AMERICAN ANTITRUST INSTITUTE

PRIVATE ANTITRUST ENFORCEMENT CONFERENCE

SUPPORTING MATERIALS

SESSION II: ANTITRUST ISSUES IN PRIVATE ENFORCEMENT ACTIONS AGAINST AGRICULTURAL INDUSTRIES

- *Allen v. Dairy Farmers of America Inc.*, No. 5:09-cv-230, 2016 WL 3208947 (D. Vt. June 11, 2014).
- Motion for Preliminary Approval of Settlement, *In Re: Broiler Chicken Antitrust Litigation*, No. 1:16-cv-08637 (N.D. Ill. Aug. 4, 2017).
- Peter Carstensen, *Agricultural Cooperatives and the Law: Obsolete Statutes in a Dynamic Economy*, 58 S.D. L. Rev. 462 (2013).

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ALICE H. ALLEN, LAURANCE E. ALLEN, d/b/a Al-lens Farm, GARRET SITTS, RALPH SITTS, JONATHAN HAAR, CLAUDIA HAAR, RICHARD SWANTAK, PETER SOUTHWAY, MARILYN SOUTHWAY, REYNARD HUNT, ROBERT FULPER, STEPHEN H. TAYLOR, and DARREL J. AUBERTINE, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	Case No. 5:09-cv-230
DAIRY FARMERS OF AMERICA, INC. and DAIRY MARKETING SERVICES, LLC,	)	
Defendants.	)	

OPINION AND ORDER GRANTING MOTION FOR FINAL APPROVAL OF DECEMBER 2015 PROPOSED SETTLEMENT
(Doc. 2076)

Pending before the court is a motion for final approval of a proposed settlement (the "December 2015 Proposed Settlement") between Defendants Dairy Farmers of America, Inc. ("DFA") and Dairy Marketing Services, LLC ("DMS") and the DFA/DMS and non-DFA/DMS subclasses (collectively, "Plaintiffs" or the "Dairy Farmers Class"). (Doc. 2076.)[1] The Dairy Farmers Class is comprised of dairy farmers who produced and sold raw Grade A milk in Federal Milk Market Order 1 ("Order 1") between January 1, 2002 to the present. Defendant DFA is a dairy cooperative that produces, processes, and distributes raw Grade A milk. Defendant DMS is a milk-marketing agency that was

[1] The pending motion also requests that the court allocate a portion of the settlement fund for distribution to Rust Consulting for administrative costs. *See* Doc. 2076-1 at 48-51. The court will address this issue in a separate Order.

formed in 1999 by DFA and Dairylea Cooperative, Inc. ("Dairylea") and is currently owned by DFA, Dairylea, and St. Albans Cooperative Creamery, Inc. ("St. Albans Co-op").

On May 13, 2016, the court held a Fairness Hearing, at which thirty-five class members or their designees appeared and addressed the court regarding whether the December 2015 Proposed Settlement is fair, reasonable, and adequate as required by Fed. R. Civ. P. 23(e)(2). The court also heard oral argument from the parties' attorneys, all of whom support the settlement.

A total of 8,859 farms were provided court-approved notice of the December 2015 Proposed Settlement. Approximately 7,551 farms (85% of those notified) submitted claims.

Prior to the Fairness Hearing, the court received and reviewed approximately 1,400 letters regarding the December 2015 Proposed Settlement. Approximately 90% of those letters were in favor of the settlement and approximately 10% opposed it. Members of the Dairy Farmers Class were permitted to opt out of the December 2015 Proposed Settlement to initiate or continue litigation against DFA and DMS, and approximately 172 farms (1.9% of the Dairy Farmers Class) did so. The ability to opt out was not offered in any of the parties' previous settlement proposals.

Dairy Farmers Class Representatives Alice H. Allen, Laurance E. Allen, Peter Southway, Marilyn Southway, Reynard Hunt, Robert Fulper, Stephen H. Taylor, and Darrel J. Aubertine support the December 2015 Proposed Settlement ("Supporting Class Representatives"). Class Representatives Jonathan and Claudia Haar oppose it ("Opposing Class Representatives"). Class Representatives Garrett Sitts, Ralph Sitts, and Richard Swantak have opted out of the December 2015 Proposed Settlement ("Opting Out Class Representatives").

I. The December 2015 Proposed Settlement.

A. Terms of the December 2015 Proposed Settlement.

Pursuant to the December 2015 Proposed Settlement, without an admission of wrongdoing, Defendants have agreed to pay $50 million dollars to the Dairy Farmers

Class in exchange for a release of the claims asserted in this action as well as claims "arising out of the conduct alleged in the Complaint" as to specified released parties.[2] (Doc. 2076-2 at 5, ¶ 1.16.) Defendants have agreed to non-retaliation safeguards for the Dairy Farmers Class; specific protocols to increase class members' ability to leave DFA/DMS without penalty; the provision of a milk marketing grace period in the event a dairy farm is terminated from DFA/DMS; disclosure of certain financial information; and a prohibition of non-solicitation agreements, which allegedly prevented class members from freely leaving their cooperatives and joining competing cooperatives.

In addition to the injunctive relief set forth in previous proposed settlements, the December 2015 Proposed Settlement includes the following:

> The extension of the prohibition on the formation or renewal of full supply agreements, except in certain circumstances, for a four-year period following final approval of the December 2015 Proposed Settlement by the court;
>
> The establishment and funding of an independent Advisory Council Member for four years to review DFA/DMS financial records, serve as an advocate within DFA for higher pay prices and farmer equity, and attend and participate in DFA Northeast Area Council Meetings as a non-voting member;
>
> The establishment and funding of a Farmer Ombudsperson for five years to investigate and facilitate resolution of any complaints—including complaints related to testing, voting rights, or termination from DFA/DMS—and attend and participate in DFA Northeast Area Council Meetings;
>
> The imposition of certain protocols regarding milk testing for five years, including a mechanism that allows farmers to obtain "split samples" and secure testing at independent labs up to three times per year at no cost to the farmer, the annual receipt by the Farmer Ombudsperson of a report from the Market Administrator regarding the results of its independent testing of the Dairy One laboratory, and standards regarding the reporting of adulterated milk testing results for five years;

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[2] In late 2010, Plaintiffs and former Defendant Dean Foods Company ("Dean") reached a settlement agreement (the "Dean Settlement") that required Dean to make a one-time payment of $30 million. Plaintiffs agreed to release and discharge Dean from certain claims and potential claims. The court approved the Dean Settlement and the certified settlement class received the proceeds of the settlement, minus attorneys' fees and expenses of $6 million.

> The prohibition on DFA/DMS from obtaining a controlling interest in the Dairy One milk testing organization for ten years and the prohibition on DFA members from holding a majority of seats on Dairy One's board;
>
> The imposition of limitations on DFA's use of block voting in connection with voting on Federal Milk Market Order 1 amendments, as well as the preservation of the right to vote individually; and
>
> The formation of an Audit Committee consisting of seven DFA members plus two independent advisors with expertise in accounting, financial reporting, and auditing to monitor compliance with the December 2015 Proposed Settlement and to report to the delegates at the DFA annual meeting.

B. Reaction of Governmental Agencies and Others.

Consistent with the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4 (2005), notice of the December 2015 Proposed Settlement was provided to officials at the Justice Department and each Attorneys General office located in Order 1. Only the Vermont Attorney General's Office responded to the notice. In its written submission to the court, the Vermont Attorney General's Office stated that it supported the settlement, noting that it was:

> impressed by the extensive injunctive relief that the settlement obtains for the class members. The behavioral remedies go directly to the conduct alleged in the matter[.] . . . The injunctive relief appears to be on par with the sort of relief that our office would seek in a matter like this. In light of these considerations, we hope that the Court will approve this settlement.

(Doc. 832 at 1-2.)

Two groups of legislators in Order 1 also provided written support for the December 2015 Proposed Settlement. Vermont Senators Robert Starr, Chair of the Committee on Agriculture, and Jane Kitchel, Chair of the Committee on Appropriations, support approval of the settlement, emphasizing the increased transparency it affords with regard to DFA/DMS's operations and the benefits dairy farmers will derive from independent milk testing and the appointment of an ombudsperson. Robert Haefner, John O'Connor, and Tara Sad, the Chairman, Vice Chairman, and ranking member, respectively, of the New Hampshire House of Representatives Environment and Agriculture Committee, also expressed their "strong support of the proposed

settlement[.]" (Doc. 2023 at 1.)

II. Conclusions of Law and Analysis.

Under Rule 23, a court may approve a settlement in a class action only after finding that it is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *see also D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001). This entails a review of "the negotiating process leading up to the settlement[, *i.e.,* procedural fairness,] as well as the settlement's substantive terms[, *i.e.,* substantive fairness]." *McReynolds v. Richards-Cantave*, 588 F.3d 790, 803-04 (2d Cir. 2009) (alterations in original and internal quotation marks omitted).

A. Procedural Fairness.

"The court must review the negotiating process leading up to the settlement for procedural fairness, to ensure that the settlement resulted from an arm's-length, good faith negotiation between experienced and skilled litigators." *Charron v. Wiener*, 731 F.3d 241, 247 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 1941 (2014). The court "must pay close attention to" and "examine[] the negotiation process with appropriate scrutiny." *D'Amato*, 236 F.3d at 85. The court must also bear in mind its own "fiduciary responsibility of ensuring that the settlement is fair and not a product of collusion, and that the class members' interests were represented adequately." *In re Warner Commc'ns Sec. Litig.*, 798 F.2d 35, 37 (2d Cir. 1986).

In this case, counsel for both parties and Supporting Class Representatives assert that the negotiation process took place in an arms-length manner and in good faith. They further assert that the class representatives participated in in-person, telephonic, and email discussions as part of these negotiations, as detailed in Subclass Counsel's submissions.

Although they acknowledge that Supporting Class Representatives have engaged in no wrongdoing and have participated in the negotiation of the December 2015 Settlement Proposal in good faith, Opposing Class Representatives nonetheless contend that the December 2015 Proposed Settlement is the product of collusion, coercion, and bad faith. They claim certain members of Subclass Counsel have engaged with

Defendants in a sham settlement, are guilty of professional misconduct, and have coerced support from the class. Counsel for both parties and Supporting Class Representatives disavow this characterization of the settlement process.

On April 20, 2015 and June 1, 2015, the court held a two-day evidentiary hearing at which Opposing Class Representatives and Opting Out Class Representatives were permitted to present their evidence of collusion, coercion, and bad faith. No such evidence was presented. Rather, it became clear that there were differences of opinion between Subclass Counsel and certain class representatives regarding how the case should be litigated, whether it should be settled or proceed to trial, and, if settled, the appropriate nature and extent of injunctive relief. It further became clear that communication had broken down between certain class representatives and certain Subclass Counsel to such an extent that no meaningful settlement or trial preparation discussions were possible. These circumstances were contrary to the interests of the class as a whole. *See* Doc. 682 at 8 (noting that because of a breakdown in communications, "the opposing Subclass Representatives and Subclass Counsel [were] failing to present a united front on behalf of the Dairy Farmer[s] [Class] and, in this respect, [were] undermining the interests of absent class members[,]" and that, "[a]s the case progresses towards either trial or to a final settlement, the stalemate and the lack of communication between Subclass Counsel and all but two of the Subclass Representatives [was] and will continue to be unacceptable").[3]

On September 3, 2015, Defendants moved to decertify the class for lack of adequate representation. *See* Fed. R. Civ. P. 23(a)(4), 23(c)(1)(C). Defendants argued that the appointed class representatives were "committed to the effective destruction of

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[3] *See Martens v. Thomann*, 273 F.3d 159, 173 n.10 (2d Cir. 2001) (noting that class representatives "have fiduciary duties towards the other members of the class"); *Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 331 (1980) (recognizing "the responsibility of named plaintiffs to represent the collective interests of the putative class"); *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1077 (2d Cir. 1995) ("Both class representatives and class counsel have responsibilities to absent members of the class."); *see also McDowall v. Cogan*, 216 F.R.D. 46, 49 n.3 (E.D.N.Y. 2003) ("A named plaintiff acts as a fiduciary to the unnamed class members.").

DFA and DMS as functioning dairy marketing organizations," which was antithetical to the interests of other class members "who belong to DFA or market through DMS, who greatly value the continued existence and functioning of those organizations, and who very much do not want to see them disbanded[.]" (Doc. 692-1 at 2-3.)

On September 24, 2015, Subclass Counsel sought to remove certain class representatives, asserting they were unable to communicate and work with their counsel; failed to objectively evaluate the case; refused to abide by the court's rulings; and were "prepared to take actions that [would] prejudice the interests of the Subclass . . . without any meaningful consultation about the implications under prevailing antitrust and class action law." (Doc. 701-1 at 4.) In turn, Opposing Class Representatives and Opting Out Class Representatives renewed their motion to remove Subclass Counsel. Neither Subclass Counsel nor Opposing and Opting Out Class Representatives proffered any resolution to their stalemate other than the other group's removal.

The court denied Defendants' motion to decertify as moot, and denied on the merits Subclass Counsel's motion to remove certain class representatives and the motion to remove Subclass Counsel. In so ruling, the court noted that as long as the breakdown in communication on Plaintiffs' side of the case persisted, no meaningful settlement negotiations or trial preparation could take place. In an attempt to remedy this stagnation and to ensure adequate representation of the class, the court appointed additional class representatives and additional class counsel. *See In re Austrian & German Bank Holocaust Litig.*, 317 F.3d 91, 104 (2d Cir. 2003) ("'The ultimate responsibility to ensure that the interests of class members are not subordinated to the interests of either the class representatives or class counsel rests with the district court.'") (quoting *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1078 (2d Cir. 1995)). Thereafter, the parties negotiated during a 90-day period that culminated in the December 2015 Proposed Settlement.

There is no credible evidence that the process by which the December 2015 Proposed Settlement was reached was tainted by collusion, coercion, or bad faith. Instead, the negotiations took place at arms-length and in good faith between experienced

antitrust litigators who were knowledgeable about the facts and the law, the realities of the marketplace, and the risks and challenges of a trial. The evidence thus establishes that the December 2015 Proposed Settlement is procedurally fair, reasonable, and adequate. *See* Fed. R. Civ. P. 23(e)(2).

B. Substantive Fairness.

In the Second Circuit, a court is directed to "examine the fairness, adequacy, and reasonableness of a class settlement according to the '*Grinnell* factors.'" *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 117 (2d Cir. 2005) (quoting *Joel A. v. Giuliani*, 218 F.3d 132, 138 (2d Cir. 2000)). The *Grinnell* factors require examination of:

(1) the complexity, expense and likely duration of the litigation;
(2) the reaction of the class to the settlement;
(3) the stage of the proceedings and the amount of discovery completed;
(4) the risks of establishing liability;
(5) the risks of establishing damages;
(6) the risks of maintaining the class action through the trial;
(7) the ability of the defendants to withstand a greater judgment;
(8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and]
(9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Wal-Mart Stores, Inc., 396 F.3d at 117 (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974)).

The complexity, expense, and likely duration of the litigation weigh heavily in favor of approving the December 2015 Proposed Settlement. This case has been pending since 2009 and has presented costly, complex, and protracted litigation for both sides. Any trial would be a substantial additional expense and a time consuming process, which would be exacerbated by the fact that neither party is presently engaged in trial preparations. *See In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 477 (S.D.N.Y. 1998) (noting that antitrust cases are "generally complex, expensive and lengthy" and that antitrust class actions in particular "have a well deserved reputation as

being most complex") (internal quotation marks omitted).[4] Regardless of the outcome at trial, this court's rulings and the jury's verdict would almost inevitably be the subject of one or more lengthy appeals.[5]

Participation of the class in the December 2015 Proposed Settlement has been robust and far exceeds the participation in previous proposed settlements in this case. The reaction of the class has been overwhelmingly positive. *See Wal-Mart Stores, Inc.*, 396 F.3d at 119 (concluding that the reaction of class members to the settlement "is perhaps the most significant factor in [the] *Grinnell* inquiry"); *see also In re Am. Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 425 (S.D.N.Y. 2001) (noting that "[i]t is well settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy") (internal quotation marks omitted).

The stage of the proceedings and the amount of discovery completed also weigh in favor of approval. There is an ample factual record in this case which permits the parties to have "a thorough understanding of their case." *Wal-Mart Stores, Inc.*, 396 F.3d at 118 (also noting settlement was reached after "extensive discovery proceedings spanning over seven years[,] . . . leaving relatively few unknowns prior to trial"). No additional discovery is contemplated, nor would it likely alter the risks and benefits of going to trial. The court has already ruled on Defendants' motion for summary judgment, winnowing the claims for trial and identifying those issues that hinge on witness testimony. This is

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[4] To the extent objecting class members insist that only a trial will vindicate their claims against DFA/DMS, they may opt out of the settlement.

[5] *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 118 (2d Cir. 2005) (observing that the appellate process could take "several years"); *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 331-32 (E.D.N.Y. 2010) (noting that the "complexity, expense, and likely duration of the litigation favor the proposed Settlement" because "[r]egardless of the outcome at trial, post-trial motions and an appeal by the losing party were likely, possibly followed by a new trial in the event of a reversal[,] . . . [and] [d]elay at the trial stage and through post-trial motions and the appellate process might have forced class members to wait years longer for any recovery"); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 138 (S.D.N.Y. 2010) (explaining that "even if the Class were to win a judgment at trial, the additional delay of trial, post-trial motions and appeals could deny the Class any actual recovery for years"); *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, 2007 WL 2230177, at *5 (S.D.N.Y. July 27, 2007) (approving settlement where "there would have been significant additional resources and costs expended to prosecute the claims through trial and the inevitable appeals").

thus not a case that has been settled prematurely or without an adequate understanding of the value of Plaintiffs' claims and the extent of Defendants' litigation risk.

The risks to the class of establishing liability and damages also weigh in favor of approving the December 2015 Proposed Settlement. If this matter proceeded to trial, Plaintiffs would face substantial challenges in establishing a factually and legally sustainable market definition, Defendants' market power, the economic motive for the alleged conspiracy, and the participation of a wide array of co-conspirators at the cooperative and processor levels. Defendants' statute of limitations defenses, alone, may have precluded many of Plaintiffs' claims and a significant portion of Plaintiffs' claimed damages.

As the numerous written responses to the settlement make clear, Plaintiffs would face the additional challenge of persuading a Vermont jury that this case involves dairy farmers against wealthy corporate entities, as opposed to dairy farmers against dairy farmers. At trial, Plaintiffs may have to confront evidence from the many dairy farmers who spoke at the Fairness Hearing and who view DFA/DMS as transparent and helpful partners that assist them in finding the most advantageous market and best price for their fluid Grade A milk.

In addition, if this case proceeded to trial, Defendants would likely renew their motion to decertify the class, arguing that the interests of dairy farmers who supported DFA/DMS were unrepresented by Subclass Counsel and the Dairy Farmers Class representatives. In opposing this motion, there is a distinct likelihood that Plaintiffs would either not present a united front, or would have difficulty demonstrating that they are adequately representing pro-DFA/DMS dairy farmers' interests. The risks of maintaining the class through trial thus support a negotiated resolution.

The ability of Defendants to withstand a greater judgment appears uncontested. This factor, however, "does not suggest that the settlement is unfair" when it "stand[s] alone" against the settlement and the remaining factors weigh in favor of the settlement. *D'Amato*, 236 F.3d at 86; *see also In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 129 (S.D.N.Y. 1997) ("[T]he fact that a defendant is able to pay more than it offers in

settlement does not, standing alone, indicate that the settlement is unreasonable or inadequate."), *aff'd*, 117 F.3d 721 (2d Cir. 1997).

