

No. 04-12137-D

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**United States Court of Appeals  
For the Eleventh Circuit**

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HENRY LEE PICKETT, et al.,

*Plaintiffs-Appellants,*

v.

TYSON FRESH MEATS, INC.,

*Defendant-Appellee.*

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Appeal from the United States District Court for the Middle District  
of Alabama, Northern Division, C.A. No. 96-A-1103-N, Hon. Lyle E. Strom,  
United States District Judge

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**BRIEF OF AMERICAN STATE BANK & TRUST COMPANY, N.A., FCS  
COMMERCIAL FINANCE GROUP, HARRIS TRUST AND SAVINGS  
BANK, RABOBANK INTERNATIONAL, U.S. AGBANK, FCB, AND U.S.  
BANK NATIONAL ASSOCIATION, AS *AMICI CURIAE*, SUPPORTING  
DEFENDANT-APPELLEE AND IN SUPPORT OF AFFIRMANCE**

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July 27, 2004

**SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS  
AND CORPORATE DISCLOSURE STATEMENT**

Set forth below is a list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of a party's stock, and other identifiable legal entities related to a party, that that were omitted from the previous certificates filed in this appeal, to the best of my knowledge:

1. American State Bancshares, Inc.
2. American State Bank & Trust Company, N.A.
3. Bank of Montreal
4. Farm Credit Services of Minnesota Valley
5. FCS Commercial Finance Group
6. Harris Bancorp., Inc.
7. Harris Financial Corp.
8. Harris Trust and Savings Bank
9. Michael E. Lackey, Jr.
10. Mayer, Brown, Rowe & Maw LLP
11. Rabo Agrifinance, Inc.
12. Rabobank International

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13. Rabobank Nederland
14. Brad P. Rosenberg
15. United FCS, ACA
16. U.S. AgBank, FCB
17. U.S. Bancorp
18. U.S. Bank National Association
19. Valley Independent Bank

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Association

Dated: July 27, 2004

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## **IDENTITY AND INTEREST OF THE *AMICI CURIAE***

American State Bank & Trust Company, N.A., based in Great Bend, Kansas, is a locally owned and managed financial institution with assets of \$175 million that offers full service commercial, agricultural and household banking. Fully 30 percent of the bank's loans are to cattle producers.

FCS Commercial Finance Group is a part of the Farm Credit System. Established by Congress in 1916, the Farm Credit System offers agricultural borrowers a nationwide network of lenders with combined assets in excess of \$100 billion. FCS Commercial Finance Group provides financing to customers who grow crops, raise livestock, and process agricultural commodities.

Harris Trust and Savings Bank is a premiere, mid-market corporate bank located in Chicago, Illinois. The bank regularly provides financing to pork producers. Because the pork packing and production industry is governed by the same statutory and regulatory scheme as is the beef packing and production industry, and because forward contracts are regularly used in the pork production industry, the bank has chosen to participate in this *amicus* brief.

Rabobank International, a branch of Rabobank Nederland, has been actively lending to the U.S. cattle industry for twenty years. Rabobank Nederland, a global banking cooperative with over \$392 billion in assets, also provides financial

services to the U.S. agricultural community through its subsidiaries Rabo Agrifinance, Inc. and Valley Independent Bank.

U.S. AgBank, FCB, is a member of the Farm Credit System. That system, established by Congress in 1916, offers agricultural borrowers a nationwide network of lenders with assets of over \$100 billion. U.S. AgBank serves farm credit associations in ten states. These farm credit associations provide a dependable source of financing and financial services for agricultural land, crop and livestock production, rural homes, and agricultural cooperatives.

U.S. Bank National Association is a subsidiary of U.S. Bancorp, which, with over 2200 offices in 24 states, is the eighth largest financial services holding company in the United States. U.S. Bank provides a comprehensive line of financial services to consumers, businesses and institutions. Among its services, U.S. Bank offers agricultural loans, including short-term lines of credit for the production of crops and livestock.

*Amici Curiae* American State Bank and Trust Company, N.A., FCS Commercial Finance Group, Harris Trust and Savings Bank, Rabobank International, U.S. AgBank, FCB, and U.S. Bank National Association (“*Amici*”) collectively represent a broad cross-section of financial institutions that regularly provide financing to cattle producers or, in the case of Harris Trust and Savings Bank, pork producers. *Amici* seek to assist this Court by illustrating how the use of

forward contracts plays an important and useful role in the financing of the purchase and sale of cattle. Because forward contracts guarantee that financed cattle will be sold and fix the price at which the transaction will take place, they reduce the risk to lenders who can pass along the savings to producers in the form of lower-interest loans. As a consequence, *Amici* have an interest in seeing that these contracts remain an option for producers to use when appropriate – a practice that could cease if the jury’s verdict is reinstated.

