

No. 08-5577

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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Alton T. Terry,  
*Plaintiff-Appellant,*

v.

Tyson Farms, Inc.,  
*Defendant-Appellee.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TENNESSEE

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**BRIEF OF *AMICUS CURIAE* CARGILL MEAT SOLUTIONS CORP.  
IN SUPPORT OF DEFENDANT-APPELLEE TYSON FARMS, INC.**

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September 3, 2008

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FOR THE EASTERN DISTRICT OF TENNESSEE AT WINCHESTER

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**DISCLOSURE OF CORPORATE AFFILIATIONS  
AND FINANCIAL INTEREST**

Pursuant to Sixth Circuit Rule 26.1, *amicus curiae* Cargill Meat Solutions Corp. makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly-owned corporation?

*Yes. Cargill Meat Solutions Corp. is a wholly-owned subsidiary of Cargill, Incorporated.*

2. Is there a publicly-owned corporation, not a party to the appeal, that has a financial interest in the outcome?

*Not to the knowledge of amicus curiae Cargill Meat Solutions Corp.*

Dated: September 3, 2008

/s/ Andrew Tauber  
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## **IDENTITY AND INTEREST OF THE *AMICUS CURIAE*<sup>1</sup>**

Cargill Meat Solutions Corporation (“CMS”), which processes and packages beef, pork, and turkey, is one of the largest meat packing companies in the United States. CMS plants across the country process 20,000 head of cattle and 35,000 hogs each day. To maintain a consistent supply of high-quality animals, CMS buys cattle and swine raised by thousands of producers in numerous states. In doing so, CMS enters into a wide variety of contractual arrangements with feeders and producers.

CMS files this brief to bring two points to the Court’s attention. First, it is important to the entire industry that livestock producers and packers retain the ability to enter into variously structured contracts, the benefits of which redound to producers, packers, consumers, and the livestock market as a whole. Second, those significant benefits will be endangered if the district court’s reading of the Packers and Stockyards Act of 1921 (“PSA”), 7 U.S.C. §§ 181 *et seq.*, is not affirmed.

## **INTRODUCTION AND SUMMARY OF THE ARGUMENT**

The freedom to contract in flexible and innovative ways is vital to the producers and packers who participate in the markets for cattle and swine and to

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<sup>1</sup> Pursuant to Federal Rule of Appellate Procedure 29(b), this brief is accompanied by a motion for leave to file the brief. Plaintiff has not consented to the filing of this brief.

the consumers who depend upon them for a steady supply of high-quality, specialized meat.

Historically, packers such as CMS bought livestock in cash transactions on the spot market. Exclusive reliance on the often volatile spot market meant that packers and producers were unable to establish the stable relationships required for the collaborative development of the specialized meats increasingly demanded by consumers, and that it was often difficult for producers to secure the credit they needed to expand and improve their operations.

But the development of marketing agreements, formula contracts, and other innovative contractual arrangements has transformed the industry. Forward-looking, written contracts have enabled cattle producers to reduce risk, to increase revenues through the production of specialty animals, and to secure the financing they need to operate in a highly competitive market. Forward-looking, written contracts also benefit packers by ensuring a reliable supply of livestock in general, and of specialty animals in particular.

Consumers are the ultimate beneficiaries of forward-looking contracts. When packers and producers enter into contractual relationships that ensure packers a steady supply of high quality livestock from predetermined sources, packers can invest in—and provide producers the results of—the research and development that is necessary for the production of specialized products tailored to

consumers' increasingly sophisticated tastes. As a result, consumers are able to enjoy beef that is more tender and that has a more consistent texture as well as pork that is free of antibiotics, hormones, and growth stimulants.

The district court's interpretation of the PSA secures the ability of producers and packers to enter into these types of beneficial forward-looking contracts. In particular, the district court's opinion protects packers and progressive producers from suits by those who would prefer that all cattle be sold on the cash market, regardless of its inherent risks and disadvantages. A contrary decision would threaten the economic security of cattle producers, the regular supply of cattle to packers, and the ability of the packers to provide continued benefits to consumers. Because reversal of the district court's opinion could result in the litigation-driven eradication of legitimate, mutually beneficial contracts from livestock markets, CMS respectfully asks the Court to affirm the district court's interpretation of the PSA.<sup>2</sup>

## **ARGUMENT**

### **I. FREEDOM OF CONTRACT IN THE LIVESTOCK MARKET BENEFITS PRODUCERS, PACKERS, AND CONSUMERS.**

The ability to contract freely is critical to livestock markets. It allows individualist producers to operate as they wish, selling their cattle on the spot

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<sup>2</sup> The district court's opinion also addresses claims brought by the plaintiff under the Agricultural Fair Practices Act, 7 U.S.C. § 2301 *et seq.* CMS expresses no opinion on this issue.

market without the need to coordinate with packers. At the same time, it allows other producers, who are interested in benefiting from the packers' latest scientific research, to enter long-term agreements that guarantee packers a steady supply of the specialty cattle that consumers increasingly demand.

