

1989

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

Utah Court of Appeals

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DOCKET NO. 890289 IN THE SUPREME COURT OF THE STATE OF UTAH

GENE BRICE, WILLIS HALL,  
JOSEPH R. MAY, DOUGLAS QUAYLE,  
THEDFORD ROPER, 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  
Certificates of Interest in  
Cache Valley Dairy Association,

89 0289 CA

Plaintiffs and Appellants,

vs.

Case No. 870301

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; SAN SOES 1-10,

Priority No. 14b

Defendants and Respondents.

---

ADDENDUM TO BRIEF OF RESPONDENTS

---

APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT  
IN AND FOR CACHE COUNTY  
HONORABLE VENOEY CHRISTOFFERSEN, DISTRICT COURT JUDGE

---

FILED  
MAY 16 1989

IN THE SUPREME COURT OF THE STATE OF UTAH

---

GENE BRICE, WILLIS HALL,  
JOSEPH R. MAY, DOUGLAS QUAYLE,  
THEDFORD ROPER, J. ROLFE  
TUDDENHAM and GORDON ZILLES,  
on behalf of themselves, for  
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JOHN DOES 1-30; SAN SOES 1-10,

Priority No. 14b

Defendants and Respondents.

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IN AND FOR CACHE COUNTY  
HONORABLE VENNY CHRISTOFFERSEN, DISTRICT COURT JUDGE

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- ADDENDUM 1: Reporter's Partial Transcript of Proceeding,  
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- ADDENDUM 2: Appellee's Motion to Dismiss or in the  
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- ADDENDUM 5: Affidavit of Lynn Cottrell
- ADDENDUM 6: Affidavit of Douglas P. Larsen
- ADDENDUM 7: Affidavit of LaThair Peterson
- ADDENDUM 8: Motion to Strike and Memorandum of Points and  
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- ADDENDUM 11: Utah Rules of Civil Procedure, Rule 52
- ADDENDUM 12: Utah Rules of Civil Procedure, Rule 23

ADDENDUM

1

1 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
2 STATE OF UTAH, IN AND FOR THE COUNTY OF CACHE

3 -----  
4 GENE BRICE, ET AL., )

5 PLAINTIFFS, )

6 -VS- )

7 CACHE VALLEY DAIRY ASSOC., )

8 DEFENDANTS. )

CIVIL NO. 25514  
REPORTER'S PARTIAL TRANS-  
SCRIPT OF PROCEEDINGS

9 -----  
10 HEARING HELD IN THE ABOVE-ENTITLED COURT AND  
11 CAUSE AT LOGAN, UTAH, ON THE EIGHTH DAY OF JUNE, 1987, ON THE  
12 AFTERNOON CALENDAR, BEFORE THE HON. VE NOY CHRISTOFFERSEN,  
DISTRICT JUDGE.

13 APPEARANCES:

14 FOR THE PLAINTIFFS N. GEORGE DAINES, ESQ., &  
15 KEVIN KANE, ESQ.  
LOGAN, UTAH 84321

16 FOR THE DEFENDANTS J. ANTHONY EYRE, ESQ.,  
17 ROGER P. CHRISTENSEN, ESQ., &  
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ROBERT H. HENDERSON, ESQ.  
SALT LAKE CITY, UTAH

19 -----  
20  
21  
22  
23 GEORGE A. PARKER, R. P. R. - C. M.  
24 CERTIFIED SHORTHAND REPORTER  
25 208 HALL OF JUSTICE  
LOGAN, UTAH 84321

FILED 25514-82

JAN 22 1988

SETH S. ALLEN, Clerk  
-1-  
RECEIVED

P R O C E E D I N G S

1  
2  
3  
4           \*\*\* MR. DAINES: YOUR HONOR, I'M NOT ALL THAT MUCH  
5 IN FAVOR OF VISUAL AIDS, YOUR HONOR, BUT I THOUGHT--AND  
6 FRANKLY IT'S PROBABLY APPROPRIATE TO SAY THAT EACH OF THESE  
7 GENTLEMEN HAVE CITED A NUMBER OF FACTS, AND I CAN GET UP AND  
8 DISAGREE WITH THEIR STATEMENTS, AND I DON'T THINK THAT'S  
9 REALLY GOING TO ASSIST THE COURT.

10           THE COURT: NO. RIGHT.

11           MR. DAINES: FOR EXAMPLE, THE QUESTION THAT THEY  
12 VOTED TO AFFIRM; THE NUMBER OF YEARS. I'M NOT GOING TO GO  
13 THROUGH THAT, BUT I THINK IF I COULD PRESENT THE THINGS TO  
14 WHICH THE PARTIES DON'T DISAGREE, I COULD INDICATE TO THE  
15 COURT REALLY THE LEGAL ISSUE<sup>FROM</sup>/WHICH ALL OF THE OTHER ISSUES  
16 SEEM TO STEM, AND I THINK FRANKLY BOTH SIDES AGREE ON THE  
17 ESSENTIAL FACTS TO THE CENTRAL ISSUE OF THE CASE.

18           WHEN YOU GET INTO WHETHER MR. WILSON COMMITTED  
19 MALPRACTICE OR NOT, THAT FLOWS FROM THE CENTRAL ISSUE.

20           THE COURT: I WANT TO KNOW WHETHER I CAN DECIDE  
21 THIS FROM THESE PLEADINGS AND MOTIONS ON THAT ISSUE OF WHE-  
22 THER YOU HAVE ANY VALIDITY FOR RELIEF OR NOT WITHOUT TAKING  
23 TRIAL TIME, FOR TAKING EVIDENCE TO RESOLVE FACTUAL DISPUTES.  
24 THIS IS WHAT I WANT TO FIND OUT.

