A. McEowen, *DOJ to Investigate Meatpackers – What’s It All About?*, AGRIC. L. & TAX’N BLOG (May 8, 2020), <https://lawprofessors.typepad.com/agriculturallaw/2020/05/doj-to-investigate-meatpackers-whats-it-all-about.html> [<https://perma.cc/BL2B-HNL5>]; see *Pickett v. Tyson Fresh Meats, Inc.*, 315 F. Supp. 2d 1172 (M.D. Ala. 2004) (overruling a jury verdict in favor of the producers due to Tyson’s entitlement to use ‘captive supplies’ to depress cash cattle prices to ‘meet competition’ and assure a ‘reliable and consistent’ supply of cattle).

162. McEowen, *supra* note 161.

163. See *id.*

Legislation must be drafted to ensure the courts are upholding the antitrust laws established many years ago.¹⁶⁴

Legislation proposed in the past tried to help guide courts and lawmakers on administering the PSA.¹⁶⁵ One important concept included in the 2010 proposed regulations inserted situations where “a packer . . . wrongfully depresses prices paid to a producer . . . below market value, or impairs a producer’s . . . ability to compete with other producers . . . or to impair a producer’s . . . ability to receive the reasonably expected full economic value from a transaction in the market channel or marketplace.”¹⁶⁶ If these regulations would pass into law, the courts would have more formal rules to follow when finding if there is a plausible PSA claim.¹⁶⁷

It is time to institute a populist notion of antitrust law focused on free and fair competition, which will protect citizens from unfair business practices.¹⁶⁸ An industry that is highly concentrated usually leads to concentrated political power.¹⁶⁹ Such power inevitably leads to influence on legislation and our court’s interpretations “of existing law in favor of the powerful.”¹⁷⁰ Agricultural producers have become the “servants of corporations,” which is exactly what these laws were intended to prevent.¹⁷¹ Today, the goals of the antitrust laws are to “promote

164. *Id.*; see Implementation of Regulations Required Under Title XI of the Food Conservation and Energy Act of 2008; Conduct in Violation of the Act, 75 Fed. Reg. 35,338-01 (June 22, 2010) (to be codified at 79 C.F.R. pt. 201) (proposing regulations to provide guidance on handling antitrust related issues under the PSA).

165. McEowen, *supra* note 161 (“Under the proposed regulations, ‘likelihood of competitive injury’ was defined as ‘a reasonable basis to believe that a competitive injury is likely to occur in the market channel or marketplace.’”).

166. *Id.*

167. *Id.* (“The proposed regulations note that a PSA violation can occur *without* a finding of harm or likely harm to competition . . . contrary to numerous court opinions that have decided the issue.”). The 2010 proposed regulations made it into the form of an Interim Final rule but withdrawn later. *Id.*; see Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, 82 Fed. Reg. 48,594-01 (Oct. 18, 2017) (to be codified at 9 C.F.R. pt. 201) (withdrawing the 2010 proposed regulations).

168. See C. Robert Taylor, *Speak Your Piece: Antitrust Law Perverted*, DAILY YONDER (Mar. 1, 2012), <https://dailyyonder.com/speak-your-piece-antitrust-law-peverted/2012/03/01/> [<https://perma.cc/9WRZ-XPA4>] (opining that the populist ideal was based on common sense economics).

169. *See id.*

170. *Id.* Monopoly power is strengthened by this concentrated political power, thus creating the need for antitrust laws to keep a democracy from being turned into a corporatocracy. *See id.*

171. *See id.* (noting Justice Peckham’s opinion in the first substantive decision interpreting the 1890 Sherman Act: “it is not for the real prosperity of any country that such

efficiency in the economic sense.”¹⁷² However, the word efficiency is not found in the Sherman Act or the PSA.¹⁷³ Much of the wording contained in the Sherman Act or PSA has been twisted in order to favor corporations, including the Big 4.¹⁷⁴

