

Complaint

90 F.T.C.

IN THE MATTER OF
CENTRAL CALIFORNIA LETTUCE PRODUCERS
COOPERATIVE, ET AL.

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket 8970. Complaint, June 10, 1974 — Final Order, July 25, 1977

This order dismisses a complaint issued against a Salinas, Calif. nonprofit cooperative and 22 of its members for alleged price-fixing practices in the lettuce market, violative of antitrust law. The Commission ruled that the price-fixing practices were exempt from the antitrust laws, under the Capper-Volstead Act, which permits producers of agricultural products to "act together in association . . . in collectively . . . marketing" their products.

Appearances

For the Commission: *Carl J. Batter, Jr.* and *David B. Loken.*

For the respondents: *Philip C. Olsson* and *James F. Rill, Collier, Shannon, Rill & Edwards*, Washington, D.C., *Andrew Church, Abramson, Church & Stave*, Salinas, California and *Max Thelen Jr., Thelen, Marrin, Johnson & Bridges*, San Francisco, California.

COMPLAINT

[2] Pursuant to the provisions of the Federal Trade Commission Act (Title 15, U.S.C. 41, *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the parties listed in the caption hereof, and more particularly described and referred to hereinafter, have violated the provisions of Section 5 of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Central California Lettuce Producers Cooperative (hereafter "Central") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Central maintains its home office and principal place of business at 512 Pajaro St., Salinas, California. [3]

PAR. 2. Respondent Admiral Packing Co. (hereafter "Admiral") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Admiral maintains its home office and principal place of business at 495 Brunken Ave., P.O. Box 1089, Salinas, California.

PAR. 3. Albert C. Hansen is an individual doing business as Hansen

Farms (hereafter "Hansen"). Hansen maintains its home office and principal place of business at 1941 Alisal Rd., P.O. Box 269, Salinas, California.

PAR. 4. Respondent California Coastal Farms, Inc. (hereafter "Coastal") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Coastal maintains its home office and principal place of business at 1140 Abbott St., P.O. Box 811, Salinas, California.

PAR. 5. Respondent Carl Joseph Maggio Inc. (hereafter "Maggio") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Maggio maintains its home office and principal place of business at South 1st St. & Lonoak Rd., P.O. Box 536, King City, California.

PAR. 6. Respondent D'Arrigo Bros. Co. of California (hereafter "D'Arrigo") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. D'Arrigo maintains its home office and principal place of business at 706 West Market St., P.O. Box 850, Salinas, California.

PAR. 7. Respondent Eckel Produce Co. (hereafter "Eckel") is a partnership organized, existing and doing business under and by virtue of the laws of the State of California. Eckel maintains its home office and principal place of business at 740 Airport Blvd., P.O. Box 1027, Salinas, California.

PAR. 8. Respondent Green Valley Produce Co-Op (hereafter "Green Valley") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Green Valley maintains its home office and principal place of business at 1148 Abbott St., P.O. Box 2123, Salinas, California. [4]

PAR. 9. Respondent Growers Exchange, Inc. (hereafter "Growers") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Growers maintains its home office and principal place of business at 740 Airport Blvd., P.O. Box 479, Salinas, California.

PAR. 10. Respondent Harden Farms of California (hereafter "Harden") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Harden maintains its home office and principal place of business at 1102 Growers St., P.O. Box 779, Salinas, California.

PAR. 11. Respondent J. R. Norton Co. (hereafter "Norton") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Norton maintains its home office and principal place of business at Front & Gabilan Sts., P.O. Box 5375, Salinas, California.

PAR. 12. Respondent Jack T. Baillie Co., Inc. (hereafter "Baillie") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Baillie maintains its home office and principal place of business at 634 South Sanborn Rd., P.O. Box 268, Salinas, California.

PAR. 13. Respondent Let-Us-Pak is a partnership organized, existing and doing business under and by virtue of the laws of the State of California. Let-Us-Pak maintains its home office and principal place of business at 740 Airport Blvd., P.O. Box 225, Salinas, California.

PAR. 14. Respondent Merit Packing Co. (hereafter "Merit") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Merit maintains its home office and principal place of business at 634 South Sanborn Rd., P.O. Box 1649, Salinas, California.

PAR. 15. Respondent Merrill Farms (hereafter "Merrill") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Merrill maintains its home office and principal place of business at 1067 Merrill St., P.O. Box 659, Salinas, California. [5]

PAR. 16. Respondent Pacific Lettuce (hereafter "Pacific") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Pacific maintains its home office and principal place of business at Rianda & Prader Sts., P.O. Box 534, Salinas, California.

PAR. 17. Respondent R. T. Englund (hereafter "Englund") is a partnership organized, existing and doing business under and by virtue of the laws of the State of California. Englund maintains its home office and principal place of business at 271 Rianda St., P. O. Box 517, Salinas, California.

PAR. 18. Respondent Royal Packing Co. (hereafter "Royal") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Arizona. Royal maintains an office and place of business at 91 Spicer St., P.O. Box 5337, Salinas, California.

PAR. 19. Respondent Salinas Lettuce Farmers Cooperative (hereafter "Salinas Lettuce") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Salinas Lettuce maintains its home office and principal place of business at 624 South Sanborn Rd., P.O. Box 594, Salinas, California.

PAR. 20. Respondent Salinas Marketing Cooperative (hereafter "Salinas Marketing") is a corporation organized, existing and doing

business under and by virtue of the laws of the State of California. Salinas Marketing maintains its home office and principal place of business at 1222 Merrill St., P.O. Box 357, Salinas, California.

PAR. 21. Respondent The Garin Co. (hereafter "Garin") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Garin maintains its home office and principal place of business at 634 South Sanborn Rd., P.O. Box 1731, Salinas, California.

PAR. 22. Respondent United Brands Company (hereafter "United Brands") is a corporation organized, existing and doing business under and by virtue of the [6] laws of the State of New Jersey. United Brands maintains its home office and principal place of business at 245 Park Ave., New York, N.Y. United markets fresh produce, including lettuce, through a wholly-owned subsidiary, Inter Harvest, Inc. whose home office and principal place of business is located at 122 East Alisal St., P.O. Box 2115, Salinas, California.

PAR. 23. Respondent West Coast Farms (hereafter "West Coast") is a partnership organized, existing and doing business under and by virtue of the laws of the State of California. West Coast maintains its home office and principal place of business at 470 West Beach St., P.O. Box 809, Watsonville, California.

PAR. 24. Respondents Admiral, Hansen, California, Maggio, D'Arrigo, Eckel, Green Valley, Growers, Harden, Norton, Baillie, Let-Us-Pak, Merit, Merrill Pacific, Englund, Royal, Salinas Lettuce, Salinas Marketing, Garin, United Brands and West Coast (sometimes referred to as "respondent marketers") market fresh produce, including lettuce, primarily from the growing areas of California and Arizona. The total sales of lettuce by respondent marketers in the Salinas, California area in 1973 was substantial, approximately 20,000,000 cartons. Each respondent marketer is a member of respondent Central.

PAR. 25. In the course and conduct of respondent marketers' business of offering for sale, selling, shipping or causing the shipping of fresh produce, including lettuce, from the State of California to persons, corporations or partnerships located in states other than the State of California, and/or in the maintenance by some respondent marketers of selling offices in both California and Arizona, respondent marketers have been and are now engaged in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 26. Respondent Central is engaged in commerce as "commerce" is defined in the Federal Trade Commission Act by virtue of its functions as the vehicle by which its members fix, control,

establish or maintain the price or price ranges of lettuce which is shipped by respondent's members in interstate commerce.

PAR. 27. Except to the extent that competition has been hampered and restrained by reason of the practices hereinafter described, respondent marketers have been in substantial competition with each other and other marketers of fresh produce, including lettuce. [7]

PAR. 28. Since approximately May of 1972, when respondent Central was incorporated, Central and respondent marketers have engaged in a plan, policy, or course of action, the purpose of which is to fix, control, establish or maintain the prices, or price ranges, or price floors, or price ceilings, at which each respondent marketer offers to sell or sells lettuce.

PAR. 29. In furtherance of the plan, policy, or course of action referred to above, Central and respondent marketers have engaged, among others, in one or more of the following acts or practices, each of which constitutes, in itself, an illegal act or practice:

(a) On or about May, 1973, each respondent marketer agreed in writing to sell lettuce to all customers only at prices within the limits of the ceiling prices and floor prices established on a weekly or daily basis by Central.

(b) Representatives of respondent marketers have met, under the auspices of respondent Central, and have discussed or agreed upon prices, or price ranges, or floor or ceiling prices at which each respondent marketer would sell lettuce to their customers.

(c) Respondent marketers have offered to sell or have sold lettuce to their customers at the prices, or price ranges, or floor or ceiling prices discussed or agreed upon at meetings held under the auspices of respondent Central.

PAR. 30. The above acts and practices have or may have the capacity to unduly hinder, suppress, lessen and eliminate competition between respondent marketers and between respondent marketers and other marketers of lettuce and deprives or may deprive the consuming public of prices determined by free and open competition in the sale of lettuce or other fresh produce and thus constitute unfair methods of competition in commerce and unfair acts and practices in commerce, within the intent and meaning of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY MORTON NEEDELMAN, ADMINISTRATIVE
LAW JUDGE

MARCH 13, 1975

[3] 1

STATEMENT OF THE CASE

The Federal Trade Commission issued a complaint on June 10, 1974, charging respondent Central California Lettuce Producers Cooperative (hereinafter "Central"), and its 22 members with a violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) by reason of illegal price-fixing in the sale of lettuce.

Prior to filing an answer, respondents moved to dismiss the complaint on the grounds, first, that Central comes within the antitrust exemption for agricultural cooperatives contained in Section 6 of the Clayton Act, and the Capper-Volstead Act of 1922; and second, that since Central is an exempt cooperative only the Secretary of Agriculture has authority to review its pricing practices. On September 4, 1974, I ruled that the Secretary of Agriculture does not have exclusive jurisdiction and the Federal Trade Commission may properly assert its own jurisdiction to determine all the issues in this case including the very issue of the existence of an antitrust exemption.¹ I said at the time that the exemption issue is so closely intertwined with the merits of the case that a motion to dismiss could not [4] be granted, but I indicated the respondents would be given ample opportunity to present evidence as well as legal argument to show why they are entitled to a Capper-Volstead exemption. Subsequently, I ruled that respondents' motion to dismiss on the grounds of lack of jurisdiction may not be certified to the Commission and respondents were ordered to file an answer.²

Respondents' answer dated September 20, 1974, admitted, with certain minor exceptions, the allegations respecting the identity of each of the respondents. The answer also admitted that each of the individual respondents is engaged in commerce as "commerce" is

¹ See, Order Denying Motion to Dismiss and Request for Oral Argument and Setting Date for Filing of Answer (September 4, 1974). Addressing the argument that the Secretary of Agriculture has exclusive or primary jurisdiction over the exemption question, I said that this view has been "unequivocally rejected" by the Supreme Court after "full consideration" was given to the legislative history. *Maryland and Virginia Milk Producers Assn., Inc. v. United States*, 362 U.S. 458, at 462-463 (1960); *United States v. Borden Co.*, 308 U.S. 188 (1939). In addition, I noted that the plain language of the statute, as well as the legislative history and the decided cases compel the conclusion that the Capper-Volstead Act grants no more than auxiliary power to the Secretary in certain special circumstances, and even if the Secretary should exercise that power, the Commission need not stay its hand. *Washington Crab Assn., et al.*, 66 F.T.C. 45 (1964).

² See, Order Denying Respondents' Request for Certification to the Commission pursuant to Section 3.23(b) and Granting Further Time to Answer (September 16, 1974).

defined in the Federal Trade Commission Act by reason of the fact that they all sell lettuce across state lines. All other material allegations of the complaint were denied and respondents again asserted the affirmative defense that the Commission lacked jurisdiction because of the exempt status of Central and its members.³

With the joinder of issue, a prehearing conference was held on October 15, 1974. After listening to the arguments of both parties, it appeared to the Administrative Law Judge that the facts of the case could be stipulated and on the basis of that stipulation a decision could be rendered on both the applicability of the Capper-Volstead exemption and whether a substantive antitrust violation had occurred.

[5] The parties agreed to follow this suggested course and on December 11, 1974, a stipulation, with exhibits attached, was filed. Thereafter, on January 20, 1975, motions and briefs and accompanying affidavits in support of summary decision were submitted by both parties; replies were filed on February 21, 1975, and oral argument on the cross-motions was heard on February 27, 1975.

Based on the factual stipulation and exhibits as well as the briefs filed in support of the cross-motions for summary decision, I make the following findings of fact, and conclude that complaint counsel's motion for summary decision should be granted.