The reasonableness of the settlement fund, in light of the best possible recovery and the attendant risks of litigation, also weighs in favor of approving the December 2015 Proposed Settlement. The settlement's $50 million in monetary relief will offer class members a modest recovery, predominantly because of the size of the class.[6] However, a total recovery against DFA/DMS and Dean of $80 million is not insubstantial when viewed against the backdrop of the risks of continued litigation. The injunctive relief offered by the December 2015 Proposed Settlement is more extensive than Plaintiffs request in the Second Amended Complaint, and thus more extensive than the court would likely order if Plaintiffs prevailed at trial.

Collectively, the *Grinnell* factors weigh in favor of approving the December 2015 Proposed Settlement. *See Weinberger v. Kendrick*, 698 F.2d 61, 69 n.10 (2d Cir. 1982) (directing that a district court "passing on settlements of class actions under [Rule 23]" is not "an umpire in [a] typical adversary litigation" but rather "a guardian for class members"); *see also Neilson v. Colgate-Palmolive Co.*, 199 F.3d 642, 654 (2d Cir. 1999) (emphasizing that "the district court bears the ultimate responsibility for ensuring that the interests of vulnerable class members are vindicated") (internal quotation marks omitted). The court thus finds that the December 2015 Proposed Settlement is substantively fair, reasonable, and adequate. Fed. R. Civ. P. 23(e)(2). To ensure the parties' compliance with the terms of the December 2015 Proposed Settlement, the court retains jurisdiction over its enforcement.

[6] It is estimated that the average recovery will be $4,000 per dairy farm class member, however, the court's determination of Subclass Counsel's motions for attorneys' fees, reimbursement of expenses, and incentive awards (Docs. 728 & 729) will affect this amount.

CONCLUSION

For the foregoing reasons, the motion for final approval of the December 2015 Proposed Settlement is GRANTED. (Doc. 2076.)

SO ORDERED.

Dated at Burlington, in the District of Vermont, this 7th day of June, 2016.

Christina Reiss, Chief Judge
United States District Court

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

IN RE: BROILER CHICKEN ANTITRUST LITIGATION	Case No. 1:16-cv-08637
THIS DOCUMENT RELATES TO: DIRECT PURCHASER ACTION	

MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT BETWEEN DIRECT PURCHASER PLAINTIFF CLASS AND FIELDALE FARMS CORPORATION AND FOR CONDITIONAL CERTIFICATION OF THE PROPOSED SETTLEMENT CLASS

I. INTRODUCTION

Direct Purchaser Plaintiffs ("DPPs") respectfully move the Court to preliminarily approve a proposed settlement of claims between DPPs and Fieldale Farms Corporation.[1] This is the first "ice-breaker" settlement in this litigation. Pursuant to the Settlement Agreement, on or before August 28, 2017, Fieldale Farms will pay the Settlement Class the sum of two million and two hundred and fifty thousand dollars ($2,250,000.00) in cash and will provide material cooperation to DPPs in this litigation.

DPPs now move the Court to preliminarily approve the Settlement Agreement and conditionally certify the proposed Settlement Class. As discussed in this memorandum, at a later date DPP Co-Lead Counsel will move the Court to approve a program to notify members of the Settlement Class of this and any other then-pending settlements. At the Final Fairness Hearing, Co-Lead Counsel will request entry of a final order and judgment ("Final Order") dismissing Fieldale Farms and retaining jurisdiction for the implementation and enforcement of the Settlement Agreement.

II. BACKGROUND

This is an antitrust class action filed against certain producers of Broilers.[2] DPPs allege that Defendants combined and conspired to fix, raise, elevate, maintain, or stabilize prices of Broilers sold in the United States. DPPs allege that Defendants implemented their conspiracy in

[1] The Settlement Agreement is attached hereto as Exhibit A to the Declaration of W. Joseph Bruckner (hereinafter, "Settlement" or "Settlement Agreement").

[2] Broilers are chickens raised for meat consumption to be slaughtered before the age of 13 weeks, and which may be sold in a variety of forms, including fresh or frozen, raw or cooked, whole or in parts, or as a meat ingredient in a value added product, but excluding chicken that is grown, processed, and sold according to halal, kosher, free range, or organic standards. *See* DPPs' Second Amended Complaint (ECF No. 212). Fieldale Farms agrees to this definition of "Broilers" only for purposes of this Settlement Class and maintains, as asserted in its individual motion to dismiss Plaintiffs' Complaints (ECF Nos. 278, 281), that antibiotic free ("ABF") chicken should not be included in the definition of "Broilers."

various ways, including via coordinated supply restrictions, sharing competitively sensitive price and production information, and fixing of the Georgia Dock Broiler price index.

DPPs commenced this litigation on September 2, 2016, when they filed a class action lawsuit on behalf of all direct purchasers of Broilers in the United States. On October 14, 2016, the Court appointed the undersigned as Interim Direct Purchaser Plaintiffs' Co-Lead Counsel. (*See* ECF No. 144.) DPPs filed a Consolidated Amended Complaint on October 28, 2016 (ECF No. 178) and a Second Amended Complaint on November 23, 2016 (ECF No. 212, hereinafter, "Complaint"). On January 27, 2017, all Defendants filed a motion to dismiss DPPs' complaint supported by various memoranda of law. (ECF Nos. 274-291, 294-298.) All Plaintiffs filed an opposition to these motions on March 15, 2017 (ECF Nos. 343, 345), and Defendants replied on April 12, 2017. (ECF Nos. 360, 363-64, 366, 368-373.) The motions are currently pending.

Unlike many other civil antitrust actions, DPPs developed and brought this case without the benefit of a formal antitrust investigation by the U.S. Department of Justice or the assistance of a leniency applicant under the Department of Justice's Corporate Leniency Program. *See Corporate Leniency Policy*, U.S. Dep't of Justice, https://www.justice.gov/atr/corporate-leniency-policy. As a result, since filing their initial complaint, DPPs have continued their factual investigation into the conspiracy alleged in their Complaint. While DPPs have continued pressing to set the parameters for discovery since this case was filed in September 2016 (*e.g.*, document source negotiations, Rule 34 objections), they have received no substantive discovery from Defendants thus far in this litigation. Therefore, as part of their continued prosecution, DPPs' Co-Lead Counsel negotiated an icebreaker settlement with Fieldale Farms.

In addition to the payment of money, this first settlement allows DPPs to obtain Fieldale Farms' cooperation in their continued prosecution of the Action against the remaining

Defendants. Further, Fieldale Farms has one of the smallest Broiler market shares of all Defendants (12th largest out of 14 Defendant families) and is the smallest-sized company among the Defendants that participated in the Georgia Dock price survey.[3] Thus, a settlement with Fieldale will not materially affect the size of the Defendant group remaining in the litigation. Additionally, the remaining Defendants are jointly and severally liable for any damages resulting from Fieldale Farms' Broiler sales during the Class Period.

III. SUMMARY OF THE SETTLEMENT AGREEMENT

After extensive arm's length negotiations, DPPs agreed to settle with Fieldale Farms in return for its agreement to pay two million and two hundred and fifty thousand dollars ($2,250,000.00) to the Settlement Class, and to provide cooperation to DPPs in their ongoing prosecution of the case. In consideration, DPPs and the proposed Settlement Class agree to release claims against Fieldale Farms which were or could have been brought in this litigation arising from the conduct alleged in the Complaint. The release does not extend to any other Defendants.

Fieldale Farms' cooperation includes providing DPPs documents it produced to the Office of the Florida Attorney General in a related inquiry into the Broiler industry; producing Agri-Stats reports, phone records, ESI, and other documents; making five current or former employees available for interviews and depositions; and an attorney proffer to provide a description of the principal facts known to Fieldale Farms that are relevant to the conduct at issue in the litigation. (*See* Settlement Agreement, § II.A.2.)

[3] As Plaintiffs have alleged, Defendants' coordination of the Georgia Dock price index was one of the methods by which they implemented their conspiracy. (Complaint, ECF No. 212, at ¶¶ 9, 97-115.)

IV. STANDARDS APPLICABLE TO PRELIMINARY APPROVAL OF THE PROPOSED SETTLEMENT

A. The Proposed Settlement Falls "Within the Range of Possible Approval" and Therefore Should Be Preliminarily Approved.

There is an overriding public interest in settling litigation, and this is particularly true in class actions. *See Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996) ("Federal courts naturally favor the settlement of class action litigation."); *E.E.O.C. v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 888-89 (7th Cir. 1985), *cert. denied*, 478 U.S. 1004 (1986) (noting that there is a general policy favoring voluntary settlements of class action disputes); *Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d 305, 312 (7th Cir. 1980) ("It is axiomatic that the federal courts look with great favor upon the voluntary resolution of litigation through settlement."), *overruled on other grounds*, *Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998). Class action settlements minimize the litigation expenses of the parties and reduce the strain such litigation imposes upon already scarce judicial resources. *Armstrong*, 616 F.2d at 313 (*citing Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977)). However, a class action may be settled only with court approval. Before the court may give that approval, all class members must be given notice of the proposed settlement in the manner the court directs. Fed. R. Civ. P. 23(e).

Generally, before directing that notice be given to the class members, the court makes a preliminary evaluation of the proposed class action settlement. The Manual For Complex Litigation (Fourth) § 21.632 (2004) explains:

> Review of a proposed class action settlement generally involves two hearings. First counsel submit the proposed terms of settlement and the judge makes a preliminary fairness evaluation . . . The Judge must make a preliminary determination on the fairness, reasonableness and adequacy of the settlement terms and must direct the preparation of notice of the . . . proposed settlement, and the date of the [formal Rule 23(e)] fairness hearing.

See also 2 NEWBERG ON CLASS ACTIONS, §11.24 (3d ed. 1992); *Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th Cir. 1982) ("The first step in district court review of a class action settlement is a preliminary, pre-notification hearing to determine whether the proposed settlement is 'within the range of possible approval.'"); *see also Armstrong*, 616 F.2d at 314; *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 254 (D. Del. 2002); *In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y 1997).

A proposed settlement falls within the "range of possible approval" under Rule 23(e) when it is conceivable that the proposed settlement will meet the standards applied for final approval. The standard for final approval of a class action settlement is whether the proposed settlement is fair, reasonable, and adequate. Fed. R. Civ. P. 23(e); *see Uhl v. Thoroughbred Tech. & Telecomms, Inc.*, 309 F.3d 978, 986 (7th Cir. 2002); *Isby*, 75 F.3d at 1198-99.

When granting preliminary approval, a court does not conduct a "definitive proceeding on the fairness of the proposed settlement," and the court "must be careful to make clear that the determination permitting notice to members of the class is not a finding that the settlement is fair, reasonable and adequate." *In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1384 (D. Md. 1983) (quoting *In re Montgomery Cty. Real Estate Antitrust Litig.*, 83 F.R.D. at 315-16). That determination must await the final hearing where the fairness, reasonableness, and adequacy of the settlement are assessed under the factors set forth in *Armstrong*.[4]

[4] The *Armstrong* factors for a motion for final approval of a class settlement as fair, reasonable, and adequate are: (1) the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement; (2) the defendants' ability to pay; (3) the complexity, length, and expense of further litigation; (4) the amount of opposition to the settlement; (5) the presence of collusion in reaching a settlement; (6) the reaction of class members to the settlement; (7) the opinion of competent counsel; and (8) the stage of the proceedings and the amount of discovery completed. *Armstrong*, 616 F. 2d at 314.

B. The Settlement is Fair and Resulted from Arm's Length Negotiations

The requirement that class action settlements be fair is designed to protect against collusion among the parties. *In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. at 1383. There is usually an initial presumption that a proposed settlement is fair and reasonable when it was the result of arm's length negotiations. *See* 2 NEWBERG ON CLASS ACTIONS, § 11.40 at 451 (2d ed. 1985); *Goldsmith v. Tech. Solutions Co.*, No. 92-C-4374, 1995 WL 17009594, at *3 n.2 (N.D. Ill. Oct. 10, 1995) ("[I]t may be presumed that the agreement is fair and adequate where, as here, a proposed settlement is the product of arm's-length negotiations."). Settlements proposed by experienced counsel and which result from arm's length negotiations are entitled to deference from the court. *See, e.g., In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 640 (E.D. Pa. 2003) ("A presumption of correctness is said to attach to a class settlement reached in arms-length negotiations between experienced, capable counsel after meaningful discovery.") (*quoting Hanrahan v. Britt*, 174 F.R.D. 356, 366 (E.D. Pa. 1997)). The initial presumption in favor of such settlements reflects courts' understanding that vigorous negotiations between seasoned counsel protect against collusion and advance the fairness concerns of Rule 23(e). In making the determination as to whether the proposed settlement is fair, reasonable, and adequate, the Court necessarily will evaluate the judgment of the attorneys for the parties regarding the "strength of plaintiffs' case compared to the terms of the proposed settlement." *In re AT&T Mobility Wireless Data Servs. Sales Litig.*, 270 F.R.D. 330, 346 (N.D. Ill. 2010).

The proposed Settlement plainly meets the standards for preliminary approval. The Settlement reached here is the product of intensive settlement negotiations conducted over a period of three months and included several rounds of give-and-take between DPPs' Co-Lead Counsel and Fieldale Farms' counsel. (Bruckner Decl. at ¶ 6.) Based on DPPs' extensive factual investigation to date, the cooperation provisions negotiated as part of the settlement enable DPPs

to obtain critical additional information regarding the allegations in the Complaint. (*Id.* at ¶¶ 4-5.) Therefore, based on both the monetary and cooperation elements of the Settlement Agreement, DPP Co-Lead Counsel believe this is a fair settlement for the Class. (*Id.* at ¶ 11.)

Moreover, this Settlement does not affect the potential full recovery of damages for the Class under the antitrust laws in light of the fact that the remaining Defendants will be jointly and severally liable for injuries resulting from Fieldale Farms' sales during the Class Period. *See Paper Sys. Inc. v. Nippon Paper Indus.*, 281 F.3d 629, 632 (7th Cir. 2002) ("[E]ach member of a conspiracy is liable for all damages caused by the conspiracy's entire output."). In addition to not affecting the overall damages, the Settlement should hasten and improve the Class' recovery by providing DPPs access to information that likely would otherwise only be obtainable through protracted discovery. *See In re Ampicillin Antitrust Litig.*, 82 F.R.D. 652, 654 (D.D.C. 1979) (approving settlement where class will "relinquish no part of its potential recovery" due to joint and several liability and where settling defendant's "assistance in the case again [a non-settling defendant] will prove invaluable to plaintiffs").

In addition to a monetary payment, the Settlement will provide the additional benefit to the Class of cooperation from Fieldale Farms as provided in the Settlement Agreement, intended to help streamline discovery and trial. Courts have recognized the value of such cooperation:

> [F]rom a pragmatic standpoint, the value of . . . [cooperating defendants] in litigation, as opposed to the specter of hundreds of uncooperative opponents, is significant. The [settling defendants] know far better than the plaintiff classes precisely what occurred in the [relevant] period . . . and their willingness to open their files . . . may ease the plaintiffs' discovery burden enormously.

In re IPO Sec. Litig., 226 F.R.D. 186, 198-99 (S.D.N.Y. 2005) (footnote omitted). This cooperation here is even more valuable in light of the applicability of joint and several liability to

DPPs claims. While DPPs believe that their case is strong, any complex antitrust litigation is inherently costly and risky, and this Settlement mitigates that risk and protects the Class.

Conversely, Fieldale Farms believes its case is strong and that it would achieve success on the merits. Fieldale denies any liability with respect to both the output reduction and the Georgia Dock aspects of the alleged conspiracy, and Fieldale maintains that it did nothing wrong. But in the interests of avoiding the risk and uncertainty of trial, Fieldale Farms has agreed to settle, and its participation in both the Georgia Dock and Agri Stats gives it valuable and unique insight into two of the primary mechanisms through which the Plaintiffs allege the Defendants implemented a conspiracy.

In sum, the Settlement Agreement: (1) provides substantial benefits to the class; (2) is the result of extensive good faith negotiations between knowledgeable and skilled counsel; (3) was entered into after extensive factual investigation and legal analysis; and (4) in the opinion of experienced Class Counsel, is fair, reasonable, and adequate to the Class. Accordingly, Co-Lead Counsel believe that the Settlement Agreement is in the best interests of the Class Members and should be preliminarily approved by the Court.

V. THE COURT SHOULD CERTIFY THE PROPOSED SETTLEMENT CLASS

At the preliminary approval stage, the Court must also determine whether the proposed Settlement Class should be certified for settlement purposes. Under Rule 23, class actions may be certified for settlement purposes only. *See, e.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Certification of a settlement class must satisfy each requirement set forth in Rule 23(a), as well as at least one of the separate provisions of Rule 23(b). *Id.* at 613-14; *see also In re Cmty. Bank of N. Va.*, 418 F.3d 277, 299 (3d Cir. 2005) ("[C]ertification of classes for settlement purposes only [is] consistent with Fed. R. Civ. P. 23, provided that the district court engages in a Rule 23(a) and (b) inquiry[.]").

DPPs seek certification of a Settlement Class consisting of:

> All persons who purchased Broilers directly from any of the Defendants or any Co-Conspirator identified in this action, or their respective subsidiaries or affiliates for use or delivery in the United States from at least as early as January 1, 2008 until the Date of Preliminary Approval. Specifically excluded from this Class are the Defendants, the officers, directors or employees of any Defendant; any entity in which any Defendant has a controlling interest; and any affiliate, legal representative, heir or assign of any Defendant. Also excluded from this Class are any federal, state or local governmental entities, any judicial officer presiding over this action and the members of his/her immediate family and judicial staff, any juror assigned to this action, and any Co-Conspirator identified in this action.

(Settlement Agreement, § II.E.2.) This is the same class proposed in DPPs' Complaint. As detailed below, this proposed Class meets the requirements of Rule 23(a) as well as the requirements of Rule 23(b)(3).

A. The Requirements of Rule 23(a) are Satisfied

1. Numerosity

Fed. R. Civ. P. 23(a)(1) requires that the class be so numerous as to make joinder of its members "impracticable." No magic number satisfies the numerosity requirement, however, "a class of more than 40 members is generally believed to be sufficiently numerous for Rule 23 purposes." *Schmidt v. Smith & Wollensky LLC*, 268 F.R.D. 323, 326 (N.D. Ill. 2010) (citations omitted). The proposed Settlement Class consists of persons and entities that purchased Broilers from the Defendants during the period from January 1, 2008 to the Date of Preliminary Approval. While the precise number of Class members is presently known only to Defendants, based on their extensive investigation Co-Lead Counsel believe there are at least thousands of persons and entities that fall within the Settlement Class definition. Thus, joinder would be impracticable and Rule 23 (a)(1) is satisfied.

2. Common Questions of Law and Fact

Fed. R. Civ. P. 23(a)(2) requires that there be "questions of law or fact common to the class." Plaintiffs must show that resolution of an issue of fact or law "is central to the validity of each" class member's claim and "[e]ven a single [common] question will" satisfy the commonality requirement. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011).

A central allegation in the Complaint is that Defendants illegally conspired to restrict supply and increase prices of Broilers. Proof of this conspiracy will be common to all Class members. *See, e.g.*, *Thillens, Inc. v. Cmty. Currency Exch. Ass'n*, 97 F.R.D. 668, 677 (N.D. Ill. 1983) ("The overriding common issue of law is to determine the existence of a conspiracy."). In addition to that overarching question, this case is replete with other questions of law and fact common to the Settlement Class including: (1) the role of each Defendant in the conspiracy; (2) whether Defendants' conduct violated Section 1 of the Sherman Act; (3) whether Defendants affirmatively concealed their agreement; (4) whether Defendants' conspiratorial conduct restricted Broiler supplies and caused the prices of Broilers to be inflated; (5) the appropriate measure of monetary relief, including the appropriate measure of damages; and (6) whether Plaintiffs and Class members are entitled to declaratory and/or injunctive relief. Accordingly, the Settlement Class satisfies Rule 23(a)(2).