### **ISSUES PRESENTED**

In this brief *Amici* address two issues. First, the use of forward contracts by packers such as Defendant-Appellee Tyson Fresh Meats, Inc. (“Defendant” or “Tyson”) facilitates private market financing, which is a legitimate business reason to use them. Second, because of these financing benefits, the district court properly held that there was no evidence that would permit a jury to conclude that Tyson lacked a legitimate business justification for its use of forward contracts.

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

Fed cattle marketing is a capital intensive industry. Cattle producers regularly take loans to purchase feeder cattle, secure the loans with those cattle, and then repay the loans once the cattle have been sold. Because of the expense of purchasing and feeding cattle, very few producers could operate without outside financing.

Fed cattle marketing is a risky industry. A cattle producer has to contend with fluctuations in the price of feed. Weather can adversely impact the value of cattle at the time of sale. And when cattle are at their peak of marketability, the price they command is dictated by supply and demand conditions that vary over time.

One way in which producers can control their risk is by using forward contracts. Forward contracts set, in advance, the terms on which cattle are sold (and producers are paid), thus removing all price risk. By removing that risk, forward contracts increase the availability – and decrease the cost – of cattle financing. The riskier a borrower's operations, the more a borrower has to pay to obtain financing (if financing is available at all), or the less money the borrower can obtain. By reducing price risk through a forward contract, producers can obtain access to more capital pursuant to more favorable terms and conditions. That benefits not only the individual producer, but the entire fed cattle industry; greater access to capital, at more favorable terms, increases both output and competition across the board. Under this Circuit's standard, as properly applied by the district court, the financing advantages of forward contracting is a legitimate business justification that ultimately benefits producers, packers, and financial lenders.

## ARGUMENT

### I. THE USE OF FORWARD CONTRACTS RESULTS IN MORE ADVANTAGEOUS FINANCING TERMS FOR PRODUCERS

Forward contracts, in which a cattle owner commits to sell a specific lot of cattle at a future date at an agreed-upon price (R37-2488:24-2489:6),<sup>1</sup> provide many benefits for both cattle producers and packers. While a full evaluation of the benefits of these contracts is beyond the scope of this *amicus* brief, one clear benefit is that they substantially reduce the risks that cattle producers face when marketing their livestock. And by using forward contracts to reduce those risks, producers are able to obtain financing on terms that are substantially better than those available to producers who choose to trade in the turbulent cash market.

#### A. Forward Contracts Offer An Effective Method Of Reducing Risk To Both Producers And Lenders.

By guaranteeing a sale on a set date for a price certain, forward contracts provide “a way of reducing risk . . . [in] a very volatile business.” R37-2486:21-24; *see also* R37-2660:2-7 (when cattle are sold on a forward contract, risk is “pretty much eliminated”). By taking those risks off the table, forward contracts provide a benefit to producers who choose not to subject their business to the unpredictable and risky cash market. *See* R24-509:10-17 (a producer may choose

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<sup>1</sup> Some forward contracts apply a formula to establish a price.

to sell cattle via a forward contract because of his “tolerance for risk”). Forward contracts reduce or eliminate these risks in several ways.

First, and most obviously, by using a forward contract a cattle producer can obtain a buyer for his cattle months before they must be sold. R37-2660:8-16. This eliminates the risk that a producer will not be able to locate a buyer for its cattle when they are at optimal weight for slaughter.

Second, by selling on a forward contract a cattle producer can eliminate exposure to price fluctuations in the cash market by “lock[ing] in a good price.” R25-753:1-3. A producer that anticipates a decrease in the market price for fed cattle while its cattle are on feed can agree to a price early and protect himself from decreased prices in the cash cattle market. By allowing producers to avoid these market risks, forward contracts have proved to be an effective tool to protect producers (and, hence, lenders) when the bottom of the cattle market has fallen out.

