

1988

Gene Brice, Willis Hall, Joseph R. May, Douglas
Quayle, J. Rolfe Tuddenham, Gordon Zilles v.
Cache Valley Dairy Association : Reply Brief of
Appellants

Utah Court of Appeals

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DOCKET NO.

IN THE SUPREME COURT OF THE STATE OF UTAH

890289

GENE BRICE, WILLIS HALL, *
JOSEPH R. MAY, DOUGLAS *
QUAYLE, J. ROLFE TUDDENHAM, *
and GORDON ZILLES, on *
behalf of themselves, *
for the benefit of *
Cache Valley Dairy *
Association and for all *
members and/or Holders of *
Certificates of Interest in *
Cache Valley Dairy *
Association, *

Plaintiffs and Appellants, *

vs. *

CACHE VALLEY DAIRY *
ASSOCIATION, a Utah *
agricultural cooperative, *
INTERMOUNTAIN MILK PRODUCERS *
ASSOCIATION; a Utah *
Agricultural Cooperative; *
VERNON BANKHEAD; RANDALL *
BRADSHAW; DON C. NYE; FRANK P. *
OLSEN; WILFORD B. MEEK; *
LATHAIR PETERSON; RULON KING; *
LARRY PITCHER; LYNN MICKEL; *
ROBERT HAWORTH; JEFF HYDE; *
EVAN SKINNER; ROBERT JACKSON; *
and WILLIAM LINDLEY; *
RANDON WILSON; JOHN *
DOES 1-30; SAM SOES 1-10, *

Defendants and Respondents. *

8c

Docket No. 870301

Priority No. 14b

REPLY BRIEF OF APPELLANTS

APPEAL FROM THE ORDER OF DISMISSAL OF THE
DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF CACHE COUNTY
HONORABLE VENOV CHRISTOFFERSEN

FILED

JUN 20 1988

Clk. Supreme Court, Utah

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REPLY TO DEFENDANTS' STATEMENT OF ISSUES PRESENTED FOR REVIEW

The Defendants avoid rather than answer the issues presented on appeal by the Plaintiffs. The Defendants create their own "Statement of Issues Presented for Review" which has no correspondence with Plaintiffs'. (See Brief of Appellants page 1 and Brief of Respondents page 1). The Defendants seek to divert the attention of this Court from the principal issues just as they succeeded with the lower court. The Defendants seek to focus the appeal on the questions of remedy and equity. Those issues are premature until the principal legal issues are determined. Issues of remedy and equity are difficult in this case but at this point they have not received even a preliminary hearing in the trial court. They are simply not ripe for appellate review.

Despite Defendants' diversions, the central question of this appeal is whether there was a valid combination between CVD and IMPA. IMPA cannot focus on such a question for long since they have no authority upon which they can rely to justify their position. They can talk about the "few disgruntled", the "irreversible entanglements" and "ratification by subsequent mergers", but such cannot change the fact that the CVD merger was a sham and a clear attempt to circumvent the law. (See R. 66, 80-81).

REPLY TO RESPONDENTS' STATEMENT OF FACTS

Defendants' "Statement of Facts" focuses on the issue of rescission, implying that Plaintiffs seek rescission of some contractual relationship between Plaintiffs and Defendants.

Plaintiffs' claim, as stated in their First Cause of Action, is for money damages and only alternatively for separation of the two entities. The Plaintiffs' do not claim that the "Letter of Intent" should be rescinded, which agreement was the standard of operation between IMPA and CVD until the purported merger. Plaintiffs do allege that the Letter of Intent is not part and parcel to the later purported merger, consolidation or transfer of assets.

The real fact is that the Letter of Intent, although it laid the ground work for a future possible combination of the participating cooperatives, has little to do with Plaintiffs' lawsuit. The Defendants would like this Court to believe that the Letter of Intent was in fact the controlling document which legitimized Defendants' claim of "a transfer of assets". (R.66). Perhaps this is because Defendants know that Letter was the only thing that the record reveals was approved by the Board of Directors of CVD. In fact, a closer look at the Letter of Intent clearly reveals that any formal combination of the associated cooperatives would require "further board and/or membership approval of the parties as may be required by law at that time". (R. 537-538). Paragraph eight of the Letter of Intent clearly states that the assets of the various associated cooperatives would remain under the ownership of the respective parties and would be made available through lease or other mechanisms to IMPA. (R. 538).