3. Typicality

Fed. R. Civ. P. 23(a)(3) requires that the class representatives' claims be "typical" of class members' claims. "[T]ypicality is closely related to commonality and should be liberally construed." *Saltzman v. Pella Corp.*, 257 F.R.D. 471, 479 (N.D. Ill. 2009) (citations omitted). Typicality is a "low hurdle," requiring "neither complete coextensivity nor even substantial identity of claims." *Owner-Operator Indep. Drivers' Ass'n v. Allied Van Lines, Inc.*, 231 F.R.D. 280, 282 (N.D. Ill. 2005). When "the representative party's claim arises from the same course of

conduct that gives rise to the claims of other class members and all of the claims are based on the same legal theory," factual differences among class members do not defeat typicality. *Id.* Courts generally find typicality in cases alleging a price-fixing conspiracy. *See, e.g., In re Mercedes-Benz Antitrust Litig.*, 213 F.R.D. 180, 185 (D.N.J. 2003) (finding that plaintiffs met the typicality requirement based on the fact that plaintiffs' main claim - that they were harmed by an illegal price-fixing conspiracy - was the same for all class members).

DPPs here allege a conspiracy to fix, maintain, and inflate the price of Broilers in the United States. The named class representative Plaintiffs will have to prove the same elements that absent Settlement Class members would have to prove, *i.e.*, the existence and effect of such conspiracy. As alleged in the Complaint, each named representative purchased Broilers directly from one or more Defendants and that it was overcharged and suffered an antitrust injury as a result of the violations alleged in the Complaint. (Complaint, ¶¶ 22-28.) Because the representative Plaintiffs' claims arise out of the same alleged illegal anticompetitive conduct and are based on the same alleged theories and will require the same types of evidence to prove those theories, the typicality requirement of Rule 23(a)(3) is satisfied.

4. Adequacy

Fed. R. Civ. P. 23(a)(4) requires that, for a case to proceed as a class action, the court must find that "the representative parties will fairly and adequately protect the interests of the class." Adequacy of representation is measured by a two-part test: (i) the named plaintiffs cannot have claims in conflict with other class members, and (ii) the named plaintiffs and proposed class counsel must demonstrate their ability to litigation the case vigorously and competently on behalf of named and absent class members alike. *See Kohen v. Pacific Inv. Mgmt.*, 571 F.3d 672, 679 (7th Cir. 2009).

Both requirements are satisfied here. As they demonstrated at the time they sought appointment, Co-Lead Counsel are qualified, experienced, and thoroughly familiar with antitrust class action litigation. Co-Lead Counsel have successfully litigated many significant antitrust actions and have prosecuted and will continue to vigorously prosecute this lawsuit.[5]

Moreover, the interests of the settling Class members are aligned with those of the representative Plaintiffs. Plaintiffs, like all Class members, share an overriding interest in obtaining the largest possible monetary recovery and as fulsome cooperation as possible. *See In re Corrugated Container Antitrust Litig.*, 643 F.2d at 208 (certifying settlement class and holding that "so long as all class members are united in asserting a common right, such as achieving the maximum possible recovery for the class, the class interests are not antagonistic for representation purposes"). Representative Plaintiffs are not afforded any special compensation by this proposed Settlement and all Class members similarly share a common interest in obtaining Fieldale Farms' early and substantial cooperation to prosecute this case.

As they respectfully submit has been demonstrated by their conduct to date, Co-Lead Counsel have diligently represented the interests of the Class in this litigation and will continue to do so. Accordingly, the requirements of Rule 23(a)(4) are satisfied.

B. The Proposed Settlement Class Satisfies Rule 23(b)(3)

Once Rule 23(a)'s four prerequisites are met, Plaintiffs must show the proposed Settlement Class satisfies Rule 23(b)(3) by showing that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." As to predominance, "[c]onsiderable overlap exists between the court's

[5] *See* ECF Nos. 44-0 – 44-3 (DPPs' Motion to Appoint Co-Lead and Liaison Counsel); ECF No. 144 at p. 3 (Court's Order of October 14, 2016 appointing same).

determination of commonality and a finding of predominance. A finding of commonality will likely satisfy a finding of predominance because, like commonality, predominance is found where there exists a common nucleus of operative facts." *Saltzman*, 257 F.R.D. at 484.

In antitrust conspiracy cases such as this one, courts consistently find that common issues of the existence and scope of the conspiracy predominate over individual issues. *In re Foundry Resins Antitrust Litig.*, 242 F.R.D. 393, 408 (S.D. Ohio 2007); *see also In re Catfish Antitrust Litig.*, 826 F. Supp. 1019, 1039 (N.D. Miss. 1993) ("As a rule of thumb, a price fixing antitrust conspiracy model is generally regarded as well suited for class treatment."). This follows from the central nature of a conspiracy in such cases. *Hughes v. Baird & Warner, Inc.*, No. 76 C 3929, 1980 WL 1894, at *3 (N.D. Ill. Aug. 20, 1980) ("Clearly, the existence of a conspiracy is the common issue in this case. That issue predominates over issues affecting only individual sellers."); *see also Amchem*, 521 U.S. at 625 ("Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws.").

Plaintiffs must also show that a class action is superior to individual actions, which is evaluated by four considerations:

> (A) the interest of the members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of the class action.

Fed. R. Civ. P. 23(b)(3).

Here, any Class member's interest in individually controlling the prosecution of separate claims is outweighed by the efficiency of the class mechanism. Thousands of entities purchased Broilers during the class period; settling these claims in the context of a class action conserves both judicial and private resources and hastens Class members' recovery. Finally, while

Plaintiffs see no management difficulties in this case, this final consideration is not pertinent to approving a settlement class. *See Amchem*, 521 U.S. at 620 ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial.").

Accordingly, the proposed class action is superior to other available methods (if any) for the fair and efficient adjudication of the controversy relating to Fieldale Farms.

VI. NOTICE TO THE CLASS

Rule 23(e) requires that prior to final approval, notice of a proposed settlement be given in a reasonable manner to all class members who would be bound by such a settlement. For a class proposed under Rule 23(b)(3), whether litigated or by virtue of a settlement, Rule 23(c)(2)(B) enumerates specific requirements. At an appropriate time prior to moving for final approval of this proposed Settlement, DPPs intend to propose to the Court a plan of notice which, pursuant to Rule 23(c)(2)(B), will provide due process and reasonable notice to all customers of Defendants—Settling and Non-Settling Defendants alike—who can be identified through customer lists that will be requested of the Defendants. However, for the reasons identified below, and with Fieldale Farms' agreement, DPPs request that the Court agree to defer formal notice to the Class for the time being.[6]

There is a large cost to the Class, likely to run to six figures, each time notice is provided to a class of this size. (Bruckner Decl., ¶ 10.) Therefore, DPPs request that the Court agree to defer formal notice to the Class of this settlement for efficiency and cost effectiveness. In large antitrust cases, courts have deferred notice until enough settlements have been reached to make it cost effective. *In re Aftermarket Filters Antitrust Litig.*, No. 1:08-cv-04883, Preliminary

[6] Fieldale Farms and DPPs have agreed that the timing of a motion to approve notice to the Class of this Settlement Agreement is in the discretion of Co-Lead Counsel, and may be combined with notice of other settlements in this Action. (*See* Settlement Agreement, § II.E.4.)

Approval Order (ECF No. 885) at p. 5 (N.D. Ill. Feb. 16, 2012) (granting preliminary approval of settlement agreements, certifying settlement class, and ordering that class notice be deferred until a later time); *In re New Jersey Tax Sales Antitrust Litig.*, No. 3:12-cv-01893, Order (ECF No. 276) at ¶ 7 (granting preliminary approval of settlement and finding that cost of class notice warranted deferral). If more settlements are reached, then the costs of notice can be spread across those settlements. In addition, multiple notices can be potentially confusing for class members. This Court has the discretion to decide the timing of the notice. *Id.* In the experience of DPP counsel, it is better for notice of more than one proposed settlement to be combined into one notice, with the attendant and obvious efficiencies and savings to the class.

In addition to the cost savings to the Class of deferring notice, DPPs will need time to obtain customer lists from each Defendant. Use of defendants' customer lists for individual notice is commonplace in antitrust cases. *See, e.g.*, *Visa Check/MasterMoney*, No. 96-5238, 2002 WL 31528478 at *2-3 (E.D.N.Y. June 21, 2002) ("For purposes of providing notice, the best way to identify individual merchant class members is . . . through merchant contact information . . . ."). Defendants have so far refused to move forward with discussions regarding transactional data. Therefore, the proposed deferral of class notice will permit time to obtain each Defendants' customer contact information, including through motion practice if necessary.

VII. CONCLUSION

For these reasons, Interim Co-Lead Counsel respectfully request that the Court preliminary approve the Fieldale Farms Settlement and preliminary certify the Settlement Class.

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Respectfully submitted,

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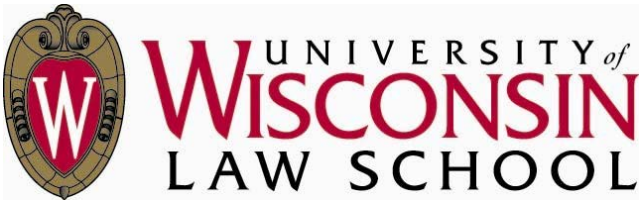

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Agricultural Cooperatives and the Law: Obsolete Statutes in a Dynamic Economy

Peter Carstensen

AGRICULTURAL COOPERATIVES AND THE LAW: OBSOLETE STATUTES IN A DYNAMIC ECONOMY

PETER C. CARSTENSEN†

Agriculture has always had a special place in American politics and public policy. This was even truer in the first third of the last century when farmers were more numerous. Section 6 of the Clayton Act,[1] the Capper-Volstead Act,[2] and the Cooperative Marketing Act[3] are the results of that "solicitude" for farmers.[4] Adopted in 1914, 1922, and 1926, these acts have remained unchanged over the succeeding decades. The Agricultural Marketing Agreement Act[5] ("AMAA"), despite many amendments since its adoption during the Depression, still authorizes the creation of enforceable output restrictions in various commodities. Moreover, the AMAA has the effect of further strengthening the hand of cooperatives in some important types of agriculture, especially dairy. Overall, this combination of statutes has the capacity to facilitate a variety of anticompetitive acts affecting both farmers and consumers. Competitive concerns most frequently arise when the cooperative is large or its members include, or might even exclusively be, vertically integrated producers of agricultural commodities.

This article will examine the problems that result from a statutory scheme adopted in an era dominated by small farms and local cooperatives that has survived into an era of immense farming operations. In this modern era, "farms" can be billon dollar enterprises that directly process and market their commodities, and "cooperatives" can have tens of thousands of members. Congress should revise these acts, particularly the Capper-Volstead Act and the AMAA, to address the dramatically different nature of American agriculture in the 21st Century. Regrettably, the iconic status of the Capper-Volstead Act among farmers and politicians makes revision politically unlikely. Hence, judicial interpretation provides the only means to limit the unintended harmful consequences to both farmers and consumers of these historic relics. Similarly, the Secretaries of Agriculture over the decades have, with rare exceptions, been unwilling to use the limited powers under the Capper-Volstead Act and the more

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† Professor of Law, University of Wisconsin Law School. This article draws on my chapter 4 on agricultural antitrust exemptions in ABA ANTITRUST SECTION, FEDERAL EXEMPTIONS FROM ANTITRUST (2007). I have greatly profited from the opportunity to discuss these issues in a variety of contexts, including the Dairy Workshop (June 2009), and the AAI Private Antitrust Enforcement Conference (December 4, 2012). I am also indebted to Kelliann Blazek, Class of 2014, for research assistance.

1. 38 Stat. 731 (1914) (codified as amended at 15 U.S.C. § 17 (2006)).
2. 42 Stat. 388 (1922) (codified as amended at 7 U.S.C. § 291-292 (2006)).
3. 44 Stat. 803 (1926) (codified as amended at7 U.S.C. § 455 (2006)).
4. My father, a historian of agriculture, often observed that politicians and newspaper editors romanticize farming in ways that no farmer would. The political solicitude all too often was symbolic and did not address the fundamental needs of American agriculture.
5. 49 Stat. 750 (1935) (codified as amended in scattered sections of 7 U.S.C.).

expansive powers conferred by the AMAA to police the competitive and governance issues that exist. While only legislative or administrative action can avoid some of the undesirable consequences, the evolving pattern of judicial construction of the Capper-Volstead Act can limit a number of its potential adverse effects.

A broader concern, and the secondary focus of this article, is the weakness of both internal and external oversight with respect to the governance of large cooperatives. The combination of the statutory immunities of these enterprises with the inherent nature of the limited governance role of cooperative members creates an additional set of issues that should be of concern to farmers and lawmakers.

Part I of this article reviews the statutory scheme itself. Part II describes the varied functions that agricultural marketing cooperatives can perform. Part III describes the consequences of an obsolete and incomplete legal framework. Those consequences include competitive harms that have affected both farmers and consumers. The instances of such harm are relatively limited and usually require either a combination of statutory entitlements that create the potential for harm, or the dominance of a sector by large, vertically integrated firms. A second consequence is the lack of oversight and appropriate legal rules regulating the internal governance of large cooperatives. This systemic failure directly harms members of large cooperatives whose interests are often subordinated to managerial exploitation. It also creates additional incentives for managers to engage in anticompetitive conduct because of their ability to appropriate the resulting gains. Part IV provides a critical review of the current state of the law applicable to the concerns raised in Part III. Part V proposes a set of statutory reforms that would free some classes of productive cooperatives from the dead hand of the past while providing a better framework for authorizing and supervising cartelistic cooperatives. Recognizing the political futility of such reform, Part VI evaluates the evolving pattern of judicial interpretation and suggests how it can best minimize many, but not all, of the downsides of the static statutory scheme.

I. THE FEDERAL STATUTORY SCHEME GOVERNING AGRICULTURAL COOPERATIVES: EXEMPTIONS FROM ANTITRUST, TAX AND SECURITIES LAW

A. THE ANTITRUST EXEMPTION FOR FARM COOPERATIVES

Section 6 of the Clayton Act,[6] the Capper-Volstead Act,[7] and the Cooperative Marketing Act of 1926[8] provide, in combination, an antitrust exemption for some activities of farm cooperatives engaged in the marketing of

6. 38 Stat. 731 (1914) (codified as amended at 15 U.S.C. § 17 (2006)).
7. 42 Stat. 388 (1922) (codified as amended at 7 U.S.C. § 291-292 (2006)).
8. 44 Stat. 803 (1926) (codified as amended at7 U.S.C. § 455 (2006)).

agricultural commodities. In adopting the Sherman Act,[9] Congress rejected an amendment to exempt cooperatives and labor unions from the statute.[10] Indeed, prior to the adoption of the Clayton Act, there had been no antitrust challenges to cooperatives under the Sherman Act,[11] but a number of state antitrust cases had found against cooperatives.[12] The courts were particularly concerned about exclusive supply contracts between cooperatives and their members.[13]

Congress intended Section 6 of the Clayton Act to resolve these problems with respect to both unions and cooperatives generally.[14] Unlike the Capper-Volstead Act, Section 6 applies to any "labor, agricultural, or horticultural organization[] instituted for the purposes of mutual help . . . ."[15] Thus, this provision covered some farm cooperatives that provided goods and services to farmers as well as those that marketed farm products. However, Section 6 applied only to "organizations . . . not having capital stock or conducted for profit . . . ."[16] Hence, it did not shield a growing number of cooperatives organized in a corporate form based on equity investment and profit sharing among members. Moreover, the exemption applies only to "the existence and operation" of such organizations, and only protects members if they are "carrying out the legitimate objects thereof . . . ."[17] The courts read this Clayton Act exception narrowly, giving it limited value for both farmer cooperatives and labor unions facing a Sherman Act complaint.[18]

Following World War I, farm prices collapsed as greatly increased

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9. 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (2006 & Supp. 2011)).

10. The reasoning was that the law would not apply to such organizations. U.S. DOJ, REPORT OF THE TASK GROUP ON ANTITRUST IMMUNITIES (1977) [hereinafter U.S. DOJ REPORT]; DONALD A. FREDERICK, RURAL BUS. COOP. SERV., USDA, ANTITRUST STATUS OF FARMER COOPERATIVES: THE STORY OF THE CAPPER-VOLSTEAD ACT 25-27 (2002), *available at* http://www.rurdev.usda.gov/rbs/pub/cir59.pdf [hereineafter USDA, ANTITRUST STATUS].

11. USDA, ANTITRUST STATUS, *supra* note 10, at 68-70. *But see* Steers v. United States, 192 F. 1 9-11 (6th Cir. 1911) (antitrust law applied to "night riders" who sought to enforce boycott of tobacco buyers by coercive means). In addition, labor unions had been subject to successful antitrust challenge. *See generally* Loewe v. Lawlor, 208 U.S. 274 (1908).

12. For a review of these early cases, see USDA, ANTITRUST STATUS, *supra* note 10, 67-70.

13. *See id.*

14. *See* 38 Stat. 731 (1914) (codified as amended at 15 U.S.C. § 17 (2006)). Section 6 states:

> Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of 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; 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.

Id.

15. *Id.*

16. *Id.*

17. *Id.*

18. *See, e.g.*, United States v. King, 229 F. 275 (D. Mass. 1915); United States v. King, 250 F. 908, 909-10 (D. Mass. 1916) (narrowly construing Clayton Act exception to uphold antitrust claims against potato cooperative based on pleadings that alleged the use of unlawful means to enforce the cooperatives' policies); Duplex Printing Press Co. v. Deering, 254 U.S. 443, 469 (1921) (narrowly construing the Clayton Act provisions as applied to labor union activities); *see also* USDA, ANTITRUST STATUS, *supra* note 10, 83-87.

productive capacity faced a lack of demand.[19] Within the agricultural community, there was both advocacy for the creation of broadly based cartels that would control the price of agricultural commodities and demands for direct government subsidies. Another theme in this period was the need for farmers to have better ways to process and/or market their commodities.

Direct subsidies lacked political attraction to the conservative leadership of the country. Moreover, the history of the Granger movement in the 1880s argued against the likelihood that farmers could effectively band together to control prices.[20] At the same time, antitrust became a tool for suppressing union bargaining. The Department of Justice challenged the Sun Maid raisin organization in California, which had achieved a near monopoly on the supplies of raisins in a year of shortage and dramatically increased prices.[21] In addition, there were complaints about dairy cooperatives that had raised prices in a few major cities where cooperatives controlled milk supplies.[22] These events provided the background for a demand for more antitrust protection for cooperatives that marketed farm products. The process went forward from 1920 to 1922 and culminated in the Capper-Volstead Act.

The proponents of this legislation repeatedly emphasized that farmers were at the mercy of large buyers who dictated unfairly low prices while simultaneously raising prices to consumers.[23] Hence these antitrust challenges to cooperatives were presented as the opening stages of broader attacks on farmer owned cooperatives.[24] Cooperatives in turn were pictured as the means of protecting the farmers' rights to fair treatment[25] and the means to demand reasonable prices for their products either through bargaining with buyers or through processing and marketing of their products.[26] Moreover, the legislative history shows a congressional assumption that buyers paid farmers low prices

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19. WILLARD W. COCHRANE, THE DEVELOPMENT OF AMERICAN AGRICULTURE: A HISTORICAL ANALYSIS, 100-01 (1979).

20. *Id.* at 114-16, 292-93.

21. VICTORIA SAKER WOESTE, THE FARMER'S BENEVOLENT TRUST 118-26 (1998); *see id.* at 128 tbl.6.4. Although thought of as a cooperative, Sun Maid's legal form and membership did not conform to the cooperative model authorized by the Capper Volstead Act. *See id.* at 112-13. After a Federal Trade Commission investigation, the Justice Department initiated a lawsuit focused on various coercive practices allegedly used by Sun Maid. The Federal Trade Commission Report is reprinted in Senate Judiciary Committee hearings on the Capper-Volstead Bill, H.R. 2373, 67th Cong., 1st Sess, , (1921), 8-16. For a description of the background of the case, see WOESTE, *supra* note 21, 138-63; *see also* USDA, ANTITRUST STATUS, *supra* note 10, at 63-67.