Furthermore, many private entities are immune from liability for influencing the passage or enforcement of laws, even if those laws have anticompetitive effects.¹⁷⁵ Antitrust laws are not the only branch of the law that corporations have their thumb on.¹⁷⁶ The judicial system is being invaded as we speak.¹⁷⁷ An independent judicial system may need to be created to interpret antitrust laws as they were written, along with corrective legislation to assist those courts in defining antitrust laws.¹⁷⁸

It is time for our antitrust laws to be rewritten and reinterpreted by the judicial system.¹⁷⁹ A more aggressive approach to enforcing the current law and

changes should occur which result in transferring an independent business man . . . into a mere servant or agent of a corporation . . . having no voice in shaping the business policy . . . and bound to obey orders issued by others.”

Poultry growers fell into this trap and many other industries, beef included, have travelled far down “The Road to Serfdom.”).

172. *See id.* (“The broad goals of antitrust have been stripped away, layer-by-layer.”).

173. *See id.* Instead, both Acts include the word fair, which has been ignored repeatedly. *Id.*

174. *Id.* Free competition now favors greed within a free market between corporations. *Id.* “Business dominated by a giant is not ‘free’ of rules and regulations as the giant’s ‘rules’ are imposed on smaller business. An industry ruled by a big gorilla is not a free market for anyone except the big gorilla.” *Id.*

175. *Id.* (“[P]rivate entities are immune from antitrust even when they employ deceptive and unethical tactics to influence legislation. Corporations and individuals are treated equally under Noerr-Pennington. Corporations, individuals and their trade associations have essentially no limits on trying to influence legislation or the courts. Deception and lies are just fine . . .”); *see* Paul Gowder, *Noerr-Pennington Doctrine*, FIRST AMEND. ENCYCLOPEDIA (2009), [https://www.mtsu.edu/first-amendment/article/1122/noerr-pennington-doctrine#:~:text=the%20Associated%20Press\)-,The%20Noerr%2DPennington%20doctrine%20is%20a%20judicially%20created%20defense%20against,and%20United%20Mine%20Workers%20v](https://www.mtsu.edu/first-amendment/article/1122/noerr-pennington-doctrine#:~:text=the%20Associated%20Press)-,The%20Noerr%2DPennington%20doctrine%20is%20a%20judicially%20created%20defense%20against,and%20United%20Mine%20Workers%20v) [https://perma.cc/H92P-ANCZ] (expanding on the Noerr-Pennington Doctrine).

176. *See generally* ROGER M. MICHALSKI, *ASSESSING IQBAL* (2021), <https://harvardlpr.com/online-articles/assessing-iqbal/> [https://perma.cc/XKY5-SLVT].

177. *See generally* Taylor, *supra* note 168.

178. *See generally* MICHALSKI, *supra* note 176.

179. *See* AM. ANTITRUST INST., *THE STATE OF ANTITRUST ENFORCEMENT AND COMPETITION POLICY IN THE U.S.* 4-5 (2020), https://www.antitrustinstitute.org/wp-content/uploads/2020/04/AAI_StateofAntitrust2019_FINAL2.pdf [https://perma.cc/B4LV-M93E].

correct interpretations is just one option that could be considered.¹⁸⁰ The political-economic dilemma in the United States is a result of under-enforcement of antitrust laws currently present.¹⁸¹ During the Trump Administration, there were many anti-regulation initiatives.¹⁸² A prime example of this was the USDA's cancellation of the proposed Fair Farmer Practices (FFP) rules in 2017.¹⁸³ The judicial interpretation of the PSA would have been clarified by the FFP rules, and this cancellation involved "withdrawal of the rule that reversed judicial interpretation requiring competitive harm as a prerequisite to any unfairness claim."¹⁸⁴ This revocation of the FFP rules "leaves independent farmers and ranchers vulnerable to exploitation while insulating powerful processing corporations from liability."¹⁸⁵ The legislative changes that must happen fall back on the plausible pleading proponents for Section 1 of the Sherman Act and also the PSA.¹⁸⁶

Bringing attention to imbalances or wrongdoings by a successful private antitrust litigation may be one chance for the producers to prevail against the Big 4.¹⁸⁷ With the opportunity for private individuals to bring suit comes the right for state Attorney Generals to do the same.¹⁸⁸ Nevertheless, legislative antitrust reform is needed to help change the current antitrust laws even with such opportunities for individuals and states.¹⁸⁹ It is time for Congress to take a serious look at current

180. *Id.* at 37.