The Defendants allege in their "Statement of Facts" that it

would not be feasible to separate former CVD producers from IMPA, that farm pick up routes have been adjusted to achieve economies which are irreversible, that insurance between the cooperatives has been combined, that capital purchases and leases have been entered into and that these "entanglements" and points of "detrimental reliance" justify the Court in foreclosing on the possibility that CVD and IMPA should or could be pulled apart. It seems odd that Defendants should emphasize the difficulty of remedies as their primary defense. A court sitting in equity will have to determine remedies after a full determination of facts. No one can prejudge what method a trial court will determine is best suited to correct the errors alleged by Plaintiffs. There are numerous alternatives with unlimited permutations from which the court sitting in equity can select. Plaintiffs did not ask for rescission but for money damages first and then alternatively for orders placing the parties back under the Letter of Intent.

Interestingly, the Defendants' "Statement of Facts" failed to elucidate that all of the entanglements which Defendants refer to were as a direct and calculated result of the terms of the Letter of Intent which on its face was clearly terminable by its own provisions in paragraph 21 of the Letter of Intent. (R.541). The parties to the Letter of Intent anticipated the potentiality of a breaking apart from the entanglements of their association pursuant to the provisions of the Letter of Intent.

In the second to the last paragraph on page 13 of

Defendants' "Statement of Facts", the Defendants state as a matter of fact that "the corporate entities of the four (4) cooperatives which formed IMPA possess no members, no assets, no liabilities or any purpose for existing". Such a statement is clearly not fact but an erroneous legal conclusion. In fact, if the alleged combination between CVD and IMPA was improper and invalid it is void ab initio, similar to an annulment of a marriage, and CVD would be restored to its separate assets. If CVD had no Board of Directors, someone forgot to advise them since they held an official meeting after the alleged combination took place on December 17, 1987. (R. 547).

The most disturbing part of the Defendants' "Statement of Facts" involves the recitation of voting results from a subsequent merger between IMPA and two other cooperatives. In the "Statement of Facts" the Defendants cite those voting results and imply that such was a referendum which ratified their earlier illegal acts. Any subsequent combinations of IMPA with other entities is irrelevant and immaterial. In fact, it is entirely possible and quite probable that certain members or equity holders voting on the subsequent IMPA merger did so only in the belief that they were preserving what equity interests they retained by now voting to move it to an entity that offered more stability than IMPA. It is interesting to note, however, that IMPA apparently learned how to conduct a proper combination of agricultural cooperatives as it did follow in this instance the procedures of Utah Code Section 3-1-30, (1953 as amended). Had

IMPA followed those same procedures which were also announced for the December 16, 1985 meeting, this entire dispute could have been avoided.

The only relevant part of the Defendants' entire "Statement of Facts" is that IMPA never followed the requirements of Section 3-1-30 et seq. or any other statutory requirements in combining IMPA with CVD. Although the Defendants claim on page 9 of their "Statement of Facts" that the members of CVD "approved and authorized the transfer", a search of the referenced record from page 429 through 547 attributable to that alleged fact does not reveal any record to support the allegation. The only thing it does reveal is that there was in fact an advertisement served on some of the members of CVD of a meeting on December 16, 1985 to consider a merger/consolidation under Section 3-1-30 et seq., Utah Code Annotated. The meeting admittedly did not occur as advertised and the lower court so found. (R. 687-688). The only CVD Board action which came close to approving a merger was its authorization of the December 16th meeting. (R. 543). There is no evidence within the entire record that CVD ever approved a transfer of assets, let alone a plan of merger, but only a "meeting to merge". (Emphasis added). The unrefuted affidavits of Gordon Zilles, the author of the December 16, 1985 minutes, further clarify the purpose of the approved "meeting".

Defendants claim in their "Statement of Facts" that Plaintiffs did not raise their challenge to the validity of the combination until two and a half (2 1/2) years from the date the

Letter of Intent was signed. Plaintiffs had no reason to challenge the validity of the Letter of Intent until the Letter of Intent was transformed into an illegal combination and the claimed eradication of CVD as an autonomous cooperative. After the member meeting of December 16, 1985, the Deed to the Amalgamated CVD plant was transferred to IMPA without any notice to the CVD Board in August of 1986. The recitations in the Deed to a resolution of the CVD Board of directors is entirely imaginary. No meeting ever considered or approved any such deed. These activities were unknown in significant part to the Board until the Board Meeting held December 17, 1986. Suit was filed less than two (2) months later on February 13, 1987. Clearly the Plaintiffs acted timely and Defendants' arguments to the contrary simply attempt to divert the Court from the real issues.