II

FINDINGS OF FACT

Central and Its Members

1. This case involves the formation and subsequent pricing activity of Central California Lettuce Producers Cooperative (hereinafter "Central"), an association of 22 lettuce producers located in the Salinas-Watsonville-King City area of California and who, together, account for a significant share of the total production in the United States of this important fresh food. (Finding 37)

2. Central was incorporated on June 8, 1972, as a nonprofit cooperative association without capital stock under the provisions of Chapter 1, Division 20, of the Agricultural Code of California, West's Ann. Agric. Code, §§ 54001, *et seq.* (Stip. ¶¶ 2, 6; Ex. B-1)

3. Central began functioning in May 1973, when it signed an

³ Another affirmative defense relating to alleged denial of an opportunity to present and discuss offers of settlement as provided by Sections 2.31 and 2.34 of the Commission's Rules and 5 U.S.C. 554 has not been adequately briefed to the Administrative Law Judge to the point where an initial decision can be rendered on this issue. Moreover, the Commission's policy relating to administration of Part 2 of its Rules is not a matter properly before an Administrative Law Judge.

identical "Cooperative Marketing Agreement" (hereinafter "CMA") with each of the following 22 individual respondents named in the complaint: Admiral Packing Company; Albert C. Hansen d/b/a Hansen Farms; California Coastal Farms, Inc.; Carl Joseph Maggio, Inc.; D'Arrigo Bros. Co. of California; Eckel Produce Co.; Green Valley Produce Co-Op; Growers Exchange, Inc.; Harden Farms of California; J. R. Norton Co.; Jack T. Baillie Co., Inc.; Let-Us-Pak; Merit Packing Co.; Merrill Farms; Pacific Lettuce; R. T. Englund Co.; Royal Packing Co.; [6] Salinas Lettuce Farmers Cooperative; Salinas Marketing Cooperative; The Garin Co.; Inter Harvest, Inc., a

subsidiary of United Brands Co.; and West Coast Farms. (Stip. ¶ 1)⁴
[9]

*The Production and Marketing of Lettuce*⁵

4. The practices of Central and its members, which are the subject of this proceeding, take place in a lettuce industry consisting of growers, grower-shippers, and shippers, as well as brokers and buyers

⁴ In the joint answer filed by the 22-member respondents, each admits the complaint allegations respecting corporate identity. Minor errors in the complaint with respect to respondents J. R. Norton Co. and Inter Harvest, Inc. were corrected by stipulation (see, Order Incorporating Stipulation Into Record, March 3, 1975). The corporate identities of the 22 members of Central are as follows:

Respondent Admiral Packing Co. is a California corporation with its home office and principal place of business at 495 Brunken Ave., P.O. Box 1089, Salinas, California.

Albert C. Hansen is an individual doing business as Hansen Farms with its home office and principal place of business at 1941 Alisal Rd., P.O. Box 269, Salinas, California.

Respondent California Coastal Farms, Inc. is a California corporation with its home office and principal place of business at 1140 Abbott St., P.O. Box 811, Salinas, California.

Respondent Carl Joseph Maggio, Inc. is a California corporation with its home office and principal place of business at South 1st St. & Lonoak Rd., P.O. Box 536, King City, California.

Respondent D'Arrigo Bros. Co. of California is a California corporation with its home office and principal place of business at 706 West Market St., P.O. Box 850, Salinas, California.

Respondent Eckel Produce Co. is a California partnership with its home office and principal place of business at 740 Airport Blvd., P.O. Box 1027, Salinas, California.

Respondent Green Valley Produce Co-Op is a California corporation with its home office and principal place of business at 1148 Abbott St., P.O. Box 2123, Salinas, California.

Respondent Growers Exchange, Inc. is a California corporation with its home office and principal place of business at 740 Airport Blvd., P.O. Box 479, Salinas, California.

Respondent Harden Farms of California is a California corporation with its home office and principal place of business at 1102 Growers St., P.O. Box 779, Salinas, California.

Respondent J. R. Norton Co. is an Arizona corporation with its home office and principal place of business at Front & Gabilan Sts., P.O. Box 5375, Salinas, California.

Respondent Jack T. Baillie Co., Inc. is a California corporation with its home office and principal place of business at 634 South Sanborn Rd., P.O. Box 268, Salinas, California.

Respondent Let-Us-Pak is a California partnership with its home office and principal place of business at 740 Airport Blvd., P.O. Box 225, Salinas, California.

Respondent Merit Packing Co. is a California corporation with its home office and principal place of business at 634 South Sanborn Rd., P.O. Box 1649, Salinas, California.

Respondent Merrill Farms is a California corporation with its home office and principal place of business at 1067 Merrill St., P.O. Box 659, Salinas, California.

Respondent Pacific Lettuce is a California corporation with its home office and principal place of business at Rianda & Prader Sts., P.O. Box 534, Salinas, California.

Respondent R. T. Englund is a California partnership with its home office and principal place of business at 271 Rianda St., P.O. Box 517, Salinas, California.

Respondent Royal Packing Co. is an Arizona corporation. Royal maintains an office and place of business at 91 Spicer St., P.O. Box 2337, Salinas, California.

Respondent Salinas Lettuce Farmers Cooperative is a California corporation with its home office and principal place of business at 624 South Sanborn Rd., P.O. Box 594, Salinas, California.

Respondent Salinas Marketing Cooperative is a California corporation with its home office and principal place of business at 1222 Merrill St., P.O. Box 357, Salinas, California.

Respondent The Garin Co. is a California corporation with its home office and principal place of business at 634 South Sanborn, P.O. Box 1731, Salinas, California.

Respondent United Brands Company is a New Jersey corporation with its home office and principal place of business at Prudential Center, Boston, Mass. United Brands markets fresh produce, including lettuce, through a wholly-owned subsidiary, Inter Harvest, Inc., whose home office and principal place of business is located at 122 East Alisal St., P.O. Box 2115, Salinas, California.

Respondent West Coast Farms is a California partnership with its home office and principal place of business at 470 West Beach St., P.O. Box 809, Watsonville, California.

⁵ The stipulated facts relating to the lettuce industry are derived from some of the findings on the subject in the Initial Decision in F.T.C. Dkt. No. 8835, *United Brands Company* (Slip Opinion dated March 19, 1973 [83 F.T.C. 1614]).

located at various shipping points. The shipping points change during the year. Starting with spring shipments in May and until October, the Salinas-Watsonville-King City area (Monterey and Santa Cruz Counties, California) furnishes the major share of lettuce. In November, most lettuce comes from Arizona. And from December through March, the major source, again, is California (the Imperial Valley, and, especially in March, the Blythe District of the Imperial Valley). During April, as in November, the largest share comes from Arizona. In addition to these major shipping points, smaller amounts of lettuce come from other areas from time to time. (Stip. ¶ 25(a))

5. Lettuce is a perishable food which means that once it ripens, it must be harvested within three or four days. (Stip. ¶ 25(a))

6. Harvesting decisions are made on a day-to-day basis and depend on such factors as volume shipped and the prices received on the preceding day, information as to the "unloads" and prices in major terminal markets, local weather conditions, weather conditions in terminal markets, and the condition of the crop. (Stip. ¶ 25(a))

7. After the harvesting decision is made, lettuce is cut, packed, and inspected in the field. Lettuce is normally packed 24 heads to a cardboard carton and then trucked to a vacuum cooler, where the temperature is lowered to about 34 degrees. From the vacuum cooler, the cartons are shipped by rail or truck to destinations throughout the United States. Again, because it is a perishable product, it must be shipped on the same day it is cut or, at the latest, the next day. (Stip. ¶ 25(a))

[10] 8. Buyers and buyer representatives may inspect the lettuce at the vacuum cooling plant or in the field. Inspection normally takes place before a final purchase is made. Buyers compare quality as between different grower-shippers or between the lettuce produced in different fields but handled by the same shipper or grower-shipper. Quality is an important factor in pricing and accounts in significant measure for the range of lettuce prices at each shipping point. (Stip. ¶ 25(a))

9. Most lettuce is shipped "naked" in the carton; that is, the heads are not individually wrapped. The clear plastic film in which lettuce is sometimes displayed in retail stores is ordinarily added by the store after the lettuce head is cut and trimmed of any discoloration that may have taken place in transit. While lettuce, both wrapped and unwrapped, is not advertised to consumers on a brand basis, individual label names are used by growers and certain labels have achieved some measure of trade recognition for quality. (Stip. ¶ 25(a); Affidavit of John Derdivanis, January 15, 1975, attached to Respon-

dents' Memorandum in Support of Motion For Summary Decision, January 20, 1975.)

10. Growers, grower-shippers, and shippers keep abreast of the market by contacts with one another and through the services offered by the Federal-State Market News Service. By personal contact, and by telephone, and by following the publications of the Federal-State Market News Service, both sellers and buyers have available the latest information relating to the price and the volume of lettuce being sold. This includes information on "unloads" and prices in terminal markets, on weather conditions in these markets, as well as in other producing areas; the shipping volume and price for the preceding day; and also the current day's volume and pricing. Market News reporters seek and disseminate information on both the selling and buying side of the market. This is done through contacts with shippers and with purchasers. This information is verified and published the following day. (Stip. ¶ 25(a))

[11] 11. As indicated in Finding 6, lettuce is sold on a day-to-day basis. Negotiations over any particular sale begin in the morning and terminate in the afternoon after each party has had the opportunity of informing himself fully on the day's market, both through the Market News Service and by contact with the trade. The buyers are represented by brokers or by their own representatives. (Stip. ¶ 25(a))

12. Most lettuce is sold f.o.b. at the shipping point. However, some lettuce is sold on a consignment basis. This usually represents an established relationship between a particular terminal market wholesaler and grower-shipper with a consequent sharing of the profits or losses involved in resale at the terminal market. (Stip. ¶ 25(a))

13. At times, consignments are made on a distress basis — that is, cars that could not be sold at the shipping point are consigned to a wholesaler or another representative who will undertake to sell the contents at the terminal market for the best price he can get. In other words, the car has a "home," where a designated representative will undertake to sell it. (Stip. ¶ 25(a))

14. In the absence of either a shipping point sale or a consignment, a grower-shipper may "roll" the car and endeavor to sell it while it is en route toward Eastern markets. Otherwise, he may "no-bill" the car — that is, provide no bill of lading for that day but hold the car over for another day for possible sale or consignment at that time. (Stip. ¶ 25(a))

15. To the extent that there exists any substantial volume of no-bills, rollers, and distress consignments, this tends to depress the market since such cars are surplus at the going prices. (Stip. ¶ 25(a))

16. The lettuce industry often will be faced with average annual prices over a two or three-year period which do not cover total costs of production and harvesting. For this reason, well-established grower-shippers and shippers plan their schedules and evaluate financial performance over relatively long periods of operations [12] of up to four to five years, with the expectancy that losses in one year will be offset by gains in others. As would be expected, successful shippers and grower-shippers require sufficient cash reserves to carry them through possible years of low return. (Stip. ¶ 25(a))

17. Traditionally, the industry has been characterized by considerable price uncertainty. Because of the perishable character of lettuce and the huge volumes that must be moved to market in a brief period of time, supplies are highly variable, not only from area to area and from season to season, but also from year to year. Both the vagaries of weather and the uncoordinated production of many growers may result in sudden shortages or unanticipated surpluses. (Stip. ¶ 25(c))

18. Lettuce is subject to an inelastic demand curve. This means that a small change in quantity will generate an opposite but relatively larger change in the prevailing market price. If shipments are reduced by a given percentage, there is an opposite and more than proportional increase in price resulting in greater total grower-shipper returns. On the other hand, if shipments are increased by given percentage, there is an opposite and more than proportional decrease in price, with a resultant decrease in total revenue for the industry. (Stip. ¶ 25(c))

19. With the industry subject to so many variables on both the supply side and the demand side, prices tend to fluctuate widely and wildly. Prices may drop or rise by as much as 300 percent in a week — from \$5.50 to \$1.50, or the converse. (Stip. ¶ 25(d))

The Activities of Central

20. Against this background of perishability of product, price uncertainties, demand inelasticities, as well as a history of distress selling, Central was created. Its purpose, as indicated in the preface to the CMA which was signed with the 22 members (Finding 3), is as follows:

[13] WHEREAS, it is the objective of the Cooperative [i.e., Central] to improve conditions in the produce industry for the mutual benefit of its members as producers by promoting, fostering, and encouraging the intelligent and orderly marketing of agricultural products through cooperation; eliminating speculation and waste; making the distribution of agricultural products between producers and consumers as direct as can be efficiently done; stabilizing the marketing of

agricultural products; encouraging efficiency and economy in marketing; preventing the demoralizing of markets resulting from dumping and predatory practices; mitigating the recognized evils of a marketing system under which prices are set for the entire industry by the weakest producer; and fostering the ability of the members of the Cooperative to obtain prices for their products, in competitive markets, which are fair prices but not prices inflated beyond the reasonable value of such products by reason of artificially created scarcity of such products or other predatory trade practices which would injure the public interest; and

WHEREAS, the objective can be achieved only if supported by mutual cooperative effort of all the members on a relatively permanent basis, and this agreement is one of a series of contracts with the members evidencing such cooperative effort. (Stip. ¶ 1; Ex. A, p. 1)

21. The CMA in effect between Central and each of its members during the 1973 and 1974 Salinas-Watsonville-King City lettuce season had a three-year term, but the producers' obligations thereunder are limited to the actual Salinas-Watsonville-King City season. Moreover, the CMA may be terminated by a member upon 31 days notice. (Stip. ¶ 1; Ex. A, pp. 1,7)

22. While each of the 22 members of Central is a producer of lettuce, Central, itself, does not grow or harvest or ship lettuce in its own name. Central does not negotiate directly with buyers of lettuce, and does not enter into direct agreements with buyers for the sale [14] or shipment of specific lots of lettuce. Central does not employ any sales personnel in its own name and has no receipts from sales of lettuce. (Stip. ¶¶ 9, 19, 22)

23. Central's income comes from membership fees and assessments. Each member pays a membership fee in the same amount as every other member. Assessments were paid during the 1973 season at the rate of \$500 per member and during the 1974 season at the rate of \$0.002 per carton shipped. Central has never made any distribution of its income to its members. (Stip. ¶ 20)

24. Each individual member of Central or his individual agent, arranges or negotiates with buyers for the sale of lettuce produced by or for him during the Salinas-Watsonville-King City season. Members compete with each other for the same customers. Payment for such lettuce is billed and collected by the individual member or its individual agent for its own account. At all times the individual members deal with lettuce buyers under their individual trade names. The member's affiliation with Central is disclosed by imprinting the organization's name or logo on shipping boxes. (Stip. ¶¶ 22, 24)

25. Paragraph 2 of the CMA imposes the following obligations on each member (*i.e.*, "Producer"):

A. *Cooperative Marketing.* Producer agrees to handle and market

all lettuce grown or harvested by or for Producer during the term of this agreement, whether on land owned by or rented to Producer or otherwise, only through the Cooperative [i.e., Central] and under its auspices and pursuant to the terms and conditions of this agreement.