Traditionally, packers have bought cattle from producers or from third-party feed yards in handshake deals on the spot market. *See Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1274–75 (11th Cir. 2005) (describing the cash market).<sup>3</sup> Indeed, cash transactions on the spot market still account for a significant majority of cattle sales today.

But cash transactions on the spot market have severe disadvantages for both producers and packers. Producers who sell on the spot market face a host of risks. They are at the mercy of the weather, fluctuating feed costs, and—most importantly—daily changes in the sales price of cattle. From the standpoint of the packers, the spot market cannot guarantee an adequate supply of cattle. The capacity of U.S. packers to process cattle exceeds the number of cattle raised by producers, while the processing costs of the packers are fixed. *See Pickett*, 420 F.3d at 1283. Packers therefore need reliable supplies of cattle—but there is no

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<sup>3</sup> Even on the cash market, prices are set in a variety of ways. Some prices are based on the cattle's live weight, while others are based on the weight of the dressed carcass after slaughter. *Cf. Packers, Producers Need Each Other* (Mar. 28, 2007), available at [http://www.tristateneighbor.com/articles/2007/03/29/tri\\_state\\_news/livestock\\_news/live14.txt](http://www.tristateneighbor.com/articles/2007/03/29/tri_state_news/livestock_news/live14.txt) (describing grid-based pricing).

guarantee that a sufficient number of cash deals will be successfully completed. See *Livestock Weekly, Ranchers Renaissance President Stresses Project's Partnership* (Feb. 21, 2002), at <http://www.livestockweekly.com/papers/02/02/21/whlbutler.asp> (describing the need for a constant supply). Procuring cattle on the spot market also involves enormous transaction costs, as buyers representing the packers travel from feedlot to feedlot, evaluating and bidding on individual lots of cattle. Finally, the cash market is particularly ill-suited for specialty products, because suitable animals are relatively scarce. Cf. Ray A. Goldberg et al., *Friona Industries: Delivering Better Beef* 8 (Harv. Bus. Sch. Case 906-405, Aug. 7, 2005) (describing the traditionally erratic supply of cattle to feedyards).

To offset these disadvantages, many packers and producers now use a variety of forward-looking contracts. These innovative contractual forms include but are not limited to marketing agreements, formula contracts, and forward contracts. Although there is considerable variation across the different types of forward-looking contracts, all of them reduce market volatility by establishing relationships between producers and packers that endure beyond a one-off cash transaction on the spot market. Marketing agreements, for example, establish long-term relationships between producers, feedyards, packers, and sometimes retailers, in which the price for the cattle is set according to a pre-arranged formula and the precise delivery date is negotiated between the feedyard and the packer.

*See Pickett*, 420 F.3d at 1275–76. Formula contracts also peg the sale price to a pre-arranged formula but, rather than establishing long-term relationships, are short-term contracts resulting from week-to-week negotiations initiated by producers. Under a forward contract, cattle are sold “at a fixed future date but at a price set at the time the contract is written.” *In re Gold Coast Seed Co.*, 751 F.2d 1118, 1119 (9th Cir. 1985). There are still other contractual arrangements that producers and packers enter. For example, a packer and producer will sometimes jointly own and raise a small number of cattle, particularly cattle destined to become specialty meat. Furthermore, specific contracts may contain a mélange of provisions that do not fit neatly into these categories, but which meet the needs of the particular producer and packer at the time of contracting.