No marketing alternative provides the same level of risk reduction as forward contracts. While a cattle producer can hedge on the Chicago Mercantile Exchange (“CME”), the producer bears the significant costs associated with using the CME (such as brokerage fees and potential margin calls). R26-994:7-23. Indeed, a cattle producer that hedges on the CME and cannot meet a margin call will have his entire futures position liquidated. And there is little that a lender can

do; futures markets change quickly, and it is very difficult – if not oftentimes impossible – for lenders to monitor producers’ positions on the CME.

Moreover, producers who hedge on the CME face so-called “basis risk,” which is the risk of a price difference between the place where cattle are sold and the CME price. See Clement E. Ward & Stephen R. Koontz, *Fed Cattle Pricing: Basis Contracts* 1 (Okla. State Univ. Div. of Agric. Sci. & Natural Res., Fact Sheet F-558, 2004), available at <http://osuextra.okstate.edu/pdfs/F-558web.pdf> (“basis is the cash market price at the time fed cattle are delivered for slaughter less the price for the nearby futures market price at the same time”). That risk is significant because “basis . . . varies across location considerably from day to day and week to week.” R38-2804:19-21. There is no basis risk associated with forward contracts for the producer, however, because the packer agrees to pay an agreed-upon price for cattle in the feedyard where the cattle are located.

**B. The Reduced Risk Associated With Forward Contracts Facilitates Lending To Producers.**

A lender’s decision whether to finance any venture, and how much to charge for its money, is impacted by the risk of the loan. This is especially true in an industry as “volatile” as fed cattle marketing. R37-2486:21-24; see also Def. Trial Exs. 2037, 2038 (attached hereto as an addendum) (demonstrating that fed cattle prices in Iowa ranged from a high of just under \$68 per hundredweight to a low of just over \$56 per hundredweight during one year time period); Elizabeth Weise,

*Beef prices on the way up; Canadian import ban, demand cited*, USA Today, Oct. 24, 2003, at 1A (describing one-year surge in cattle prices from \$64 per hundredweight to \$116 per hundredweight due to “completely unprecedented” circumstances); Greg Burns, *No lean year for cattle futures; As demand rises, Merc beef prices at a 10-year high*, Chicago Tribune, Sept. 2, 2003, at C1 (“cattle futures prices have surged,” which “wreaked havoc among small-time speculators and floor traders” at the CME). Thus, forward contracts, by reducing the price risk associated with selling fed cattle, benefit all producers by allowing them to obtain financing at a reasonable price for their livestock feeding operations.

It goes without saying that lenders are more likely to make loans to producers who have lined-up purchasers for their cattle than to those who have not. Testimony presented at trial supports this truism. Forward contracts, by reducing risk, also allow some producers to receive loans for which they otherwise might not be eligible. Indeed, some producers “***need the forward contract in order to get financing.***” R34-2012:21-23 (emphasis added); *see also* R24-509:25-510:14 (forward contracts allow cattle producers to “get the cattle sold,” which may be necessary in a “bank situation”); R37-2486:21-2487:1 (forward contract “helped us to acquire financing”); R34-2011:21-2013:19 (bankers sometimes require producers to use forward contracts as a prerequisite to receiving a loan); R27-

1092:25-1093:3 (forward contract could help a cattle producer to secure financing for his business). As Tyson's expert explained,

[F]eedyards might want to take a loan. And since the cattle price could go up or down, the bank might say to them, you're just too risky, you know, to loan you money to buy cattle. But if you sell on the futures contract, you can reduce that risk a lot. . . . ***[T]he bank might loan you a loan that it otherwise wouldn't.***

R37-2660:17-23 (emphasis added); *see also* R37-2660:2-7 (forward contracts "pretty much eliminate[ ]" risk). This is not an academic matter for cattle producers; bank loans are the lifeblood of the cattle industry. As one producer stated bluntly, "we're borrowing money, of course. ***None of us have cash enough to feed all these cattle. There's no way.***" R23-337:1-2 (emphasis added).

By selling on a forward contract, producers can also increase the amount of financing they will receive. Because of the reduced risk associated with forward contracts, lenders are generally willing to loan creditworthy producers 85 percent of the value of cattle sold on forward contracts. For cattle sold on the cash market, however, most lenders advance that same producer only 75 percent of the cattle's expected value. When producers are able to borrow more money on the same cattle, they need less personal capital to operate their businesses. Thus, producers selling on forward contracts can debt finance a greater percentage of their

operations.<sup>2</sup> This is especially beneficial for small producers who lack capital to participate on a significant scale in the cash market, but can obtain larger loans (and thus buy more cattle) by using forward contracts. Forward contracts allow capital-starved producers to leverage the capital they have in order to compete more effectively against better-financed producers. The entire cattle industry benefits from this increased competition.