B. *Crop Reports.* Producer agrees to report to the Cooperative and keep the Cooperative advised at all times of the actual and expected status of all crops of lettuce under Producer's control. Such reports shall include, but not be limited to, the number of acres and types of lettuce planted, date of planting, expected yields of each lot, and expected dates of harvest, relating to the harvesting, packing, shipping, and/or marketing of such lettuce. Reports of planting shall be rendered [15] within one month after planting has been completed in each lot. Reports of expected yields and harvest dates shall be rendered weekly, or at such other intervals as the Cooperative may establish, with each report to contain a breakdown to daily estimates.

C. *Cooperative Schedules.* Producer agrees to abide by the harvesting, processing, packing and shipping schedules, and other requirements established by the Cooperative. Volume controls may not be imposed by the Cooperative unless approved by a unanimous vote of all those members in attendance at a meeting called to consider such controls after giving actual notice of the time, place and purpose of such meeting to all members, either in person, by phone, or by delivery of written notice, at least 24 hours in advance of such meeting.

D. *Inspection.* Producer agrees to permit official representatives of the Cooperative to enter Producer's fields, sheds and other facilities to inspect the condition, quality and quantity of growing and harvested crops.

E. *Brokerage.* Producer agrees to make no discounts or concessions in lieu of brokerage. Any brokerage paid shall be shown on the invoices to all parties.

F. *Prices.* Producer agrees to sell lettuce to all customers only at prices within the limits of the ceiling prices and floor prices established on a weekly or daily basis by the Cooperative.

G. *Shipping Terms.* Producer agrees to sell lettuce to all customers on only the terms authorized by the Cooperative, and those terms shall be F.O.B., F.O.B.A., F.O.B.A.F. No Recourse, Joint Account, Guarantee Consignment, and Open Consignment, except for Government buying, which shall be D.S.A., if required. Producer agrees to make no sales on terms better than "Good Delivery Standards as set forth for produce under P.A.C.A. Rules & Regulations, under a 'No grade' contract."

H. *No Market Protection.* Producer agrees to eliminate market protection at the time of transaction.

I. *No Unsold Rollers.* Producer agrees not to roll any lettuce unless and until it has been sold or consigned.

[16] J. *Canadian Sales.* Producer agrees that on all sales to Canada, the costs of inspection and inspection services wires are to be paid by the receiver or buyer.

K. *Delinquent Accounts Report.* Producer agrees to submit to the Cooperative on Monday of each week during the season a list of all accounts over 30 days old from date of shipment, listing customers, amounts in arrears, and age of accounts.

L. *Chronic Complainers Report.* Producer agrees to submit to the Cooperative on Monday of each week the names of receivers and buyers who have become habitual and chronic complainers about grade, quality and/or condition of produce received by them from Producer.

M. *Accounts and Records.* Producer agrees to make available to the Cooperative for inspection and copying all sales confirmation documents for each and every sale of lettuce made by Producer during the term of this contract, whether or not such sale has been in compliance with the schedules and requirements established as provided herein. Producer agrees that all books of accounts and records relating to the sale of crops during the term of this contract shall be open to inspection by Cooperative at reasonable times during business hours and for a period not exceeding three years following any transaction. Producer shall not be obligated by this contract to keep or retain any of his records more than three years following the consummation of any given transaction during the term of this contract. (Stip. ¶ 1, Ex. A, pp. 1-3)

26. The obligations of Central are set forth in paragraph 3 of the CMA. One such obligation is to set up a committee or committees, and through such committee or committees to "establish for its membership . . . such schedules and requirements for harvesting, processing, packing, shipping, grading, quality control, marketing and pricing of lettuce as shall be considered necessary by the Cooperative [Central] to achieve the objectives set forth in the preamble to this Cooperative Marketing Contract." (Stip. ¶ 1; Ex. A, pp. 3-4)

[17] 27. In addition, the CMA provides that a committee of committees is to meet weekly or more often if necessary. Decisions are to be by majority vote, Central is to provide proper notice of meetings, and give equitable treatment to all members (Stip. ¶ 1; Ex. A, pp. 3, *et seq.*), and

acquire, exchange, interpret, and disseminate past, present and prospective crop, market, statistical, economic and similar information to and for the benefit of its membership, including Producer hereunder. Such information shall include information relating to complaints, rejections, sales and purchasing practices and credit of brokers, commission merchants, receivers and purchasers. (Stip. ¶ 1; Ex. A, p. 3 (CMA Para. 3(E)))

28. Pursuant to by-laws adopted subsequent to the formation of the cooperative, each member of Central had a seat on the Board of Directors and a seat on the Executive Committee of Central. During 1973 and 1974, each respondent member had a seat on the Board of Directors and a seat on the Executive Committee of Central. (Stip. ¶ 8; see, Tr. 17-19 (Feb. 27, 1975))

29. Central's Executive Committee meets weekly or more often and reviews the various factors affecting the overall supply and demand for lettuce and determines a ceiling price, a floor price, or both, for future sales of lettuce by its members. (Stip. ¶ 6)

30. The organization and activity of Central is further described in a series of "messages" which Central caused to be published in *The Packer*, a trade publication which is the national newspaper of the fresh fruit and vegetable industry. (Stip. ¶ 12)

31. The "message" of June 16, 1973, described how the members of the Executive Committee meet at least once a week, how each member provides information on his acreage, plantings, expected yields, and estimated shipments for the following week. The Committee takes into account estimated shipments of nonmembers, and from other shipping points, as well as marketplace conditions. Then, the Committee fixes a ceiling or floor, or both on the price of lettuce. Thus, according to the June 16, 1973 "message" —

[18] Accurate information is the key ingredient in any successful marketing program. The marketing agreement signed by the 22 lettuce producing members of the Central California Lettuce Producers Cooperative recognizes its importance.

At least once each week, the Co-op members gather as a committee of the whole to present current crop reports. Each member reports the actual and expected status of all lettuce crops under his control for the coming period, usually one week.

These reports include the number of acres and type of lettuce planted, date of planting, expected yields of each lot and expected dates of harvest. It is interesting that for the week June 4-8 the production estimated by the members a week ahead of harvest was for 1.326 carlot equivalents. The actual total packed was 1.352 carlot equivalents. We think this is very accurate forecasting in a crop prone to such sizeable fluctuations due to weather.

The committee of the whole also takes into consideration what amounts of lettuce can be expected from producing areas other than the Salinas-Watsonville-King City district, the amounts expected from S-W-K.C., shippers not participat-

ing in the Co-op and conditions in the marketplace that will have a bearing on demand.

Working with accurate production information provides the basis for an open debate by Co-op members. With 22 separate members and 22 separate points of view, debate is assured. Every member can and does express his view en route to a consensus opinion.

With the production information firmly in hand, members then seek to arrive at an equitable range of prices that will result in an orderly flow of lettuce to market during the coming week.

[19] Section F of the marketing agreement states the "producer agrees to sell lettuce to all customers only at prices established on a weekly or daily basis by the cooperative."

To date, the Co-op has suggested only ceiling prices above which sales by members were prohibited. Tight supplies to date have made suggested price floors unnecessary.

The agreement also provides for inspection of members' fields should it be necessary to insure the accuracy of a members' crop estimate.

By arriving at a price range on a factual basis, the Co-op makes it possible for its members' customers to enjoy a new confidence in the supply and price quotations. It also insures our members a fair return within the dictates of supply and demand. It is, we submit, orderly marketing in action. (Stip. ¶ 12; Ex. C, p. 2)

32. The June 23 "message" dealt with "Good Delivery Standards, Shipping Terms Defined." Paragraph 2 of the CMA was quoted in full, and the message interpreted it as follows:

Not authorized and therefore forbidden are delivered sales, price arrival, and F.O.B. Inspection and Acceptance on Arrival. Specifically forbidden under Section I of the agreement are unsold rollers.

Those practices not authorized in the agreement are forbidden on the grounds that lettuce sales on those terms are not conducive to orderly marketing. (Stip. ¶ 12; Ex. C, p. 3)

33. The "message" in the August 18 *Packer* was entitled, "1973 a Year of Steep Union Wage Increases in Salinas." It dealt in particular with the week of August 6:

[20] The Central California Lettuce Producers Co-op has experienced a good deal of success in promoting orderly marketing during the 1973 season at price levels fair to both shippers and receivers in view of lighter than normal supplies. Yet it was not entirely the Co-op's activity that was responsible for lettuce pricing the week of August 6 — a week that may be looked back upon as the time that \$1.25 lettuce became obsolete.

Getting back into action after a 19-day strike by Teamster Union Local 890, a huge glut of supplies developed the week of August 6 as growers and shippers tried to salvage fields past the peak of maturity in addition to lettuce scheduled for that date. The remarkable factor was that prices did not generally go below the \$1.75 mark — \$.50 higher than the normal rock-bottom distress price.

* * * * *

With the heavy cost increases of labor, packaging supplies, and other inputs in

1973, it seems likely that \$1.75 may be the lowest price at which growers will harvest and pack in time of burdensome supply. (Stip. ¶ 12; Ex. C, p. 10)

34. In addition to the "messages" the day-to-day operations of the cooperative are further reflected in the minutes of the weekly, or more frequent meetings, at which members of the Executive Committee of Central discuss prices and sometimes other terms and conditions of sale. These "minutes" are usually the handwritten notes kept by the chairman. (Stip. ¶ 13)

35. The "minutes" which are in the record show that during 1973 the Executive Committee took the following actions to establish ceiling prices: [21]

May 9, 1973	\$6.00 ceiling	in effect May 9-12
May 11, 1973	\$6.00 ceiling	in effect until May 18
May 25, 1973	\$7.00 ceiling	in effect May 28-June 1
May 30, 1973	\$7.00 ceiling	in effect through June 6
August 3, 1973	\$5.00 ceiling	in effect until August 8
August 29, 1973	\$2.75 ceiling	in effect until September 1
August 31, 1973	\$3.00 ceiling	in effect until September 5
September 5, 1973	\$3.00 ceiling	in effect September 6-12
September 12, 1973	\$3.00 ceiling	in effect September 13-19

(Stip. ¶13; Ex. D, pp.3, 6, 8, 10, 24, 30, 31, 32, 35)

36. The "minutes" of the Executive Committee meetings for 1973 reflect only one decision to establish a price range. At the meeting of August 6, 1973, the Executive Committee voted to establish a maximum price of \$2.50 and a minimum price of \$1.75 to remain in effect until August 10. (Stip. ¶ 13; Ex. D, p. 25)

37. During 1973, the 22 members of Central shipped over 20 million cartons or over 60 percent of the lettuce originating from the Salinas-Watsonville-King City shipping point. During calendar year 1973, approximately 77,678,000 cartons of lettuce were shipped from all California areas during all seasons and total U.S. shipments covering all U.S. areas and seasons were approximately 110,622,000 cartons. (Stip. ¶ 23)

38. The lettuce produced by the 22 members of Central is shipped

in interstate commerce generally, on a day-to-day basis, from approximately mid-April to mid-October (the Salinas-Watsonville-King City season). (Stip. ¶ 10)

39. All 22 respondent members of Central sold lettuce pursuant to the policies of Central as set forth in Sections 2E to 2J of the CMA and as further implemented by votes of the Executive Committee. (See, Finding 25; Stip. ¶ 18; Ex. A, pp. 2-3) [22]

JII

DISCUSSION

This case has been submitted on cross-motions for summary decision under Section 3.24 of the Commission's Rules. All of the major facts have been stipulated, and complaint counsel do not contest certain additional facts as stated in two supporting affidavits filed by respondents. Since there is no dispute as to any material question of fact, I have decided, as a matter of law, that summary decision sustaining the complaint is justified.⁶

The case involves the scope of the so-called agricultural cooperative exemption as it applies to the 22 lettuce growers who, during 1973 and 1974, made up the Central California Lettuce Producers Cooperative (Central).

The exemption derives, initially, from Section 6 of the Clayton Act, which states that nothing in the antitrust laws shall "forbid the existence and operation of * * * agricultural or horticultural organizations, instituted for * * * mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof." Section 6 of the Clayton Act further provides that neither such organizations nor their members "shall be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws."⁷ By its terms, the Section 6 exemption applies only to cooperatives "not having capital stock"; this limitation, however, was removed by enactment of the Capper-Volstead Act of 1922.⁸

[23] Section 1 of Capper-Volstead allows agricultural producers to "act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market,

⁶ The Supreme Court has said that antitrust cases usually are not susceptible to disposition by summary judgment under Rule 56 of the Federal Rules of Civil Procedure, *Poller v. Columbia Broadcasting System Inc.*, 368 U.S. 464 (1962); there is no reason, however, for denying summary decision in an antitrust case where the main facts have been stipulated, and particularly, where the controlling issue is one of jurisdiction. See, Gellhorn and Robinson, *Summary Judgment In Administrative Adjudication*, 84 Harv. L. Rev. 612, 626-628 (1971).