These various contractual arrangements reduce the price risk borne by producers. Other things being equal, this reduction in risk induces financial institutions to provide producers greater financing at lower interest rates. The access to increased financing on more favorable terms, in turn, allows producers to feed and raise a greater number of cattle, increasing the individual producers’ revenue and the aggregate supply of cattle on the market. By enabling smaller producers to expand their operations and thereby compete with larger producers, forward-looking contracts increase competition in the cattle industry. *See Pickett*,

420 F.3d at 1284 (finding that marketing agreements have “pro-competitive benefits for the industry”).

Contract sales also benefit producers in a more immediate ways. Packers pay premium prices to producers who agree to raise cattle in accordance with certain contractual specifications. *See Packers, Producers Need Each Other, supra* n.3; Goldberg et al., *Friona Industries* 10. Moreover, because producers are able to choose freely between the various contractual arrangements, they can select the arrangement that best suits their current needs. *See Review of Western Organization of Resource Councils Petition for Rulemaking, Grain Inspection and Packers and Stockyards Administration, Packers and Stockyards Programs 31–32 (1997), at [http://archive.gipsa.usda.gov/psp/issues/worc\\_petition/worchmpg.pdf](http://archive.gipsa.usda.gov/psp/issues/worc_petition/worchmpg.pdf).*<sup>4</sup>

The use of contracts in lieu of cash sales benefits packers as well. As the Eleventh Circuit has noted, “marketing agreements provide a more reliable and stable supply of cattle for meat packers, reduce their transaction costs for purchasing cattle, and allow them to better match price to actual quality and yield.” *Pickett*, 420 F.3d at 1287; *see also id.* at 1280 (noting that marketing agreements “allow [packers] to keep up with competitors”); Goldberg et al., *Friona Industries*

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<sup>4</sup> Of course, producers who wish to enter only into cash sales on the spot market may do so—just as those who prefer to tailor contractual arrangements to particular economic circumstances may individualize their agreements. The freedom to contract maximizes economic well-being by ensuring that all market participants can arrange their affairs as they see fit.

10. The other types of forward-looking contracts provide the same security of supply and reduction of risk.

Finally, the benefits of contractual cattle sales extend to consumers. Consumers want and expect beef products that are both consistent and consistently tender. *See* Wes Ishmael, *Love Me Tender*, *Beef Magazine* 27, 27 (May 2006), *available at* [http://beefmagazine.com/mag/beef\\_love\\_tender/](http://beefmagazine.com/mag/beef_love_tender/); Goldberg et al., *Friona Industries* 12. Few producers have sufficient capital to fund or perform the scientific research that results in beef that possesses these qualities. While some of CMS' research advances can be implemented by CMS alone in the packing process, the characteristics of meat are relatively inflexible after slaughter. Thus, the qualities valued by consumers depend heavily on how the cattle were bred and raised. For this reason, CMS invests heavily in the research and development of planned breeding programs that incorporate genetic advances, state-of-the-art feeding, and related innovations. *See, e.g.*, Goldberg et al., *Friona Industries* 7 (detailing CMS's research); John Maday, *Balancing Act* (Sept. 19, 2002), *available at* [http://www.ranchersrenaissance.com/media/drovers\\_sept-2002-b.pdf](http://www.ranchersrenaissance.com/media/drovers_sept-2002-b.pdf) (describing research into cattle implants used by a marketing alliance in which CMS participates). The resulting products include multiple lines of Angus beef, which is more tender and flavorful than other beef, and meats tailored to the needs of multicultural consumers.

A packer such as CMS will share the results of its proprietary research with producers, and thereby generate these consumer benefits, if, but only if, the packer is assured—through forward-looking contracts—of obtaining the resulting cattle. If, however, packers and producers dealt with each other exclusively through cash transactions on the spot market, there would be no opportunity for producers to implement any of the packers’ research-driven programs, many of which result in a supply of specialty cattle for a particular product line. Thus, forward-looking contracts, which establish on-going relationships between packers and producers, are essential to securing the benefits of packers’ scientific research. *See* Suzanne B. Bopp, *Report on Progress* (Sept. 19, 2002), at [http://www.ranchersrenaissance.com/media/drovers\\_sept-2002-a.pdf](http://www.ranchersrenaissance.com/media/drovers_sept-2002-a.pdf) (noting that there now is “an increased willingness of packers to share more information with producers”). This benefits all participants in the livestock marketplace: Consumers receive the specialized meat products they prefer, packers are able to procure a steady supply of cattle to satisfy consumer demand, and producers are paid a premium for breeding and raising scientifically improved cattle.