Finally, many of the references to the record reflected in Defendants' "Statement of Facts" referred to depositions which were taken of the Plaintiffs without allowing time for Plaintiffs' attorney to cross-examine and without having the depositions completed. (R. 496). These partial depositions were never published and any reference to them on the record should be stricken and should not be considered by this Court. In addition, certain supplemental affidavits and memorandums were filed by the Defendants well beyond the deadlines for responses of motions before the Court pursuant to rule and without leave or approval from the lower court to file the supplemental documents. (R. 525-551). These documents should also be stricken from the

record and not considered by this Court.

REPLY ARGUMENT

I. REPLY TO POINT I

As stated before, the Defendants have intentionally mischaracterized the issue of rescission as it relates to this case. (R. 117-121). It is not the principal issue. The principal issue is what the Defendants did; the question of which remedy is to be involved is premature. In any event, the First Cause of Action sought money damages and only as an alternative to separate the two cooperatives. (See Verified Complaint (R. 6-7)).

The Plaintiffs do not seek a "rescission" of the combination between CVD and IMPA, but since Defendants make it the primary object of their defense it merits some discussion. Rescission is a contractual remedy. One cannot have rescission unless there was first a contract. Plaintiffs' action is not based on contract but based on statutory procedures for combining two (2) Utah agricultural cooperatives. Plaintiffs are not acting on any contract with Defendants in this case. The Letter of Intent is not at issue and there is no other contract between the parties. The only reference to rescission in Plaintiffs' complaint is in the Fifth and last Cause of Action wherein Plaintiffs seek rescission of liens and other incumbrances on CVD assets which were granted by IMPA to unidentified third-parties without proper authority.

Nevertheless, if the Court chooses to define Plaintiffs'

action as seeking rescission, that issue goes merely to the question of remedies available; the remedy must be fashioned only after all of the facts are heard by the trial court. Affidavits and depositions of the Plaintiffs clearly raised disputed issues of fact regarding whether the remedy of rescission would be available and to what degree. The lower court never acknowledged those disputed facts nor did it determine that such facts were undisputed.

The lower court in its Memorandum Decision held that no rescission was available because there "are many other entities, people involved, that have so changed their position and reliance from the transfer of assets that it would be inequitable for the Court to consider the remedies of rescission and restitution." The lower court cannot make such a finding without having a full evidentiary hearing or without also finding that there are no disputed facts with respect to the finding. (R. 553). The lower court did neither and the record reflects that the evidence would not support such a finding even had the court done so. (R. 552-554, 266).

The Defendants claim in their "Statement of Case" that the disputed facts which the Plaintiffs rely on are from inadmissible affidavits of Gordon Zilles and Lyle Tuddenham. A review of the affidavits and depositions show otherwise. (R. 239-246). And although the Defendants attempted to strike the affidavits of Gordon Zilles and Lyle Tuddenham, Defendants' motion to strike was never granted, and that motion relied heavily on Mr.

Tuddenham's deposition which was never completed and which Plaintiffs had no opportunity to cross-examine. (See R. 496). Mr. Daines had no opportunity to cross-examine because of the deposition schedule which Defendants arranged and unilaterally imposed on Plaintiffs counsel with very short notice, taking a full week's block of time directly prior to the hearing on the motion to depose each Plaintiff.

But the best evidence supporting Plaintiffs' contention that there are disputed material facts is based on the Letter of Intent itself under which CVD and IMPA had been operating up until the time of the alleged combination. That Letter of Intent specifically provided that the different parties would operate under separate ownership of their respective assets, that employees would remain employees of the respective employers, and that IMPA would cause CVD to be reimbursed for the use of CVD plants through IMPA's payment of CVD debts. (R. 538). These points were reiterated in the affidavits of Mr. Zilles and Mr. Tuddenham and in their depositions which Defendants only now seek to introduce. In other words, the entanglements between the parties resulted from the Letter of Intent, which was terminable, by its own terms, not by the combination.