⁷ 38 Stat. 731 (1914), 15 U.S.C. 17.

⁸ 42 Stat. 388 (1922), 7 U.S.C. 291-292.

handling, and marketing" their products. Section 1 also provides that "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" Section 2 of the Act authorizes the Secretary of Agriculture to issue cease and desist orders if he finds that a cooperative monopolizes or restrains trade "to such an extent that the price of any agricultural product is unduly enhanced by reason thereof."

Central is not a stock corporation,⁹ and respondents claim the agricultural exemptions under both the Clayton Act and the Capper-Volstead Act.¹⁰ While the right of farmers to organize into cooperatives derives from both Acts, it has been held that Capper-Volstead clarifies the exemption,¹¹ and a specific practice must be sanctioned by Capper-Volstead since the "full effect" of the Clayton Act is to allow the creation of an agricultural cooperative without triggering the antitrust laws by reason of the mere existence of the cooperative.¹² [24] Therefore, in resolving the ultimate issue in this case — whether Central was legally engaged in "collectively marketing" as that term is used in Capper-Volstead or engaged in illegal price-fixing — I assume that the latter is not a "legitimate object" of Clayton 6, while the former is. In short, the Clayton Act adds no additional substantive breath to the claimed exemption, and respondents' cause must rise or fall with the Capper-Volstead Act.

In this case the Capper-Volstead exemption is claimed by 22 lettuce growers in the Salinas-Watsonville-King City area who created Central because they were concerned about certain industry conditions and competitive practices which tended to depress prices.¹³ Dealing with a highly perishable commodity which had to be harvested within three or four days after it ripens, and is usually sold on the same day as it is harvested, lettuce was being marketed by some growers at distress prices while other growers were consigning lettuce to Eastern markets in the form of so-called "unsold rollers."¹⁴ The existence of such surplus lettuce had the effect of bringing prices down to the point that the industry as a whole operated at a loss for periods of two years or more.¹⁵ The stipulation describes the background of Central as follows:

To the extent that there exists any substantial volume of no-bills, rollers, and

⁹ Finding 2.

¹⁰ As well as the Cooperative Marketing Act of 1926, see Footnote 24, *infra*.

¹¹ *Case-Swayne Co., Inc. v. Sunkist Growers, Inc.*, 389 U.S. 384 (1967). See also, *Sunkist v. Winckler & Smith Co.*, 370 U.S. 19 at 28 (1962) ("The Capper-Volstead Act set out this immunity [*i.e.*, Clayton 6] in greater specificity").

¹² *Maryland and Virginia Milk Producers Assn. v. United States*, 362 U.S. 458, 465-466 (1960).

¹³ Findings 4 to 20.

¹⁴ Findings 5, 6, 7, 11, 13, 14, 15, 20.

¹⁵ Findings 15, 16.

distress consignments, this tends to depress the market since such consignments are surplus at the going prices.¹⁶

* * * * *

Traditionally, the industry has been characterized by considerable price uncertainty. Because of the perishable character of lettuce and the huge volumes that must be moved to market in a brief period of time. Supplies are highly variable, not only from area to area and from season to season, but also from year to year. Both the [25] vagaries of weather and the uncoordinated production of many growers may result in sudden shortages or unanticipated surpluses.¹⁷

* * * * *

With the industry subject to so many variables on both the supply side and the demand side, prices tend to fluctuate widely and wildly. Prices may drop or rise by as much as 300% in a weekly time — from \$5.50 to \$1.50 or the converse.¹⁸

The stipulation also shows that some producers, by reason of long-range corporate planning, were able to overcome the financial strain of short-term price uncertainty but others, apparently, were not.¹⁹ And obviously, *all* would have preferred not to have to confront competitive conditions which tend to depress prices. Taking what Central actually did (eliminate “rollers,” and set a range of prices or a ceiling price)²⁰ and in the light of the background described above, a fair conclusion from the stipulation is that Central was put together mainly to stop distress selling, to get higher prices, and thereby to improve profits; its members assuming that regulation of pricing and elimination of price cutting in order to accomplish these ends was permissible conduct under the limited antitrust exemption recognized by the Capper-Volstead Act. Unquestionably, if there is no exemption in this case, the members and Central are guilty of illegal price-fixing under *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

To qualify for the exemption, an agricultural cooperative must meet the following structural requirements: (1) It must be an association of agricultural producers — *i.e.*, actual farmers, not middlemen; (2) It must operate on a nonprofit basis; (3) It must [26] operate for the mutual benefit of its members; (4) It must not deal in a greater dollar volume of nonmembers' products than the value of products handled by it for members; (5) It must conduct its business either on a one member, one vote basis, or not pay dividends on capital in excess of 8 percent per year.

¹⁶ Finding 15.

¹⁷ Finding 17.

¹⁸ Finding 19.

¹⁹ Finding 16.

²⁰ Findings 25, 29, 31, 32, 33, 35, 36, 39.

Complaint counsel do not challenge the organizational basis of Central, and I conclude that Central did, indeed, meet all structural requirements.²¹ But consideration of the Capper-Volstead Act exemption only begins with these conditions. Before the exemption can be claimed, it must be shown that the cooperative was engaged in “collectively processing, preparing for market, handling and *marketing* in interstate and foreign commerce, such products of persons so engaged [*i.e.*, the products of the farmer members].”

Respondents contend that given the fact that Central was properly organized, they come within the Capper-Volstead exemption because the weekly meeting for the purpose of setting a ceiling price or a range of prices or to eliminate “distress” practices is a proper collective marketing function of a legitimately structured Capper-Volstead cooperative. Complaint counsel, on the other hand, say that there is no exemption because Central does not engage in any legitimate form of collective marketing and, therefore, the meetings constituted illegal price fixing.

The meaning of the term “collectively marketing” is the key issue here because clearly Central does not perform any of the *other* legitimate functions of a Capper-Volstead cooperative; that is, it does no collective “processing,” “preparing for market,” or “handling.” By this I mean, that Central does not negotiate with buyers of lettuce nor does it enter into agreements with buyers of lettuce for the sale or shipment of produce.²² Central does not employ any sales personnel in its own name nor does it have receipts from the sale of lettuce. Central does not grow, harvest, or ship lettuce in its own name.²³ [27] All that Central does, that is of any significance to this case, is to serve as a meeting ground for the lettuce producers to come together and agree on pricing policy.²⁴ After these price discussions, and on the basis of the pricing policies established at the meetings, each individual member of Central negotiates with buyers for the sale of the lettuce produced by it.²⁵ Payment for the lettuce is billed and collected by the individual member for its own account.²⁶ Given these facts, as I indicated above, the area of dispute in this case is whether

²¹ See also, Findings 22, 27.

²² Finding 22.

²³ Finding 22.

²⁴ Central carries out some informational and educational functions, but these are clearly secondary to its main pricing function. Moreover, the stipulation shows that even prior to the formation of Central there was no shortage of accurate information available on all aspects of lettuce growing and marketing (Finding 10). I am willing to assume, however, that whatever Central did in a purely educational or informational vein was sanctioned by the Cooperative Marketing Act of 1926, 44 Stat. 803, 7 U.S.C. 455, *et seq.*, which provides that agricultural producers and their associations may acquire and exchange “past, present and prospective crop, market, statistical, economic, and other similar information” directly or through an agent. By its terms, an act which allows the exchange of information so that farmers can compete more effectively, does not sanction a price-fixing agreement.

²⁵ Finding 24.

²⁶ Finding 24.

Central engages in the *kind* of activity which comes within the meaning of the Capper-Volstead term "collectively marketing."

[28] The meaning of "collectively marketing" in an agricultural cooperative context was recently treated at length in *Treasure Valley Potato Bargaining Association v. Ore-Ida Foods, Inc.*, 497 F.2d 203 (9th Cir. 1974), *rev. denied* by Supreme Court, 43 Law Week 3274 (reported, 11-12-74). There the argument was made that "bargaining associations" had no antitrust exemption because they did not sell the potatoes grown by the members and, therefore, they did not "collectively market." The Court of Appeals rejected this argument and upheld the exemption claim on the grounds that the cooperatives were indeed "marketing." The Circuit Court said:

The two associations were in fact "bargaining" associations. They were named "Malheur Potato Bargaining Association" and "Treasure Valley Potato Bargaining Association." (Emphasis added.) Their principal function was to bargain collectively for their respective members as to prices, terms and conditions of pre-season potato contracts. They "coordinated their bargaining efforts" and tacitly attempted to secure similar contracts from both associations so that their members would be treated similarly regardless of the defendant-processor to whom they sold their potatoes.

True, the associations did not collectively *process, prepare for market, handle* or actually sell potatoes. But Section 1 of the Capper-Volstead Act further authorizes "Persons engaged in the production of agricultural products as farmers . . . [to] act together in associations . . . in collectively . . . marketing in interstate and foreign commerce, such products of persons so engaged . . . and have marketing agencies in common; . . ."

The activities of the two associations came within the word *marketing*. Each association acted and bargained for its members in negotiating contracts for the sale of potatoes by its members. [29] It was such bargaining activity, and particularly the practice of one association following the lead of the other, and attempting to secure for its members the same price obtained by the other association in its first contract with Ore-Ida and Simplot, that was the basis for defendants' (cross-appellants') contention of antitrust violations.

We think the term *marketing* is far broader than the word *sell*. A common definition of "marketing" is this: "The aggregate of functions involved in transferring title and in moving goods from producer to consumer, including among others buying, selling, storing, transporting, standardizing, financing, risk bearing, and supplying market information." *Webster's New Collegiate Dictionary*, 1953 Edition. [Emphasis added.] The associations here were engaged in bargaining for the sales to be made by their individual members. This necessarily requires supplying market information and performing other acts that are part of the aggregate of functions involved in the transferring of title to the potatoes. The associations were thus clearly performing "marketing" functions within the plain meaning of the term. We see no reason to give that word a special meaning within the context of the Capper-Volstead Act.²⁷

²⁷ 497 F.2d 203, at 215 (all emphasis supplied by Court). There is a separate question in *Treasure Valley* of the legality of an inter-cooperative agreement (i.e., between Malheur and Treasure). The court disposed of that issue by saying that since Capper-Volstead allows associations to have common marketing agencies, it follows that without

(Continued)

[30] *Treasure Valley* held that a bargaining cooperative need not sell the produce of its members, but there was no issue there whether a mere agreement about prices without any other cooperative activity (i.e., not even collective "bargaining") vis-a-vis the "outside world" is "collectively marketing" within the statutory meaning. Consequently, I believe that *Treasure Valley* left open the question of whether there is a real distinction between (a) the cooperative that bargains with buyers for a price for its members (undoubtedly on the basis of discussions amongst the members about a desirable selling price) and (b) a cooperative which serves as a forum for the members to agree on prices and then lets its members do the actual selling, as in the instant case.

In dealing with the problem of whether the policy behind the exemption logically compels a distinction between these two ways of doing business, I start with the proposition that Capper-Volstead, like any other limited antitrust exemption, is to be construed in the light of the national economic policy as reflected in the antitrust laws. With respect to this policy, the Supreme Court has said:

[The antitrust laws were] designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. . . . [They] rest on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.²⁸

When it is said, therefore, that exemptions like Capper-Volstead are to be *narrowly* read, this means that every effort must be made to harmonize the exemption with the basic national economic policy of encouraging "interaction of competitive forces." Precedent indicates that this standard is to be met by not going beyond what is reasonably [31] necessary to serve whatever *other* Congressionally-mandated policies are inherent in the exemption itself, while at the same time preserving to the fullest extent possible the basic policy of competition.²⁹

such a separate agency, the associations may act together under the principle that if the act of the agent is lawful, the same act performed by the principal is also lawful. *Id.* at 214. The court, however, did not say that either the existence or nonexistence of a common marketing agency between cooperatives has any bearing on the legality of the activity of the individual cooperatives. On that issue, the court went into a long discussion of what is "collectively marketing" by a single cooperative. In this case, contrary to respondent's argument, there is no issue of a common marketing agency as between cooperatives. The main issue here is analagous to the second part of *Treasure Valley* — i.e., does Central, as an individual cooperative, engage in the kind of activity which is exempt by Capper-Volstead?

²⁸ *Northern Pacific Railway Co., et al. v. United States*, 356 U.S. 1, at 4 (1958).