22. *See* USDA, ANTITRUST STATUS, *supra* note 10, at 61-62.

23. *See, e.g.*, 62 CONG. REC. 2259 (1922) (remarks of Senator George Norris, R. Kansas).

24. Senator Norris, for one, denied that cooperatives marketing their members' products would violate the antitrust laws, but he asserted that many farmers were reluctant to join out of concern for antitrust liability because many in the business community kept asserting that cooperatives were illegal. *Id.* at 2257, 2261. The idea of an exemption for lawful conduct to avoid the risks and costs of potential antitrust liability has been advanced as an explanation for the continued viability of the exemptions for various types of agreements in the transportation industry. *See* Peter C. Carstensen, *Replacing Antitrust Exemptions for Transportation Industries: The Potential for a "Robust Business Review Clearance,"* 89 OR. L. REV. 1059 (2011).

25. 62 CONG REC. 2259-60 (1922) (remarks of Senator George Norris, R. Kansas).

26. *See* H.R. REP. NO. 24 to accompany H.R. 2373, 67th Cong., 1st Sess. (1921); S. REP. NO. 236 (Authorizing Association of Producers of Agricultural Products), 67th Cong. 1st Sess (1921).

but charged consumers high prices.[27] The resulting margin between farm and consumer ought to be shared with the farmer. Hence, Congress adopted the Capper-Volstead Act[28] with a stated goal of enhancing the bargaining power of farmers in their dealings with buyers.[29]

From the outset, therefore, the Capper-Volstead Act had dual goals of efficiency enhancement and wealth transfer. In the case of wealth transfer in particular, there were strands of countervailing power ideas[30] (organized farmers would be better able to bargain for reasonable, fair prices) and cartelistic notions (by organizing, farmers could drive up prices). However, the record suggests that Congress lacked any in-depth understanding of how cooperatives would achieve either wealth transfer goal. Indeed, another theme was that with so many producers, there was no risk of excessive prices for consumers.[31]

The Act expanded the Clayton Act's coverage of farmer cooperatives engaged in the marketing of agricultural commodities to include corporate cooperatives, provided they met either a voting constraint (each member to have only one vote) or a limit on the amount of dividends that could be paid to members (no more than eight percent could be paid on investments).[32] It imposed limits as to membership (only producers, i.e., farmers, could be members) and required that cooperatives deal primarily in the products of their members.[33] The Act does not explicitly reference the antitrust laws, but it expressly legalizes contracts between a cooperative and its members and authorizes cooperatives to act in concert with each other, but not with third parties. This latter provision also arguably shields both mergers among and monopoly positions held by cooperatives. However, the Act also only authorizes "collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged."[34]

In response to concern about exploitation of consumers, the Act authorizes the Secretary of Agriculture to oversee the conduct of cooperatives but only with respect to excessive prices to buyers.[35] The language of the Capper-Volstead

27. *See id.*; *see also* 62 CONG. REC. 2257-2260 (1922) (remarks of Senator George Norris, R. Kansas).

28. 42 Stat. 388 (1922) (codified as amended at 7 U.S.C. § 291-292 (2006)).

29. *See* House Report, *supra* note 26, at 2-3.

30. The concept of countervailing power received its initial formal articulatution in JOHN K. GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER (1956).

31. *See* 62 CONG. REC. S2260 (Feb. 8, 1921) (remarks of Sen. Norris).

32. 42 Stat. 388 (1922) (codified as amended at 7 U.S.C. § 291-292 (2006)). This applies only to earnings on invested capital. Cooperatives engaged in the processing of commodities often distributed their profits in the form of patronage refunds based on the volume of business that a farmer did with or through the cooperative. When the Robinson-Patman Act was adopted, this method of distributing profits created a conflict with the prohibition in that act on price discrimination. So, the Robinson Patman Act provided a further exemption from the prohibition on price discrimination for rebates to cooperative members based on "purchases or sales from, to, or though the association." 49 Stat. 1526 (1936) (codified at 15 U.S.C. § 13 (2006)). This exemption applies as well to cooperatives outside the scope of Capper-Volstead, including consumer cooperatives and other comparable organizations. *Id.*

33. 7 U.S.C. § 291 (2006).

34. *Id.*

35. 7 U.S.C. § 292. Initially, the Senate version of this legislation assigned the responsibility to

Act has remained unchanged since its adoption. In the mid-1920s, in response to further declines in agricultural commodity prices and extensive advocacy for more direct government intervention in these markets, Congress adopted the Cooperative Marketing Act of 1926 to provide more support for the development of agricultural cooperatives, including a provision explicitly authorizing the sharing and coordination of marketing information among cooperatives.[36]

Neither statute provides any method or authority to determine whether an entity qualifies as a Capper-Volstead cooperative. As a result, the USDA does not provide any general certification process with respect to cooperatives.[37] Some entities have used the Business Review Clearance process of the Antitrust Division of the Justice Department to ascertain whether they qualified.[38] Similarly, the SEC and IRS may periodically review the status of organizations that claim the statutory benefits accorded such cooperatives.

B. TAX TREATMENT AND EXEMPTION FROM FEDERAL CORPORATE (SECURITIES) REGULATION

Federal tax law and securities law also provide special treatment for cooperatives that qualify under standards comparable to those in the Capper-Volstead Act. Section 521 of the Internal Revenue Code exempts from corporate taxation any farm cooperative that limits payments to its investors to the greater of eight percent or the maximum interest rate authorized by state law and limits stock ownership to its farmer members.[39] In addition, the cooperative must do at least half its business on behalf of its producer members.[40] Thus, the

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oversee anticompetitive conduct broadly defined to the Federal Trade Commission *see* S. Rep 67-236 (1921), but in reconciling the House and Senate versions, the House preference for the Secretary of Agriculture and a narrower mandate (review of selling prices only) prevailed.

36. Cooperative Marketing Act of 1926, ch. 725, § 5, 44 Stat. 803 (codified at 7 U.S.C. § 455 (2006)). Nothing in the legislative reports suggests that antitrust concerns motivated this provision. *See* S. REP. NO. 69-664 (1926); H.R. REP. NO. 69-116 (1926). But the recently decided cases on information exchange may have been a factor in leading to the inclusion of this provision. *See* Am. Column & Lumber Co. v. United States, 257 U.S. 377 (1921); Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925).

37. The USDA does have to certify that dairy cooperatives participating in the milk order program satisfy the Capper-Volstead Act. Procedure for Determining the Qualification of Cooperative Milk Marketing Associations, 7 C.F.R. § 900.350-.357 (2012). But the process of certification does not address the concerns examined later in this article.

38. *See, e.g.*, Letter from Richard W. McLaren, Assistant Attorney Gen., Antitrust Div., U.S. DOJ, to Irving Isaacson (Nov. 24, 1969) (requesting business review for Nat'l Egg. Co.). *See also* Holly Farms Poultry Indus. v. Kleindienst, 1973 WL 814 (M.D.N.C. May 10, 1973) (challenge to negative business review with respect to Capper-Volstead status). The Business Review process is set forth in 28 C.F.R. § 50.6 (2012). The current Antitrust Division index of business review letters does not reveal any recent correspondence, but there were a number of letters sent prior to 1992. *See* U.S. DOJ, ANTITRUST DIVISION BUSINESS REVIEWS, http://www.justice.gov/atr/public/busreview/index.html (last visited Feb. 16, 2013).

39. 26 U.S.C. § 521(b) (2006). Many cooperatives today rely on other, more general exemptions. See, Thomas E. Geu, James B. Dean, *The New Uniform Limited Cooperative Association Act: A Capital Idea for Principled Self-Help Value Added Firms, Community-Based Economic Development, and Low-Profit Joint Ventures*, 44 Real Prop. Trust & Est. L. J. 55, 91-96 (2009) (overviewing tax treatment of cooperatives with references).

40. *Id.* Thus, the income tax exemption does not use the optional basis—the limit on voting rights to one vote per member—to qualify a cooperative under the Capper-Volstead Act. This provision

cooperative can retain earnings and not pay any corporate income tax on them. This is offset by the limits on dividends and the fact that ownership interests are hard to transfer. Over time, the theoretical value of a membership can increase with the retained earnings allocated to the member, but extracting that value when a member leaves the cooperative can be quite difficult.

In the early 1930s Congress adopted federal securities laws and included exemptions for farm cooperatives. The 1933 Act governing public sale of new issues of securities requires extensive disclosure of information to investors but exempts qualified cooperatives.[41] The 1934 Act governs on-going accounting, public reporting, governance, and voting rights of shareholders of large corporations.[42] Over time, the 1934 Act and its regulations have expanded the scope of regulations for such entities. Again, the Act exempted cooperatives regardless of their size or the number of members.[43] Curiously, the bases for the two exemptions differ.[44] Moreover, the exemptions do not completely preclude securities law liability, as the general fraud provisions of Rule 10-b (5) do apply to the sales of securities by cooperatives.[45]

For many cooperatives, their securities offerings as well as internal governance requirements would not have been subject to federal law even if there had been no exemptions. Federal law only applies to "public offerings"[46] and to governance of enterprises with substantial numbers of shareholders and assets.[47] Because of these exemptions and the lack of any alternative national

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discourages use of higher payouts to attract capital.

41. Securities Act of 1933, 48 Stat. 74 (codified as amended at 15 U.S.C. § 77c(a)(5)(B) (2006), exempts the issuance of securities by any farm cooperative that satisfies the definition of Section 521 of the Internal Revenue Code, 26 U.S.C. § 521(b)).

42. Securities Exchange Act of 1934, 48 Stat. 881 (codified as amended in scattered sections of 15 U.S.C.).

43. 15 U.S.C. § 78l(g)(2)(E) (2012) (exempts farm cooperatives from any obligations to register their securities if they satisfy the criteria of the Agricultural Market Act of 1929, 12 U.S.C. § 1141j(a)). That Act incorporates both of the Capper-Volstead Act criteria for exemption (limited return or limited voting rights).

44. The registration exemption in the 1933 Act applies only if the standards of 26 U.S.C. § 521 are satisfied, while the 1934 Act obligations are avoided so long as the cooperative satisfies either basis (voting or dividend cap) specified in the Capper-Volstead Act. Despite this exemption some cooperatives have issued publicly registered preferred stock and so have become obliged to adhere to some of the public reporting and financial regulations of the 34 Act. For example, CHS, a very large cooperative active in grain handling among other activities, has a class of preferred stock that in turn requires it to adhere to the SEC reporting and disclosure rules. *See Investors*, CHS INC., https://www.chsinc.com/portal/server.pt/community/2investors/351 (last visited April 23, 2013).

45. 17 C.F.R. § 240.10b-5 (2013) (the rule applies to "any security" and so includes securities issued by a cooperative). *See* Reves v. Ernst & Young, 494 U.S. 56, 60-68 (1990) (the notes issued by the bankrupt cooperative were securities under the 1934 Act so the accountants were subject to suit for the alleged violation of Rule 10b-5).

46. The Securities Act requires that all issuers register their securities before they sell them, 15 U.S.C. § 77e (2006), but the Act also provides a number of exceptions and exemptions. *See, e.g.*, 15 U.S.C. § 77d. The end result is a statute that requires those who seek to avoid its provisions to establish that they are entitled to a pass, rather than requiring that the regulatory body prove that the issuer was covered.

47. The minimum requirement is that a corporation must have at least 500 shareholders of record of some class of securities and assets of at least $10 million. *See* 15 U.S.C. § 78*l*(g) (2006 & Supp. 2012).

oversight system for large cooperatives, the cooperative statute from the state of incorporation provides the only legal framework for the governance of any cooperative. State corporate law has achieved some consistency and coherence because of the dominance of Delaware as the place of incorporation of so many large corporations. No similar central legal tendency has emerged among cooperatives. Hence, the law governing internal operations of cooperatives, especially large ones, unlike analogous corporate law, is not well developed.

C. THE MARKET ORDER SYSTEM—PUBLICLY REGULATED CARTELS

In the late 1920s and early 1930s, farm prices declined dramatically.[48] With the arrival of the New Deal in 1933, various laws sought to restrict agricultural output in order to raise prices. Out of these efforts emerged the AMAA.[49] Its goal was to facilitate cartelization of agricultural product markets for the benefit of the producers. The economic justification for this statute was explicitly to transfer wealth to farmers from downstream buyers through creation of market power. First, it authorized voluntary "agreements" between farmers or ranchers and processors with respect to the marketing of a specific crop, including price and output restraints. These agreements conferred no control over producers and processors who were not parties to the agreement.[50] They were also to be limited to a defined geographic region and specific crop. Finally, these agreements are expressly exempt from antitrust law,[51] provided the Secretary of Agriculture approved them.[52]

Second, the AMAA authorized the Secretary to impose "marketing orders" with respect to a limited number of agricultural commodities.[53] Such an order governs the conduct of all producers and processors of the commodity in the geographic region covered by the order. An order can regulate any aspect of the marketing process for the crop, including setting prices and restricting the volume that any producer can sell. Orders can, therefore, establish a government-sponsored cartel.

Most orders cover a limited geographic region with the result that the same crop is subject to several orders depending on where it is grown. However, a few crops, such as cranberries and hops, are or were the object of a single national order.[54] Before the Secretary can impose an order, two-thirds of the

48. COCHRANE, *supra* note 19, at 120. Farm prices fell almost fifty percent from 1929 to 1932.

49. 50 Stat. 246 (1937), codified at 7 U.S.C. § 608b and elsewhere in title 7. The AMAA revised and re-enacted the Agricultural Adjustment Act of 1933, ch. 25, 48 Stat. 31 et seq., codified, as amended, at scattered sections of 7 U.S.C.

50. 7 U.S.C. § 608b(a) (2006).

51. *Id.* ("The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States . . . .").

52. *Id.*

53. 7 U.S.C. § 608c(1) (2006). This provision of the AMAA has been explained as an alternative strategy for selected agricultural commodities that did not qualify for direct price supports. *See* Leon Garoyan, *Marketing Orders*, 23 U.C. DAVIS L. REV. 697, 698-699 (1990).

54. 7 C.F.R. § 929 (2012) (cranberries). Technically the hops order covered a limited group of states, but those were the only places where hops were produced. In 2004, the Antitrust Division opposed a plan by the hop growers that would have allocated production. *See* U.S. DOJ Post-Hearing

affected farmers must approve it.[55] Affected processors must also be allowed to vote, but the Secretary may override processor rejection.[56] The Secretary is to oversee the operation and conduct of orders.[57] Moreover, the AMAA provides that orders may include a prohibition on "unfair methods of competition and unfair trade practices . . . ."[58]

The difference between AMAA "agreements" and "orders" is significant in theory. Agreements alone cannot control market prices unless there is both nearly complete producer participation and processor cooperation. In contrast, covered producers must adhere to an order, and it can be imposed on dissenting processors without their consent. This is consistent with the AMAA's underlying goal to facilitate increased producer income. The AMAA does not expressly exempt orders from antitrust law, but the prior agreement of the farmers (and processors if they agree) is immunized.[59] As a practical matter, however, there are no "agreements" except those contained in "orders." Any purely voluntary effort to restrict or regulate production would encounter very substantial risks of opportunistic behavior.

Of the commodities to which the AMAA currently applies,[60] the most significant is milk because marketing orders, or state equivalents, apply to a substantial majority of milk production in the country.[61] Marketing orders outside of milk are limited, and appear to be declining. In 1987, there were

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Memorandum, Proposed Marketing Order No. 991, Hops Produced in Washington, Oregon, Idaho, and California, No. AO-F&V-991-A3; FV03-991-01 (USDA, Feb. 18, 2004), *available at* http://www.justice.gov/atr/public/comments/202477.pdf. The hops order appears to have terminated following this intervention.

55. 7 U.S.C. § 608c(8) (2006).

56. *Id.* (requiring processor approval by a majority except for California citrus where three-fourths approval is required); § 608c(9) (allowing the Secretary to override rejection by processors based on findings of fact and approval by the required majority of producers).

57. § 608c(16)(A) (2006). The administrative process includes a system of committees with industry representation. *See* 7 U.S.C. § 608c(7)(C) (2006). The structure is analogous to the kinds of market regulations contemplated in the National Industrial Recovery Act ("NIRA"), which Congress adopted in that same period, but which the Supreme Court struck down. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) (finding an NIRA "code of fair competition" unconstitutional). However, the Supreme Court upheld the constitutionality of the marketing order process for agricultural commodities in United States v. Rock Royal Co-Op, Inc. 307 U.S. 533, 581 (1939).

58. 7 U.S.C. § 608c(7)(A) (2006). No current order appears to have any such prohibition.

59. An antitrust exemption for an order would also follow from the doctrine of implied exemption necessary to make a statute work. *See, e.g.*, Credit Suisse Securities (USA) LLC v. Billing 551 U.S. 264 (2007) (antitrust law preempted to protect the authority of the SEC to oversee the public market in securities).

60. The original AMAA authorized orders for milk, vegetables, fruit, soybeans, tobacco, and naval stores. Agricultural Marketing Agreement Act, § 8c(2), 49 Stat. 754 (1935) (codified as amended at 7 U.S.C. § 608c(2) (2006)). The current law also explicitly prohibits orders in the major grains, including soybeans, although soybeans had been on the list of commodities for which orders were initially authorized. 7 U.S.C. § 608c(2) (2006).

61. *See* § 608c(5). This section implements marketing orders for milk production and pricing subject to approval by dairy farmers in each of the statutorily defined marketing areas. *Id.* These orders define the conditions necessary for a farmer to share in the premium price paid for fluid milk in the order area. *See id.* They do not regulate the volume of milk produced. *See id.*

forty-five orders under the AMAA and an additional forty-five state orders.[62] As of 2013, about thirty separate orders are in the Code of Federal Regulations, and a number of those relate to regional production of the same commodities, e.g., potatoes, onions, and apples.[63] Moreover, relatively few orders impose significant restraints on production.[64] Most federal orders regulate the grading of commodities,[65] and often define the units in which the commodity is to be sold. Most orders do not directly control production or price. Their ostensible purpose is to ensure more uniformity and predictability of the quality and quantity of the products. This standard setting function can have a market facilitating effect because it reduces transaction costs when remote buyers can rely on standards to give assurance of the nature and quantity of the produce being purchased. However, such standards can also be used to differentiate products and thereby reduce quantities going to higher priced uses.[66] Orders have also excluded crop varieties that have better characteristics when only some farmers subject to the order were producing the superior variety.[67]

A good example of the extreme effects of the use of AMAA controls over sales exists in the pie cherry order. There is a dominant order covering the primary growing regions. In 2011, the cherry farmers were required to dump nearly forty percent of their crop to preserve prices.[68] The manifest incentive, given a percentage quota system, is to expand production so that the permitted quota would increase in absolute volume. The result is an over investment in cherry orchards.

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62. Garoyan, *supra* note 53, at 697-698.

63. *See generally* 7 C.F.R. §§ 900.01-999.500 (2012).

64. Among the federal orders in 1987, eleven had some form of market allocation or allocation of production rights and another four used reserve pools (agreements to remove surplus from the market); another thirteen allocated sales rights on a short run basis to regulate the flow of the commodity to the market. Garoyan, *supra* note 53, at 700. *See also* CHARLES BOWSHER, COMPTROLLER GENERAL, GENERAL ACCOUNTING OFFICE, REPORT TO THE CONGRESS: THE ROLE OF MARKETING ORDERS IN ESTABLISHING AND MAINTAINING ORDERLY MARKET CONDITIONS (1985). The General Accounting Office review of nine orders found two orders could restrict entry and one order could result in waste, but that in eight of the nine orders, competition limited the capacity to raise prices. *Id.*

65. *See* Garoyan, *supra* note 53, at 701. Forty-three marketing orders regulate grading or size. *Id.*

66. *See* James Chalfant & Richard Sexton, *Marketing Orders, Grading Errors, and Price Discrimination*, 84 AM J. AG. ECON. 53 (2002). By setting standards that exclude part of the crop from the premium price market, it is possible to increase the prices that producers get for that part of their crop. Marketing orders greatly facilitate such discrimination. However, the ability to evade such limits in many circumstances means that the actual gain to producers may be marginal or even negative. *See infra* notes 67 and 68 and accompanyting text.