181. *Id.* at 2.

182. *Id.* at 22 ("The Trump administration's deregulatory initiatives reveals the risks of tilting the playing field toward powerful incumbent firms and away from consumers, workers, and small businesses.").

183. *Id.* at 23 ("A failure to promulgate needed non-discrimination rules leaves independent farmers and ranchers vulnerable to exploitation while insulating powerful processing corporations from liability.").

184. *Id.* (citing Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, 82 Fed. Reg. 48,594-01 (Oct. 18, 2017) (to be codified at 9 C.F.R. pt. 201)).

185. *Id.*

186. *See id.* at 30. ("[C]ircumstantial evidence of price increases, pled with 'plus factors,' may not be sufficient in many courts to constitute a violation without pleading *additional* facts, such as direct evidence of a conspiracy.").

187. *Id.* at 32 (explaining that one important outcome of the *O'Bannon* Case is a change in public attitudes thereby generating policy consequences); *see O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1079 (9th Cir. 2015) (holding NCAA compensation limits violate the Sherman Act).

188. *Id.* at 34 ("Weak federal enforcement may prompt a phase of invigorated state activity, including merger challenges and state-level civil complaints in response to the price fixing schemes.").

189. *Id.* at 35 ("Proposals addressing antitrust reforms fall into three major categories: (1) comprehensive reform to core areas of antitrust law such as mergers, monopolies, and

antitrust statutes and quit slaughtering bills that will tip the scales in favor of the producer.

C. Pandemic Impacts on Producers and Consumers

1. How Producers and Consumers Were Impacted

Not only do producers feel the impact of the beef cartel's market control, so too do consumers.¹⁹⁰ The Midwest is the leading region for producing the majority of cattle in the country.¹⁹¹ States across the country that rely on beef from the Midwest found themselves with a shortage during the COVID-19 pandemic.¹⁹² This section will begin by discussing the impact on producers, and then discuss the impact on consumers across the country.

At the beginning of 2020, no one knew how big of an impact the COVID-19 pandemic would have on America.¹⁹³ At its inception, it began with a toilet paper shortage and led to empty grocery store shelves across the country.¹⁹⁴ Many businesses shut down, including certain packing plants across the country due to the spread of the coronavirus.¹⁹⁵ As the packing plants shut down, producers were left with limited options to market their products.¹⁹⁶ The beef cattle industry had

anticompetitive agreements; (2) targeted concerns or specific violations that harm competition, consumers, and workers; and (3) provisions for specific industries.”)

190. See generally Tim Petry, *Spotlight on Economics: COVID-19 Impact on Meat Consumers and Producers*, N.D. STATE UNIV. EXTENSION AND AGRIC. RSCH. NEWS (Aug. 5, 2020), <https://www.ag.ndsu.edu/news/columns/spotlight-on-economics/spotlight-on-economics-covid-19-impact-on-meat-consumers-and-producers> [<https://perma.cc/A7Z8-5479>] (discussing the meat industry during the COVID-19 pandemic).

191. See Rob Cook, *Top 10 States with The Most Cattle*, BEEF2LIVE (Mar. 27, 2021), <https://www.beef2live.com/story-top-10-states-cattle-0-110713> [<https://perma.cc/7P5E-WXQD>] (noting Texas is in the lead with 13.24% of cattle production. However, Nebraska, Kansas, Iowa, South Dakota, Wisconsin, and Colorado are all within the top 10 cattle producing states).