These mutual gains are illustrated by Ranchers Renaissance (“RR”), a cooperative alliance founded by cattle producers that includes ranchers, feedyards, stockers, and CMS. *See, e.g.,* Colleen Schreiber, *Alliance Teams Up with Kroger to Unveil Branded Beef Product*, *Livestock Weekly* (Aug. 2, 2001), at <http://www>.

livestockweekly.com/papers/01/08/02/whlren.asp.<sup>5</sup> RR members cooperate to provide a continuous supply of consistently tender mid-grade beef to consumers via a line of branded products sold at Kroger supermarkets. See Curt Olson, *Ranchers Renaissance Changes the Face of Beef Marketing*, National Cattlemen 20, 21-22 (Aug. 2001); Schreiber, *Alliance Teams Up*. To do so, RR tracks individual cattle from birth through processing and engages in over twenty quality-control checks over the life of each animal. See Schreiber, *Alliance Teams Up*; Olson, *Ranchers Renaissance*, at 20. Genetic improvements, cutting-edge tenderness testing, and post-slaughter tenderizing processes are also used to ensure that consumers receive consistently tender meat from RR. See Olson, *Ranchers Renaissance*, at 20–22; Ishmael, *Love Me Tender*, at 27. After the meat is processed, each entity involved in bringing the meat to market is paid in accordance with a profit-sharing methodology that ensures producers are paid a premium for the cattle that met RR specifications. See Wes Ishmael, *A Value Visionary*, Beef Magazine (Nov. 1, 2001), available at <http://industryclick.com/magazinearticle.asp?releaseid=9572&magazinearticleid=133169&siteid=5&magazineid=13>; Olson, *Ranchers Renaissance*, at 20; Schreiber, *Alliance Teams Up*. By “[p]roviding consumers with more high-quality products,” CMS and its RR alliance partners “will increase beef demand and, ultimately, industry-wide

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<sup>5</sup> Excel Corporation, identified in Schreiber as the packing company involved in Ranchers Renaissance, is the former name of CMS.

profitability,” thereby providing future benefits to all market players. *Packers, Producers Need Each Other*, *supra* n.3.

Long-term contracts for hogs, which are more common than forward-looking contracts for cattle, provide many of the same advantages to participants in the pork market. Although swine prices are generally based on Department of Agriculture (“USDA”) reports, producers benefit from the security of having a buyer in place and by receiving a premium price for their livestock. Packers, meanwhile, are able to acquire supplies of animals that were raised in accordance with particular standards. *See* Bryan Salvage, *A Natural Alliance*, Meat Processing 14 (Apr. 2007) (describing CMS’s former natural pork partnership with Prairie Grove Farms). They are thus able to offer consumers pork that is not only more tender and marbled but also free of hormones, antibiotics, and growth stimulants. *See id.*

## **II. THE DISTRICT COURT’S INTERPRETATION OF THE PSA PROTECTS THE BENEFITS DERIVED FROM FREE CONTRACTING IN THE LIVESTOCK MARKET.**

The Packers and Stockyards Act (“PSA”) was passed to prohibit a “monopoly of the packers.” *Stafford v. Wallace*, 258 U.S. 495, 514 (1922); *see also, e.g., London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1304 (11th Cir. 2005) (“[E]limination of a competitive impact requirement would subvert the policy justifications for the PSA’s adoption.”); *Pac. Trading Co. v. Wilson & Co.*, 547

F.2d 367, 369–70 (7th Cir. 1976) (“the purpose of the [PSA] is to halt unfair business practices which adversely affect competition”). It is therefore “designed to promote efficiency, not frustrate it.” *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1458 (8th Cir. 1995). In interpreting the PSA, a court must not “upset the traditional principles of freedom of contract,” *id.*, “interfere with a meat packer’s business practices where those practices [do] not interfere with competition,” *Pickett*, 420 F.3d at 1280, or “stifl[e] the initiative of the industry,” *Armour & Co. v. United States*, 402 F.2d 712, 720 (7th Cir. 1968).

The district court’s holding that 7 U.S.C. § 192(a) and (b) “require[] a showing of anticompetitive effect in order to sustain a cause of action” avoids these pitfalls by correctly interpreting the PSA. *Terry v. Tyson Farms, Inc.*, No. 4:08-cv-3, at 12 (E.D. Tenn. Apr. 9, 2008). The district court refused to interfere with the freedom of contract absent any indication of anti-competitive behavior, and it followed the Supreme Court’s directive to read the language of the statute in light of “the purposes Congress sought to serve.” *Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 36 (1983). In doing so, the district court reached the same conclusion as the vast majority of circuit courts to consider the issue: The Fourth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have each expressly held that Section 192 and its various subsections uniformly demand that there be an injury to competition before liability arises