67. In the winter of 2004, the Florida winter tomato order administrators banned the sale of a variety of tomato that reportedly had substantially better flavor, but ostensibly failed to meet the physical appearance requirements of the order, i.e., the tomato was lumpy. This kept the farmers raising that variety from being able to sell to willing, informed buyers. Florence Fabricant, *Forget About Taste, Florida Says, These Tomatoes Are Just Too Ugly to Ship*, N.Y. TIMES, Dec. 21, 2004, at A19.

68. *See* Tart Cherries Grown in the States of Michigan, et al.; Final Free and Restricted Percentages for the 2010-2011 Crop Year for Tart Cherries, 76 Fed. Reg. 10,471 (Feb. 25, 2011) (to be codified at 7 C.F.R. pt. 930). In 1993, the Antitrust Division of the Department of Justice submitted very critical comments concerning the undesirable efficiency implications of this approach. *See* Comments of the DOJ, Call for Additional Proposals for a Marketing Order for Red Tart Cherries Under the Agricultural Marketing Order Act (USDA, Nov. 8, 1993), *available at* http://www.justice.gov/atr/public/comments/200660.htm.

The AMAA also privileges cooperatives in ways that create a strong link between it and the Capper-Volstead Act. Specifically, cooperatives receive proxies for all their members' votes.[69] Thus, no member can vote individually and remain a member of the cooperative unless the cooperative waives this right. To the extent that the economic interests of a cooperative diverge from that of individual members, it can compel adherence to its position so long as membership is valuable to the individual member.

II. A TYPOLOGY OF AGRICULTURAL COOPERATIVES

The debate leading up to the Clayton Act and the subsequent Capper-Volstead Act reflected conflicting views of cooperatives and a related uncertainty about their status under the antitrust laws. Tension concerning the role and function of cooperatives has persisted to this day. Traditionally, producer cooperatives could serve one or more of three economic functions. They might be (1) vertically integrated processors of members' products, (2) intermediaries that market their members' products, or (3) bargaining agents on behalf of their members with buyers for prices and other terms that the buyer will observe in obtaining the agricultural products directly from the members. Since the 1960s, a fourth role has emerged as individual agricultural enterprises have vertically integrated from production to direct sales of finished goods. The "cooperative" provides a forum in which the "members" agree on the prices or other terms they will charge their buyers. This approximates a pure cartel in which the cooperative only provides a vehicle for the parties to agree how they will compete with each other.

A. COOPERATIVES AS PROCESSORS

Some cooperatives act as processors of the physical commodity. This role substitutes these cooperatives for one or more levels of businesses that would otherwise buy from farmers, process the product, and resell it.[70] There were and are a number of such cooperatives including grain elevators, creameries and cheese factories, fruit, nut and vegetable processors, and slaughter houses.[71] Furthermore, as in the well known examples of Sunkist, Sun Maid, Land O Lakes, Welch's, and Ocean Spray, some cooperatives have also developed popular brand names. Such branding and other downstream marketing activities provide an additional opportunity to share the gains that traditionally went to processors because of product differentiation.[72]

Cooperatives engaged in the actual processing and marketing of their

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69. 7 U.S.C. § 608c(12).

70. *See* MURRAY R. BENEDICT, FARM POLICIES OF THE UNITED STATES 1790-1950, at 135-36 (1953).

71. *Id.* at 136 & n.52.

72. WOESTE, *supra* note 21, at 120; WILLARD F. MUELLER, PETER G. HELMBERGER, THOMAS W. PATERSON, THE SUNKIST CASE: A STUDY IN LEGAL-ECONOMIC ANALYSIS 80-81 (1987) [hereinafter MUELLER ET AL., SUNKIST].

members' products are comparable to other business entities. Their membership rules and the contracts for the delivery of products are the necessary incidents of their productive activities.[73] Such ventures today would only raise antitrust concerns as arise with any other enterprise. However, as discussed previously, some early cases treated such agreements as unlawfully exclusionary.[74] For these entities, the tax and securities law treatments are probably more relevant than the antitrust exemption. The challenge that such entities face is often obtaining sufficient capital to be efficient producers.

In response to the need for more investment and greater flexibility in organization control, several states have recently given statutory authorization to new forms for cooperatives.[75] These organizations may accept outside investment as risk capital having a right to earn returns beyond that authorized by the Capper-Volstead Act and the tax laws.[76] In addition, investors can obtain votes and board representation in these cooperatives.[77] These new forms of cooperatives appear unlikely to qualify for an antitrust exemption under current Capper-Volstead criteria. Yet for many organizations, flexibility in seeking the investments needed to compete in the market for food products appear to outweigh the tax, securities law, and antitrust advantages of adhering to the Capper-Volstead cooperative model.

B. COOPERATIVES AS MARKETING AGENTS FOR FARMERS

Cooperatives can also act as sales agents or intermediaries for their farmer members. This is primarily a marketing role. There are often important economies for buyers in dealing with a single supplier who undertakes to deliver the required quantity and quality of goods. These cooperatives buy the products from the farmer member and then market them in a greater quantity than the individual producers could achieve. In some circumstances, the cooperative may process or sort the products, thus performing some of the processing functions as well. In providing these services, the cooperative acts in the same economic manner as non-cooperative agents that provide similar services. Thus, in dairy markets, for example, the cooperative often undertakes the function of supplying milk to the processor as well as the functions of collecting and testing. The title to the milk passes from the farmer to the cooperative (called a "milk handler"),

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73. *See* Nw. Wholesale Stationers v. Pac. Stationery & Printing, 472 U.S. 284, 296 (1985). But it is possible for such contracts to have anticompetitive implications. *Id.* at 295-96; MUELLER ET AL., SUNKIST, *supra* note 72, at 154; *see* Thomas W. Paterson, Willard F. Mueller, *Sherman Section 2 Monopolization for Agricultural Marketing Cooperatives*, 60 TUL. L. REV. 955, 973-75.

74. *See* USDA, ANTITRUST STATUS, *supra* note 10, at 67-71.

75. *E.g.*, Minnesota Cooperative Associations Act, MINN. STAT. §§ 308B.001-.975 (2011 & Supp. 2013). Other states modifying their cooperative laws to allow non-farmer investments include Iowa and Wyoming. IOWA CODE § 501.103(2)(a) (2008); WYO STAT. ANN. §§ 17-10-101 to -253 (2011).

76. *E.g.*, MINN. STAT. §§ 308B.601, .411 (2011). The Minnesota statute limits the maximum share of cooperative profits that can be distributed to such investors and restricts the total voting rights that such investors can obtain. *Id.* Up to eighty-five percent of all profits can go to outside investors, but the farmer members must retain a majority of the board. §§ 308B.411(2)(b), .601(3).

77. *See, e.g.*, § 308B.411.

and then the cooperative resells it to the processor. The cooperative gets the benefit of the AMAA dairy market order. The cooperative in turn buys the milk from the farmer and pays the "mail box" price—net of various expenses incurred in collecting, testing, and delivering the milk—as well as any other charges or differences that the contract with the farmer impose.

A variant of this type of cooperative that has focused on production of specialized crops has developed in the last several decades. It undertakes the production and sale of a defined quantity of the crop with each member allocated a specific quota. The production rights may then be transferable among the members or even sold to non-members, but to retain tax, securities, and antitrust privileges, non-member production may not exceed fifty percent of the total production. The potentially crucial difference is that these cooperatives undertake to produce and market only a specific quantity of the commodity. Unlike the standard model of a cooperative, these entities do not market all of the commodities that their participants can produce. Similar organizations directed at producing a relatively defined quantity of specific products also exist completely outside the cooperative model using limited liability companies or corporate forms of organization.

C. COOPERATIVES AS BARGAINING AGENTS FOR FARMERS

Another well-recognized function of agricultural cooperatives is that of bargaining agents that negotiate the terms on which their members sell directly to downstream buyers.[78] Such cooperatives function in much the same way that unions operate—they negotiate contracts that cover their members' transactions with the buyers. Under Galbraith's theory of countervailing power, the gains to farmers would come from redistributing the economic rents collected by the existing monopsonistic buyers.[79] Many members of Congress believed that such bargaining would not result in excessive prices to consumers.[80] This belief seems to have rested largely on an assumption of low barriers to entry into the production of any particular commodity. Hence, if the cooperative bargained for excessive prices, non-members would be expected to enter into production and undercut the cooperative.[81] Moreover, modern economic analysis suggests that it would be very difficult for a cooperative to bargain for higher prices than those already prevailing in the market.

Even when the overall market largely determines the price for the

78. Donald A. Frederick, *Legal Rights of Producers to Collectively Negotiate*, 19 WM. MITCHELL L. REV. 433, 435-36 (1993); *see, e.g.*, Holly Sugar Corp. v. Goshen Country Coop. Beet Growers Ass'n., 725 F.2d 564, 568-69 (10th Cir. 1984); Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc., 497 F.2d 203, 215 (9th Cir. 1974).

79. *See* GALBRAITH, *supra* note 30, at 160-61.

80. *See* VOLSTEAD, ASSOCIATIONS OF PRODUCERS OF AGRICULTURAL PRODUCTS, H.R. REP. NO. 67-24, at 3 (1921); WALSH, AUTHORIZING ASSOCIATION OF PRODUCERS OF AGRICULTURAL PRODUCTS, S. REP. NO. 67-236, at 2 (1921).

81. This statement assumes that the cooperative does not have any means to control access to the downstream buyers. When a marketing order exists under the AMAA, it is more possible to control entry into the market.

commodity, a bargaining cooperative can contribute important values to its members. Specifically, by working through such an entity, the costs associated with developing and implementing a viable bargaining position are spread over the entire membership. This allows the bargaining agent to obtain better information and have a stronger bargaining position *vis-a-vis* the buyers. In addition, a bargaining cooperative may be able to demand and enforce rules against discriminatory treatment of individual members.[82] When an unconstrained buyer has the freedom to choose among a number of potential suppliers, there is a strong incentive to exploit such discretionary power. The bargaining cooperative can require buyers to adhere to rules of non-discrimination and equal treatment for all members.

D. COOPERATIVES AS FACILITATORS OF COORDINATION AMONG VERTICALLY INTEGRATED PRODUCERS

Since the 1960s, enterprises have emerged that qualify as "farmers" under the Supreme Court's definition,[83] but they are vertically integrated from production to sale to either retailers or wholesalers. Thus, the "cooperative" of which they are the only members of plays no role in "collectively processing, preparing for market, handling, and marketing" the production of its members. However, if such a cooperative qualifies under Capper-Volstead for antitrust immunity, then it offers such firms a forum in which to coordinate competition. This use of a cooperative approximates a more traditional cartel in that it only coordinates the independent conduct of participants. A more complex scenario exists when some members are vertically integrated but others rely on the cooperative for some elements of "collectively processing, preparing for market, handling, and marketing" their production.[84] Here the vertically integrated firm(s) can coordinate prices or other aspects of competition with the membership of the cooperative that relies on that entity to market their products.

In overview, producer cooperatives conduct a continuum of activities that range from processing through agency relationships to bargaining prices on behalf of individual sellers to conventional seller cartels.

III. COMPETITIVE AND GOVERNANCE CONCERNS WITH AGRICULTURAL COOPERATIVES

This part starts with a review of the competitive issues that agricultural cooperatives create for both producers and consumers. Then, it examines the problems that arise for the governance of large cooperatives resulting from the lack of inherent internal governance capacity combined with the lack of effective

82. One of the major problems that strong buyer power creates is the capacity to engage in significant discrimination among suppliers. *See* Peter C. Carstensen, *Buyer Power, Competition Policy, and Antitrust: The Competitive Effects of Discrimination among Suppliers*, 53 ANTITRUST BULL. 271, 327 (2008).

83. Nat'l Broiler Mktg. Ass'n v. United States, 436 U.S. 816, 823-28 (1978).

84. *See* 7 U.S.C. § 291 (2006).

external oversight.

A. EXPLOITATION AND EXCLUSION BY COOPERATIVES

In general, neither processing nor sales agent cooperatives raise serious competitive concerns standing by themselves. The presence of many farmers who can move to a different sales outlet provides an inherent limit on the capacity of such organizations to restrict competition and exploit markets. Further, the basic ideology of cooperatives is that they have an obligation to market all that their members produce. Thus, both the low barriers to entry into effective competition in the marketing of most commodities and the ideology of standard cooperatives work against any general desire to exploit the market. Mueller and his collaborators have made this case most effectively in their analysis of the Sunkist orange cooperative.[85]

However, if a cooperative can obtain enough exclusive contracts with downstream buyers and obtain sufficient loyalty from its members, it can achieve temporary market dominance. Such dominance, absent other factors facilitating market control, is likely to be fleeting because the downstream buyers will have an incentive to avoid such exploitation. In addition, because the cooperative must accept all production from its members if it is to control prices, the members will have an incentive to increase output in response to price increases. However, that will result in lower per unit prices as the cooperative is forced to withhold more product from the exploited market(s). This in turn gives disaffected members increasing incentive to defect and sell their total production outside the cooperative. Thus, a cartelistic cooperative needs to keep farmers' output low relative to the price to buyers and find a way to block entry by competitors into producing the commodity and/or marketing it.

The ability to exploit the market increases when the cooperative operates within a Marketing Order, as is the case with milk cooperatives. The order provides means to limit participation in the premium part of the market and allows more market control. Because a cooperative participating in a Market Order obtains the proxies for all its members, this can confer substantial control, especially if the resulting proxies are sufficient to control the vote on the order. By exercising control through the order, the cooperative can restrict output either directly or by limiting sales to the highest priced markets. Once a cooperative or a group of cooperatives controls the market order system, it can also adopt rules that exclude other producers from access to the highest paid outlets for their product. For milk cooperatives, a farmer can share in the premium paid for fluid milk only if the farmer is part of the "pool" available for that use. By adopting draconian rules that only the dominant cooperative can satisfy, an order can compel all producers in the order area to submit to the control of the dominant cooperative.[86]

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85. *See generally* MUELLER ET AL., SUNKIST, *supra* note 72 (evaluating the monopoly case against a large citrus cooperative).

86. In the Midwest, a facility buying milk for use in processing non-fluid products, e.g., cheese,

Because of the incentive to expand output when prices go up, which inheres in any market with a large number of participants, cooperatives both operating within marketing orders and outside them have worked to restrict production and thus influence price indirectly. Some of the most prominent examples include the purchases of mushroom-growing caves by a group of mushroom producers acting through their cooperative.[87] The caves were then resold with a covenant that the buyer and its successors not use the cave to produce mushrooms.[88] In the case of potatoes, the producers acting again through several cooperatives agreed on acreage limitations for each producer with various penalties for violation of the rules.[89] Finally, a number of dairy cooperatives entered into a plan to buy dairy cattle from farmers with the condition that the farmers thereafter not expand their herds.[90] In each instance, the goal is to reduce overall production of the commodity and thus force prices up by reducing supply. By restricting the participants' capacity to expand production, provided there is sufficient coverage of capacity, the necessary result is higher prices. This strategy usually seems to include vertically integrated, high volume producers and/or cooperatives with large membership covering a significant part of production.[91]

The final way in which producers use cooperatives to affect the market occurs when the industry is vertically integrated such that the producers also process and sell at wholesale their product. Such vertically integrated firms arguably qualify as farms when they own the land on which they produce the basic commodities. Through the means of a cooperative, such firms can coordinate their competition with each other. The cooperative does not bargain, market, or process the commodity, but rather it only serves as a vehicle through which competing producers can share information and agree on how they will operate in the market. An example is the egg market, where the leading firms

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must deliver at least ten percent of its milk purchase to a fluid processor, or its farmer suppliers will be excluded from the benefits of the pooling process. 7 C.F.R. § 1030.7(c). While in the Southeast, the same facility must divert fifty percent of its milk to a fluid processor. 7 C.F.R. § 1007.7(c). Unless the facility has access to a fluid milk buyer that is not tied to an exclusive dealing contract, this is a nearly impossible requirement either in the Midwest, where as much as eighty percent of milk goes to non-fluid uses, or in the Southeast where the largest part is used for fluid. In either case, the non-fluid buyer will find that access to a fluid buyer is likely to be very difficult especially since many fluid buyers are tied to exclusive dealing contracts.

87. *See* United States v. E. Mushroom Mktg. Coop., No. 2:04-CV-5829, 2005 WL 3412413, at *1-2 (E.D. Pa.); *In re* Mushroom Direct Purchaser Antitrust Litig., 621 F. Supp. 2d 274, 291 (E.D. Pa. 2009).

88. *Mushroom Direct Purchaser Antitrust Litig.*, 621 F. Supp. 2d at 279.

89. *In re* Fresh and Process Potatoes Antitrust Litig., 834 F. Supp. 2d 1141, 1157 (D. Idaho 2011).

90. *See* Class Action Complaint at 1, Edwards v. Nat'l Milk Producers Fed'n, No. CV 11 4766 (N.D. Cal. Sept. 26, 2011).

91. One might contrast the foregoing examples with what seems to be the case in pie cherries. *See supra* text accompanying note 68. In the case of pie cherries, restricting a producer's sales to some percentage of their harvest has resulted in increased production by all growers who are, presumably, seeking to retain the same sales volume that they had in prior years. These growers face expanded production by other growers and thus must match that production in order to retain the same final sales volume. The result of this strategy is that costs increase, and consequently, actual profits fall back to some normal level.

include several publicly traded firms with billon dollar revenues.[92] Through their "cooperative," the producers worked out the likely price effects of constraining production sold in the domestic market.[93] Demand for eggs is relatively price inelastic, and so constrained sales can result in substantially higher prices.[94] The industry engaged in a number of tactics, including exporting large quantities of eggs at losses, increasing the size of the area provided to each chicken (thus reducing the production from a standard egg house) and coordinating marketing plans.[95] By limiting overall production in light of a reasonably good estimate of overall demand, the cooperative was able to facilitate its members in achieving substantially higher prices.[96]

Downstream buyers of commodities may find it attractive to collaborate with cooperatives in controlling output and prices. The cooperative can favor certain buyers with discounts or rebates, or it can even refuse to deal with potential competitors of incumbent buyers. The favored buyers in turn have a more stable market situation with less competition and greater barriers to entry. This confers on the buyer greater power in selling the commodity further downstream.[97] The symbiotic relationship allows the cooperative and the favored buyers to allocate the gains among themselves.

The newer type of cooperative that focuses on a set quantity, rather than handling whatever quantity its members produce, can occupy a unique market niche into which entry is difficult. If so, it can charge a supra-competitive price without facing the problem of excess production. However, such opportunities are likely to be quite limited.

Such defined quantity organizations use both cooperative and non-cooperative forms of organization. This suggests that they seek primarily efficient production and handling/processing of commodities with some additional expectation of above market prices if entry is limited. As such, many of these enterprises are like any other joint venture and are subject to antitrust law in the same degree as other businesses.

B. THE INTERNAL GOVERNANCE OF COOPERATIVES—THE AGENCY PROBLEM

The law governing cooperatives is exclusively state law so there are many different versions of that law. Moreover, there appears to be little or no

92. For example, Cal-Maine Foods is a publicly traded company with annual sales of over a billion dollars. CAL-MAINE FOODS, INC., 2012 ANNUAL REPORT 3 (2012), *available at* http://www.calmainefoods.com/investor_relations/index.html.

93. *E.g.*, *In re* Processed Egg Products Antitrust Litig., 821 F. Supp. 2d 709, 713-14 (E.D. Pa. 2011).

94. *Id.* at 715.

95. *Id.* at 714-15.

96. *Id.* at 715.