192. See Petry, *supra* note 190.

193. See *id.*; see also Salo, *supra* note 1.

194. See Petry, *supra* note 190.

195. See LEE ENTERS. MIDWEST REPS., *Meat Industry Butchered by COVID-19 in the Midwest*, NWI.COM (Dec. 3, 2020), https://www.nwitimes.com/news/watch-now-meat-industry-butchered-by-covid-19-in-the-midwest/article_bae39958-d20b-58df-ad57-9f1094eeae52.html [<https://perma.cc/8UVQ-SCQL>].

196. Amanda Radke, *COVID-19: The Economic Blood Bath for Ag Continues*, BEEF DAILY (Apr. 15, 2020), <https://www.beefmagazine.com/management/covid-19-economic-blood-bath-ag-continues> [<https://perma.cc/WM6X-475J>]; see also LEE ENTERS. MIDWEST REPS., *supra* note 195 (explaining that many producers were forced to euthanize their animals ready for market or tried to give them away on Facebook and other social media sites).

an estimated loss of \$13.6 billion in total economic damage—\$9.2 billion in total revenue loss.¹⁹⁷ Between April and May of 2020, over a period of eight weeks, 22,000 head of cattle per day were ready to go to slaughter but had nowhere to go due to plant closures.¹⁹⁸ With the reduction of packing plant operations, the shelf price of beef was exceptionally high while the cattle prices for producers remained very low.¹⁹⁹ Many producers were forced to find smaller lockers to process their market-ready cattle, but many of those lockers were filled until 2021.²⁰⁰ Producers were shocked to continue losing money despite store shelves remaining empty and an extremely high demand for beef across the country.²⁰¹ The Big 4 blamed the supply bottleneck, which pushed prices up, on panic buying consumers, plant shutdowns, and the coronavirus spreading through the plants.²⁰² This type of market fluctuation is exactly what the plaintiffs in *Samuels* plead in their

197. Radke, *supra* note 196.

198. Anecdotally, for a family that runs 600 cow/calf pairs and owns a feedlot that regularly ships fat cattle to packing plants, there were impacts. Throughout the year, the farm usually sends two to three pot loads of cattle to Meyer Natural Angus in Fort Morgan, Colorado. During the winter months – January through April – they can have up to six loads going to slaughter. Not surprisingly, these all-natural cattle are processed at one of Cargill, Incorporated's plants. Despite the challenges faced everyday (with or without the pandemic), the cattle were fed and taken care of. See N. COLO. BUS. REP., *Cargill Marketing Meyer Beef*, BEEF DAILY (June 22, 2020), <https://www.beefmagazine.com/markets/0623-cargill-marketing-meyer-beef> [<https://perma.cc/3QTH-QJ27>].

199. Danielle Ferguson, *Attorney General: Meat processors 'take advantage' of COVID-19 to Gouge Beef prices*, ARGUS LEADER (May 5, 2020, 12:07 PM), <https://www.argusleader.com/story/news/2020/05/05/south-dakota-attorney-general-meat-processors-take-advantage-covid-19-gauge-beef-prices/3084965001/> [<https://perma.cc/XUZ8-PJTV>].

200. Carolyn Orr, *Lesson in Resiliency: How States, Farmers and Processors Managed Impact of COVID-19 on Food Production*, COUNCIL STATE GOV'TS MIDWESTERN OFF. (Sept. 22, 2020), <https://csgmidwest.org/lesson-in-resiliency-how-states-farmers-and-processors-managed-impact-of-covid-19-on-food-production/> [<https://perma.cc/LES6-VBL9>].

201. Victoria G. Myers, *Highjacked Market: Divisions Deepen in the Cattle Industry Over Price Discovery*, PROGRESSIVE FARMER (July 27, 2020, 12:39 PM), <https://www.dtnpf.com/agriculture/web/ag/livestock/article/2020/07/27/divisions-deepen-cattle-industry> [<https://perma.cc/AQ8C-9K6G>].