under the PSA. *See, e.g., Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1230 (10th Cir. 2007); *London*, 410 F.3d at 1303; *Philson v. Goldsboro Milling Co.*, 164 F.3d 625 (table), 1998 WL 709324, at \*4 (4th Cir. Oct. 5, 1998); *Farrow v. U.S. Dep't of Agric.*, 760 F.2d 211, 215 (8th Cir. 1985); *DeJong Packing Co. v. U.S. Dep't of Agric.*, 618 F.2d 1329, 1335 n.7, 1337 (9th Cir. 1980); *Armour & Co.*, 402 F.2d at 717. *But see Wheeler v. Pilgrim's Pride Corp.*, \_\_\_ F.3d \_\_\_, 2008 WL 2789319, at \*3 (5th Cir. July 21, 2008) (reaching the opposite conclusion).

In addition to properly interpreting the statute, the district court's opinion protects the benefits that forward-looking contracts generate for producers, packers, and consumers by placing non-traditional but pro-competitive contracts beyond the reach of the PSA. If this Court were to reverse the decision below and allow plaintiffs to recover damages under Section 192 without proving anticompetitive injury, it would invite legal challenges to the use of forward-looking contracts and thus risk eliminating the economic benefits such contracts confer. Disaffected cattle producers who pine for the pure cash market despite its inherent risks and disadvantages have already brought numerous lawsuits under the PSA in an effort to declare "unfair" and therefore illegal the various kinds of mutually economically beneficial contracts described above. *See, e.g., Pickett*, 420 F.3d 1272. Similarly, producers unhappy with economic conditions not within the control of either contracting party have also tried to sue packers under the PSA.

*See, e.g., Schumacher v. Cargill Meat Solutions Corp.*, 515 F.3d 867, 871-72 (8th Cir. 2008) (dismissing a case against packers based on a USDA error in calculating prices). If successful, either type of suit would impair the ability of producers and packers to enter into continuing relationships and the benefits described above would be lost. To date, plaintiffs attempting to restructure the markets via litigation in these ways have generally been rebuffed—but largely because almost every court to have interpreted Section 192 has done so in the same way as the district court. *See, e.g., id.; Pickett*, 420 F.3d 1272; *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999). Moreover, even if claims under the PSA that do not allege an anticompetitive harm ultimately founder on the merits, a reversal of the district court would nevertheless expose producers and packers to severe legal uncertainty and to the necessity of lengthy, expensive defenses of legitimate business practices that benefit not only themselves but consumers as well.<sup>6</sup>

A reversal would also place in-circuit producers and packers at a competitive disadvantage. Packers in this Circuit would be forced to choose between entering into contracts that may later be challenged under the PSA by

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<sup>6</sup> The terms of a contract “do not suddenly become ‘unfair’ or ‘deceptive’ within the prohibitions of the PSA simply because they are in a contract between a packer and a livestock producer.” *Kinkaid v. John Morrell & Co.*, 321 F. Supp. 2d 1090, 1104 (N.D. Iowa 2004). Accordingly, even a broad reading of Section 192 should not encompass the contractual arrangements in the cattle and hog markets discussed in Section I, *supra*. Nevertheless, a reversal of the district court would create uncertainty around current contracts, significant incentives to litigate, and corresponding disincentives against innovation.

disgruntled producers, dealing exclusively on the cash market for cattle, or purchasing livestock elsewhere and transporting it across longer distances for processing. Producers, meanwhile, would face the same contractual uncertainty and the prospect of lost business. They would also confront a decreased ability to borrow funds from financial institutions—and would therefore be able to raise fewer cattle.

In short, the district court's interpretation of the PSA protects a host of benefits to cattle producers, packers, and consumers. A contrary interpretation would threaten those benefits by making the forward-looking contracts that generate them vulnerable to legal challenges. A reversal would also leave producers and packers operating in this circuit at a severe competitive disadvantage.

## CONCLUSION

For these reasons, the Court should affirm the district court's interpretation of the PSA.

Respectfully submitted,

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Dated: September 3, 2008

## **CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)**

This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (6) and the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font and contains 3,435 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Andrew E. Tauber  
Andrew E. Tauber

Dated: September 3, 2008

## CERTIFICATE OF SERVICE

I hereby certify that, on September 3, 2008, I served copies of the foregoing Brief of *Amicus Curiae* Cargill Meat Solutions Corp. in Support of Defendant-Appellee Tyson Farms, Inc. using ECF on each of the following:

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