²⁹ "It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible. . . . The intention of the legislature to repeal 'must be clear and manifest' . . . There must be a positive repugnance between the provisions of the new law, and those of the old; and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy." *United States v. Borden Co.*, 308 U.S. 188, at 198-199 (1939). See, also, *Federal Maritime Commission v. Seatrain Lines, Inc.*,

(Continued)

In this instance, the exemption, reflects a Congressionally-mandated policy of permitting relief of a certain kind to farmers who face the disadvantages (and, presumably, the low prices) which result from being small, disorganized, scattered, subject to the vagaries of the weather, and in many other respects, largely the victims of contingencies beyond their control.³⁰ Relief, insofar as Capper-Volstead is concerned,³¹ was to be granted in the form of allowing a pooling of resources into a single democratically-functioning "corporate" entity which was to meet in [32] open market and bargain with large buyers.³² Viewed in the light of our basic economic policy, the purpose of Capper-Volstead, then, was to allow the creation of an organizational unit which could *compete* effectively in the market and have its prices determined by equality, or near equality, of strength rather than by the autocratic power of oligopsonists. As Congressman Volstead said,

The farmers are not asking a chance to oppress the public, but insist that they should be given a fair opportunity to meet business conditions as they exist — a condition that is very unfair under the present law. Whenever a farmer seeks to sell his products he meets in the market place the representatives of vast aggregations of organized capital that largely determine the price of his products. Personally he has very little if anything to say about the price. If he seeks to associate himself with his neighbors for the purpose of *collectively negotiating* for a fair price, he is threatened with prosecution [*i.e.*, under the Sherman Act].³³

[33] Against this legislative background, the Ninth Circuit could conclude in *Treasure Valley* that formation of a cooperative bargaining unit was at least not inconsistent with the notion of allowing farmers to join together and form a single bargaining unit as a way of overcoming the imbalance in bargaining power which was said to exist between small, family farmers and corporate middlemen. Here, however, there is no joining together of farmers in any sense contemplated by the act or even within the broad definition of "marketing" advanced by *Treasure Valley*. Instead, a group of

411 U.S. 726 (1973); *Otter Tail Power Co. v. United States*, 410 U.S. 366, at 372-74 (1973); *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963); *Silver v. NYSE*, 373 U.S. 341 (1963); *United States v. McKesson & Robbins*, 351 U.S. 305 (1956).

³⁰ *Tigner v. Texas*, 310 U.S. 141 (1940).

³¹ It must be stressed that we are not dealing here with the *total* agricultural policy of the United States. Capper-Volstead is but a segment of that policy relating to collective marketing as one remedy to some of the farmers' problems. 61 Cong. Rec. 1042 (1921) (remarks of Cong. Sumners). Other facets of that policy — "parity" prices, restrictions on production, marketing agreements, and "soil banks" — indicate no dearth of tools when Congress desires to raise or stabilize prices in ways other than by allowing farmers to negotiate as a group.

³² See, H.R. Report No. 24, 67th Congress, 1st Session (1921); 61 Cong. Rec. 1033 (1921) (remarks of Cong. Volstead); 62 Cong. Rec. 2057 (1922) (remarks of Senator Volstead); Hearings on S. 4344 Before a Subcommittee on the Senate Committee on the Judiciary, 66th Cong., 2nd Sess., at 49 (1920) (remarks of Senator Brandegee).

In the legislative debates there are also references to the prospect of eliminating unnecessary middlemen entirely, by encouraging farmers, through their collective marketing efforts, to sell directly to consumers, 62 Cong. Rec. 2255 (1922) (remarks of Senator Norris).

³³ H.R. Report No. 24, 67th Congress, 1st Session (1921), at p. 2. [Emphasis added.]

growers simply put into effect a plan to manipulate the market price and then go their separate ways.

The fact that they do go their separate ways (after first agreeing on price) contradicts the basic assumption of the exemption — namely, that farmers are to be allowed to band together to redress a presumed imbalance in bargaining strength. Nowhere in the legislative history of the Act is there a suggestion that farmers are to be given an exemption to resort to their own devices and to make whatever agreements or arrangements they may wish to inflict on a substantial part of commerce.³⁴ Such an interpretation of the exemption would not only bring it into direct conflict with our basic economic policy, but it would be contrary to the legislative goal of allowing farmers to unite into single bargaining units for the purpose of *counteracting* price-fixing by handlers and middlemen. To this effect, in *Liberty Warehouse Co. v. Burley Tobacco Growers' Co-Operative Marketing Association*, 276 U.S. 71 (1928), the Supreme Court quoted with approval the opinion of the Kentucky Supreme Court upholding the Bingham Act [Kentucky Co-operative Incorporating Statute]:

We take judicial knowledge of the history of the country and of current events and from that source we know that conditions at the time of the enactment of the Bingham Act were such that the agricultural producer was at the mercy of speculators and others *who fixed the price of the selling producer and the final consumer through combinations and other arrangements, [34] whether valid or invalid*, and that by reason thereof the former obtained a grossly inadequate price for his products. So much so was that the case that the intermediate handlers between the producer and the final consumer injuriously operated upon both classes and fattened and flourished at their expense. It was and is also a well known fact that without the agricultural producer society could not exist and the oppression brought about in the manner indicated was driving him from his farm thereby creating a condition fully justifying an exception in his case from any provision of the common law, and likewise justifying legislative action in the exercise of its police power.³⁵

Legislatures, in short, knew too well the evils which had resulted from fixing the price of farm produce by powerful middlemen, and it is untenable that they would entrust to *either* party to the transaction — a cooperative of selling producers or a combine of buyers — power to fix market prices to the possible detriment of the consuming public. Indeed, both the limited state and Federal exemptions to the antitrust laws which were given to farmers were based on the assumption that combinations of farmers would *not* subject the general public to monopolistic or restrictive practices. In *Tigner v. Texas*, the Supreme Court said:

³⁴ See, Findings 37, 38.

³⁵ 276 U.S. 71, at 93. [Emphasis added.]

Farmers were widely scattered and inured to habits of individualism, their economic fate was in large measure dependent upon contingencies beyond their control. In these circumstances, legislators may well have thought combinations of farmers and stockmen presented no threat to the community, or, at least, the threat was of a different order from that arising through combinations of industrialists and middlemen.³⁶

[35] Not only were the cooperatives not considered a "threat" to the community, they were looked on, as I indicated above, as a way of *promoting* competition. The House Report by Congressman Volstead on the exemption legislation declares:

it is not sought to place these associations above the law [Sherman Act] but to grant them the same immunity from prosecution that corporations now enjoy [i.e., in terms of allowing the existence of corporate organizations] so that they may be able to do business successfully *in competition* with them.³⁷

Manifestly, there was no purpose in Capper-Volstead to make the national economic policy as reflected in the antitrust laws inapplicable to the farm industry; the purpose was to assure fair and vigorous competition where formerly one side — the buyers — were able to dictate terms. Consistent with the objective of fair competition and the limited means chosen to accomplish that objective — i.e., allowing farmers an exemption to organize and then to sell or bargain as one unit — the courts have uniformly said that *certain* cooperative activity does not conform with this legislative plan however organizationally "pure" the cooperative may be, and no matter how directly the questioned activity relates to the ultimate price to be realized by the farmers. Thus, in *United States v. Borden*, the Supreme Court held that the Pure Milk Association, a milk producers cooperative, had engaged in a criminal violation of Section 1 of the Sherman Act when it conspired with milk distributors to fix and maintain uniform and noncompetitive milk prices in the Chicago area. While affirming the right of agricultural producers "to unite in preparing for market and marketing their products," the Supreme Court said that the Capper-Volstead Act does not "authorize any

³⁶ 310 U.S. 141 at 145 (1940). In the Congressional debates on Capper-Volstead, the threat of a farm monopoly was rejected ("In the case of the farmer it is impossible for him through these farm organizations and under this bill to create a trust or monopoly such as is contemplated by antitrust laws" 61 Cong. Rec. 1044 (1921) (remarks of Cong. Hersey)). See also, 62 Cong. Rec. 2053 (1922) (remarks of Senator Kellogg) and 62 Cong. Rec. 2059 (1922), where Senator Capper said, "... a farmer's monopoly is impossible. If the cooperative marketing association makes its price too high, the result is inevitable self-destruction by overproduction in the following years."

³⁷ H.R. Report No. 24, 67th Cong., 1st Session (1921), at p. 3. [Emphasis added.] There is other internal evidence in the Act that Congress did not intend to give farmers the power to fix market prices "... in restricting membership to producers. Congress also intended to limit in a rough way the amount of market power which could be controlled by such organizations." *Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384 at 398-399 (opinion of Mr. Justice Harlan, concurring and dissenting).

combination or conspiracy with other persons in restraint of trade that these producers may see fit to devise.”³⁸ It is particularly significant [36] that in *Borden*, the Court said that it was unable to accept the view of the district court which had held that the Act “legalizes price-fixing for those within its purview.”³⁹ The Supreme Court stated:

... the conspiracy charged is not that of merely forming a collective association of producers to market their products but a conspiracy, or conspiracies, with major distributors and their allied groups, with labor officials, municipal officials, and others in order to maintain artificial and non-competitive prices to be paid to all producers for all fluid milk produced in Illinois and neighboring States and marketed in the Chicago area, and thus in effect, as the indictment is construed by the court below “to compel independent distributors to exact a like price from their customers” and also to control “the supply of fluid milk permitted to be brought to Chicago.” . . . Such a combined attempt of all the defendants, producers, distributors and their allies, to control the market finds no justification in § 1 of the Capper-Volstead Act.⁴⁰

While it is true that *Borden* involved a conspiracy with “others,” the rationale of the opinion should apply to any attempt by a cooperative to do more (at least with respect to price) than organize and function as a single bargaining unit. In *Maryland and Virginia Milk Producers Assn.*, the Supreme Court, relying on *Borden*, held that even where a cooperative of dairy farmers acts *by itself* it may be found to be in violation of Section 2 of the Sherman Act where it attempts to manipulate the market by such tactics as interfering with truck shipments [37] of nonmembers, and boycotting a dairy’s farm supply store in order to compel it to buy from the cooperative.⁴¹

Addressing the question of the exemption granted by Section 6 of the Clayton Act, the Supreme Court held in *Maryland and Virginia Milk Producers Assn.*:

Thus the full effect of § 6 is that a group of farmers acting together as a single entity in an association cannot be restrained “from lawfully carrying out the legitimate objectives thereof” but the section cannot support the contention that it gives such an entity full freedom to engage in predatory trade practices at will.⁴²

Turning, next, to the scope of Capper-Volstead, the Supreme Court said that the Act was intended to allow individual farmers acting

³⁸ *United States v. Borden Co.*, 308 U.S. 188, at 204 (1939).

³⁹ *Id.* at 205.

⁴⁰ *Id.* at 205 [emphasis added].

⁴¹ *Maryland and Virginia Milk Producers Assn. v. United States*, 362 U.S. 458 (1960). In addition, on the basis of *Maryland and Virginia Milk Producers Assn.*, resale price maintenance or vertical price-fixing is clearly forbidden to cooperatives. *Bergjans Farm Dairy Co. v. Sanitary Milk Producers*, 241 F.Supp. 476 (E.D.Mo. 1965), *aff’d*, 368 F.2d 679.

⁴² *Id.* at 465-466.

through cooperatives the same competitive advantages as other forms of corporations, but "the Act did not leave the cooperatives free to engage in practices against other persons in order to monopolize trade or restrain and suppress competition with the cooperative."

By the same token, where there is no more than an agreement by farmers to fix the market price, I believe this is, in the words of *Maryland and Virginia Milk Assn.*, an attempt to "restrain and suppress competition." It is not "collectively marketing" as that term is used in *Capper-Volstead*, because the term cannot be read to exceed the legislative purpose — to allow farmers to join together and bargain as one. There was no legislative purpose to sanction a market-rigging private price arrangement of the kind involved in this case.

[38] Apparently this case presents a new question on which no Federal court has had an opportunity to rule one way or the other — that is, whether internal price-fixing by farmers in the absence of any other collective marketing activities is exempt under *Capper-Volstead*. As far as I know, there is only one Federal case which has plainly held that the Clayton Act and the *Capper-Volstead* Act exempt a naked price-fixing agreement as between otherwise legitimately functioning cooperatives. This was *United States v. Maryland Cooperative Milk Producers, Inc.*, 145 F.Supp. 151 (D.C.D.C. 1956), a conspiracy involving two cooperatives who were fixing prices to the Army at Fort Meade.⁴³ Because the Government lost *Maryland Cooperative*, it could not appeal, but it is hardly reliable authority considering the fact that the district court which decided the case was the same court which rendered the lower court opinion in *United States v. Maryland and Virginia Milk Producers Ass'n*, 167 F.Supp. 45 (D.C.D.C. 1958). In both Maryland milk cases, the lower court opinions are based on the view that cooperatives were totally immune from the Sherman Act in the absence of any conspiracy with other persons. The second Maryland milk case, however, was appealable, and this theory of total immunity was totally rejected in *Maryland and Virginia Milk Producers Assn. v. United States*, 362 U.S. 458 (1960). Moreover, in *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962), where the Supreme Court was presented with the opportunity to apply the total immunity concept to an inter-cooperative agreement, it did not cite the reasoning of *Maryland Cooperative* and said, instead, that

⁴³ While *Maryland Cooperative* contains expansive language about the immunity for price-fixing by cooperatives, the case is not squarely in point since the district court relied, at least in part, on the language in Section 1 of *Capper-Volstead* relating to common marketing agencies as between cooperatives. 145 F.Supp. 151 at 154-55. See, also, Footnote 27, *supra*.

because all the cooperatives involved were part of Sunkist, their existence as separate corporations had no economic significance.

[39] In reaching the conclusion that I have — to sustain complaint counsel's Motion for Summary Decision — I necessarily conclude that it is irrelevant that the lettuce growers usually agree on a ceiling price only (although at least once they set a floor, too) and that in evidentiary hearings it might develop that there may have been some instances where some growers sold below the "lid" (*i.e.*, ceiling price), and that the lid, itself may on occasion be less than "going" market price.⁴⁴ Since the 22 lettuce growers do not have an exemption, they come within *Trenton Potteries*:

The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed.⁴⁵

There are several additional points which must be considered. First, the argument has been made that where a group of farmers operating under the cover of the cooperative exemption fixes market prices, the sole remedy contemplated by Congress is for the Secretary of Agriculture to convene a proceeding under Section 2 of the Capper-Volstead Act and determine whether the market price has been "unduly enhanced."⁴⁶ The Supreme Court, however, has plainly held in *Borden* that the powers given the Secretary of Agriculture are merely "auxiliary" and that the "procedure for which § 2 [of Capper-Volstead] provides is not to be deemed to be designed to take the place of or to postpone or prevent, prosecution under § 1 of the Sherman Act for the purpose of punishing such conspiracies."⁴⁷ Since Section 5 of the Federal Trade Commission Act minimally registers all Sherman Act violations, *FTC v. Cement Institute*, 333 U.S. 683 (1948), the Commission, like [40] the Justice Department, is not precluded from challenging an illegal price-fixing conspiracy which could lead to unduly enhanced prices.