202. *Id.* (explaining that when the COVID-19 pandemic began, choice boxed-beef cutout value was \$215.32 per CWT. By May, however, the packers saw a \$260.07 per CWT increase in boxed beef. While the boxed beef prices were at \$475.39 per CWT, 600-pound calves were only selling for \$135-\$145 per CWT at the sale barns. Producers were forced to hold onto their calves longer but needed to get rid of them as soon as they could because the future outlook for August 2020 was an anemic \$95.6 to \$96.9 per CWT for live cattle. Since the cattle markets are run by the CME, “[i]f the futures are up, my calves are up. If they're down, so are my calves. CME has a lot more to do with my price than anything else.”).

complaint.²⁰³ Unfortunately, and as explained above, the Big 4 are likely to escape this suit with the recent, tentative dismissal of *In re Cattle Antitrust Litigation*.²⁰⁴ If the attorneys cannot find a whistleblower willing to both break confidentiality agreements with the Big 4 and provide the necessary details to overcome the *Twombly* plausibility standard, producers will need to find alternative ways to market their cattle.²⁰⁵ And, if producers are not able to find a solution to this market domination by the Big 4, consumers will continue to suffer high prices and shortages.²⁰⁶

While the packing plants were not accepting cattle, many producers turned to the small-town locker to process their livestock. The packing plants admitted that the “food supply chain [was] breaking” in the midst of the pandemic.²⁰⁷ Even with President Trump’s executive order in April to keep meat processing plants in operation, the packing plants reduced their slaughter volumes thereby reducing the output of beef for retailers and consumers.²⁰⁸ Many grocery stores across the country were forced to put a limit on the amount of beef consumers could buy.²⁰⁹ Retailers were forced to increase their prices on beef during the midst of the pandemic to cover the increased cost of buying boxed beef from the packers.²¹⁰ A huge problem across the country was that retailers could not keep up with demand, but the problem was not a meat shortage.²¹¹ Packers, in turn, were forced to grind

203. Class Action Complaint at 1, *Samuels v. Cargill, Inc.*, No. 0:20-cv-01319-NEB-KMM (D. Minn. June 6, 2020).

204. See *supra* Section II.C.1.

205. See Myers, *supra* note 201.

206. See *id.*

207. Tara Law, *COVID-19 Meat Shortages Could Last for Months. Here's What to Know Before Your Next Grocery Shopping Trip*, TIME (Apr. 30, 2020, 3:58 PM), <https://time.com/5830178/meat-shortages-coronavirus/> [<https://perma.cc/V9V5-F4V3>].

208. *Id.*

209. Tatiana Freitas, *Beef Prices Will Remain High for Months as Producers Work to Rebuild Capacity, Executive Warns*, TIME (May 19, 2020, 12:31 AM), <https://time.com/5838703/beef-shortage-months/> [<https://perma.cc/NB66-RWSH>].

210. See *The Impact of the COVID-19 Pandemic on Food Price Indexes and Data Collection*, U.S. BUREAU OF LAB. STAT. (August 2020), <https://www.bls.gov/opub/mlr/2020/article/the-impact-of-the-covid-19-pandemic-on-food-price-indexes-and-data-collection.htm> [<https://perma.cc/54VE-AR9V>]. (explaining the consumer price index for meats, poultry, fish, and eggs increased 8% from March 2020 to June 2020).