25           MR. DAINES: YOUR HONOR, I THINK YOU CAN, AND I DO

1 NOT MEAN TO INDICATE TO THE COURT THAT ONCE YOU DECIDE THOSE  
2 FACTS THAT THERE ISN'T ANOTHER BURDEN WHICH MAY REQUIRE EVI-  
3 DENTIARY HEARINGS, BUT THE CENTRAL ISSUE OF THIS CASE, ONCE  
4 YOU DECIDE THAT ISSUE, IF WE LOSE, YOUR HONOR, WE HAVE TO GO  
5 HOME. WE'RE THROUGH. ALL OF THE OTHER ISSUES FALL.

6 THE COURT: OKAY.

7 MR. DAINES: BUT IF THE COURT DECIDES THE ISSUE IN  
8 OUR FAVOR, THEN IT HAS THE BURDEN TO GO FORWARD ON THIS  
9 DECIDING IF SOMEONE IS RESPONSIBLE FOR NEGLIGENCE, IF THE  
10 DIRECTORS ARE RESPONSIBLE, WHAT THE DAMAGES ARE, HOW TO COR-  
11 RECT THE PROBLEM AND SO FORTH; BUT THE CENTRAL ISSUE, YOUR  
12 HONOR, IS AN ISSUE UPON WHICH THERE ARE NOT FACTS IN DISPUTE.

13 \*\*\* .

14 (END OF EXCERPT.)

15 -----  
16 CERTIFICATE

17 AS THE THEN OFFICIAL REPORTER FOR THE WITHIN-  
18 NAMED COURT, I CERTIFY THE ABOVE AND FOREGOING TO BE A TRUE  
19 AND CORRECT EXCERPT FROM THE PROCEEDINGS HELD IN THE WITHIN-  
20 NAMED MATTER ON THE EIGHTH DAY OF JUNE, 1987.

21 DATED THIS 22ND DAY OF JANUARY, 1988.

22  
23  
24   
25

CERTIFIED SHORTHAND REPORTER. LIC. #27.

ADDENDUM

IN THE SUPREME COURT OF THE STATE OF UTAH

---

GENE BRICE, WILLIS HALL,  
JOSEPH R. MAY, DOUGLAS QUAYLE,  
THEDFORD ROPER, J. ROLFE  
TUDDENHAM and GORDON ZILLES,  
on behalf of themselves, for  
the benefit of Cache Valley  
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Cache Valley Dairy Association,

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CACHE VALLEY DAIRY ASSOCIATION,  
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RANDALL BRADSHAW; DON C. NYE;  
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ROBERT HAWORTH; JEFF HYDE; EVAN  
SKINNER; ROBERT JACKSON; and  
WILLIAM LINDLEY; RANDON WILSON;  
JOHN DOES 1-30; SAN SOES 1-10,

Defendants and Respondents.

Docket No. 870301

---

APPELLEE'S MOTION TO DISMISS OR IN THE  
ALTERNATIVE MOTION FOR SUMMARY DISPOSITION  
AS TO THE RESCISSION CLAIM.

---

Motion to Dismiss Appeal of the July 23, 1987 Order  
of the First Judicial District Court in and for  
Cache County, State of Utah, the Honorable VeNoy  
Christofferson, Judge, Presiding.

---

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STATEMENT OF ISSUES PRESENTED ON MOTION  
TO DISMISS PLAINTIFF'S APPEAL OR IN THE  
ALTERNATIVE TO SUMMARILY AFFIRM THE  
DISMISSAL OF THE RESCISSION CLAIM.

1. Is the July 23, 1987, order of the First District Court a final order from which an appeal may be taken?
2. Is an interlocutory appeal proper when plaintiffs have failed to follow Rule 5, Rules of the Utah Supreme Court?
3. In the alternative, should the lower court's dismissal of plaintiff's claim for rescission be affirmed?

STATEMENT OF DETERMINATIVE RULES

The following is the text of the Rules of the Utah Supreme Court, Rules 3, 5:

RULE 3. APPEAL AS OF RIGHT:

(a) Filing Appeal from Final Orders and Judgments.

An appeal may be taken from a district court to the Supreme Court from all final orders and judgments, except as otherwise provided by law, . . .

RULE 5. DISCRETIONARY APPEALS FROM  
INTERLOCUTORY ORDERS.

(a) Petition for Permission to Appeal.

An appeal from an interlocutory order may be sought by any party by filing a petition for permission to appeal from the interlocutory order with the Clerk of the Supreme Court within 20 days after the entry of such order of the district court, with proof of service on all other parties to the action.

STATEMENT OF CASE

This case commenced as a multi-claim action by seven former directors of Cache Valley Dairy Association (CVDA) by and

on behalf of themselves, CVDA and purportedly on behalf of all equity holders of CVDA against CVDA, Intermountain Milk Producers Association (IMPA), the entity to which CVDA transferred its assets, and all other directors of CVDA, and IMPA's attorney, Randon Wilson. The plaintiffs sought rescission of the transfer that had been ongoing for two and one-half years and \$55,000,000 in money damages. The gravamen of their claims was that the consolidation of CVDA and the other dairy cooperatives into IMPA was done improperly.

#### DISPOSITION IN LOWER COURT

On July 23, 1987, Judge VeNoy Christofferson signed an order which dismissed plaintiff's complaint without prejudice. The Court specifically ruled that certain claims as plead in the plaintiff's complaint were improper as set forth. In particular, the Court:

1. Denied plaintiff's request for class certification as set forth in their complaint;
2. Dismissed plaintiffs' claims for rescission and restitution; and
3. Dismissed plaintiffs' other claims as to all Defendants without prejudice with plaintiff's right to amend their complaint for monetary damages.