Second, respondents argue that the Commission's own interpretation of another exemption — the Webb-Pomerene Act, 40 Stat. 517 (1918), 15 U.S.C. 62 — allows exporters to agree on a price and then sell individually. Such an interpretation, of course, would be perfectly consistent with the Congressional purpose of Webb-Pomerene of depriving foreign buyers of the benefits of competition among

⁴⁴ Supplemental Affidavit of Henry Franta in Support of Respondents' Motion for Summary Decision (January 27, 1975) and Proposed Finding 34 of Respondents' Proposed Findings of Fact and Conclusions of Law (February 21, 1975).

⁴⁵ *United States v. Trenton Potteries Co.*, 273 U.S. 392, at 397 (1927).

⁴⁶ The Secretary of Agriculture has never issued an order under Section 2 of Capper-Volstead.

⁴⁷ 308 U.S. 188, at 205-206 (1939).

American firms, without in any significant way depriving American consumers of the advantages of competition. *United States v. Concentrated Phosphate Export Assn., Inc., et al.*, 393 U.S. 199 (1968). There is nothing in Capper-Volstead which suggests that Congress intended that farmers be allowed the same rights as exporters or that domestic consumers of farm produce were to be treated under the same competitive standards as the foreign businessmen.

Finally, while I am convinced that a price-fixing agreement standing alone is not condoned by the strict interpretation of Capper-Volstead which I have followed,⁴⁸ the dilemma posed by this case, is that the legal alternative to illegal price-fixing may create still additional problems for consumers. By the terms of the "Notice Order" filed with this complaint, respondents are not precluded from forming a cooperative which either acquires and bargains to sell the entire production of its members, or merely bargains for the members in the open market on the basis of prices agreed to by the members.⁴⁹ [41] Should the lettuce growers decide to form such a cooperative, the assumption of the Act is that with the imbalance in the bargaining strength of sellers and buyers having been redressed, the ultimate price will be determined on the basis of ordinary give-and-take of the market. The legislative judgment behind that assumption may have been proven faulty with the passage of time and the emergence of selling cooperatives which may have significant market power.⁵⁰ What is especially troublesome to me is that the market price which may be commanded by a cooperative which bargains on the basis of one man control over 60 percent of production may be more inflexible than the price fixed internally on 60 percent of production with the understanding that each member of the conspiracy will sell on its own. A firm held by one bargaining agent on 60 percent of production may be infinitely more difficult to break than a conspiracy of 22 independent sellers who eventually can be expected to "cheat" or "shade" on the price-fixed terms.

Notwithstanding the *possibility* that an even more restrictive cooperative may be formed by the lettuce producers, I believe an order disbanding Central as it is presently constituted — *i.e.*, as a mere forum for price-fixing — is appropriate. There is some evidence

⁴⁸ See text at Footnotes 28-29, *supra*. See also, *Case-Swayne Co. v. Sunkist Growers*, 389 U.S. 384, at 393 (1967) ("We deal here with 'special exceptions to a general legislative plan' . . . (§ 6 of the Clayton Act), and therefore we are not justified in expanding the Act's coverage . . .").

⁴⁹ Such an agreement among the members setting the cooperative's own selling or bargaining price is clearly not illegal price-fixing. *Maryland and Virginia Milk Producers Assn. v. United States*, 362 U.S. 458, 468; *Treasure Valley Bargaining Assn. v. Ore-Ida*, 497 F.2d 203 (9th Cir. 1974).

⁵⁰ See Testimony of Thomas E. Kauper, *Hearings Before The Subcommittee On Monopolies and Commercial Law Of The House Comm. On The Judiciary*, 93rd Cong., 1st Sess., ser. 15, at 4 (1973). Mr. Kauper's views were sharply challenged by the National Council of Farmer Cooperatives. *Id.* at 576.

that its members neither wanted, needed, nor will they claim the advantages of selling or bargaining as one — the *only* advantage allowed under the exemption. The stipulated facts are (1) that there are established relationships between certain growers and certain wholesalers, and (2) that through the use of individual labels some growers have been able to establish some measure of trade recognition for quality.⁵¹ The producers of these [42] more highly regarded labels, particularly those with established relationships, may see very little advantage in being lumped together with their less efficient neighbors. In other words, it may turn out that *all* that the lettuce producers *ever* wanted from their neighbors was an agreement to eliminate some distressful pricing practices, and that, in fact, some, if not all of the growers, *prefer* to confront the market alone. As I indicated above, where the method of operation demonstrates no need (or, for that matter, desire) to bargain collectively, there is no exemption. From the stipulated facts, one cannot tell how important these non-price factors are, and what alternative course the members may pursue if they are not allowed to get together solely to fix prices. In any event, the antitrust laws do not permit a price-fixing conspiracy to remain in effect because of the mere possibility that the price-fixers may attempt to exploit whatever legal loopholes now exist in an antitrust exemption.

The long-range solution, of course, is that the consuming public should not have to face the Hobson's choice between a group of farmers who fix prices illegally and a cooperative which legally sets its own price and then may "fix" it on the basis of significant market power.

In sum, perhaps Congress should be told that the major assumptions underlying the exemption, itself, are now open to serious question because (1) the exemption is being claimed by giant agribusinesses, like United Brands in this case, which have resources that are far different from those of the small family farmers who were Congress' concern in 1922;⁵² and (2) that despite [43] the regulatory safety-valve contemplated by Section 2 of the Act, the exemption may fall into the hands of cooperatives who may have

⁵¹ Finding 9.

⁵² While the legislative history shows that the purpose of the Capper-Volstead Act was to redress the imbalance which existed between the relatively powerless individuals who toil the land and large marketing corporations, nevertheless, the Supreme Court has not denied the exemption when some of the producers were corporate farmers. In *Case-Swayne Co. v. Sunkist Growers*, 389 U.S. 384 (1967), the Supreme Court notes, without additional comment, the presence of "corporate growers" and it addresses itself, instead, to the antitrust consequences of membership in the association of nongrower packing houses. *Id.* at 387.

Apparently no decided case has directly dealt with the issue of whether giant corporate agribusinesses, like United Brands, are even eligible for an exemption which assumes a lack of bargaining strength due to size. In any event, I do not presume to perform the legislative function of reading a "dollar" or "size" limit into a statute where none exists, and the size of some of the members of Central has not been a consideration in this decision.

enough market power to set prices in much the same anticompetitive ways as combines of middlemen.

IV

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction in this matter because (a) the action is in the public interest; (b) respondents are engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act,⁵³ and (c) respondents have no exemption from Section 5 of the Federal Trade Commission Act.

2. The antitrust exemption for agricultural producers conferred by Section 6 of the Clayton Act and the Capper-Volstead Act is a limited exemption, providing only that agricultural producers may organize together in associations to collectively process, prepare for market, handle and market their agricultural products.

3. A cooperative association which does not have any contacts with the outside commercial world, and which, specifically, does not grow, harvest, ship, sell, bargain or compete for the sale of any agricultural products and merely serves as a forum for a price-fixing agreement does not engage in collective processing, preparing for market, handling and marketing as those terms are used in the Capper-Volstead Act.

[44] 4. Central California Lettuce Producers Cooperative (Central) does not engage in the collective processing, preparing for market, handling and marketing of the agricultural products of its members and it is not permitted by virtue of Section 6 of the Clayton Act and the Capper-Volstead Act to serve as a forum in which its individual members agree to fix the prices at which the individual members will sell their lettuce.

5. The individually named respondents and Central conspired together to fix the prices at which each respondent member of Central would sell lettuce at the Salinas-Watsonville-King City shipping point, and each respondent member of Central, during the period of the complaint, did sell lettuce at prices agreed upon under the auspices of Central, which activities constitute a violation of Section 5 of the Federal Trade Commission Act.

Accordingly, complaint counsel's motion for summary decision is granted, and the following order will be issued:

⁵³ Central is engaged in commerce by reason of the fact that it is used by interstate sellers as an instrumentality of fixing interstate prices. See, *FTC v. Cement Institute*, 333 U.S. 683 (1948).

ORDER

It is ordered, That respondent Central California Lettuce Producers Cooperative and the respondent marketers,⁵⁴ individually and collectively:

[45] 1. Cease and desist from entering into any agreement, understanding or course of dealing between any respondent marketer and any other marketers of fresh produce, including other respondent marketers, as to factors which may affect the prices, the price ranges, price ceilings, or price floors at which any respondent marketer and any other marketers of fresh produce, including other respondent marketers, individually sell or offer to sell their fresh produce.

2. Cease and desist from the adherence, in any manner, by any respondent marketer to any agreement, understanding or course of dealing as to factors which may affect the prices, the price ranges, the price ceilings, or price floors at which any respondent marketer and any other marketers of fresh produce, including other respondent marketers, individually sell or offer to sell their fresh produce.

It is further ordered, That respondent Central California Lettuce Producers Cooperative be dissolved, and that respondent marketers cease and desist from the formation of any association, or the joining of any association, among whose purposes or activities are the discussion of or agreement on factors which may affect the prices, price ranges, price ceilings, or price floors [46] at which members of such association individually sell their fresh produce.

It is further ordered, That respondent marketers deliver a copy of this Order to all present and future personnel of said respondent engaged in the offering for sale, or sale of fresh produce.

It is further ordered, That respondent marketers notify the Commission at least thirty (30) days prior to any proposed change in said respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in said respondents which may affect compliance obligations arising out of this order.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

⁵⁴ Admiral Packing Company; Albert C. Hansen d/b/a Hansen Farms; California Coastal Farms, Inc.; Carl Joseph Maggio, Inc.; D'Arrigo Bros. Co. of California; Eckel Produce Co.; Green Valley Produce Co-op; Growers Exchange, Inc.; Harden Farms of California; J. R. Norton Co.; Jack T. Baillie Co., Inc.; Let-Us-Pak; Merit Packing Co.; Merrill Farms; Pacific Lettuce; R. T. Englund Co.; Royal Packing Co.; Salinas Lettuce Farmers Cooperative; Salinas Marketing Cooperative; The Garin Co.; United Brands Company; and West Coast Farms.

OPINION OF THE COMMISSION

BY COLLIER, *Commissioner*:

[2] The complaint in this matter was issued on June 10, 1974, charging Central California Lettuce Producers Cooperative, a corporation ("Central"), and 22 of Central's members, with violating Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) by illegally agreeing among themselves on the prices at which Central's members would sell the lettuce they produce.

[3] On the basis of a stipulated factual record, Administrative Law Judge ("ALJ") Morton Needelman entered an initial decision on March 13, 1975, sustaining the allegations of the complaint and recommending the issuance of an order to cease and desist. The respondents appealed to the Commission. Argument on the appeal was heard on October 1, 1975; the Commission ordered reargument, which was heard on June 30, 1976.

The facts are undisputed. Central was incorporated on June 8, 1972, as a nonprofit cooperative association without capital stock under California law (I.D. 2),¹ and began operating in May of the following year after signing an identical "Cooperative Marketing Agreement" ("CMA") with each of the 22 other respondents (I.D. 3). During 1973, Central's members shipped over 20 million cartons of lettuce out of a total of approximately 77,678,000 cartons shipped from all California areas, and approximately 110,622,000 from all areas in the United States (I.D. 37).

Central neither grows, harvests nor ships lettuce in its own name. Central does not negotiate directly with lettuce buyers and does not enter directly into sales agreements with buyers. It has no sales personnel in its own name, and no receipts from lettuce sales (I.D. 22). Rather, each member enters into separate arrangements with buyers for the sale of his own lettuce. Members sell under their own trade names (although they stamp Central's name on their cartons as well). Since lettuce produced in different fields by different growers at different times commands different prices (I.D. 8) the members compete among themselves for the same customers, and each member bills and collects its own accounts (I.D. 24).

"All that Central does, that is of any significance to this case," the ALJ concluded, "is to serve as a meeting ground for the lettuce producers to come together and agree on pricing policy." (I.D. p. 27). Under the terms of the CMA, Central's members bind themselves to sell all their lettuce through the cooperative, and only at prices

¹ The following abbreviations are used in this opinion: I.D.—Initial Decision, Finding No. I.D. p.—Initial Decision, Page No. Stip.—Stipulation.

within the limits of ceiling and floor prices set by the cooperative [4] (I.D. 25).² During the 1973 season, Central's Executive Committee (on which each respondent member had a seat) met several times and agreed on ceiling prices for the members' lettuce, although there was only one occasion on which a floor price was set (I.D. 28, 35, 36).

It is clear that the activities of Central and its members violate Section 1 of the Sherman Act (15 U.S.C. 1), and thus Section 5 of the F.T.C. Act, unless the respondents' conduct falls within some exemption to the antitrust laws.³ The respondents claim three separate sources of exemption: Section 6 of the Clayton Act (15 U.S.C. 17), Section 1 of the Capper-Volstead Act (7 U.S.C. 291), and Section 5 of the Cooperative Marketing Act of 1926 (7 U.S.C. 455). Complaint counsel contest Central's eligibility for any of these exemptions. They contend that no ostensible cooperative whose predominant (if not sole) function is to fix the prices at which its individual members sell their products can take advantage of the cooperative exemptions conferred by Congress, however those exemptions are construed.