97. In both the Southeastern and Northeastern milk cases, a primary claim was that the Dairy Farmers of America, the dominant cooperative, had entered into discriminatory deals with several dominant buyers, including Dean Foods Co., which favored those buyers over its competitors. *See In re* Se. Milk Antitrust Litig., 801 F. Supp. 2d 705, 719 (E.D. Tenn. 2011); Allen v. Dairy Farmers of Am., Inc., 748 F. Supp. 2d 323, 331 (D. Vt. 2010).

monitoring of the activities of cooperatives by state authorities. Similarly, the U.S. Department of Agriculture has very limited authority to oversee the conduct of cooperatives generally, although the AMAA provides a basis for stricter oversight if the Department elected to employ that authority. The implication of this legal framework is that there is little external control over the governance of cooperatives. This in turn means that if the members are not themselves active with respect to supervising the operations of the business, the managers have a very wide range of discretion.

In corporate America, this "agency problem" is associated with early works of Adolph Berle and Gardner Means, who showed that managers of large corporations with dispersed shareholdings were, in the era prior to federal corporate law, largely unconstrained by their shareholders.[98] This separation of "ownership" from "control" resulted in abuses of various kinds as shareholders lack the information and organization to challenge managerial control.[99] Over the succeeding eighty years, Congress, the SEC, and the courts have fashioned a system of direct limits on managerial discretion, external auditing based on standardized accounting systems, extensive information disclosure, and regulation of the voting and governance process of large corporations. While hardly perfect, this system has both imposed limits on the discretion of corporate management and empowered shareholders to use the courts to overturn some egregious managerial abuses.

For cooperatives of modest size, regardless of their function, internal governance is probably not a source of concern. Such enterprises are small enough that their managers are likely to be accountable to the members, and the members are more likely to be able to overcome both organizational and informational challenges. To be sure, there are examples of small cooperatives that have been victimized by their managers because the members were unable or unwilling to provide sufficient oversight.[100]

There is a much greater problem, however, with large cooperatives. Dairy Farmers of America ("DFA") has over 18,000 members (shareholders) scattered over the entire United States,[101] owns thirty-one plants that process milk into a wide range of products,[102] has joint ventures with a number of large food manufacturers,[103] and reported $13 billion in revenue.[104] It is not required to

98. *See* ADOLPH A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 196-206 (Harcourt, Brace & World rev. ed. 1967).

99. *See id.* at 301.

100. *See, e.g.*, John Driscoll & Thadeus Greenson, *Humboldt Creamery Goes Bankrupt, Seeks a Fresh Start*, TIMES-STANDARD, Apr. 22, 2009, http://www.times-standard.com/ci_12197817?IADID=Search-www.times-standard.com-www.times-standard.com. The CEO fraudulently manipulated financial data of the cooperative resulting in its bankruptcy. The organization has now reorganized and is continuing in business.

101. DAIRY FARMERS OF AMERICA, http://www.dfamilk.com/newsroom/press-releases/dairy-farmers-america-board-directors-elects-officers (last visited Mar. 8, 2013).

102. *Products*, DAIRY FARMERS OF AMERICA, http://www.dfamilk.com/products (last visited Mar. 8, 2013).

103. *Id.*

104. *DFA Reports 2011 Financial Results*, DAIRY FARMERS OF AMERICA, http://www.dfamilk.com

employ any particular accounting system or make annual reports to its members similar to those required by the SEC of comparable corporations. Moreover, the members of DFA lack the rights held by shareholders of publicly traded corporations, such as the ability to have both shareholder and agency oversight of corporate conduct and rules requiring membership approval of certain managerial decisions. While there are good reasons to believe that the federal law does not provide a completely satisfactory system for policing, the lack of any system of oversight has contributed to serious abuses by management of DFA.

DFA's leadership has engaged in a series of insider deals and sweetheart transactions with friends. As reported in *The New York Times*, one associate of the then-CEO Gary Hanman received $100 million for a stake in a milk plant he had purchased for $6.9 million two years earlier.[105] Hanman was barred for five years from participating in the commodities market after the Commodities Futures Trading Commission discovered a substantial violation of its rules with respect to Class III milk futures by the CEO and DFA that manipulated the market to the benefit of DFA.[106] As a result, DFA had to pay $12 million and have a monitor of its futures trading, and two former executives were banned for five years from trading.[107]

DFA was accused of entering into sweetheart deals with Dean, the country's largest fluid milk processor, that resulted in dairy farmers receiving substantially less for their milk than they ought to have received.[108] It now appears that these claims in the Southeast have been settled at a cost of over $300 million to DFA and Dean,[109] while a related case involved the Northeast remains open.[110]

Ocean Spray has also a long history of controversy with respect to its internal and external conduct in the cranberry market.[111] Unlike some other

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/newsroom/press-releases/dfa-reports-2011-financial-results (last visited Mar. 8, 2013).

105. Andrew Martin, *Awash in Milk and Money*, N. Y. TIMES, Oct. 28, 2012, at B1; *see also* United States v. Dairy Farmers of Am., Inc., 426 F.3d 850, 853 (6th Cir. 2005) (describing an example of insider dealing).

106. Dairy Farmers of America, Inc., 2008 CFTC Lexis 107 (Dec. 15, 2008) (CFTC No. 09-02), *available at* http://www.cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfdfaorder121608.pdf.

107. *Id.*

108. *See* Sweetwater Valley Farm, Inc. v. Dean Foods Co. (*In re* Se. Milk Antitrust Litig.), 801 F. Supp. 2d 705, 715-16, 743 (E.D. Tenn. 2011) (rejecting defense motion for summary judgment).

109. *See* Dave Natzke, *DFA Agrees to Settlement in 'Southeast Milk' Lawsuit*, DAIRYBUSINESS, http://dairybusiness.com/seo/headline.php?title=dfa-agrees-to-settlement-in-southeast-milk-la&date=2013-01-22&table=headlines#ixzz2K2YA9BAm (last visited Mar. 8, 2013).

110. *See* Allen v. Dairy Farmers of Am., Inc., No. 5:09-CV-230, 2013 WL 211303 (D. Vt. Jan. 18, 2013).

111. *See generally* EDWARD V. JESSE & RICHARD T. ROGERS, FOOD SYSTEM RESEARCH GROUP, *The Cranberry Industry and Ocean Spray Cooperative: Lessons in Cooperative Governance*, *in* 19 FSRG Monograph Series 1 (2006), *available at* http://www.uwcc.wisc.edu/pdf/case%20studies/19cranberryjan06.pdf (providing an overall history of the development of the industry and internal disputes within the cooperative); Bill Martin, *Ocean Spray Sued by Longtime Associates*, PRODUCE BUSINESS (May 2007), http://www.producebusiness.com/media/articles/oceanspray-5-07.pdf (describing litigation involving price discrimination and special deals for selected buyers). Litigation involving

cooperatives, Ocean Spray has a number of members who are large producers and who are highly invested in overseeing the business decisions of management. This has sometimes resulted, however, in paralysis and actions that serve specific member interests rather than the enterprise.[112]

There are a number of other very large cooperative enterprises. Of the 100 largest cooperatives engaged in some aspect of agriculture, over 90% are marketing cooperatives.[113] The smallest of these had revenues in excess of $300 million and assets of $43 million.[114] The report did not include any information about number of members, but the scale of these entities is such that they must have membership in the hundreds or more. Because of the standard requirement that each member have one vote, it is hard in such situations to concentrate voting power sufficiently to result in any kind of a proxy contest. Moreover, in many cooperatives the method of electing directors is very indirect. Regional groups of members elect delegates to other assemblies, which in turn may select still other delegates, who ultimately select the directors.[115]

In addition to the potential for managerial exploitation of the weak internal governance mechanisms that exist in large cooperatives, the same factors invite managers to exploit market power. Because the members lack much ability to oversee or control the results of exploitation, managers have a greater ability to allocate the gains to themselves or their associates. The allegations in the DFA litigation have highlighted a number of ways in which the gains from exploiting farmers as a result of underpayment were distributed to various insiders. Thus, weak governance also contributes to the incentive to engage in anticompetitive conduct.

IV. THE CURRENT STATE OF COMPETITION AND GOVERNANCE LAW FOR COOPERATIVES

Despite the apparent immunity from antitrust law that Capper-Volstead provides, there are a substantial number of cases that impose antitrust liability on

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anticompetitive actions by Ocean Spray include: Northland Cranberries, Inc. v. Ocean Spray Cranberries, Inc., 382 F. Supp. 2d 221 (D. Mass. 2004) (rejecting antitrust claims based on Capper-Volstead immunity); April v. Nat'l Cranberry Ass'n, 168 F. Supp. 919 (D. Mass. 1958) (predatory conduct not exempted by Capper-Volstead from antitrust liability); Cape Cod Food Prods. v. Nat'l Cranberry Ass'n, 119 F. Supp. 242 (D. Mass. 1954) (granting attorney fees in antitrust case); Cape Cod Food Prods. v. Nat'l Cranberry Ass'n, 119 F. Supp. 900 (D. Mass. 1954) (jury charge on antitrust violation); Class Action Complaint, Growers v. Ocean Spray Cranberries, Inc., No. 1:12CV012016 (D. Mass. Oct. 27, 2012) (claiming discrimination against certain classes of grower members). For more background on *Growers v. Ocean Spray Cranberries, Inc.*, see Jon Chesto, *Cranberry Growers' Suit Claims Ocean Spray Drove Down Prices*, BOSTON BUS. JOURNAL, Nov. 16 2012, *available at* http://www.bizjournals.com/boston/print-edition/2012/11/16/ocean-spray-growers-suit.html.

112. *See* Robin Sidel, *Ocean Spray is Hamstrung by Cranberry Growers' Feuds*, WALL ST. J., Aug. 10, 2004, at A1.

113. *See Top 100 Ag Co-ops Eclipse Previous Sales Record by $18 Billion*, RURAL COOPERATIVES (United States Department of Agriculture), Sept./Oct. 2012, at 8, 12-17, *available at* http://www.rurdev.usda.gov/supportdocuments/rdCoopMagSep-OctCoopmag.pdf.

114. *Id.*

115. *See, e.g.*, Shaw v. Agri-Mark, Inc., 663 A.2d 464, 465-466 (Del. 1995) (describing process of selecting directors for a cooperative with several thousand members).

cooperatives. On the other hand, there is very little case law addressing the governance of cooperatives despite substantial evidence, often coming from antitrust litigation, of abuses by top managers of cooperatives.

A. ANTITRUST LAW AND COOPERATIVES

The primary and recurring legal issues that have arisen with respect to the antitrust exemptions for farm cooperatives[116] involve whether or not the entity can claim a Capper-Volstead exemption based on its membership. Closely related are questions concerning whether specific agreements involve third parties and so fall outside the exemption. The cases also tend to focus on conduct that, without the exemption, would constitute per se unlawful conduct. But, even for exempt entities, there are also cases that limit the scope of the exemption with respect to the kinds of conduct permitted.

1. Which Entities are Within the Coverage of the Capper-Volstead Act

Perhaps, the most frequently litigated issue in the reported decisions since the adoption of the Capper-Volstead Act is whether the defendant qualifies for immunity as a Capper-Volstead cooperative. These status issues are resolved in a rigid way. The cooperative cannot have non-producer members, and producers are narrowly defined as those who are conventionally thought of as farmers.[117] Thus, the Sunkist California orange producers' cooperative lacked Capper-Volstead immunity because some of its members were engaged only in the processing of such fruit.[118] The National Broiler Marketing Association, which included most producers and processors of chickens, was denied Capper-Volstead immunity because some of its processor members were not "farmers;" they only owned flocks of chickens that were hatched and raised by others.[119]

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116. Cooperatives that provide group purchasing power for inputs such as seed, fertilizer, and pesticides, have rarely been the object of attack, despite their lack of antitrust exemption. One exception is *Bell v. Fur Breeders Agricultural Cooperative.*, 348 F.3d 1224 (10th Cir. 2003) (dismissing on Capper-Volstead and Clayton Act, section 6 grounds a challenge to pricing practices concerning the sale of mink feed by a cooperative). The application of the Capper-Volstead Act exemption does not seem to have been contested in this case although sales of supplies to farmers are not within the scope of the Capper-Volstead Act exemption, even if the cooperative also engaged in the sale of agricultural products to which the Capper-Volstead Act would apply. But supply cooperatives that fit the Clayton Act requirements could, in any event, claim that exemption.

117. This restrictive approach is seen in the first Supreme Court case interpreting the statute where the Court rejected the lower court's effort to read the statute as creating a broad exemption for any agreement in which a cooperative participated. United States v. Borden Co., 308 U.S. 188, 204-05 (1939). Other types of activity that include the production or processing of natural resources have not been included. *See, e.g.*, Boise Cascade Int'l, Inc. v. N. Minn. Pulpwood Producers Ass'n, 294 F. Supp. 1015 (D. Minn. 1968) (association of independent contractors who cut pulp wood did not qualify as a Capper-Volstead cooperative when they engaged in a collective refusal to deal).

118. Case-Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384, 387-93 (1967); *see also* Sunkist Growers Inc. v. Winckler & Smith Citrus Prods. Co., 370 U.S. 19, 29-30 (1962) (treble damage award based on conspiracy theories overturned because only some of the theories involved collusion by non-cooperatives).

119. Nat'l Broiler Mktg. Ass'n v. United States, 436 U.S. 816 (1978). Still unresolved is the permissibility of fully vertically-integrated members. They presumably are not permitted because they would enjoy no benefit from membership, except cooperative downstream prices. *See* David P.

The dissent argued that all those engaged in the production process should be included as "producers" within the scope of the exemption.[120] The majority opinion rejected this argument in part because such entities frequently contracted with farmers for a large part of their supplies and thus stood in relation to those producers as the middlemen that the Capper-Volstead Act had excluded from participation.[121]

In the dairy class action cases where corporate and cooperative entities were charged with agreeing to exploit dairy farmers, the courts refused to apply Capper-Volstead to preclude inquiry into the merits of the conduct.[122] In the mushroom litigation, the primary issue was whether the cooperative had the benefit of the exemption.[123] There the court rejected the claim because at least one party was not a farmer.[124]

Another membership issue that has received attention in one case concerns the immunity of a cooperative when it has participants who are farmers, but not American farmers.[125] In the one decision on this issue, a district court judge upheld the magistrate's opinion that including cranberry farmers from Canada in the Ocean Spray cranberry cooperative did not cause the cooperative to lose its status as a cooperative under the Capper-Volstead Act.[126] The decision rested on the definition of the term "persons" in the Capper-Volstead Act.[127] Because Capper-Volstead did not define "person," the court relied on the definitions used in the Clayton Act, which defined the coverage of Section 6's protection for cooperatives.[128] While this decision provides some reassurance for cooperatives that include foreign farmers as members, a subsequent decision rejected the claim that an agreement between an American cooperative and a foreign cooperative qualified for protection from antitrust scrutiny.[129] The foreign cooperative does not directly serve the interests of American farmers who seem to be the primary intended beneficiaries of the statute, nor would the foreign cooperative necessarily conform to Capper-Volstead's requirements on membership and finance. However, the foreign cooperative sought to rely on the Cooperative Marketing Agreement Act, which authorizes a broader level of information sharing among "producers," and so might provide a basis to insulate

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Claiborne, Comment, *The Perils of the Capper-Volstead Act and its Judicial Treatment: Agricultural Cooperation and Integrated Farming Operations*, 38 WILLAMETTE L. REV. 263, 292 (2002).

120. *Nat'l Broiler*, 436 U.S. at 840-43 (White, J., dissenting).

121. *See id.* at 826-29. The same analysis was applied to the Fishermen's Collective Marketing Act in *United States v. Hinote*, 823 F. Supp. 1350 (S.D. Miss. 1993).

122. *See In re* Se. Milk Antitrust Litig., 555 F. Supp. 2d 934 (E.D. Tenn. 2008) (denying dismissal based on Capper-Volstead because of alleged participation by non-cooperatives in the conspiracy); Allen v. Dairy Farmers of Am., Inc., 748 F. Supp. 2d 323 (D. Vt. 2010) (same).

123. *In re* Mushroom Direct Purchaser Antitrust Litig., 621 F. Supp. 2d 274, 277 (E.D. Pa. 2009).

124. *Id.* at 286. A similar issue was addressed in *Ripplemeyer v. National Grape Cooperative Ass'n, Inc.*, 807 F. Supp. 1439 (W.D. Ark. 1992).

125. *See* Northland Cranberries v. Ocean Spray, 382 F. Supp. 2d 221 (D. Mass. 2004).

126. *Id.* at 225-26.

127. *Id.*

128. *Id.*

129. *In re* Fresh and Process Potatoes Antitrust Litig., 834 F. Supp. 2d 1141, 1157-58, 1179 (D. Idaho 2011).

at least some joint activities between American and foreign cooperatives from antitrust review.[130] Nevertheless, the allegations in the case were that the foreign cooperative had directly participated in price fixing and output control, which went beyond the scope of what the Cooperative Marketing Agreement Act authorizes.[131]

The limited membership cooperative apparently retains Capper-Volstead Act immunity,[132] but the other new forms probably do not. Although some materials that explain these new forms contend that they can still qualify under the Capper-Volstead Act,[133] this position seems questionable under the current interpretations of that statute.[134] In any event, the primary goal of these new style cooperatives is to engage in value creating, processing, and marketing of their members' products. They would seem to have little need for any antitrust exemption. Such organizations, even when purchasing and selling contracts, are not likely to create antitrust concerns, absent a degree of market power that cooperatives have rarely, if ever, achieved.

The Third Circuit has determined that the question of whether the cooperative qualifies under Capper-Volstead is an affirmative defense.[135] This means that if there is a factual dispute, the question can only be resolved after trial. This in turn reduces the value of the exemption in class action litigation. Reliance on this defense whenever the trial court has determined that there is a factual issue requires the cooperative to go to final judgment on liability before it gets a chance to have review of its claim. Hence, if it loses on the exemption claim, it can face a massive jury verdict.

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130. *Id.* at 1179.

131. *Id.* at 1159, 1179. The Cooperative Marketing Agreement Act authorizes "original producers of agricultural products" acting through "associations, corporate or otherwise" to "acquire, exchange, interpret, and disseminate past, present, and prospective crop, market, statistical, economic, and other similar information by direct exchange between such persons, and/or such associations or federations thereof, and/or by and through a common agent created or selected by them." 7 U.S.C. § 455 (2006). Because this statute refers more generally to "associations," it might provide a basis to exempt from antitrust law coordinating international information exchange affecting competition. The scope of such an exemption is hard to predict.

132. *See* Shannon L. Ferrell, Comment, *New Generation Cooperatives and the Capper-Volstead Act: Playing a New Game by the Old Rules*, 27 OKLA. CITY U. L. REV. 737, 759 (2002); Scott Flynn, Comment, *Putting the New Generation Cooperative in Perspective within the Value-Added Industry*, 85 IOWA L. REV. 1473, 1499-1500 (2000). *Cf.* Therese C. Tuttle, *Champagne vs. Grape Juice: Defending, Adding, or Discovering Value at the Farm-Gate: New Strategies for the California Cooperative*, 5 DRAKE J. AGRIC. L. 193 (2000) (noting that the scope of the Capper-Volstead Act has been tested).

133. *See, e.g.*, Mark Hanson, Presentation at Annual Meetings of the Wisconsin Federation of Cooperatives, Minnesota Association of Cooperatives and Wisconsin Electric Cooperative Association, Bloomington, Minnesota (November 17, 2003) (on file with author).

134. In a memorandum to cooperative leaders, the President and Managing Director of the Minnesota Association of Cooperatives cautioned that: "Allowing non-patron investor members into the cooperative may place this [Capper-Volstead] immunity at risk and should be carefully considered by the cooperative's legal and tax experts." Memorandum from Bill Oemichen, President and Chief Exec. Officer, Minn. Ass'n Coops., & Maura Schwartz, Managing Dir., Minn. Ass'n of Coops., to Minn. Coop. Leaders 4 (June 5, 2003) (on file with South Dakota Law Review).