The Court specifically made no ruling as to whether the transfer of assets from CVDA to IMPA was wrongful and specifically reserved such a determination for future consideration. A copy of the Court's Order is attached hereto as

Exhibit A.

The Court, pursuant to Utah Rules of Civil Procedure, Rule 52(a), based the Order upon a "brief written statement of the ground for its decision" entitled "Memorandum Decision". A copy of the Memorandum Decision is attached as Exhibit B.

The Court's order does not terminate the lower court's proceeding in that it specifically allows the plaintiffs leave to amend and specifically reserved ruling on several key legal issues including the legality of the transfer of assets from CVDA to IMPA. The order was not a final order, and plaintiff's appeal should be dismissed.

#### STATEMENT OF FACTS

The following brief overview of the factual setting of this case is based on the statement of undisputed facts filed in the lower court, unrefuted affidavits and plaintiffs' own depositions. If the court desires a more in depth factual overview, a copy of the undisputed facts summary and affidavits of Lynn Cottrell and Douglas P. Larsen are submitted herewith.

1. During a several year period prior to 1984, various discussions and negotiations took place involving four different dairy-oriented agricultural cooperatives, Western General Dairies, Inc., Cache Valley Dairy Association, ("CVDA"), Star Valley Cheese Cooperative, and Lake Mead Cooperative Association. The discussions and negotiations concerned the joining of the assets and resources of such cooperatives to work together in one larger cooperative for assembling, processing and marketing milk

and milk products.

2. The negotiations resulted in a Letter of Intent Agreement among the four cooperatives, which went into effect on August 1, 1984. Such agreement as well as subsequent agreements, eventually led to the transfer of assets and liabilities, over a period of time, by the four cooperatives to Intermountain Milk Producers Association, the new larger cooperative. The transition process concluded on August 1, 1986.

3. There were several meetings of CVDA's board of directors where the Letter of Intent was considered. The Letter was approved by the board of directors at each such meeting with no more than 5 of the 21 member board voting against it. At such meetings several of the plaintiffs voted in favor of the Letter of Intent and plaintiffs, Gene Brice, Thedford Roper and Gordon Zilles voted consistently in favor of it.

4. Cooperatives only allow active producers for the cooperative to be members. Once membership ends, a person may still retain an equity interest which the cooperative will retire over a specified time period; an eight to ten year time period is not uncommon.

5. On December 16, 1985, a special Meeting of Members of CVDA was held, at which a vote of the members was taken on proposed consolidation of CVDA with the other cooperatives. All members were encouraged to attend and were allowed to vote.

6. Included among the non-producer equity holders of the CVDA at the time of the membership vote on December 16, 1985,

were individuals who were producing milk for other cooperatives or concerns which were in direct competition with the CVDA. Some equities of CVDA were owned by institutions or individuals which were not dairy producers on said date. These nonmember equity holders were not allowed to vote, which was consistent with the entire history of CVDA.

7. Based upon the approval of the board and the vote of the membership, by August 1, 1986, all assets owned by the four cooperatives had been transferred to IMPA and all liabilities had been assumed by IMPA. Hundreds of members from these four cooperatives were effected by the consolidation and have changed their position in reliance.

8. CVDA benefited from the consolidation. The Association gained immediate access to a Grade A market which allowed members to become Grade A producers and receive higher prices for their milk. Approximately 80 members of CVDA were able to become Grade A producers as a result. The cheese plants owned by CVDA secured commitments for a greater volume of milk with the potential of allowing their plants to operate at higher efficiency. IMPA caused certain equities held by CVDA members and former members to be redeemed in the amount of \$1,173,989 in order to reduce the outstanding equities of Cache Valley Dairy from ten to eight years.

9. It was not until December, 1986, two and one-half years after the letter of intent was executed, and the consolidation of operations began, one year after the membership

vote and several months after the transfer of assets was fully completed that plaintiffs first raised the question of the legality of the consolidation. Out of the entire membership of CVDA, only 7 have filed suit. The vast majority of the membership are in agreement with the consolidation and recently approved a merger of IMPA with Mountain Empire Dairymen's Association with a vote of 523 members in favor of the merger and only 67 against.

10. Substantial changes have occurred as a result of the consolidation. IMPA has assumed all of CVDA's liabilities and has paid off its debts. CVDA assets have been pledged by IMPA as security on loans. Cash accounts have been intermingled, financial statements consolidated and joint tax returns filed. 82 former members of CVDA have converted from Grade B to Grade A status, have received Grade A milk pricing and a proportionate share of the Grade A milk market. Farm pick-up routes for milk have been adjusted to achieve economies and equipment has been modified, reassigned, salvaged or sold. Substantial capital purchases and leases have been made in IMPA's name including the construction of a \$10 million milk plant in Salt Lake County. Due to the excess plant capacity available in the IMPA system, certain plants have been, or are in the process of being closed or modified, including Cedar City plant, the Murray plant, the Ogden plant and the Idaho Falls plant. Hundreds of third parties have changed their positions in reliance on the consolidation.

11. Plaintiffs have also received substantial benefits from the consolidation. Some have converted to Grade A status, and all have received early equity payments which total \$1,173,989. None of the plaintiffs have offered to retender any of the benefits of the consolidation and have expressly affirmed that they are not willing to do so.