I. JURISDICTION

Section 2 of the Capper-Volstead Act (7 U.S.C. 292) provides, in pertinent part:

[5] That if the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached, or contained therein, a notice of hearing, specifying a day and place not less than thirty days after the service thereof, requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade. . . .

The respondents argue that Section 2 specifies the exclusive remedy against the antitrust transgressions of cooperatives meeting the criteria of Section 1 of Capper-Volstead. The Supreme Court has squarely rejected this position on two occasions and the Commission has rejected it on a third. *United States v. Borden Co.*, 308 U.S. 188,

² The CMA also bound Central's members to other obligations, including certain uniform terms and conditions of sale, the rendering of crop reports, and steps to reduce the amount of surplus lettuce on the market ("unsold rollers") (I.D. 25). Central performs certain other educational and informational functions.

³ Since complaint counsel not surprisingly relied on well-settled principles of per se illegality, the stipulated record contains no indication of the effects of the respondents' conduct on quantities or prices of lettuce. For example, there is no indication whether any of respondents' lettuce is withheld entirely from the market as a result of establishing prices that are too high to clear the market. Nor is it clear whether stabilization of lettuce prices after the formation of Central was attributable to its activities or whether, if so, it was the result either of Central's pricing policies or Central's efforts to furnish timely information on market conditions to growers (see I.D. 6, 10, 17, 19, 20, 25 B, 33). As explained below, note 20, different questions might be presented if respondents' pricing practices had the effect of imposing production or quality restrictions on lettuce.

205-06 (1939); *Maryland and Virginia Milk Producers Association, Inc. v. U.S.*, 362 U.S. 458, 562-63 (1960); *Washington Crab Association*, 66 F.T.C. 45, 122 (1964).⁴

The respondents attempt to distinguish these cases from their own because Central and its members are charged neither with combining with outsiders nor with predatory practices. We find no support for such a distinction in the reasoning of these authorities, and the respondents fail to offer any reasons of their own for so narrowly confining the clear holdings.

II. CAPPER-VOLSTEAD EXEMPTION

The central question is whether the respondents' conduct is covered by Section 1 of the Capper-Volstead Act which reads, in relevant part, as follows:

That persons engaged in the production of agricultural products as farmer, planters, ranchmen, dairymen, nut or fruit growers 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, [6] 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: . . .⁵

Complaint counsel make two arguments why respondent cannot claim the exemption. First, they argue that a qualifying cooperative must engage in all of these enumerated functions. Concededly, Central does not collectively process, prepare for market, or handle the products of its members. This argument, however, fails to find support in the plain language of the statute. Section 1 of the Capper-Volstead Act enumerates those activities in which a qualifying association "may" engage. It does not, by its terms, constitute a checklist of functions that must be performed. No cases are cited in [7] support of complaint counsel's reading of the statute and, as noted below, Congress has manifested no intent to mandate any particular

⁴ *Marketing Assistance Plan, Inc. v. Associated Milk Producers, Inc.*, 338 F. Supp. 1019, 1024 (S.D. Tex. 1972).

⁵ The rest of Section 1 reads:

Provided, however, That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second. That the association does not pay dividends on stock or membership capital in excess of 8 percentum per annum.

And in any case to the following:

Third. That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members.

Complaint counsel do not contest Central's compliance with these structural requirements.

degree of vertical integration as a precondition to Capper-Volstead immunity.

Complaint counsel's second argument, accepted by the Administrative Law Judge, is that respondent is not engaged in "collectively. . . marketing" within the meaning of the statute. This issue is at the core of the case and warrants more extended treatment.

Legislative History

Because the words of the statute are undefined, a review of its legislative history is in order.

The 1922 Capper-Volstead Act was enacted in response to Congressional concern that Section 6 of the Clayton Act⁶ put undue organizational limitations on the cooperative exemption by denying it to associations either organized for profit or having capital stock. There was also concern that Section 6 failed adequately to protect even those cooperatives which could qualify because the exemption was not clearly stated. Indictments of cooperatives and their members by allegedly overzealous prosecutors were cited in hearings and debate.⁷ Although many of Capper-Volstead's proponents maintained that Section 6 fully shielded the cooperative activities of farmers, they argued that the threat of even unjustified prosecutions deterred cooperative development. Senator Norris said in debate: "They say, 'We will be threatened, and because we have not got it explicitly in black and [8] white the farmers are afraid. The people in the business circulate propaganda and write letters, and so forth, and the farmers are afraid to come in.' So that as a matter of fact as to the great bulk of the producers I am of the opinion that it is more a matter of psychology than anything else. I do not believe they violate the law now when they organize."⁸

In the course of considering the perceived shortcomings of existing law, however, considerable discussion took place on the theory of cooperative organization and how it was expected to improve the lot of the farmer. Two themes predominated. The first was a theory of countervailing power: that farmers should be able to unite to bargain

⁶ That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws. (15 U.S.C. 17).

⁷ 61 Cong. Rec. 1037 (1921) (remarks of Rep. Volstead); 62 Cong. Rec. 2259 (1922) (remarks of Sen. Norris); *Association of Producers of Agricultural Products: Hearing on S. 4344 Before Subcomm. of Senate Judiciary Comm.*, 66th Cong., 2d Sess. 27-28 (1920) (statement of Charles A. Lyman).

⁸ 62 Cong. Rec. 2165 (1922).

effectively with middlemen. The confederation of producers was expected to enable farmers to gain higher prices.⁹ The second theme was the expectation that farmers would use cooperative associations as a vehicle for vertical integration, not only to confront the middleman but to supplant him and deal more directly with consumers. The integrated cooperative was expected to achieve economies by performing processing and distribution functions, and to divide up the savings realized through higher returns to farmers and lower retail prices for consumers.¹⁰

Both themes appear in the House Reports on Capper-Volstead. Rep. Volstead advised the full House:

Whenever a farmer seeks to sell his products he meets in the marketplace the representatives of vast aggregations of organized capital that largely determine the price of his products. Personally he has very little if anything to say about the price. If he seeks to associate himself [9] with his neighbors for the purpose of collectively negotiating for a fair price, he is threatened with prosecution. Many of the corporations with which he is compelled to deal are each composed of from thirty to forty thousand members. These members collectively do business as one person. The officers of the corporation act as agents of these members. This bill, if it becomes a law, will allow farmers to form like associations, the officers of which will act as agents for their members.

* * * * *

While this bill confers on farmers certain privileges, it can not properly be said to be class legislation. Business corporation have under existing law all the powers and privileges sought to be conferred on farm organizations by this bill. Instead of granting a class privilege, it aims to equalize existing privileges by changing the law applicable to ordinary business corporations so farmers can take advantage of it.¹¹

While speaking the language of effective bargaining, however, the report used an illustration of vertical integration: the inability of small, farmer-owned grain elevators to join together and accumulate enough capacity to deal directly with millers. The report also said:

(European farmers' associations) have tended to prevent much of the gambling in foodstuffs and to eliminate many of the useless middlemen that stand between the producers, the retailers, and the consumers.¹²

⁹ 59 Cong. Rec. 8022 (1920) (remarks of Rep. Sumners of Tex.) ("There must be given to agriculture some compensatory advantage to offset the present economic advantage which industry holds by reason of the fact that it can write into the selling price which it fixes all cost of production plus a profit."); 61 Cong. Rec. 1038 (1921) (remarks of Rep. Reavis); 62 Cong. Rec. 2223 (1922) (remarks of Sen. Lenroot); 59 Cong. Rec. 7856 (1920) (remarks of Rep. Evans of Nebr.).

¹⁰ 62 Cong. Rec. 2059-60 (1922) (remarks of Sen. Capper); 62 Cong. Rec. 2257 (1922) (remarks of Sen. Norris); 59 Cong. Rec. 7852 (1920) (remarks of Rep. Morgan); 59 Cong. Rec. 8022 (1920) (remarks of Rep. Swope).

¹¹ H.R. Rep. No. 24, 67th Cong., 1st Sess. 2 (1921).

¹² *Id.* at 3.

Although Congress seems to have expected cooperatives to assume middlemen's functions,¹³ it is not at all clear that Congress intended to deny the benefits of Capper-Volstead [10] to any cooperative that did not step into the shoes of the middleman. The vertically integrated cooperative may have been a contemplated form of organization, but, in light of the additional intention to enhance farmers' bargaining effectiveness, it does not follow that it was intended to be exclusive.

Nor does the legislative history demonstrate specific consideration of the meaning of the statutory phrase, "collectively processing, preparing for market, handling, and marketing," let alone "collectively marketing" in isolation. Both complaint counsel and counsel for respondents concede that there is no direct evidence in the legislative history of what precisely Congress meant by the word "marketing".

The legislative history is equally inconclusive on Congress' intent with respect to agreements among members of a cooperative over prices. The debates contain several approving references to the ability of the cooperative members to "fix prices," a power sometimes compared with corporate behavior.¹⁴ It is not clear, however, that Congress intended to require farmers to combine as tightly as they would were they to incorporate. Production, for example, remained under individual control,¹⁵ and a mainspring of the legislation was, in fact, the assumed impossibility of farmer incorporation.¹⁶

In summary, although price-setting was clearly a contemplated activity, the legislative history does not address the question whether or what kind of additional activity is required to qualify for the exemption. [11]

Judicial Interpretation

As framed by complaint counsel, the issue in this case is one of first impression, with the exception of a recent factually identical private action brought against Central itself. *Northern California Supermarkets Inc. v. Central California Lettuce Producers Cooperative*, 413

¹³ It is clear, of course, that the permissible goal of vertical integration does not immunize agreements with other or predatory conduct to achieve this goal. *Maryland and Virginia Milk Producers Association, Inc. v. U.S.; United States v. Borden Co.; Washington Crab Association; supra; Case-Swayne Co. Inc. v. Sunkist Growers, Inc.*, 389 U.S. 384 (1967).

¹⁴ 62 Cong. Rec. 2223 (1922) (remarks of Sen. Lenroot); 59 Cong. Rec. 8025 (1920) (remarks of Rep. Hersman).

¹⁵ 62 Cong. Rec. 2058 (1922) (remarks of Sen. Capper) ("Because of this peculiar characteristic of agriculture, the growers have never been able to adopt a corporate form of organization; they have, therefore, gradually fitted into the cooperative form of organization which maintains the individuality of production but enables them to unite for marketing purposes." (emphasis added). But see 62 Cong. Rec. 2225 (1922) (remarks of Sen. Lenroot) ("If the farmers of the United States could, through cooperation, have some control and agreement as to production and as to prices. . . ."). See note 20 below.

¹⁶ H.R. Rep. No. 24, 67th Cong., 1st Sess. 2-3 (1921).

F. Supp. 984 (N.D. Cal. 1976), *appeal docketed*, No. 76-1456 (9th Cir., March 8, 1976). While it has been held that the members and officers of a single lawfully constituted agricultural cooperative cannot, for that reason alone, violate Sections 1 and 2 of the Sherman Act by conspiring with each other,¹⁷ the question raised by complaint counsel goes back a step: is a cooperative on Central's model lawfully constituted in the first place?

The Ninth Circuit considered a closely related issue in *Treasure Valley Potato Bargaining Ass'n. v. Ore-Ida Foods Inc.*, 497 F.2d 203 (9th Cir.), *cert. denied*, 419 U.S. 999 (1974). In that case cooperative activities consisted of bargaining with processors for preseason contracts under which cooperative members would sell their potatoes. The court rejected an antitrust attack on this conduct, stating:

We think the term *marketing* is far broader than the word *sell*. A common definition of "marketing" is this: "The aggregate of functions involved in transferring title and in moving goods from producer to consumer, including *among others* buying, selling, storing, transporting, standardizing, financing, risk bearing, and *supplying market information*." Webster's New Collegiate Dictionary, 1953 Edition. (Emphasis added). The associations here were engaged in bargaining for the sales to be made by their individual members. This necessarily requires supplying market information and performing other acts that are part of the aggregate of functions involved in the transferring of title to the potatoes. The associations were thus clearly performing "marketing" functions within the plain meaning of the term. We see no reason to give that word a special meaning within the context of the Capper-Volstead Act. 497 F.2d at 215 (emphasis in original).

[12] Neither complaint counsel nor the ALJ discovered the answer in *Treasure Valley*, because that case involved bargaining for preseason contracts with buyers on behalf of cooperative members, while the respondent members here merely agree under the aegis of Central on the prices which they will seek individually. The district judge in *Northern California Supermarkets* dismissed this argument as "a distinction without a difference," 413 F. Supp. at 992. He found Central's activities within the term "marketing" as construed in *Treasure Valley* and concluded:

Moreover, I am of the opinion that even if Central engaged in no other collective marketing activities, mere price-fixing is clearly within the ambit of the statutory protection. It would be ironic and anomalous to expose producers, who meet in a cooperative to set prices, to antitrust liability, knowing full well that if the same producers engage in even more anticompetitive practices, such as

¹⁷ *April v. National Cranberry Ass'n.*, 168 F. Supp. 919, 920 (D. Mass. 1958); *Shoenberg Farms, Inc. v. Denver Milk Producers, Inc.*, 231 F. Supp. 266 (D. Col. 1964). At the same time, it is equally well-established that a cooperative is not thereby immune from charges of monopolization. See *Muirbrook Farms, Inc. v. Western General Dairies*, C75-177 (D. Utah March 17, 1977) (Order on Summary Judgment Motion); and cases cited in note 13, *supra*.

collective marketing or bargaining, they would clearly be entitled to an exemption.

