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May 21, 1991

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FEDERAL TRADE COMMISSION
NOTIFICATION OFFICE

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

[REDACTED]

Cooperative A and Cooperative Y are each organized and operated as agricultural cooperatives under the provisions of

[REDACTED]

the Capper-Volstead Act, 7 U.S.C. § 291. Both transact business in commerce or are engaged in activity affecting commerce.

[REDACTED]

to be required.

[REDACTED]

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. . . ."

[REDACTED]

[REDACTED]

[REDACTED]

Section 1 of the Clayton Act has been correctly

antitrust laws:

1. The elimination of competition among members of such [redacted] by the [redacted] establishment of prices (including minimum prices) and terms and conditions under which the grower/producer may market [redacted] (1977); Northern California Supermarkets, Inc. v. Central California Lettuce Producers Co-op, 413 F. [redacted]
2. 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. See, Treasure Valley Potato Bargaining Ass'n., et al. v. Ore-Ida Foods, 497 [redacted] Inc., 511 F.Supp. 711 (N.D. Cal. 1981).
3. The achievement of monopoly power by combinations of cooperatives, unaccompanied by predatory conduct. See, Kinnett Dairies, Inc. v. Dairymen, Inc., 512 F. Supp. 608 (M.D. Ga. 1981), aff'd., 715 F.2d 520 (11th Cir. 1983), cert. denied, 465 U.S. 1051 (1984); Fairdale Farms, Inc. v. Yankee Milk, Inc., 635 F.2d 1037 (2d Cir. 1980), cert. denied, 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 [redacted]

2. In the same section of the Report, and based upon the same line of reasoning, the Staff concluded that inter-cooperative [redacted] not exempt, notwithstanding the decision to the contrary in Treasure Valley. The Staff position was

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.

3. Finally, and perhaps most significantly, the Federal

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

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 that you confirm, as correct, our understanding.

Very truly yours,

[Redacted signature block]

6/4/91. John Synple advised

that the issue of whether mergers between agricultural cooperatives are exempt from the antitrust laws of the

exempted by the Clayton Act, Sections 1 and 7, and the Federal Trade Commission Act, Sections 5 and 17, or court decisions interpreting the Clayton Act, or court decisions interpreting the

Antitrust Laws and the Clayton Act seem to conclude that such mergers are not - or may not -