211. Jake Bittle, *Beef producers are grinding up their nicest steaks, while retailers can't meet demand for cheaper cuts*, COUNTER (May 6, 2020, 3:23 PM), <https://thecounter.org/beef-producers-grinding-steaks-ground-beef-coronavirus-covid-19-usda/> [<https://perma.cc/GSG4-HTHU>] (“We’re in uncharted waters here. Even though a number of plants have closed, there’s plenty of meat, it’s just in cold storage”).

up their higher-quality roast cuts and add them to ground beef, which inevitably drove up the price of ground beef because of its higher quality.²¹² The difference in price between cash cattle, boxed beef, and retail prices were all discussed in both lawsuits against the Big 4.²¹³ The large spread of the supply chain levels needs to be investigated, because no matter what, the packers are always ahead.²¹⁴ The future of the cattle and beef industry is contingent on legislative changes and a successful complaint reaching the discovery stage and uncovering the collusion between the Big 4.²¹⁵

2. Future Effects on the Beef Industry Across the Country

Producers in the beef industry need a break. The COVID-19 relief provided by the federal government is not enough to put cattle producers at ease.²¹⁶ The beef supply will survive the pandemic but livestock producers will continue to suffer.²¹⁷ Consumers will be the telltale factor that determines how the beef markets will recover.²¹⁸ Social distancing guidelines make it difficult for consumers to go out and purchase high quality meat in restaurants, creating a gap in supply and demand of beef.²¹⁹ The backlog of cattle ready for processing is continuing to grow, and

212. *Id.*

213. *See supra* Section II.C.1 & 2.

214. *See supra* Section II.C.1 & 2.

215. *See supra* Section III.A & B.

216. *See What Farmers Need to Know About the USDA COVID-19 Aid Program Opening Next Week*, NAT'L SUSTAINABLE AGRIC. COAL. (May 22, 2020), <https://sustainableagriculture.net/blog/covid-cfap-signup/> [<https://perma.cc/547P-LN9B>] (explaining that in the wake of the COVID-19 pandemic, the USDA created the Coronavirus Food Assistance Program (CFAP). CFAP was a \$16 billion program to aid farmers who suffered economic losses. This payment was the largest single payment in history by the United States government. Livestock and crop growers were eligible for this grant, which was a part of the CARES Act. The program was not based on the producer's actual loss, but instead determined by a formula determined by the USDA.).

217. *See Luis de Leon, COVID-19 Could Have a Billion-Dollar Impact on the Cattle Industry*, KVUE (April 22, 2020, 10:53 PM), <https://www.kvue.com/article/news/health/coronavirus/coronavirus-texas-cattle-industry-hit/269-be3e9e92-2840-4d99-b38a-3fdc8c658ac2> [<https://perma.cc/KBB6-ZWAJ>].

218. *See Economic Recovery in US Dependent on Virus Control and Consumer Confidence*, CATTLE SITE (July 14, 2020), <https://www.thecattlesite.com/news/55587/economic-recovery-in-us-dependent-on-virus-control-and-consumer-confidence/> [<https://perma.cc/9D6J-SXZC>].

219. *Id.* (noting that dine-in, take-out, restaurants, etc. are all examples of entities being affected by the pandemic and in turn affect the beef industry with lack of demand for beef).

will continue to grow until the processing plants are at 100% slaughter volume.²²⁰ The oversupply of beef is due to the carcass weights being approximately 45 pounds heavier than they were in 2019.²²¹ The oversupply will not recover until social distancing practices can be ceased and businesses can resume as they were before the pandemic.²²²

On the bright side, cattle producers can look forward to the increase of small-town lockers and processors. With the oversupply of cattle throughout the pandemic, producers were looking for lockers to process their cattle.²²³ As stated previously, many of the lockers were booked until early 2021, but would squeeze one or two steers in when they could.²²⁴ The increase in small town business has been good for economies in states like South Dakota, even though many of the small towns seem to be otherwise “dying.”²²⁵ Moving into the future, small town lockers and ranchers may have an opportunity to take advantage of the pandemic and move around the Big 4. And, if the producers are lucky enough, something will be done about the beef cartel and they will catch a break in the ever-declining cattle market. One South Dakota butcher recently decided to take on a large feat—opening his own meat processing plant in New Underwood, South Dakota.²²⁶ The

220. Dennis Rudat, *Beef and Pork Supply Chains Show Recovery, Heavier Weights – Markets Focus on Demand*, MICH. FARM NEWS (July 13, 2020), <https://www.michiganfarmnews.com/beef-and-pork-supply-chains-show-recovery-heavier-weights-markets-focus-on-demand> [<https://perma.cc/49JW-YJXM>].