#### ARGUMENT

##### Point I

THE ORDER OF THE TRIAL COURT AND THE MEMORANDUM DECISION ON WHICH IT IS BASED DO NOT CONSTITUTE A FINAL ORDER FROM WHICH AN APPEAL MAY BE TAKEN

Rule 3 of the Rules of the Utah Supreme Court ("R. Utah S. Ct.") provides that "An appeal may be taken from a district court to the Supreme Court from all final orders and judgments, except as otherwise provided by law . . . ." (Emphasis added.)

In multiple party litigation, for example, a judgment which fully decides the issues among some but less than all of the parties is not a final judgment. See Crosland v. Peck, 59 Utah Adv. Rep. 3 (1987); Tippets v. Page Petroleum, Inc., 59 Utah Adv. Rep. 4 (1987); Neider v. State, 665 P.2d 1306 (Utah 1983); Kennedy v. New Era Industries, Inc., 600 P.2d 534 (Utah 1979).

Similarly, when a plaintiff asserts several claims and the trial court renders judgment with respect to some but not all of such claims, the judgment is not final and is therefore not appealable. See Salt Lake City Corp. v. Layton, 600 P.2d 538 (Utah 1979).

In the Layton case defendants had built a fence across a street, claiming that the city had abandoned legal title to the street. The city sought an injunction compelling the defendants to remove the fence and also alleged unjust enrichment and trespass for which the city sought damages and punitive damages. The trial court issued the injunction but reserved action on the claims for damages and punitive damages. Defendants appealed from the order granting the injunction, but the Supreme Court dismissed the appeal because the order of the trial court was not a final order. The court stated:

As a general rule an appeal may be taken to this Court only from a final order or judgment. . . . A judgment is final when it ends the controversy between the parties litigant. . . . In J.B. & R.E. Walker, Inc. v. Thayn, 17 Utah 2d 120, 405 P.2d 342 (1965), this Court held that a judgment which disposes of fewer than all of the causes of action alleged in the plaintiff's complaint is not a final judgment from which an appeal may be taken. In the instant case the order entered by the trial court clearly was not a final order. The claims with respect to unjust enrichment and trespass remain alive.

600 P.2d at 539-540 (Citations omitted). Accord, South Shores Concession, Inc. v. State, 600 P.2d 550 (Utah 1979) (trial court granted plaintiff an injunction but issues were still pending regarding a declaratory judgment also sought by plaintiff; the issuing of the injunction was not a final order or judgment that could be appealed); J. B & R. E. Walker, Inc. v. Thayn, 405 P.2d 342 (Utah 1965) (trial court entered a written judgment terminating a lease, as requested by plaintiffs, but issues regarding plaintiffs' additional claims for rentals and damages

were still pending; the judgment terminating the lease was not a final judgment and therefore was not appealable).

The policies underlying the final judgment rule were articulated by Justice Stewart in the Kennedy case:

Article VIII, § 9 of the Utah Constitution [since repealed] and Rule 72(a), Utah Rules of Civil Procedure [now Rule 3 of the R. Utah S. Ct.], provide for appeals to this Court from all final orders and judgments from district court. The policy underlying these provisions is sound. In the first place, it promotes judicial economy by preventing piecemeal appeals in the same litigation to this Court. At least some appeals would ultimately never be taken, since the party aggrieved by an interlocutory order may, in the end, prevail. Also, expense to litigants and the judiciary is reduced by the general requirement that all issues be appealed in one procedure. Further, the final judgment rule prevents this Court from intermeddling in the business of the trial courts before they have had opportunity to rectify some of their own possible misjudgments and before they have completed the trial. Finally, the final judgment rule prevents the interminable protraction of lawsuits. In a day when the case load of this Court has risen astronomically and seriously strains our resources, there is even additional reason for applying the final judgment rule.

600 P.2d at 535.

In the instant case the trial court's order dismissing the plaintiffs' claims stated that it is "without prejudice to Plaintiffs' right to amend the complaint to assert such claims as Plaintiffs may have for monetary damages . . . ." Generally an order or judgment issued "without prejudice" is not a final decision from which an appeal may be taken. See Tracy v. University of Utah Hospital, 619 P.2d 340 (Utah 1980), which noted that an earlier appeal in that same case had been dismissed

by the Supreme Court because the trial court's denial of appellant's motion to intervene as a party plaintiff was without prejudice.

In Bowles v. State, 652 P.2d 1345 (Utah 1982), the Utah Supreme Court dealt with those limited circumstances in which a dismissal without prejudice can be deemed a final order or judgment which would authorize an appeal.

In the Bowles case, plaintiffs sought to have certain deeds they had executed and delivered to the State of Utah declared void because of misrepresentations claimed to have been made by the State's agent. The court dismissed the suit without prejudice, ruling that under Utah Code Ann. § 63-30-10(6) [now § 63-30-10(f)] governmental immunity from suit is not waived when the claim arises out of a misrepresentation by a governmental employee.

Plaintiffs filed a notice of appeal, and the State moved to dismiss the appeal on the grounds that an order of dismissal without prejudice is not a final order from which an appeal lies. The Utah Supreme Court noted that "The narrow question of finality of a dismissal without prejudice has never been specifically addressed by this court." The court held that under the facts of that case the notice of dismissal, even though it was without prejudice, did constitute a final and, therefore, appealable order. The court quoted from an earlier case, Winnovich v. Emery, 33 Utah 345, 93 P. 988 (1908):

The test of finality for the purpose of an appeal, therefore, is not necessarily whether the whole

matter involved in the action is concluded, but whether the particular proceeding or action is terminated by the judgment. If it is, and, in order to proceed farther with regard to the same subject-matter, a new action or proceeding must be commenced, then, as a general rule, the judgment which ends the particular action or proceeding is final for the purposes of an appeal, if an appeal is permissible at all.