It is true that the sponsors of Capper-Volstead were laboring under the assumption that the cooperative or association would be the collective marketing agent for the farmers in most circumstances. However, there is nothing in the legislative history that suggests a Congressional intention to *force* farmers into a corporate form or that collective marketing with the cooperative as the exclusive agent was considered the *only* form under which farmers' groups could organize. *Id.* (emphasis in original) (footnote omitted).

Whatever "marketing" activity excludes, it would surely seem to include establishing an asking price as an essential element of negotiations looking toward a sale.

Complaint counsel take issue with this reasoning, pointing to the Supreme Court's characterization of the exemption in *Maryland and Virginia Milk Producers Ass'n. v. U.S.*, *supra*:

[13] We believe that it is reasonably clear that from the very language of the Capper-Volstead Act, as it was in §6 of the Clayton Act, that the general philosophy of both was simply that individual farmers should be given, through agricultural cooperatives acting as, entities, the same unified competitive advantage—and responsibility—available to businessmen acting through corporations as entities. As the House Report on the Capper-Volstead Act said:

Instead of granting a class privilege, it aims to equalize existing privileges by changing the law applicable to the ordinary business corporations so that the farmers can take advantage of it.

This indicates a purpose to make it possible for farmer-producers to organize together, set association policy, fix prices at which their cooperative will sell their produce, and otherwise carry on like a business corporation without thereby violating the antitrust laws. 362 U.S. at 466 (footnote omitted).

Although the intracooperative activity of the defendant in *Maryland and Virginia* was not at issue, but rather its acquisition of one competitor and its preying upon others, complaint counsel find in the phrases, "agricultural cooperatives acting as entities," and, "fix prices at which their cooperative will sell their products," a minimum standard for cooperative status that Central cannot meet. Unfortunately, the word "entity" does not provide a standard any more precise or discriminating than "collective marketing." To say that a cooperative has to do business as a single business entity in its own right does not reveal how many activities the cooperative must perform to qualify.

To conclude that a cooperative may lawfully function as a corporate entity does not compel or even support the additional conclusion that it must perform an undefined list of corporate functions. Neither the Court's opinion nor the legislative history on

which it is grounded provides a basis for using the otherwise helpful corporate analogy in this fashion. The Commission's opinion in *Washington Crab Association*, *supra*, concedes the right of a fisherman's cooperative to sell at a single, agreed-upon price. Quoting the same passage from *Maryland and Virginia* upon which complaint counsel rely, the Commission said: [14] "The single corporation can, of course, 'fix' the prices of its various 'divisions,' with no duty to require them to compete with each other. Similarly, these 140 crab fishermen can create a single marketing agent—Washington Crab Association—to 'fix' a single price to be charged by all of its fishermen members, thus eliminating by agreement all competition between them."¹⁸ The Commission continued: "The ends—the 'legitimate objectives' of such cooperative association and its members—are the collective catching, processing, and marketing of its members' product. . . . Price-fixing is an approved objective, but it cannot be pursued by techniques that go beyond those provided by the statute."¹⁹ In short, the Commission placed intra-cooperative price-fixing on a par with collective catching, processing, and marketing as an acceptable objective of a fishermen's cooperative. We cannot find in *Washington Crab* a limitation of the exemption to cooperatives that engage in "collective catching, processing, and marketing of (their) members' product," especially since the phrase merely describes how that particular respondent did business.

In short, like the legislative history, the principal cases relied on by complaint counsel readily accept intra-cooperative pricing agreements as a necessary incident of collective marketing. They do not establish a threshold for the cooperative's level of additional activity below which this conduct becomes illegitimate.

Complaint counsel's argument is not strengthened by the anomaly it introduces: as the ALJ clearly perceived (I.D. pp. 40-43), reorganizing the cooperative to assign it more functions is likely to lead to a more rigid form of collusion than the existing arrangement. The question, of course, is what Congress intended; we are not permitted the luxury of equating a nonexempt Tweedledum with an exempt Tweedledee. Nevertheless, complaint counsel have not advanced a convincing explanation why the distinction they urge will promote either agricultural policy or antitrust policy. The ALJ speculated that the cooperative might splinter if it were required to perform additional, unspecified functions which he assumed would mean the end of some members' valuable brand identification. But the

¹⁸ *Washington Crab Association*, 66 F.T.C. 45, 106 (1964).

¹⁹ *Id.* The Commission reviewed those nonexempt techniques, which included combination with nonproducers, monopolization, coercion, and other predatory practices.

stipulated record does not [15] tell us whether lettuce can be marketed efficiently without individual labels (I.D. 9), or even whether a bargaining cooperative under these circumstances would necessarily abandon individual labels. In any case, it is hard to see why entitlement to Capper-Volstead treatment should depend on whether the product is highly perishable and differentiated and thus most suitable for sale in the field (like lettuce), or only moderately perishable and relatively fungible and thus suitable for single preseason sales transactions (like potatoes).

In this regard, it is instructive to compare the Supreme Court's treatment of the Capper-Volstead exemption in *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962) with *Case-Swayne Co., Inc. v. Sunkist Growers, Inc.*, 389 U.S. 384 (1967). In *Winckler & Smith*, the trial court had given a jury instruction that would have permitted a conspiracy to be found among three cooperatives even though the same group of 12,000 producers owned all three. Noting that the producers could have united in a single cooperative without fear of illegal combination or conspiracy, the Court said: "(W)e feel that the 12,000 growers here involved are in practical effect and in the contemplation of the statutes one 'organization' or 'association' even though they have formally organized themselves into three separate legal entities. To hold otherwise would be to impose grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect to these growers who have banded together for processing and marketing purposes within the purview of the Clayton and Capper-Volstead Acts." 370 U.S. at 29. In *Case-Swayne*, however, the Court found Sunkist's activities nonexempt on a different ground: the cooperative had included nonproducing processors, a class of persons clearly not entitled to Capper-Volstead.

The pair of Sunkist cases demonstrate that the explicit requirements of Capper-Volstead are to be applied strictly. No vague policy friendly toward agricultural cooperation is to be permitted to expand the scope of the exemption beyond what the statute and its legislative history warrant, and restrictions on membership, structure and activity should be rigorously observed. At the same time, we are unwilling to read into Capper-Volstead, as the lower courts did in *Winckler & Smith*, formalistic internal limitations on otherwise conforming cooperatives. The Supreme Court there refused to find a forfeiture of the exemption and to order the cooperatives to reshuffle their affairs, a step with no apparent practical effect. We are equally reluctant to do so here. [16] While the absence of practical effect would not justify the inclusion of ineligible parties, as in *Case-Swayne*

or the pursuit of prohibited objectives, it is hard to see why a single group of eligible producers should be prevented from pursuing an authorized object because of failure to observe a moot formality.

Conclusion

Congress clearly intended that cooperatives provide farmer-members with a restricted license to unify and balance their combined strength and information against the corporations with which they deal. By the same token, it may well be that Congress intended cooperatives to have few if any advantages over an ordinary corporation in their dealings with outsiders. But the weakness in complaint counsel's position is the assumption that the corporate analogy provides an internal standard for cooperatives as well as an external one.²⁰ As previously noted, Congress regarded farmer incorporation as impossible even if it were desirable, and [17] intended to permit farmers the competitive advantages of incorporation without compelling them to adopt a corporate form. One of those advantages appears to have been the ability to exchange information about and agree on the prices it would seek from purchasers. We can find no indication that Congress intended that advantage to be available only to cooperatives who adopt, as complaint counsel argue, "a corporation-like instrument with which to deal with other corporations," or, as the ALJ found, "a pooling of resources into a single democratically functioning 'corporate' entity which was to meet in open market and bargain with large buyers." (I.D. pp. 31-32) These standards are nowhere to be found in or fairly inferred from the statute, the legislative history or the decided cases. Indeed, in the absence of more precise guidelines not supported by the record in this

²⁰ Congress' attitude toward production controls provides an additional indication that it did not regard the corporation as the model around which the Capper-Volstead exemption would be built. Beyond doubt, a single corporation can restrict its output, if it chooses, without incurring antitrust liability. Nevertheless, there are strong indications that Congress did not intend to allow farmers to use cooperatives as a vehicle by which they could effectively agree to limit production. Sen. Capper said in debate:

But a farmers' monopoly is impossible. If the cooperative marketing association makes its price too high, the result is inevitable self-destruction by overproduction in the following years. No other industry except agriculture has this automatic safeguard. With corporation activities the group producers, such as the United States Steel Corporation, can reduce the quantity of steel rails it will produce at any given time or completely close down its mills and reduce the supply. 62 Cong. Rec. 2059 (1922).

See also fn. 15, *supra*; *Authorizing Association of Producers of Agricultural Products: Hearings on H.R. 2373 Before Subcomm. of Senate Judiciary Comm., 67th Cong., 1st Sess. 201-202 (1921)* (statement of Sec. of Agr. Henry C. Wallace). Congress has reinforced the interpretation that production controls were not authorized by adding to the Capper-Volstead Act a comprehensive statutory scheme for controlling supply in the form of the Agricultural Marketing Agreement Act of 1937 (AMAA), 7 U.S.C. 601 *et seq.* A different issue would be presented if it were alleged and proven that a cooperative had sought to limit production even among its own members, thus shutting off the safety valve against private abuse that ameliorates the adverse consumer impact of the Capper-Volstead exemption and circumventing the important procedural safeguards of the AMAA. Although Central's bylaws prohibited the regulation of plantings or production (Stip. Exhibit B-2, Section 5.14), its cooperative marketing agreement permitted "volume controls" under certain circumstances (Stip. Exhibit A, Par. 2(C)). The issue of cooperative production control was not litigated here.

case, a cooperative would be hard-pressed to know just what degree of corporate integration would be required to qualify under Capper-Volstead were we to adopt complaint counsel's theory.

If, as in *Treasure Valley*, it is sufficient merely for the cooperative to unite producers in "collectively negotiating" over price, legal consequences should not attach if the cooperative presents the results of its decisions through each member rather than through a single agent representing each member. It would seem to make little sense, for example, to require that the employees of the growers become employees of Central only to thereafter go about their business of [18] negotiating the sale on different terms of individual members' crops in their fields or cooling plants (I.D. 8). As the Supreme Court said, in a different context, the Capper-Volstead Act does not lend itself "to such an incongruous immunity-distinction . . . as that urged here."²¹

In view of our conclusion with respect to the application of the Capper-Volstead Act to the facts of this case, we see no need to consider whether Sec. 6 of the Clayton Act or the Cooperative Marketing Act of 1926 provide independent authorization for the respondents' activity. The respondents' motions to dismiss dated Oct. 1, 1975, and June 10, 1976 are denied as moot.

An appropriate order will be entered vacating the order issued by the Administrative Law Judge and dismissing the complaint.

[2] FINAL ORDER

This matter having been heard by the Commission upon the appeal of respondent from the administrative law judge's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission, for the reasons stated in the accompanying opinion, having concluded that the administrative law judge's initial decision should be set aside and that the complaint should be dismissed:

[3] IT IS ORDERED, That the administrative law judge's initial decision be, and it hereby is, set aside.

IT IS FURTHER ORDERED, That the complaint be, and it hereby is, dismissed.

Chairman Pertschuk was recorded as not participating.

²¹ *Maryland and Virginia Milk Producers Ass'n, Inc. v. U.S.*, 362 U.S. 458, 464 (1960).

Complaint

90 F.T.C.

IN THE MATTER OF

NEW RAPIDS CARPET CENTER, INC., ET AL.

ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS*Docket 9052. Complaint, Aug. 26, 1975 — Order, July 26, 1977*

This order, among other things, requires Lee Kantor, a/k/a Lee Woods, a Bronx, N.Y. retailer of carpets, furniture and major appliances, to cease using bait and switch tactics, and other unfair or deceptive techniques in the advertising and sale of its products; to cease failing to make relevant disclosures in contracts regarding quantity/unit cost data; and customers' right to cancellation and refund. Additionally, the firm must advise delinquent customers of impending collection suits and bring such suits only in the county where the customer resides or signed the contract. The order also requires the firm to provide consumers, in connection with the extension of credit, such material and disclosures as are required by Federal Reserve System regulations.

Appearances

For the Commission: *Irving C. Koch* and *Diana Kirigin*, Consumer Protection Specialist, assisting.

For the respondents: *Sol S. Perlou*, New York City.

COMPLAINT

[1] Pursuant to the provisions of the Federal Trade Commission Act and of the Truth in Lending Act and the regulations promulgated thereunder, and by virtue of the authority vested in it by said Acts and regulation, the Federal Trade Commission having reason to believe that New Rapids Carpet Center, Inc., Charge Account Factors, Inc. and Charge Account Credit Corp., corporations, and Lee Kantor, a/k/a Lee Woods (hereinafter sometimes referred to as Lee Kantor), individually and as General Manager of New Rapids Carpet Center, Inc., as an officer [2] of Charge Account Factors, Inc. and Charge Account Credit Corp., and as an individual doing business as New Rapids Furniture Warehouses, Inc. [formerly a New York corporation dissolved by proclamation of the Secretary of State on December 15, 1970], hereinafter referred to as respondents, have violated the provisions of said Acts and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents New Rapids Carpet Center, Inc. and Charge Account Factors, Inc. are corporations organized, existing and doing business under and by virtue of the laws of the State of