135. *See In re* Mushroom Direct Purchaser Antitrust Litig., 655 F.3d 158, 167 (3d Cir. 2011).

2. *Substantive Limits on Anticompetitive Behavior under Capper-Volstead*

a. Collaboration by Cooperatives with Non-farm Entities

The Supreme Court decided at a relatively early date that when an exempt cooperative combines with non-exempt enterprises, the activity falls outside the exemption and is subject to antitrust law on its merits.[136] For this reason, settlements in antitrust merger cases involving agricultural cooperatives' acquisitions of non-cooperative businesses have often required that the acquired assets be owned in a form that retains some non-cooperative ownership interest, thereby denying immunity to that enterprise.[137]

The denial of an antitrust exemption only determines that the substantive issues are subject to antitrust law. Hence, the next stage of inquiry is to determine whether on the merits, the conduct at issue is unlawful. For example, many cooperatives engaged in processing farm products have entered into various kinds of joint ventures with third parties that are not cooperatives and not farmers.[138] These ventures fall outside the scope of the Capper-Volstead exemption, but are not for that reason suspect. From an antitrust perspective, the analysis is the same as that applicable to any other business joint venture. On the other hand, the great bulk of the cases involving this issue are private damage cases claiming cartelistic conduct which is per se illegal. Once a court determines that the status of the entity or of the agreement is disputed, these cases tend to settle.

b. Non-exempt Conduct by Cooperatives Themselves

The Clayton Act exempts only conduct that "lawfully carr[ies] out the legitimate objects" of the cooperative,[139] and Capper-Volstead exempts specifically: "collectively processing, preparing for market, handling, and marketing" of the products of the members.[140] As a result, the courts have held that some conduct by cooperatives is subject to the Sherman and Clayton Acts, but the law in this area remains uncertain.[141] The Supreme Court, in an early

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136. United States v. Borden Co., 308 U.S. 188, 205 (1939) (holding that price fixing conspiracy alleged to include both milk processors and cooperatives to be outside the scope of Capper-Volstead exemption and that the AMAA did not preempt the Sherman Act).

137. *See, e.g.*, United States v. Dairy Farmers of Am., No. 00-1663, 2000 WL 33200552, at *4 (E.D. Pa. Nov. 3, 2000) (consent decree requiring cooperative acquiring butter maker to bring in non-cooperative owners to ensure continued application of antitrust law to both conduct and future acquisitions of that enterprise).

138. Such joint ventures provide a means to solve some of the challenges facing processing cooperatives with respect to raising capital while retaining the tax benefits conferred on Capper-Volstead cooperatives. The broader concerns for cooperative capital are long standing. *See, e.g.*, Philip M. Raup, *Cooperatives, Capper-Volstead and the Organization and Control of Agriculture*, STAFF PAPER P77-14 (Dep't of Ag. & Applied Econ., Univ. of Minn., 1977). *See also supra* note 132. A detailed investigation of this issue is beyond the scope of this paper.

139. 15 U.S.C § 17 (2006).

140. 7 U.S.C. § 291 (2006).

141. Almost all of the cases interpreting the substantive application of the Sherman Act involved dairy cooperatives, as to which there is a unique combination of Capper-Volstead and AMAA marketing

decision, determined that the Secretary of Agriculture's authority over excessive prices did not preempt antitrust law enforcement.[142] In 1960, it upheld an antitrust challenge to a cooperative engaged in exclusionary or predatory acts in order to achieve a monopoly in a market.[143] The Court read the Clayton Act's limitation of cooperative immunity to legitimate conduct into the Capper-Volstead Act.[144] This holding rejected an expansive reading of the Capper-Volstead exemption that the trial court had adopted and confirmed the more restrictive interpretation given in the cranberry litigation.[145] The Court also held that the Clayton Act's prohibition of anticompetitive mergers applied to acquisition of non-cooperative assets by a cooperative.[146]

The Second Circuit has held that the Sherman Act's prohibition of monopolization does not apply to monopoly power that results from the formation, growth, or combination of agricultural cooperatives but does apply "to the acquisition of such power by other, predatory means."[147] But, in a second opinion applying this test, the court permitted a market-dominating dairy cooperative to charge buyers over-order premiums, charge different premiums in different order areas, and refuse to sell milk to a buyer unless the buyer paid similar prices to other producers.[148] This creates a significant ambiguity as to the kinds of conduct that the court will classify as "predatory." An added uncertainty is whether the court meant to exempt mergers between cooperatives as well as joint marketing agreements. Capper-Volstead explicitly authorizes only the latter.

The Eighth Circuit, in a very similar situation, limited lawful monopoly power to that "achieved through natural growth, voluntary confederation and without resort to predatory or anti-competitive practices."[149] It even allowed condemnation of practices that had some business justification if, in context, they were used with the intent to stifle or smother competition.[150]

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orders. The remaining older cases have involved other areas—such as cranberries—where cooperatives and market orders interact. *See* Cape Cod Food Prods., Inc. v. Nat'l Cranberry Ass'n, 119 F. Supp. 900, 904 (D. Mass. 1954); Cape Cod Food Prods, Inc. v. Nat'l Cranberry Ass'n, 119 F. Supp. 242, 242 (D. Mass. 1954); April v. Nat'l Cranberry Ass'n, 168 F. Supp. 919, 920 (D. Mass. 1958). While market orders exist in potatoes, they do not in either eggs or mushrooms. These cases seem to rest on the dominance of the market by like-minded firms.

142. United States v. Borden, 308 U.S. 188, 203-04 (1939).

143. Md. & Va. Milk Producers Ass'n v. United States, 362 U.S. 458, 467-73 (1960).

144. *Id.* at 466.

145. *See* April v. Nat'l Cranberry Ass'n, 168 F. Supp. 919, 923 (D. Mass. 1958).

146. *Md. & Va. Milk Producers*, 362 U.S. at 472.

147. Fairdale Farms, Inc. v. Yankee Milk, Inc. (*Fairdale I*), 635 F.2d 1037, 1045 (2d Cir. 1980). *But cf,* Alan Anderson, *Recent Development: The Agricultural Cooperative Antitrust Exemption-Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 67 CORNELL L. REV. 396 (1982) (criticizing *Fairdale I* and calling for a narrow interpretation of the agricultural cooperative antitrust exemption).

148. Fairdale Farms, Inc. v. Yankee Milk, Inc. (*Fairdale II*), 715 F.2d 30, 32-34 (2d Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984). *Fairdale II* has come under fire from a variety of quarters. *See, e.g.*, MUELLER ET AL., SUNKIST, *supra* note 72, at 22-23 (criticizing the application of *Fairdale I* in *Fairdale II*); David L. Baumer, et al., *Curdling the Competition: An Economic and Legal Analysis of the Antitrust Exemption for Agriculture*, 31 VILL. L. REV. 183, 236-39 (1986).

149. Alexander v. Nat'l Farmers Org., 687 F.2d 1173, 1182 (8th Cir. 1982).

150. *Id.* at 1183. The central issue was whether the cooperative used supply contracts and exclusive

Other cases have, however, upheld agreements among cooperatives that would otherwise be unlawful. This is most evident in the context of bargaining cooperatives.[151] Such cooperatives, as explained earlier, bargain with a group of buyers for terms and conditions under which the buyers will purchase the relevant commodity from the farmer. As such, these arrangements function as a centralized type of cartel in which the cooperative is the cartel manager. In the litigated cases, it appears that the buyers resold products into competitive markets and the cooperatives served limited geographic areas. As a result, the issue being negotiated was the allocation of expected resale revenue between the processors and the producers. Exploitation of downstream buyers was unlikely. Such bargaining systems are likely to help producers avoid the risks of discrimination and buyer exploitation even though they are unlikely to produce supra-competitive prices.

Thus, the consistent interpretation of the substance of the Capper-Volstead exemption is that it is a limited one. Predatory, coercive, and exclusionary acts by cooperatives are subject to antitrust law. On the other hand, the law exempts marketing agreements among cooperatives from review even if they dominate the market, as well as bargaining cooperatives, which are on their face, cartelistic arrangements. Significant ambiguities remain, including what constitutes exclusionary or predatory conduct, as well as the status of relationships with vertically integrated producers.

c. Structural Change—Merger Among Cooperatives

Another open issue is antitrust jurisdiction over mergers among cooperatives. The Clayton Act applies when a cooperative acquires a non-cooperative.[152] The Capper-Volstead Act's explicit authorization of cooperative federations and joint marketing activities arguably includes the merger of cooperatives.[153] On the other hand, mergers are different from joint marketing activities or even federations, because they entail, *inter alia*, the involuntary transfer of membership. Hence, a narrow construction of the Capper-Volstead Act's terms could recognize that mergers among cooperatives are distinct from either federations or other exempt forms of joint cooperative activities. Thus, cooperative mergers might not be exempt from antitrust review.[154]

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hauling contracts to stifle competition. *Id.* at 1184.

151. *See, e.g.*, Holly Sugar Corp. v. Goshen Cnty. Coop. Beet Growers Ass'n., 725. F.2d. 564, 570 (10th Cir. 1984); Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc., 497 F.2d 203, 210 (9th Cir. 1974); *see also* Ewald Bros., Inc. v. Mid-America Dairymen, Inc., 877 F.2d 1384, 1394 (8th Cir. 1989) (price stabilization pooling arrangement upheld as permitted conduct under Capper-Volstead).

152. Md. & Va. Milk Producers Ass'n v. United States, 362 U.S. 458, 468-69 (1960).

153. Indeed, that is the reading apparently given to the statute by the Department of Justice. Baumer, et al, *supra* note 148, at 241.

154. *Id.* at 239-45 (arguing that such mergers are comparable to the kind of unlawful exclusionary conduct forbidden in the *Virginia & Maryland* decision). *Cf.*, United States v. Dairy Farmers of Am., Inc., 426 F.3d 850 (6th Cir. 2005) (allowing acquisition of butter producer by a cooperative only after the cooperative found additional investors such that butter producer would not be exempt in the event of any future mergers with a cooperative butter maker).

d. Restricting Output

Cooperatives in the dairy, mushroom, and potato industries have all attempted to exempt agreements that restrict output in various ways from antitrust law. The mushroom cooperatives bought up caves suitable for growing mushrooms and resold them subject to a covenant restricting mushroom cultivation. The potato cooperatives worked together to develop an acreage allocation for each member as a way to restrict the ultimate supply of potatoes. Similarly, a group of dairy cooperatives pooled resources to buy dairy cows subject to the farmer's commitment not to replace those cows. To date, the trial court in the potato case has expressed skepticism that such output controls are exempt under the Capper-Volstead Act.[155]

Two arguments support the trial court's skepticism. First, the statutory language does not refer to controlling or allocating output.[156] It only authorizes the marketing of production.[157] In contrast, the Fishermen's Cooperative Act, which is otherwise similar to the Capper-Volstead Act, explicitiy authorizes control over production ("catching").[158] Second, the AMAA, via its marketing order system, provides an explicit, congressionally authorized, means to control output, but only with respect to certain commodities.[159] Moreover, tiie Secretary of Agriculture must review and approve any output restrictions unlike the purely private, self-interested choices that cooperatives are able to make.

3. Vertically Integrated, Corporate Entities as "Farmers"

The question of how to regard vertically integrated "farmers" has provoked a variety of responses. These enterprises qualify as farmers under the *National Broiler* definition by virtue of actually producing livestock, poultry, or crops.[160] However, unlike the un-integrated farmer whose products are processed by his or her cooperative or corporate food buyer, these enterprises are vertically integrated into processing and distributing their products. Hence, the cooperative does not act as a processor, marketing agent, or bargaining agent for these entities. The only function of the cooperative as far as these producers are concerned is to provide a forum to coordinate their prices and production.

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155. *In re* Fresh and Process Potatoes Antitrust Litig., 834 F. Supp. 2d 1141, 1154-57 (D. Idaho 2011).

156. *Id.* at 1154-55.

157. *Id.*

158. The Fishermen's Collective Marketing Act covers associations engaged in "catching, producing, preparing for market, processing, handling, and marketing" fish. 15 U.S.C. § 521 (2006). *See* Andrew W. Kitts & Steven F. Edwards, *Cooperatives in US Fisheries: Realizing the Potential of the Fishermen's Collective Marketing Act*, 27 MARINE POLICY 357, 357 (2003), *available at* http://www.uwcc.wisc.edu/info/fishery/kitts.pdf (fishermen in areas where there are limits on the total catch have created cooperatives to allocate the assignment of catches where the government has imposed quotas). *See also* Christine A. Varney, *The Capper-Volstead Act, Agricultural Cooperatives, and Antitrust Immunity*, THE ANTITRUST SOURCE, Dec. 2010, at 8.

159. *See supra* Part I.C.

160. Nat'l Broiler Mktg. Ass'n v. United States, 436 U.S. 816, 827 (1978) (holding "that any member . . . that owns neither a breeder flock nor a hatchery, and that maintains no grow-out facility . . . is not among those Congress intended to protect by the Capper-Volstead Act").

Having agreed on the prices and output, these enterprises make direct sales of finished goods.

Some have argued that these enterprises are still "producers" in terms of the Capper-Volstead Act and their presence in the cooperative should not disqualify it from the antitrust exemption.[161] Prior to *National Broiler*, both the Federal Trade Commission and a district court opinion had held that these enterprises were qualified cooperatives.[162] The reasoning was that the cases that upheld the exemption for bargaining cooperatives, in particular *Treasure Island*, meant that a cooperative that only coordinated independent selling was still within the scope of the exemption.[163] In fact, the Justice Department in *National Broiler* seemed to concede that these entities would be within the statute.[164] However, earlier, the Antitrust Division had issued business review letters both accepting and denying that such enterprises qualify as producers under the Capper-Volstead Act.[165]

The contrary position is that these vertically integrated entities as "farmers" make no use of the cooperative's capacity for "collectively processing, preparing for market, handling, and marketing"[166] the products of the cooperative's members, and therefore they do not qualify themselves as members. Hence, the presence of these entities in the cooperative would mean that the cooperative loses its exemption with respect to all conduct in which it is engaged. This was the position of Justice Brennan's concurrence in *National Broiler*.[167] He took the position that a cooperative that included such entities was no longer engaged in permitted activities under the statute:

> Definition of the term "farmer" cannot be rendered without reference to Congress' purpose in enacting the Capper-Volstead Act.... I seriously question the validity of any definition of "farmer" in § 1 which does not limit that term to exempt only persons engaged in agricultural production who are in a position to use cooperative associations for collective handling and processing-the very activities for which the exemption was created. At some point along the path of downstream integration, the function of the exemption for its intended purpose is lost, and I seriously doubt that a person engaged in agricultural production beyond that point

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161. Claiborne, *supra* note 119, at 311-19; *see also Nat'l Broiler*, 436 U.S at 847-48 (White, J., dissenting).

162. *In re* Cent. Cal. Lettuce Producers Coop., 90 F.T.C. 18, 1977 WL 188550 at *23-24 (1977) (holding that collusive agreements among lettuce producers were exempt from the Federal Trade Commission Act because the organization qualified as a Capper-Volstead cooperative); N. Cal. Supermarkets, Inc. v. Cent. Cal. Lettuce Producers Coop., 413 F. Supp. 984, 993-94 (N.D. Cal. 1976) (dismissing Sherman Act conspiracy claim based on Capper-Volstead exemption). *See also* United Egg Producers v. Bauer Int'l Corp., 312 F. Supp. 319, 320-21 (S.D.N.Y. 1970) (dismissing an antitrust counterclaim based, in part, on the status of the group as a qualified cooperative).

163. *N. Cal. Supermarkets*, 413 F. Supp. at 991 (relying on Treasure Valley Potato Bargaining Ass'n. v. Ore-Ida Foods, Inc., 497 F.2d 203, 212 (9th Cir. 1974)).

164. *See* Brief for the United States at 7-8, United States v. Nat'l Broiler Mktg. Ass'n, 436 U.S. 816 (1978) (No 77-117) (conceding that if a producer owns and farms land, it is a farm for Capper-Volstead purposes).

165. *See id.* at 6 n.7.

166. 7 U.S.C. § 291 (2006).

167. *National Broiler*, 436 U.S. at 829-40.

> can be considered to be a farmer, even if he also performs some functions indistinguishable from those performed by persons who are "farmers" under the Act. The statute itself may provide the functional definition of farmer as persons engaged in agriculture who are insufficiently integrated to perform their own processing and who therefore can benefit from the exemption for cooperative handling, processing, and marketing.[168]

Indeed, such entities often buy a substantial part of the products that they process from other farmers. Hence, they are both producers and middlemen—the intended targets of the Capper-Volstead authorization of cooperatives.

No decision since *National Broiler* has directly decided the question of whether such entities cause the cooperative to lose its exempt status. Cases involving eggs and potatoes have raised these questions, but no decisions have yet been reported.[169] A 1994 decision under the Fishermen's Collective Marketing Act that basically parallels the Capper-Volstead Act in its definition of the covered parties expressly rejected the claim that an association including a vertically integrated enterprise could qualify under the act as an exempt marketing association.[170] This holding paved the way for criminal sanctions against a conspiracy among catfish producers to stabilize and fix prices.[171]

B. THE LACK OF OVERSIGHT OF INTERNAL COOPERATIVE GOVERNANCE

There is very little ease law on the governance of cooperatives.[172] Despite the substantial evidence of managerial misconduct in *In re Dairy Farmers of America, Inc. Cheese Antitrust Litigation*,[173] there appears to have been no litigation initiated by members under Kansas's cooperative statute.[174] But, it is not clear what duty that statute imposes on officers or directors.[175] Indeed, there

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168. *Id.* at 835-36.

169. The complaints in these cases seem to raise the issue of whether these entities cause the cooperative to lose its exempt status. *See, e.g.*, Bhandari v. United Potato Growers of Am., Inc., 2:10-cv-00851 (E.D. Wisc. 2010) (alleging a conspiracy among potato growers to fix prices and reduce supply); T. K. Ribbing's Family Rest. v. United Egg Producers, Inc., CV 08-4658 (E.D. Pa. 2008). *But see* United Egg Producers v. Bauer Int'l Corp., 312 F. Supp. 319, 320-21 (S.D.N.Y. 1970) (dismissing antitrust counterclaims based on the status of the group as a qualified cooperative). *See also* Varney, *supra* note 158, at 4-5 (describing the issue of whether such entities should have Capper-Volstead exemptions). Moreover, the trial judge in *Fresh & Process Potatoes Antitrust Litigation* has stated that he favors the Brennan position. 834 F. Supp. 2d 1141, 1153-54 (D. Idaho 2011).

170. United States v. Hinote, 823 F. Supp. 1350, 1359-60 (S.D. Miss. 1993).

171. *See id.* at 1360.

172. *See generally* Mary Beth Matthews, *Recent Developments in the Law Regarding Agricultural Cooperatives*, 68 N.D. L. REV. 273, 274-278 (1992) (discussing the limited number of reported cases involving fiduciary duties).

173. 767 F. Supp. 2d 880, 911 (N.D. Ill., 2011) (upholding the complaint in part and dismissing in part).

174. *See* Cooperative Marketing Act, KAN. STAT. ANN. §§ 17-1601 to 1643 (2012). In 2010, a combined antitrust and civil RICO action was filed alleging that DFA operated as a criminal conspirator in relation to the manipulation of cheese prices. *See supra* note 107 and accompanying text; *In re Dairy Farmers of America, Inc. Cheese Antitrust Litigation*, 767 F. Supp. 2d at 885-90; *see also* Pete Hardin, *Huge New Cheddar Price Manipulation Antitrust Suit Filed vs. DFA*, THE MILKWEED, May 10, 2010, at 6, *available at* http://www.themilkweed.com/Feature_10_May.pdf.