The court then stated:

Although that language is only dicta as it pertains to this case, other jurisdictions have applied comparable analyses to a dismissal of a complaint without prejudice. The general rule seems to be whether the effect of the ruling is to finally resolve the issues.

In the instant case, plaintiffs contend that the dismissal was on the "legal merits of plaintiff's action." They claim that until that ruling is reviewed, they cannot move further. We agree. The trial court's ruling does go to the legal merits of any cause plaintiffs may frame and hence it is appealable.

652 P.2d at 1345 (Emphasis added; footnote omitted).

Therefore, the criteria referred to by the Court on which it is determined whether an order is final and, therefore, appealable are:

(1) Whether the particular proceeding or action is terminated by the order such that plaintiffs must commence a new action if they desire to proceed further with regard to the same subject matter;

(2) Whether the effect of the ruling is to finally resolve the issues; and

(3) Whether the ruling goes to the legal merits of any cause of action which plaintiffs may frame.

The gist of plaintiffs' Complaint in the instant case is that defendants failed to follow the legal procedures required to effect a merger of CVDA into IMPA, for which plaintiffs seek (1) to represent all CVDA members and/or equity holders as a class under Rule 23 of the Utah Rules of Civil Procedure, (2) damages suffered by the class or, in the alternative, (3) rescission of the merger.

The trial court, in its Memorandum Decision, ruled that there had been no merger but that there had been a transfer of the assets of CVDA to IMPA "putting members or producers in CVDA in a position where they may have a cause of action for monetary damage by reason of the elimination of all of the assets of CVDA which destroys the value of their equity rights." The trial court, in its Order, therefore leaves it open to plaintiffs to pursue claims for damages "for the destruction or diminution, if any, of the value of Plaintiffs' equity interests, as a result of wrongful transfer of CVDA's assets to IMPA . . . ." Such damages are, in part, the very damages plaintiffs are seeking as set forth in paragraph D, page 9 of plaintiffs' Verified Complaint, where they ask "for a judgment against the Defendants, jointly and severally, for damages of not less than \$55,000,000.00 as and for the complete and total destruction of the Plaintiffs' equity in CVDA . . . . "

Admittedly, the result of CVDA's transfer of its assets to IMPA is that CVDA is out of business, and in several places in plaintiffs' Verified Complaint they refer to the alleged wrongful

transfer of the assets and to the resulting loss of CVDA's business. For example, plaintiffs' claim that "as a result of said Defendants' illegal<sup>s</sup> and willful and wanton actions, certain assets and equity of CVDA have been transferred, mortgaged, sold, lien<sup>d</sup>ed, assigned or otherwise seriously impaired" (paragraph 36 on page 7) and further claim that "said Defendants by appropriating the successful business of CVDA have deprived it of the opportunity of further financial benefit and gain in continuing the operation of the business" (paragraph 38 on page 7). All of those claims are left open by the trial court for plaintiffs to pursue individually if they can show that the transfer of the assets, which has admittedly occurred, was wrongful and they were damaged by it.

Therefore, even though the trial court refused to entertain plaintiffs' request for rescission, it left open their claim for monetary damages. And, while the Court denied the plaintiffs' request for class certification, it authorized plaintiffs to assert such claims for damages as the plaintiffs, themselves, may have. Therefore, in contrast to the facts in the Bowles case,

(1) the "particular" action in the instant case was not "terminated" by the court's order. Not only is the district court's order "without prejudice" but plaintiffs, in order to proceed farther, do not have to commence "a new action" but merely have to amend their complaint (which the district court expressly authorized them to do).

(2) The order did not "finally resolve the issues." Among the issues which have not been decided by the trial court are (a) whether the defendants acted wrongfully in transferring the assets of CVDA to IMPA, (b) whether any such wrongful transfer has caused any damage to plaintiffs, and, if so, (c) the amount of any such damages.

(3) The plaintiffs here are not precluded from proceeding farther because the trial court's ruling does not "go to the legal merits of any cause plaintiffs may frame." Plaintiffs may still frame a cause of action for damages for wrongful transfer of CVDA's assets as referred to above.

Therefore, based on the criteria set forth in the Bowles case, the order of the district court from which plaintiffs in the instant case are appealing is not a "final order" from which an appeal may be taken.

#### Point II

#### THE REFUSAL OF THE TRIAL COURT TO CERTIFY A CLASS ACTION IS AN INTERLOCUTORY ORDER

The issue of whether a plaintiff may appeal an order of the trial court refusing to permit a class action was not involved in the Utah cases cited above and is dealt with here separately.

Federal law is persuasive on this issue because in the federal courts the right of appeal from a federal district court to a court of appeals is, similarly, based on whether the district court action represents a final decision. Section 1291 of Title 28 of the United States Code states that "The courts of

appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court. . . ." (Emphasis added.)

In the instant case the trial court's order denied plaintiff's request for class certification, but it is clear under Federal law that an order certifying or refusing to certify a class action is interlocutory in nature; such an order is merged into the final judgment and is, therefore, subject to appellate review at the time of appeal from the final judgment. Coopers & Lybrand v. Livesay, 437 U.S. 463, 57 L. Ed. 2d 351, 98 Sup. Ct. 2454 (1978); Weil v. Investment/Indicators, Research and Management, Inc., 647 F.2d 18 (9th Cir. 1981); 7B Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE § 1802 (2d ed. 1986); 6 FEDERAL PROCEDURE - Lawyers Edition § 12:295 (1982); 3B Moore's FEDERAL PRACTICE § 23.97 (2d ed. 1948; 1987 replacement pages).