On page 22 of Defendants' response brief, they cite Peterson v. Hodges, 239 P. 2d 180 (Utah 1951), as a Utah application of the Restatement of Restitution, Section 65. However, a reading of Peterson v. Hodges finds no correlation between the Restatement of Restitution as Defendants attempt to apply it in

this case. Peterson v. Hodges is a landlord/tenant matter involving a lease whose existence no one disputed. In addition, that matter involved a "mutual" rescission of the lease contract. In this case, we have no mutual rescission and we have no contract.

The second case cited by the Defendants is also distinguishable. McIntire v. KDI Corporation, 406 F. Supp. 592 (S.D. Ohio 1957), deals with the sale of securities and has nothing to do with the legality of a merger between two corporations. After citing those two (2) cases, the Defendants boldly state "that it is horn book law that restitution is an essential element of a claim for rescission." Even if it is horn-book law, it does not apply to this case. The Defendants would have to believe that the detrimental reliance and intermingling of assets upon which Defendants rely in arguing that "rescission" would be inequitable, was a result of the combination between the two cooperatives. In fact it was a result of the Letter of Intent dated June 15, 1984, which clearly by its own terms, provided for a termination and avoidance of all of the obligations under the Letter of Intent. (See paragraph 21, Letter of Intent, R. 541).

It appears that the result Defendants are really after is to have this Court reform the Letter of Intent to be a binding contract for a sale of assets from CVD to IMPA and then declare that rescission of the reformed contract would be inequitable. And Defendants want all this even though the Letter of Intent

clearly states that it is not a merger or sale of assets and that it is terminable by the parties. (R. 536-592).

The next Utah case which Defendants rely on in support of their argument on rescission is Toscano v. Social Services, 624 p. 2d 1156 (Utah 1981). That case is hardly close to any facts attributable to this case. In Toscano this Court ordered the Defendant individual to repay the Department of Social Services for financial assistance payments which the Defendant received based on erroneous information which was provided on his application for assistance. This Court found that the Defendant had not so changed his circumstances to make restitution to the State inequitable. In this case, Toscano can be used to support Plaintiffs' position in that it was in fact IMPA that was receiving the benefits from the CVD Amalga plant and its equities therein to allow it to obtain the claimed \$18,000,000.00 line of credit with the Sacramento Bank of Cooperatives. Beyond that, Toscano has no application to this case.

Defendants cite Christensen v. Abbott, 671 P. 2d 121 (Utah 1983), as supporting this Court's position in Toscano. Christensen is another case that involves a contract. A cattle agistor was allowed to recover for his services in feeding and caring for cattle. The only part of the decision that appears at all applicable to Toscano, let alone the case at bar, appears to be the ruling by this Court that "as a general rule, an agistor may not obtain a quantum meruit recovery for the feeding and care of cattle if he has wrongfully retained possession of them. The

burden of proving wrongfulness is on the party benefitted by the agistor's services." (citations omitted). It appears from that ruling that if the Plaintiffs prove the wrongfulness of IMPA's actions with respect to the combination then Defendants would not be entitled to the restitution they claim Plaintiffs must tender to qualify for rescission, according to their own argument.

It is the Defendants who created the conditions of entanglement and reliance and change of circumstance which they now wish to rely on to avoid the clear requirements of the law with respect to the combination. It is they who have furthered the entanglements by pushing through two additional combinations since the contested one at bar. The Defendants ask this Court to encourage persons to avoid statutory requirements of merger and consolidation by authorizing boards of directors of two corporations to allow their operations and assets to be commingled beyond division. Is one to support that this is a "new" form of combination; combination by irreversible commingling.

The Defendants want to justify their end result despite their means of achieving them. Such a "new" policy would shoot a gaping hole through the legislative controls that State Government has consistently exercised over corporate power and in protection of stockholder's interests.

Defendants next claim that Plaintiffs action should be barred by their unreasonable delay. This argument deserves little reply since it is clear from the record that it was only shortly after the alleged transfer of assets was fully completed

that the Plaintiffs filed their action. Six (6) months is certainly not an unreasonable delay, especially considering the attempts that the Plaintiffs first made with other members of the Board of CVD to try to resolve the problem of the illegal combination before filing suit.