Finally, the interest rate offered by lenders reflects the risk associated with the loan. Because forward contracts reduce the risk of loans to producers, producers who use them can obtain loans at lower interest rates.

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<sup>2</sup> Consider the following hypothetical: The cost of buying and feeding each head of cattle is \$1,000. Cattle can be sold for \$1,050 for a profit of \$50 per head of cattle, and a producer has \$3,000 in his pocket. With no financing, the producer can afford to purchase three cattle and can expect a profit of \$150. Now assume that the producer decides to finance his business. With no forward contract, he can expect a bank to lend him 75 percent of the value of his collateral. The producer must then pay the remaining 25%, or \$250, out of his pocket. The producer's \$3,000 will now buy him twelve cattle, which – when sold – increases his profit to \$600. However, if the producer sells on a forward contract, he can get financing for 85 percent of the value of the cattle, and now must pay only \$150 per head. He can now purchase twenty cattle for an expected profit of \$1,000. Thus, by entering into a forward contract and receiving a higher percentage of the collateral's value in loans, a producer can increase the volume of cattle that he is buying and selling and make more money.

## II. THERE IS NO VIOLATION OF THE PACKERS & STOCKYARDS ACT IF THERE IS A LEGITIMATE BUSINESS JUSTIFICATION FOR THE CHALLENGED CONDUCT

Plaintiffs' lawsuit seeks to do nothing less than reduce the marketing options available to producers by outlawing forward contracts. But forcing all producers to engage in risky cash-market operations does not comport with the purposes of the Packers and Stockyards Act of 1921, 7 U.S.C. § 181, *et seq.* ("PSA"), which "was designed to *promote efficiency, not frustrate it.*" *IBP, Inc. v. Glickman*, 187 F.3d 974, 978 (8th Cir. 1999) (emphasis added) (quoting *Jackson v. Swift-Eckrich, Inc.*, 53 F.3d 1452, 1458 (8th Cir. 1995)). As discussed above, forward contracts promote efficiency by making loans available to more producers at better rates. That alone constitutes a legitimate business justification sufficient to allow the continued use of these contracts.

Because Plaintiffs' PSA claim sounds in antitrust law, the district court properly applied a rule of reason analysis. *See generally Jackson*, 53 F.3d at 1460 ("PSA has its origins in antecedent antitrust legislation and primarily prevents conduct which injures competition"); *De Jong Packing Co. v. United States Dep't of Agric.*, 618 F.2d 1329, 1335 n.7 (9th Cir. 1980) (PSA "incorporates the basic antitrust blueprint of the Sherman Act and other pre-existing antitrust legislation"). It is well-settled in this Circuit that a "[r]ule of reason analysis requires the plaintiff to prove (1) an anticompetitive effect of the defendant's conduct on the relevant

market, and (2) that the conduct *has no procompetitive benefit or justification.*” *Levine v. Cent. Fla. Med. Affiliates, Inc.*, 72 F.3d 1538, 1551 (11th Cir. 1996) (emphasis added); *see also Maris Distrib. Co. v. Anheuser-Busch, Inc.*, 302 F.3d 1207, 1213 (11th Cir. 2002), *cert. denied*, 537 U.S. 1190, 123 S. Ct. 1260 (2003); *S. Card & Novelty, Inc. v. Lawson Mardon Label, Inc.*, 138 F.3d 869, 876 (11th Cir. 1998). The clear and unambiguous language of these cases makes plain that defendants prevail unless plaintiffs prove that there is *no* legitimate business justification for or competitive benefit to a given business practice.

Plaintiffs acknowledge that controlling precedent, but invite the Court to reject it in favor of two other competing approaches. First, Plaintiffs claim that producers’ use of forward contracts is unlawful under a rule of reason analysis unless the defendant shows that the use of those contracts is the “least restrictive alternative” by which to achieve its goals. But the “least restrictive alternative” approach has never been used in the manner contemplated by Plaintiffs. This stringent doctrine was developed in the First Amendment context to protect fundamental constitutional rights, such as the right to free speech. *See, e.g., Ashcroft v. ACLU*, 124 S. Ct. 2783, 2791 (2004). The concept is foreign to both antitrust law and to the PSA.