Notwithstanding the fact that an order denying class certification is not a final order, there was a conflict in the federal circuits as to whether such an order should be appealable anyway if, under the circumstances, the individual plaintiff would not pursue a complex action for the chance of only a small recovery. In that situation, it was argued, the order refusing to certify the class sounded the "death knell" of the litigation. The Supreme Court case of Coopers & Lybrand v. Livesay, supra, resolved that conflict in the circuits by holding that the "death knell" doctrine did not apply and that orders relating to class

certification are not independently appealable under 28 U.S.C. § 1291 prior to final judgment.

In the Coopers & Lybrand case, plaintiffs purchased securities in reliance on a prospectus containing financial statements certified by defendant. The financial statements were not accurate, and plaintiffs sold their securities at a loss of \$2,650.00. Plaintiffs filed the action on behalf of themselves and a class of similarly situated purchasers. The district court first certified and then, after further proceedings, decertified the class. Plaintiffs then filed a notice of appeal, and the court of appeals, after looking at the small amount of plaintiffs' claim in relation to their financial resources and the probable cost of the litigation, concluded that plaintiffs would not pursue their claim individually. The court therefore viewed the decertification of the class as a "final decision" under the "death knell" doctrine.

The Supreme Court reversed and directed the court of appeals to dismiss plaintiffs' appeal, holding that the "death knell" doctrine should not be applied in order to treat orders relating to class certification as final decisions and that such orders are, therefore, not independently appealable under 28 U.S.C. § 1291 prior to judgment. The Court stated:

[I]f the "death knell" doctrine has merit, it would apply equally to the many interlocutory orders in ordinary litigation -- rulings on discovery, on venue, on summary judgment--that may have such tactical economic significance that a defeat is tantamount to a "death knell" for the entire case.

Though a refusal to certify a class is inherently interlocutory, it may induce a plaintiff to abandon his individual claim. On the other hand, the litigation will often survive an adverse class determination. What effect the economic disincentives created by an interlocutory order may have on the fate of any litigation will depend on a variety of factors.

98 Sup. Ct. at 2459 (Footnote omitted.)

The court indicated that to require an appellate court to undertake a thorough study of the possible impact of the class order on the fate of the litigation before determining whether the order is appealable would have a serious debilitating effect on the administration of justice. The court continued:

The potential waste of judicial resources is plain. The district court must take evidence, entertain argument, and make findings; and the court of appeals must review that record and those findings simply to determine whether a discretionary class determination is subject to appellate review. And if the record provides an inadequate basis for this determination, a remand for further factual development may be required. Moreover, even if the court makes a "death knell" finding and reviews the class-designation order on the merits, there is no assurance that the trial process will not again be disrupted by interlocutory review. For even if a ruling that the plaintiff does not adequately represent the class is reversed on appeal, the district court may still refuse to certify the class on the ground that, for example, common questions of law or fact do not predominate. Under the "death knell" theory, plaintiff would again be entitled to an appeal as a matter of right pursuant to § 1291. And since other kinds of interlocutory orders may also create the risk of a premature demise, the potential for multiple appeals in every complex case is apparent and serious.

Id.

Therefore, under federal law it is clear that in the instant case the trial court's refusal to certify the class would

be deemed an interlocutory order from which an appeal may not be taken as a matter of right. It is recognized that Federal law is not binding in this matter. However, the Federal courts have dealt with the issue on numerous occasions, and it is submitted that the reasoning of the Coopers & Lybrand case is sound and should be followed.

### Point III

#### APPEAL FROM INTERLOCUTORY ORDER

Utah law has a procedure under which the appellate court has the discretion to accept an appeal from an interlocutory order of the trial court (see Rule 5, R. Utah Sup. Ct.). That rule is immaterial because plaintiffs in the instant case have not filed the petition for permission to appeal as required by that Rule 5, but have, instead, attempted to appeal as a matter of right under Rule 3, R. Utah Sup. Ct., which applies only to "final orders and judgments."

Plaintiffs also could have requested the trial court, pursuant to Rule 54(b) of the Utah Rules of Civil Procedure to direct the entry of a final judgment with respect to those issues that the court did decide, but plaintiffs failed to do so. Also, in view of the fact that the trial court has not entered a final judgment, the order rendered by the court is, pursuant to that Rule 54(b), "subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Rule 23(c)(1) of the Utah Rules of Civil Procedure also specifically provides with respect to the

trial court's order as to whether a class action may be maintained, that such order "may be altered or amended before the decision on the merits."

#### Point IV

IN THE ALTERNATIVE SUMMARY DISPOSITION OF THE PLAINTIFF'S RESCISSION CLAIM IS PROPER.

Plaintiffs in the lower court requested the court to set aside the transfer of assets from CVDA to IMPA. The lower court ruled that plaintiff's claims for rescission and restitution were dismissed. This Court can summarily affirm the dismissal of plaintiff's claim for rescission on the basis plaintiffs have not and do not intend to give up the benefits they have received under the consolidation. Restitution is an essential element of rescission, and plaintiffs' claim for rescission is fatally flawed. The lower court's decision should be upheld.

Courts have applied the basic rule of fairness in rescission actions requiring that a party may only get back what it gave up in a transaction if the party demonstrates its willingness and ability to give back what the other parties gave. Peterson v. Hodges, 239 P.2d 180, 184 (Utah 1951). The Restatement of Restitution, Section 65, entitled "Offer of Restoration as a Condition of Restitution" states as follows:

The right of a person to restitution for benefit conferred upon another in a transaction which is voidable . . . is dependent upon his return or offer to return to the other party anything which he received as part of the transaction.