It was not until title passed on the CVD Amalga plant in August of 1986 that CVD Board members could have learned of the potential conflict over the full extent and impact of the alleged combination with IMPA. After August, rumors began circulating and inquiries were made to Defendant Wilson. (See R. 75-77, 79-83). Defendant Wilson then responded in a letter to the Board dated November 19, 1986 (R. 65-74) which led to the CVD Board Meeting of December 17, 1986. (R. 384). It was only then that the full impact of IMPA's position became known to the Plaintiffs. The Defendants rely on Andrews v. Precision Apparatus, Inc., 271 F. Supp 679 (S.D.N.Y. 1963), to suggest that even ten (10) days would be improper and an unacceptable delay to assert the Plaintiffs' claim. However, that case, again, is clearly distinguishable. There, the Plaintiff was seeking to enjoin a merger after the merger had become effective by filing articles of consolidation. That case did not involve an allegation of an illegal consolidation. Plaintiffs here claim that the combination was done outside of the legal requirements. In addition, by Defendants' own admission, the combination was never formalized pursuant to legal requirements by filing articles of consolidation or merger. The first time it became

clear that the Defendants were claiming that they accomplished a transfer of assets was after Plaintiffs' lawsuit was filed and answered.

Finally, Defendants claim that rescission or cancellation are not available remedies where the Plaintiffs have a "plain, adequate and complete remedy at law" through damages. That argument is irrelevant because Plaintiffs clearly did seek first "money damages" (See Verified Complaint at R. 6-7). If conceded that the legal argument is correct and applicable in this case, there is still no evidence to support the position that Plaintiffs can be fully compensated with money. As a matter of fact, the record will reveal that IMPA has suffered serious losses after its combination with CVD and continues to do so, and there are serious questions as to whether IMPA would be capable of paying damages to the Plaintiffs if they were awarded.

II. REPLY TO POINT II

Defendants again mischaracterize Plaintiffs' position with respect to the issue of the lower court's refusal to certify Plaintiffs as class representatives. Plaintiffs do not challenge the lower court's discretion but claim that the lower court cannot dismiss Plaintiffs' action based on Plaintiffs' failure to meet the Court's requirements to be certified as representatives of the class.

The lower court specifically found in its Memorandum Decision that the Plaintiffs "may have different interests" with other members of the class. However, the lower court failed to determine if the questions of law or fact were in fact common to

the class, whether the claims of the representative parties are typical of the claims of the class, and whether the representative parties will fairly and adequately protect the interests of the class. (See Rule 23(a) U.R.C.P.) Plaintiffs claim that the lower court should have made specific findings with respect to why the class action was not qualified pursuant to the statutory guidelines. In addition, Plaintiffs should have been allowed to have the class action altered or amended pursuant to Rule 23(c)(1) to meet the lower court's concerns rather than dismiss the case. Just because there are different classes within the proposed class does not necessarily mean that all of their interests with respect to the class action cannot be represented by the proposed class representatives.

Defendants rely on information in the affidavit of Leland Anderson which was submitted and filed with the Court in conjunction with a Supplemental Memorandum in opposition to Plaintiffs' Request for Class Certification (R. 525). This was filed after the hearing on all of the motions before the Court and which was completely beyond any time limitations allowed for filing of such memorandum. Nonetheless, if the Court finds that it would be appropriate to consider the document, the Defendants rely on an extraneous vote which took place subsequent to the combination between IMPA and CVD to suggest that the CVD membership somehow ratified the illegal combination of IMPA and CVD. Such argument does not follow any logic. First of all, there is no basis in the law for allowing corporate membership to

ratify illegal acts of the corporation ex post facto. Secondly, the subsequent voting had to do with completely separate issues and parties. Neither the Plaintiffs nor the Court can draw any conclusions from the results of such a vote.

The subsequent voting referred to by Defendants may very well have had the outcome from CVD members because of their belief that their equity interest in CVD may be furthered by supporting a new organization in control of CVD assets other than IMPA. No one can predict with any certainty what the voters were thinking. Nevertheless Defendants conclude that the Defendants' illegal acts in combining IMPA with CVD were ratified by that subsequent vote on a subsequent merger that involved different entities. They then attempt to boot strap that unsupported conclusion with a further argument that Plaintiffs' allegations are now moot because of the subsequent merger. Such a position carries to the ridiculous Defendants' earlier position that they can circumvent the law by entangling the parties involved to such a degree that it becomes "impossible" to pull the entities apart without causing inequities. Now they go even further to claim that if one can later get the membership of the entities involved to approve a subsequent combination that is conducted pursuant to law, that such ratifies the illegal acts and insulates the violators from being answerable to legislative requirements. Such an argument bears no further comment.