221. *Id.* (explaining that this heavier carcass weight is the result of producers holding onto their cattle longer because of plant closures).

222. *See id.*

223. Nick Lowrey and Bart Pfankuch, *Small Towns Facing Big Challenges amid Pandemic, Historic Declines*, ABERDEEN NEWS (June 23, 2020), https://www.aberdeennews.com/covid19/small-towns-facing-big-challenges-amid-pandemic-historic-declines/article_3d9ecd2a-b251-11ea-bd76-4ff9127df305.html [<https://perma.cc/7YYPH-QEAK>] (mentioning Randy Boesem, a Tri-County Locker butcher shop owner, has benefitted from being the only butcher in the small town of Newell, South Dakota. He witnessed business shut down or slow due to the pandemic. However, his butcher shop stayed busy throughout the whole pandemic. In fact, he butchered three cows and four pigs for ranchers who had nowhere else to go due to packing plant shutdowns. His locker is booked through the rest of the year).

224. *Id.*

225. *See id.*

226. Maria Tibbetts, *Meat Processing Plant Planned for New Underwood, South Dakota*, TRI-STATE LIVESTOCK NEWS (February 2, 2021), <https://www.tsln.com/news/meat-processing-plant-planned-for-new-underwood-sd/> [<https://perma.cc/4H3B-TKVY>]. (noting Ken Charfauros is the butcher looking to open the plant. The plant would sit just off of Interstate 90 about 18 miles east of Rapid City, South Dakota. It would be about 24,000 square feet and have the capacity to slaughter 1,300 head per day. Around 36 new jobs would be opened to the town of New Underwood. Charfauros wants to have a mobile slaughter unit

addition of a meat processing plant on the western side of South Dakota would be beneficial for the state and cattle producers.²²⁷ However, the proximity of this location compared to the JBS packing plant in Fort Morgan, Colorado, could pose huge issues for the butcher. Established packing plants, like JBS, do not like competition, and a 1,300 head packing plant within 350 miles may incite them into acting. Antitrust laws need to protect advantageous entrepreneurs like Ken Charfauros from being hung out to dry by the monopolistic cattle market and the Big 4.²²⁸

V. CONCLUSION

The livelihood of America's beef producers is at the slaughterhouse waiting to be slaughtered by the cartel that is the Big 4. The misguided judicial interpretations of our antitrust laws have helped kill seemingly meritorious lawsuits before the plaintiffs can even get to discovery. Most recently, the dismissal of *In re Cattle Antitrust Litigation* has outright helped the Big 4 escape punishment for manipulating the market and injuring producers.

The Sherman Act and PSA are no longer fulfilling their purposes of protecting our citizens and businesses against unfair competition. This is primarily because of the inappropriate legal standards set by judicial interpretation. Congress needs to propose and pass new rules to assist the judicial system in their interpretations of our antitrust laws. This must be done before the beef cartel pushes many farmers and ranchers out of the industry altogether. Hopefully, the plaintiff in *In re Cattle Antitrust Litigation* can procure enough information from the Department of Justice probe to help satisfy the plausibility standard set forth in *Twombly*. If this suit is dismissed for good, the pending suit, *Samuels et al. v. Cargill, Incorporated*, will also not make it through the pleading stages, and the Big 4 will win yet again. The future of America's cattle market depends on progressive changes and interpretation to our antitrust laws. America's ranchers and consumers deserve better.

with a capacity of 10 beef. The unit would travel to local ranches to slaughter cattle, which would then be hauled to the plant for hanging and processing).

227. *Id.*

228. *See supra* Section IV.A.