If the parties cannot be completely restored to their pre-transaction positions, the remedy of rescission is not available.

The case of McIntyre v. K.D.I. Corporation, 406 F. Supp 592 (S.D. Ohio 1975) is persuasive authority for this court. A group of shareholders of K.D.I. sought the rescission of a corporate merger. The court held that rescission was unavailable, and stated:

The rescinder, however, must be prepared to meet "rescissions own peculiar prerequisites" including "ability to restore the seller to the status quo."

\* \* \*

That the plaintiff in an action under the Federal Securities Act for rescission of a sale of securities pursuant to a merger agreement must be in a position to return the defendant to the status quo ante by tender back of the consideration received is well established.

Id. at 597. Likewise, since plaintiffs do not intend to return their benefits, rescission is improper and their claim may be summarily dismissed.

Plaintiff's complaint is barren of any tender of restitution. Individual plaintiffs have stated they have no intention of relinquishing the benefits they have individually received from the transfer. Gordon Zilles testified:

Q. If you get what you want out of this lawsuit, as I understand it, Cache Valley Dairy will end up with a cheese plant back. Is that true?

A. That's what we ask.

Q. But you're not planning to give your grade A status back, are you?

A. Absolutely not.

Q. So, if you get what you want out of this lawsuit, the net effect is you are going to keep grade A status and Western

General Dairy and the other two co-ops are going to lose what they have bargained for in this deal. Is that a fair statement?

- A. If everything works in Alice in Wonderland, that's probably true.

Douglas Quayle, currently a non-producing equity holder received a portion of the \$1,173,989 million equity payment. He has never offered to give that money back to IMPA.

Gene Brice also went Grade A after the consolidation and received a 900 pound base for which he did not have to pay. He has likewise made more money for his Grade A production. No retender has been made by him. J. Ralph Tuddenham also went Grade A after the transfer and acquired a base without payment. He has also not offered to pay any money to IMPA.

Plaintiffs further have not testified as to how they can restore CVDA to status quo ante August 1, 1986. Non-producing equity holders received \$1,173,989; assets have been pledged as collateral on loans; a consolidation with MEDA has occurred (which was approved overwhelmingly) and additional rights of third parties have been affected.

Restitution has not occurred; plaintiffs have not shown how to restore CVDA to status quo ante and defendants submit it is simply not possible. Lacking the vital element of restitution, plaintiff's claim for rescission is defective and this Court can summarily affirm the lower court's dismissal.

CONCLUSION

Because the order of the district court from which plaintiffs have appealed is an interlocutory order, and because plaintiffs have attempted to appeal under Rule 3 of the R. Utah Sup. Ct. which permits appeals only from "final orders and judgments," plaintiffs' appeal should be dismissed. In the alternative, this Court should affirm the dismissal of the rescission claim in that restitution has not and cannot occur and plaintiffs do not intend to give back what they received.

DATED this 7<sup>th</sup> day of October, 1987.

CHRISTENSEN, JENSEN & POWELL, P.C.

By Jan P. Mahberg

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 7<sup>th</sup> day of October, 1987, to the following:

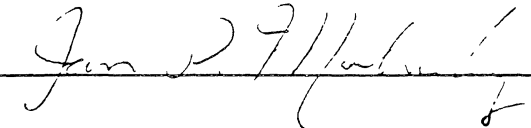
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CHRISTENSEN, JENSEN & POWELL, P.C.

  
\_\_\_\_\_

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Logan, Utah 84321  
(801) 752-4107

Attorneys for IMPA

---

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT  
OF THE STATE OF UTAH, IN AND FOR THE COUNTY OF CACHE

---

GENE BRICE, WILLIS HALL,  
JOSEPH R. MAY, DOUGLAS QUAYLE,  
THEDFORD ROPER, 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  
Certificates of Interest in  
Cache Valley Dairy Association,

ORDER

Plaintiffs,

vs.

Civil No. 25514

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; SAN SOES 1-10,

Defendants.

Number

25514-71

JUL 23 1987

SETH S. ALLEN Clerk

586

Various motions for partial summary judgment, motions to dismiss, motions for summary judgment, motions to have the Court determine whether a class action can be brought, motions to strike and other matters are currently pending before the Court. The Court, in this order, addresses these motions collectively, rather than individually.

The Court heard the arguments of counsel, reviewed the record in this case and issued a memorandum decision. Based thereon, and for the reasons stated therein, now, therefore, it is hereby Ordered that:

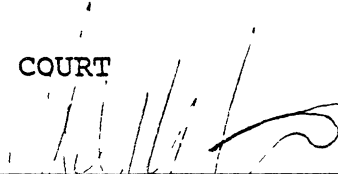
1. Plaintiffs' Request for Class Certification be, and hereby is denied;
2. Plaintiffs' claims for rescission and restitution be, and hereby are dismissed;
3. Plaintiffs' claims, as pleaded in this case, be and hereby are dismissed as to all Defendants without prejudice.

However, such dismissal is without prejudice to Plaintiffs' right to amend the complaint to assert such claims as Plaintiffs may have for monetary damages, to the extent Plaintiffs may have sustained such damages, for the destruction or diminution, if any, of the value of Plaintiffs' equity interests, as a result of a wrongful transfer of CVDA's assets to IMPA and the transfer of such equity interests from CVDA to IMPA. By granting leave to Plaintiffs to assert such claims, the Court makes no determination as to whether the transfer of assets was wrongful and makes no determination as to the merit, if any, of such claims, but reserves such determinations for future

consideration.