III. REPLY TO POINT III

Despite Defendants' claims to the contrary, Utah Code

Annotated Section 3-1-30 et seq. clearly sets forth the requirements for an agricultural cooperative to combine with another, whether it be called merger, consolidation or transfer of assets. It is curious that in all the mounds of pleading, briefing and memorandum of points and authorities on the record, the Defendants cannot produce one shred of authority that supports their alleged transfer of assets being conducted in the manner that it was. The transfer was without Board approval, without proper notice to members of the corporation and despite notice being sent to certain members that a combination was going to be conducted pursuant to certain specific statutes and then those statutes being ignored.

Although Defendants now maintain that what they did with CVD on December 16, 1985 was really a transfer of assets (despite the notices to the contrary) they have never been able to explain the IMPA Resolution adopted December 19, 1985, three (3) days after the CVD meeting. (See Resolution, R. 326). That resolution purports to have the IMPA Board abandon what the Resolution therein admits was a Plan of Merger (consolidation) approved by CVD membership. How can the CVD membership be alleged to approve a merger and then IMPA unilaterally abandon it and on its own then appropriate all CVD assets without any further CVD Board or membership action? This unbelievable maneuvering, in a nut shell, proves IMPA's ill will, bad faith and lack of any legal basis for their current position.

Plaintiffs rely principally on their arguments in their

initial brief in arguing the balance of this issue. Plaintiffs do note that the lower court erred in failing to determine, that if Section 3-1-30 et seq. did not apply what other procedures would apply. It erred in not finding that even had Defendants conducted or achieved a combination by means of a transfer of assets, that Defendants needed to meet the statutory requirements required by a corporate transfer of all or substantially all assets out of the ordinary course, to wit: proper notice to members and proper approval by a Board of Directors.

Defendants misrepresent Plaintiffs' legal position with respect to the exclusivity of the merger statute. Plaintiffs take the position that pursuant to the facts and circumstances surrounding this case, including but not limited to the notice that the exclusive method for the combination of CVD and IMPA was through that cooperative statute. But Plaintiffs have always, in the alternative, argued that if a merger by way of U.C.A. 3-1-30 et seq. was not the exclusive remedy, then the combination would need to be conducted pursuant to general corporate law, or if not by that, then by common law, and that the combination failed under any of those procedures.

Defendants claim that the Court made no finding with respect to whether the alleged transfer of assets between CVD and IMPA was done properly. The lower court's failure to make a finding with respect thereto was apparently based on the Court's erroneous belief that Plaintiffs' complaint failed to seek

monetary damages based on an improper combination and that the court did not need to reach that issue. Plaintiffs' Complaint clearly does seek such remedies. (See Verified Complaint, paragraph 36-39. (R. 7)).

Defendants also argue that Section 3-1-9(1) grants agricultural cooperatives broad powers, including a transfer of all or substantially all of the assets to the corporation outside of the ordinary course of its business and without board or membership approval. In support of that position, they quote the first part of paragraph (I) of Section 3-1-9 but fail to include the last part of the paragraph which clearly limits a cooperative's rights. It states: "and [a cooperative] may exercise all powers, rights, and privileges necessary or incident thereto including the exercise of any rights, powers and privileges granted by the laws of this state to cooperations generally, excepting such as are inconsistent with the expressed provisions of this act." Section 3-1-9(1) Utah Code Annotated (1953 as amended). This language appears to clearly limit the powers of the cooperative to powers that are generally granted to business corporations, and only then if such powers are not otherwise inconsistent. Plaintiffs believe that 3-1-30, et seq. may be more limiting. But Defendants' argument goes much further in alleging their activities are subject to no statutory controls. Such a theory is nonsensical.

The Defendants quote the comments of Senator Harwood in support of their position. However, the Senator's quote on page

40 of Defendants' Response Brief, better supports the position of the Plaintiffs. The Senator says that "evidently there has not been provided the means for corporation and cooperatives-agricultural cooperatives-to merge". suggests that cooperatives have not had the ability to merge or combine in the past. Or, if they did, the Senator states it was done through the "tedious procedure of either buying assets or buying stock or some other means that sometimes makes it difficult or even impossible". Clearly the Senator was not referring to the kind of "transfer of assets" that the Defendants are claiming in this case. It certainly appears from the record that the procedure used was less tedious and cumbersome than even the merger requirements that were espoused by Senator Harwood. In fact, it is clear from Defendant Wilson's own remarks that the Defendants chose the transfer of assets means of combination because they knew they could not achieve the results through following the statute. (See R. 66, 80-81).

