

May 21, 1991

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VIA FAX: 202-326-2050

Premerger Notification Office Federal Trade Commission Washington, D.C. 10580

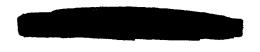
Attention: Richard Smith

Dear Mr. Smith:

The purpose of this letter is to ask advice of the Premerger Notification Office on whether, under the circumstances described below, the statutory merger of two agricultural cooperatives is subject to the pre-merger notification requirements of Hart-Scott-Rodino.

Cooperative X and Cooperative Y are each organized and operated as agricultural cooperatives under the provisions of Chapter 1 of Division 20, of the California Food and Agricultural Code. Each meets the organizational requirements of Section 1 of the Capper-Volstead Act, 7 U.S.C. § 291. Both transact business in commerce or are engaged in activity affecting commerce. Each has annual sales of not less than \$100 million and assets of not less than \$10 million. Absent an exemption, filing would appear to be required.

Section 7A(c)(5) of the Clayton Act, 15 USC § 18a(c)(5), provides that a filing is not required if the transaction is specifically exempted from the antitrust laws by Federal statute. Section 1 of the Capper-Volstead Act, 7 U.S.C. § 291, provides that "[p]ersons engaged in the production of agricultural products as . . . dairymen . . . may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes. . . . "



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Section 1 of the Capper-Volstead Act has been correctly interpreted to exempt the following from application of the antitrust laws:

- 1. The elimination of competition among members of such cooperatives by the cooperatives' establishment of prices (including minimum prices) and terms and conditions under which the grower/producer may market products. See, In the matter of Central California Lettuce Producers Cooperative, et al., 90 F.T.C. 18 (1977); Northern California Supermarkets, Inc. v. Central California Lettuce Producers Co-op, 413 F. Supp. 984 (N.D. Cal. 1976), aff'd, 580 F.2d 369 (9th Cir. 1978) cert. denied, 439 U.S. 1090 (1979).
- The fixing of prices, as between cooperatives, without the formality of a separate organization or marketing agent in common, at which the cooperatives or their members will sell their products. <u>See, Treasure Valley Potato Bargaining Ass'n.</u>, et al. v. Ore-Ida Foods, 497 F.2d 203 (9th Cir.), cert. denied, 419 U.S. 999 (1974); GVF Cannery, Inc. v. California Tomato Growers Ass'n, Inc., 511 F.Supp. 711 (N.D. Cal. 1981).
- 3. The achievement of monopoly power by combinations of cooperatives, unaccompanied by predatory conduct. <u>See, Kinnett Dairies, Inc. y. Dairymen, Inc.</u>, 512 F. Supp. 608 (M.D. Ga. 1981), <u>aff'd.</u>, 715 F.2d 520 (11th Cir. 1983), <u>cert. denied</u>, 465 U.S. 1051 (1984); <u>Fairdale Farms, Inc. v. Yankee Milk, Inc.</u>, 635 F.2d 1037 (2d Cir. 1980), <u>cert. denied</u>, 454 U.S. 818 (1981).

We are aware of the Commission Staff's contention, expressed in its 1976 Report on Agricultural Cooperatives, that inter-cooperative mergers are not exempt from the antitrust laws. See, Bureau of Competition, Federal Trade Commission, Staff Report on Agricultural Cooperatives 52-53 (1975). For at least the following reasons, we believe that position to be in error.

- 1. It was articulated before the decisions in <u>Kinnett</u> and <u>Fairdale Farms</u>.
- 2. In the same section of the Report, and based upon the same line of reasoning, the Staff concluded that inter-cooperative "combinations and conspiracies" were also not exempt, notwithstanding the decision to the contrary in Treasure Valley. The Staff position was

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wrong. Treasure Valley was indeed inconsistent with the Staff's position. Subsequent decisions in GVF Cannery, supra, Kinnett, supra, and, Northern California Supermarkets, Inc., supra, and the reasoning thereof adequately demonstrate so.

Trade Commission itself has, since publication of the Staff report, taken a directly contrary position. In its brief filed with the 9th Circuit Court of Appeals in Sunkist Growers, Inc. v. Federal Trade Commission, et al., (No. 79-3091), the Commission stated: "[i]t is clear that the exemption provided by section 1 of Capper-Volstead and section 6 of the Clayton Act extends not only to the formation of a cooperative but also to: [t]he achievement of monopoly power by the cooperative . . . through mergers between producer cooperatives." Brief for Appellees and Cross-Appellants at 36, Sunkist Growers, supra.

Accordingly, we are satisfied that the merger proposed is exempt from application of the antitrust laws within the meaning of Section 7A(c)(5) of the Clayton Act and is therefore exempt from pre-merger notification requirements. We request that you confirm, as correct, our understanding.

Very truly yours,