175. *See* Simon v. Nat'l Farmers Org., 829 P.2d 884, 887, 891 (Kan. 1992) (finding no breach of fiduciary duty by marketing cooperative even though the plaintiff showed that the price available was

seems to be only a handful of reported decisions interpreting any aspect of the statute. A survey of reported cases invoking state cooperative law yields a handful of reports, but very little consistent law. Moreover, cooperatives have found ways to structure their operations that effectively deny members access to internal records.[176]

The primary focus of concern here is with large cooperatives—those with more than 500 members and a volume of business (processing or handling) in the range of $50 million or more. If such entities were public corporations, they would be required to use standard auditing procedures and provide substantial information in a comparable format to their members and the public. In addition, the members would have clear voting rights and the ability to put in resolutions for consideration by the members at annual meetings. Finally, major corporations are subject to both state and federal requirements that management and the directors behave in the best interest of the enterprise. A particular concern is with conflicts of interest where a manager or director acts on furtherance of their own interest rather than the corporation and its shareholders.

Again, the striking difference between those rules and the lack of any response to significant evidence of malfeasance and self-interested dealings at DFA, for example, is a source of concern. For the reasons explained earlier, large cooperatives are particularly invulnerable to proxy-type contests because of the structure of voting rights. Hence, the most relevant method of constraining self-interest is through a set of legal standards that allow members or some public agency to use the courts to hold managers accountable.

It is in fact remarkable that so few public examples of managerial misconduct exist with respect to cooperatives. However, given the lack of transparency, this absence of specific events is at best highly ambiguous.

C. THE REGULATORY ROLE OF THE SECRETARY OF AGRICULTURE

The Secretary of Agriculture has no explicit authority to monitor the internal governance of cooperatives or to review consolidation of cooperatives, their association in federations, or other joint activities. Section 2 of the Capper-Volstead Act does authorize the Secretary to review and condemn excessive prices charged by cooperatives. The common belief is that the Secretary has never exercised this power.[177] However, between 1922 and 1978 there had been

four dollars higher than the cooperative paid). *See also* Bybee Farms, LLC v. Snake River Sugar Co., 625 F. Supp. 2d 1073, 1079-81 (E.D. Wash. 2007) (holding that, based on Oregon law, the cooperative president did not owe a fiduciary duty to members of the cooperative).

176. *See, e.g.*, Shaw v. Agri-Mark, Inc., 663 A.2d 464, 470 (Del. 1995) (finding that members had no right to inspect the books and records of the cooperative because it was structured so that its operations were conducted by a Delaware corporation and the members elected the directors who in turn held the stock).

177. U.S. DOJ Report, *supra* note 10, at 12; 1B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 249a, at 5 n.3 (3rd ed. 2006). For a critical assessment of the performance of the Secretary of Agriculture, see generally Ralph H. Folsom, *Antitrust Enforcement Under the Secretaries of Agriculture and Commerce*, 80 COLUM. L. REV. 1623 (1980).

at least seven investigations of cooperative prices.[178] Six of these involved dairy prices, while one involved potatoes.[179] None of these inquiries resulted in the Secretary taking any action against the prices.

Moreover, the definition of an excessive price is ambiguous and has resulted in a lengthy scholarly debate.[180] This failure to find excessive prices is consistent with the economic analyses that suggest cooperatives are unlikely to exercise significant market power absent special circumstances.[181] Further, Section 2 of the Capper-Volstead Act only focuses on prices to consumers. Hence, the Secretary has no express authority to forbid discriminatory or exclusionary conduct by cooperatives. Some commentators suggest that such conduct should therefore be subject to the antitrust laws.[182] Absent antitrust jurisdiction, there would be a troublesome gap in the oversight of anticompetitive and socially undesirable cooperative conduct. But, with respect to fiduciary duties there is no present national legal regime available to impose accountability on large cooperatives.

The Secretary of Agriculture does have plenary authority over the operation of the marketing order system. This dichotomy, given the close association of cooperatives and market orders, has led to several attempts to use the power over orders to limit the power of cooperatives. The Secretary has sought to modify or even terminate orders with varying degrees of success.[183] For example, in the case of the California orange order, the Secretary sought to require that the entire modified order be voted upon as a whole to keep Sunkist from approving only the amendments it desired.[184] On the other hand, the AMAA's fair competition requirement has had little use.[185] The Secretary has never invoked the AMAA to require reporting by cooperatives or imposed internal governance standards on cooperatives that participate in market order operations.

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178. Folsom, *supra* note 177, at 1634-35.

179. Alden Manchester, Agricultural Marketing Cooperatives and Antitrust Laws, in ANTITRUST TREATMENT OF AGRICULTURAL MARKETING COOPERATIVES 52 (Jesse, ed.) (1980).

180. *See, e.g.*, Edward Jesse, Aaron Johnson, *Defining and Identifying Undue Price Enhancement*, in ANTITRUST TREATMENT OF AGRICULTURAL MARKETING COOPERATIVES (Jesse, ed.)(1980); Edward Jesse, et al, *Interpreting and Enforcing Section 2 of the Capper-Volstead Act*, 64 AMER. J. AG. ECON. 431 (1982); Baumer, et al., *supra* note 148, at 245-51.

181. For a more complete discussion of the economics of cooperatives, see ABA SECTION OF ANTITRUST LAW MONOGRAPH 24, FEDERAL STATUTORY EXEMPTIONS FROM ANTITRUST LAW, 102-27 (2007).

182. *See generally* Baumer, et al, *supra* note 148; *see also* Folsom, *supra* note 177.

183. *See* Daniel Bensing, *The Promulgation and Implementation of Federal Marketing Orders Regulating Fruit and Vegetable Crops Under the Agricultural Marketing Agreement Act of 1937*, 5 SAN JOAQUIN AGRIC. L. REV. 3, 10-26 (1995).

184. *Id.* at 13-16 (describing the litigation which culminated in the revocation of the marketing orders for California citrus fruit).

185. *See* Folsom, *supra* note 177, at 1637 (stating that "the Secretary appears to have ignored this authority."). The USDA did issue antitrust guidelines in the late 1970s for persons under AMAA orders. This came in response to a Justice Department investigation of conduct in the raisin industry. *Id.* at n.90.

D. THE CONSEQUENCES OF AN OUTMODED LEGISLATIVE FRAMEWORK FOR COOPERATIVES

The foregoing description demonstrates that the evolution of agriculture and cooperatives has resulted in some significant unintended and harmful consequences for farmer members and the consuming public. In particular, the current law may shield collusion among major integrated producers that can claim to be "farmers," while at the same time, an inadvertent inclusion of a single non-farmer in a bargaining cooperative would expose such an entity to *per se* liability. Because the law does not distinguish among the types of cooperative activities that exist, it provides both too much and too little protection. The result is that some commodities are over-priced and consumers are exploited. At the same time, some farmers are excluded or exploited by the large cooperatives that exercise their power over access in order to entrench their own power.

From the perspective of farmers, there is also a pervasive problem concerning the governance of large cooperatives. There is a lack of transparency, full disclosure, and public accountability on the part of managers. As noted earlier, these factors that create a dramatic separation of ownership and control also provide an additional inducement for managers to exploit market power for their own benefit. While cooperatives with modest membership and revenue may not require any significant external controls over their governance because the members can protect themselves, large cooperatives need to have some significant changes in accountability.

In a different way, bargaining cooperatives, which are analogous to unions, probably ought to have a clearer and better defined legal status. The ways such organizations undertake their responsibilities and the entitlement of members to vote on specific agreements with buyers are now undefined. In addition, these entities can combine several functions that might better be kept separate. Acting as a processor or marketing agent is not consistent with bargaining on behalf of individual producers. The incentive to favor internal interests over external buyers, or even to favor processing over the gains to producers, is currently uncontrolled and often concealed.

V. A LEGISLATIVE PROPOSAL TO MODERNIZE REGULATION OF FARM COOPERATIVES

The first best option would be for a comprehensive repeal and reenactment of the law governing farm product cooperatives. The issues that would shape the agenda of such legislation include, first, providing a better set of criteria both for membership and for when an entity can lose its legal status. In particular, while the good faith and inadvertent inclusion of an unqualified member should not terminate a cooperative's rights, no entity should be allowed to participate in a cooperative if it is vertically integrated such that it does not make use of the processing, marketing, or bargaining services of the entity for a majority of its output. An absolute size limit based on value of production of any potential member would provide a second limit. This will avoid having a nominal

cooperative act as an agent for large corporate competitors and thereby coordinate their competition.[186]

These more complex standards for membership would require some kind of an oversight institution to review and pass on questions of application. The best location for such review would be in the Antitrust Division of the Justice Department using a process like the Business Review Clearance system. Locating this review outside of the Department of Agriculture will reduce the risk of undue special interest manipulation of the process. Because business review letters are public, a common law type process would allow for the evolution of standards and permit cooperatives to predict whether particular proposed members likely would raise problems.

Second, the types of cooperative functions should be distinguished, and appropriate legal regimes should be developed. Processing and marketing cooperatives may need better access to capital that can only come from reforming the current requirements on investment participation, modifying the level of dividends, and perhaps providing more insulation from taxation of retained earnings.[187] This would also explicitly allow the newer types of cooperatives to get the tax and investment law benefits of being a cooperative.

At the same time, joint marketing ("agencies in common") should be subject to standard antitrust criteria.[188] Many joint ventures are lawful because they are both legitimate and do not exercise undue market power. However, there is no efficiency justification for allowing all the processing or marketing cooperatives to combine into a single actor either by merger or by joint venture. Such combinations are unlikely to yield increased earnings for members, but would encourage managers to try to exploit the resulting market power for their own benefit.

Finally, the revised statute, while still allowing a cooperative to obtain a lawful monopoly provided it did so without coercion or exclusionary practices, should subject mergers among cooperatives to the same review as any other merger. As noted earlier, mergers involve a loss of control and may result in members losing equity in the resulting cooperative. Currently, there is no oversight as to any of these risks. While the Department of Agriculture is probably better positioned to review the non-competitive merits of such transactions, the antitrust agencies are better able to review and evaluate the competitive risks that might emerge. Thus, internal, non-predatory growth would be the only route by which a cooperative might achieve (and retain) a monopoly.

The kind of cooperative that needs to be distinguished is the bargaining cooperative. Such entities need to be distinct and subject to a different set of

186. *See generally* Ethyl Gasoline Corp. v. United States, 309 U.S. 436, 452-53 (1940) (patent licensing scheme used to coordinate retail competition); United States v. Masonite Corp., 316 U.S. 265, 274-76 (1942) (use of patent licenses to coordinate industry prices).

187. *See* Raup, *supra* note 138 and accompanying text.

188. Reliance on antitrust is preferable to having a regulatory process in the Department of Agriculture review such joint ventures. It will be less costly and less subject to capture.

rules. First, they should not have any processing or marketing interest. Such activities create an inherent conflict with the duty to bargain with buyers over prices and other terms. Second, such entities should have a process, like labor unions, by which they can be certified as the bargaining agents for their members. These rules should also include a set of duties owed to members and financial and governance obligations. The model would be modern labor law, but tailored to the farm situation.

Whether the AMAA should be retained with respect to the crops it covers, so that bargaining cooperatives could represent all farmers in the area where a majority agree to representation or whether membership and representation should be voluntary, is a difficult question. There are substantial advantages to avoiding the collective action problems of voluntary participation that can lead to free-riding and opportunism. In addition, an exclusive bargaining right would limit the ability of buyers to undermine a bargaining cooperative by selective, discriminatory deals. On the other hand, much in farming culture is hostile to forcing farmers to be represented by an entity in which they do not want to participate. The irony is, of course, that under the AMAA, dairy farms and a number of crops are actually or potentially subject to these controls today.

With respect to the AMAA, the first, best alternative would be to repeal the entire statute and then develop two different laws. One law would address the dairy business and provide the option of continuing the pooling process for milk. Such a statute should rest on a new foundation with respect to price floor development and access to the pool. Cooperatives might well remain major actors as processors or marketing agents. But, their role in proposing regional orders should be reduced. In particular, a revised statute should eliminate the provision that confers the proxies of all members on the cooperative unless it voluntary waives that right. Individual farmers should have the right to vote on the specifics of any dairy order. In addition, stronger rules on access to the pool that are not subject to restriction should be part of this revised statute.

With respect to commodities other than milk that are currently subject to the AMAA, if a case can be made that standard setting and similar market facilitation continues to be relevant and important on a regional basis, then the USDA could sponsor standard setting organizations. Such entities would be protected, in part, from antitrust liability by the Standards Development Organization Advancement Act of 2004 which guarantees that such entities, provided they are inclusive in participation and proceed with a consensus decision process, can only be subject to single damages, and then only if their conduct is "unreasonable" rather than being "per se" unlawful.[189]

Most marketing orders could easily transition to such an approach. A few orders such as those for pie cherries, hops, and Florida winter tomatoes[190] would have to retreat from cartelization and accept the dominant system of market

189. 15 U.S.C. §§ 4301-04 (2006). *See* ABA SECTION OF ANTITRUST LAW MONOGRAPH 24, FEDERAL STATUTORY EXEMPTIONS FROM ANTITRUST LAW, 263-76 (2007).

190. *See supra* notes 49, 67, and 68 and accompanying text.

competition. This would be unlikely to seriously disrupt these producers so long as there was a reasonable transition period. Similar transitions were employed when tobacco and peanut quotas were removed.

While the forgoing agenda of statutory reform is theoretically plausible and would advance the public interest in facilitating markets to the benefit of both producers and consumers, it is politically implausible at this time. Powerful, vested interests in large cooperatives support the status quo. More politically relevant, the farm community has a deep, almost religious, commitment to the continuation of the Capper-Volstead Act as it stands. This was evident in 2009 when the then-Assistant Attorney General for Antitrust, Christine Varney raised a few questions about the continued necessity for the Capper-Volstead Act in its current form. The "tsunami" of pushback from farmers and legislators lead to a very quick retreat. AAG Varney capitulated with an acknowledgement that no one was going to touch the Capper-Volstead Act.[191] So, absent some crisis which might arise if increased and deeper corruption emerges in several large cooperatives, it is unlikely that any of the legislators who would have to take a serious interest in reform would want to touch this rural, political "third rail."

There may be some potential for reform at the state level if states that host out-of-state cooperatives undertake to provide means for more critical oversight of their activities. However, such ad hoc, localized reform is unlikely to make a serious dent in the fundamental problems that large cooperatives both face and create.

VI. THE POTENTIAL FOR JUDICIAL INTERPRETATION TO LIMIT COMPETITIVE HARM AND COOPERATIVE MISMANAGEMENT

Assuming, as is very likely, that there is no inclination to reform the underlying laws, then the trend of strict judicial construction needs to continue. The most important is the limitation on the Capper-Volstead Act exemption from antitrust law. It is essential to stress that merely because conduct is not exempt, that does not make it unlawful; that is a separate and sometimes challenging inquiry. The vast majority of cases in which the courts have rejected the exemption involved classic cartels that largely facilitated exploitation of consumers and frequently small producers for the benefit of a few large enterprises.

While the issue is still unresolved, the courts also ought to exclude vertically integrated producers that make little or no use of the processing, marketing, or bargaining services of the cooperative from statutory protection agreements. This issue was first debated in the *National Broiler* decision and has support from the trial court determination in the largely analogous

191. *See* Jerry Hagstrom, *Vilsack Tries to Ease Co-Op Fears about Antitrust Review*, NATIONAL JOURNAL (June 17, 2010), http://www.nationaljournal.com/member/daily/vilsack-tries-to-ease-co-op-fears-about-antitrust-review-20100617. *See also* Christine Varney, Presentation at University of Wisconsin-Madison, *Public Workshops Exploring Competition Issues in Agriculture, Diary Workshop*, at 66:11-15 (June 25, 2010), *available at* http://www.justice.gov/atr/public/workshops/ag2010/wisconsin-agworkshop-transcript.pdf.

Fishermen's Act, but so far has not resulted in an authoritative decision. The settlement of the egg cartel case with substantial payouts mooted what may have been the best recent example of the misuse of the cooperative exemption claim.[192]

A second strand to the emerging case law is the limitation of the scope of exempt activity to matters involving processing and marketing of the commodity. This is important because it denies exemption for restrictions on production that are reserved to the AMAA marketing order system over which the Secretary of Agriculture exercises (or ought to exercise) oversight. This restriction combined with a strict interpretation of the requirement recognized in the *Virginia & Maryland* decision, that the Capper-Volstead Act only exempts non-coercive, non-exclusionary conduct by cooperatives, would largely limit the exempted conduct of processing and marketing cooperatives to that in which any lawful corporation could engage.

The hard cases are those involving bargaining cooperatives. Those decisions should narrowly construe the statute to limit its coverage to "pure" bargaining cooperatives. A "pure" bargaining cooperative is a cooperative that should not be both a bargaining agent for some of its members and a processor or marketing agent for others. There may be boundary problems in distinguishing between marketing and bargaining because, formalistically, it is possible to convert bargaining to marketing. But, when viewed functionally, there should be less of a problem in discerning whether an entity is trying to manage the market by playing both roles. Here again, it would be helpful to develop a guidance process to assist a cooperative which is uncertain before initiating a program that might raise problems. Certainly, one possible method would be to seek business review from the Antitrust Division.

A similar, legally uncertain question exists as to mergers among cooperatives. The arguments for excluding mergers from the Capper-Volstead Act's exemption rest on a classic strict construction of statutory language. In many cases, of course, there would be no antitrust concern because the merger would not create significant competitive risks. But, in those contexts where such risks do arise, there is a case to be made that the exemption should not deny judicial review. Certainly, the overall public interest in the functioning of agricultural commodity markets would support such oversight. Unfortunately, there is no direct route to obtain comparable judicial review of the merits of such mergers where the concerns focus on treatment of members' equity.

Lastly, litigation may provide an indirect means to police the problems of governance that seem potentially significant in large cooperatives. The settlement in the *Southeast Milk* class action includes efforts to reform internal governance.[193] Unfortunately, most of the proposals involve presenting reforms

192. *See In re* Processed Egg Prods. Antitrust Litig. 2012 WL 5467530, at *6 (E.D. Pa. 2012) (awarding counsel fees based on settlement with some of the defendants).

193. *See* Motion for Preliminary Approval of the DFA, DMS, NDH, Mid-Am, and Hanman Settlement, *available at*http://www.southeastdairyclass.com/PDFs/SettlementAgreementofDFAandHanman.pdf (appendix to the motion contains the proposed settlement that includes a number changes in the

to the members of the cooperative without any meaningful constraint on how the issues are presented. It is a plausible prediction that many or all of the reforms will be rejected because they are being imposed by outside forces. Still, in a litigated case, the court would have the authority to impose such reforms as a way to reduce risks of future abuse.

VII. CONCLUSION

Cooperatives that process, market, or bargain for farmers with respect to their products need specific legal rules to facilitate their operations and functions. The Capper-Volstead Act, when combined with tax and securities exemptions, has provided an early 20th Century framework that is maladapted to the 21st Century state of agriculture. Large cooperatives need nationally mandated auditing, disclosure, and governance rules appropriate to their business model. Such entities can exploit both farmers and consumers when they have rights under the Depression-era AMAA market order system, or when they combine with very large vertically integrated producers. The first, best alternative would be for Congress to revisit its handiwork of ninety-years standing and provide a modern set of laws that are responsive to the contemporary needs of agriculture. This is in all probability a pipedream. Hence, the second best solution is to continue and strengthen the strict and narrow construction of the old statutes, so that the resulting conduct optimally serves the best interests of farmers and avoids exploiting consumers.

internal governance of Dairy Farmers of America, as well as actual changes in the rights of dairy farmer members in the southeast) The Court has approved the settlement. *See In re* Se. Milk Antitrust Litig., No. 2:08-MD-1000 (E.D. Tenn. Jan. 22, 2013), *available at* http://www.southeastdairyclass.com/PDFs/SettlementOrderofDFAandHarman.pdf.