In short, Defendants reasoning is clearly flawed. If the law existing prior to the enactment of Section 3-1-30, et seq. would allow cooperatives to combine through the means used by Defendants, there would clearly be no need to enact the merger statute to "facilitate" such combinations. When Senator Harwood referred to the "tedious procedure" of transferring assets, he was referring to the common law requirement of unanimous shareholder approval. (See R. 57). The quoting of a statement made on the floor of the legislature by one senator hardly constitutes legislative intent or history?

Finally, the Defendants try to make the untenable point that the Plaintiffs have benefited from the combination of CVD and IMPA. However it is very rare that one would take an action to the State Supreme Court believing the position one is challenging is to one's benefit. The Defendants like to paint the picture that the Plaintiffs are six "disgruntled" rebels who are the only people associated with CVD and IMPA that have any desire to challenge the combination. However, as the record shows, there are numerous other potential Plaintiffs waiting to assert claims as Plaintiffs of record should such be necessary by disqualification of the class action. (R. 269).

IV. REPLY TO POINT IV

Rule 52(a) Utah Rules of Civil Procedure requires the lower court to at least enter a written statement of the grounds for its decision on all motions granted under Rules 12(b), 50(a)(b) and 59 when the motion is based on more than one (1) ground. In this case, the requirement of Rule 52(a) clearly applies and would require the lower court to explain which motion it is ruling on. It is not clear from the lower court's action whether it was granting the Defendants' Motion to Dismiss or Defendants' Motion for Summary Judgment. If it was granting Defendants' Motion for Summary Judgment it should specify the areas where it found their were undisputed facts to substantiate the Summary Judgment. If the court was granting the Motion to Dismiss, it must likewise specify on what grounds the motion is granted. The lower court made no such determinations but only made certain

findings of fact and conclusions of law which had no specific connection to the particular motions of the Defendants.

V. REPLY TO ISSUE ON "FINALITY" OF MEMORANDUM DECISION,

The Defendants have correctly pointed out in their "Summary of Argument" that the question of whether the memorandum decision was "a final order" and therefore appealable was fully briefed before this Court pursuant to the Defendants' Motion to Dismiss and a second Motion to Dismiss or in the Alternative Motion for Summary Disposition of Rescission Claim. Plaintiffs refer the Court to Plaintiffs' Memorandum of Points and Authorities in response to those motions should the Court desire to consider that issue again. It is Plaintiffs' position that this Court has already decided that issue twice in favor of Plaintiffs.

CONCLUSION

1. For the reasons set forth hereinabove, it is submitted that the trial court should be reversed and the case remanded for the trial court to consider the case based on the Defendants' being restrained by the requirements of Section 3-1-30 et seq. with respect to the combination of IMPA and CVD.

2. Alternatively, that the combination of IMPA and CVD must follow the statutory procedures of Section 3-1-30 et seq. or the general corporate procedures set forth for business or non-profit corporations by Utah Statute.

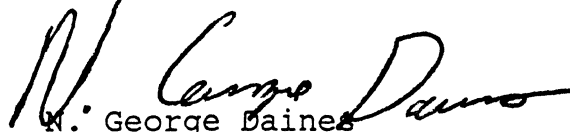
3. Alternatively that the Defendants must follow the common law requirements of the unanimous consent of the stockholders.


4. That there are disputed facts with respect to the issue of forms of relief available to the Plaintiffs, including rescission.

5. That the lower court should determine if the requirements for proper certification of Plaintiffs' action as a class action are met, and what, if any, conflicts exist with Plaintiffs being representatives of the class and allow for alterations or amendments of the class action to meet any technical deficiencies found pursuant to Rule 23(c).

DATED this 20 June, 1988.

DAINES & KANE


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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of June, 1988, I served four (4) true and correct copies of the foregoing RESPONSE BRIEF OF APPELLANTS by personal delivery to the following:

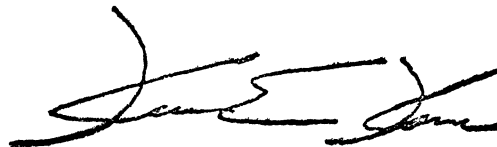
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