Second, Plaintiffs assert that the district court erred by not requiring the jury to weigh the pro-competitive benefits of forward contracts against any alleged

anticompetitive effects. Plaintiffs are wrong as a matter of fact and law. As a factual matter, the court did instruct the jury to weigh the pro-competitive benefits of forward contracts against their allegedly anti-competitive effects: “If the beneficial effects on competition *outweigh* the harmful effects on competition . . . you may find that IBP’s conduct has competitive benefits.” R14-647 (Instruction No. 16) (emphasis added). But as *Levine* instructs, the court was not required to be even that generous to Plaintiffs. 72 F.3d at 1551.

*Levine* is also consistent with PSA precedent, which does not dictate a weighing approach. For example, in *Glickman* the Eighth Circuit held that IBP did not violate the PSA because its marketing agreement was “an effort . . . to have a more reliable and efficient method of obtaining a supply of cattle.” 187 F.3d at 978. Similarly, the Seventh Circuit found that “[t]he competitive justifications” for a packer’s use of a coupon program “negate its being unjust, undue or unreasonable.” *Armour & Co. v. United States*, 402 F.2d 712, 725 (7th Cir. 1968). And in the case that provides the closest analogy to the case at bar, a district court granted summary judgment to a pork packer that used direct packer ownership and forward contracting for hogs instead of the cash market. According to the court,

Smithfield, in order to compete more efficiently in the meat market, decided they required a more stable supply of consistently high quality hogs. . . . The Defendants decided that the guess work required to fulfill their needs at cash markets was inefficient for themselves and the consumer. . . . Vertical integration also allows

Smithfield greater control over the types of meat different markets demand.

*Griffin v. Smithfield Foods, Inc.*, 183 F. Supp. 2d 824, 828 (E.D. Va. 2002) (internal citations omitted); *see also Swift & Co. v. Wallace*, 105 F.2d 848, 863 (7th Cir. 1939) (practices “which can be said to be fairly required by the exigencies of the business and which are justified by the standards of the business and are not obnoxious to any requirements of law cannot be held to conflict with any of the prohibitions of Section 202” of the PSA); *Jackson v. Swift-Echrich, Inc.*, 836 F. Supp. 1447, 1456 (W.D. Ark. 1993) (packer practice that “had a valid business purpose . . . was not unreasonable”), *aff’d*, 53 F.3d 1452 (8th Cir. 1995). In none of these cases did the courts weigh the procompetitive benefits of the conduct against any alleged harm; the fact that there was a legitimate business justification for the challenged practice ensured its legality under the PSA.

In any event, the benefits of forward contracts far outweigh any alleged anticompetitive effects. As discussed above, such contracts allow producers to compete more effectively in the marketplace. ***But for*** forward contracts, many producers would pay higher interest rates for their loans – if they could receive such loans at all. *See* Part I, *supra*. Lower interest rates mean more money in the pockets of the producers. Relying on the cash market to sell cattle is riskier than using forward contracts, and bank lending practices, by necessity, must take that additional risk into account. Forward contracts therefore result in increased

investment at better rates in the cattle industry, which spurs competition and increases output. Accordingly, forward contracts are good for both industry and consumers and are pro-competitive. *See Nat'l Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 103, 104 S. Ct. 2948, 2961 (1984) (conduct that “will increase sellers’ aggregate output” is “procompetitive”). The record reflects no evidence of competing harms that could counterbalance the enormous economic benefits of forward contracts.

### CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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Dated: July 27, 2004

**CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7) AND  
ELEVENTH CIRCUIT RULE 28-1**

I hereby certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7) and Eleventh Circuit Rule 28-1 for a brief produced with a proportionally spaced font. This brief was prepared using Microsoft Word 2002 in Times New Roman 14 point font. The length of this brief is 3,462 words.

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Brad P. Rosenberg

Dated: July 27, 2004

## CERTIFICATE OF SERVICE

I hereby certify that, on July 27, 2004, I served two copies of the foregoing Brief of American State Bank & Trust Company, N.A., FCS Commercial Finance Group, Harris Trust and Savings Bank, Rabobank International, U.S. AgBank, FCB, and U.S. Bank National Association, as *Amici Curiae*, Supporting Defendant-Appellee and in Support of Affirmance by UPS overnight delivery on each of the following:

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