DATED this 23<sup>rd</sup> day of July, 1987.

BY THE COURT



---

VeNoy Christoffersen  
District Court Judge

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing Order has been hand delivered, addressed to the following this 27 day of July, 1987:

J. Anthony Eyre  
Kipp & Christian  
330 City Centre  
Salt Lake City, Utah 84111

R. Brent Stephens and  
Robert H. Henderson  
Snow, Christensen & Martineau  
1100 Newhouse Building  
10 Exchange Place  
Salt Lake City, Utah 84111

M. David Eckersley  
Haupt, Eckersley & Downes  
419 Boston Building  
Salt Lake City, Utah 84111

David Dwyer

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing Order has been hand delivered, addressed to the following this 5<sup>th</sup> day of July, 1987:

N. George Daines  
Daines & Kane  
128 North Main  
Logan, Utah 84321

George Fink

## ADDENDUM

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Telephone: (801) 752-4107

Attorneys for Defendant IMPA

---

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT  
OF THE STATE OF UTAH, IN AND FOR THE COUNTY OF CACHE

---

GENE BRICE, WILLIS HALL,  
JOSEPH R. MAY, DOUGLAS QUAYLE,  
THEDFORD ROPER, 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  
Certificates of Interest in  
Cache Valley Dairy Association,

Plaintiffs,

vs.

AFFIDAVIT OF LELAND  
ANDERSON

Civil No. 25514

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; SAN SOES 1-10,

Defendants.

Noticed

JUN 26 1987  
SETH S. ALLEN, Clerk

548

STATE OF UTAH                   :  
                                  ss.  
COUNTY OF SALT LAKE        :

Leland Anderson, being first duly sworn upon oath, deposes and says that of his own personal knowledge, he knows the following facts to be true:

1. He is the Executive Vice-President and General Manager of both Western Dairymen Cooperative, Inc. and Intermountain Milk Producers Association.

2. He was personally involved in the meetings held on June 19, 1987, in Salt Lake City, Utah, and on June 22, 1987 in Denver, Colorado for members of Intermountain Milk Producers Association and Mountain Empire Dairymen's Association to vote on the proposed merger of IMPA with MEDA.

3. Notice was given to all members, as well as non-member equity holders of IMPA of the proposed merger and all members and non-member equity holders of \$50.00 or more were given the opportunity to vote either in person or by proxy.

4. A high percentage of those entitled vote actually cast votes. There were a total of 846 votes cast by members and equity holders of IMPA, with current members voting 523 in favor and 67 against; equity holders 243 in favor and 13 against, with a total of 766 voting in favor and 80 against. This represents a vote of slightly more than 90% in favor and slightly less than 10% in opposition.

5. The 80 negative votes were spread throughout the IMPA organization. There was not any significantly greater concentration of negative votes among those who were formerly

members of Cache Valley Dairy Association than in other areas of the organization.

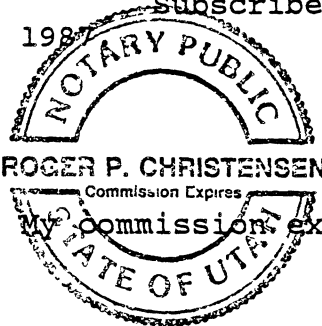
6. Among the members of MEDA, 442 total votes were cast, with 402 in favor and 40 against.

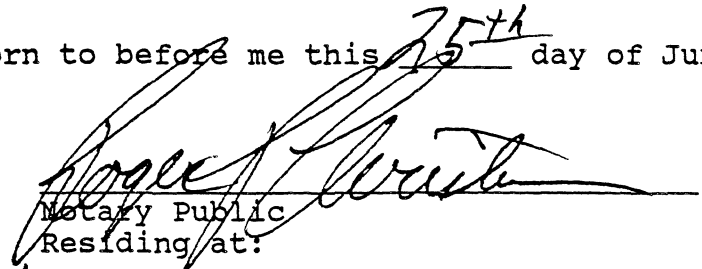
7. He personally participated in the counting of the votes and knows of his own personal knowledge that the foregoing vote totals are accurate.

DATED this 25<sup>th</sup> day of June, 1987.

  
Leland Anderson

Subscribed and sworn to before me this 25<sup>th</sup> day of June, 1987.

 My Commission expires: 1/20/90

  
Notary Public  
Residing at:

James C. Jenkins  
JENKINS, McKEAN & ASSOCIATES  
67 East 100 North  
Logan, Utah 84321  
Telephone: (801) 752-4107

IN THE FIRST JUDICIAL DISTRICT COURT IN AND FOR CACHE COUNTY  
STATE OF UTAH

---

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 Certificates  
of Interest in Cache Valley Dairy  
Association,

CERTIFICATE OF MAILING

Plaintiff,

vs.

CACHE VALLEY DAIRY ASSOCIATION,  
a Utah Agricultural Cooperative;  
INTERMOUNTAIN MILK PRODUCERS  
ASSOCIATION; a Utah Agricultural  
Cooperative; VERNON BANKHEAD;  
RANDALL BRADSHAW; DON C. NYE;  
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; SAN  
SOES 1-10,

Civil No. 25514

Defendant.

---

I do hereby certify that a true and correct copy of the  
AFFIDAVIT OF LELAND ANDERSON was mailed postage prepaid and  
properly addressed by depositing said item in the U.S. Mail on  
this 26th day of June, 1987, to the following:

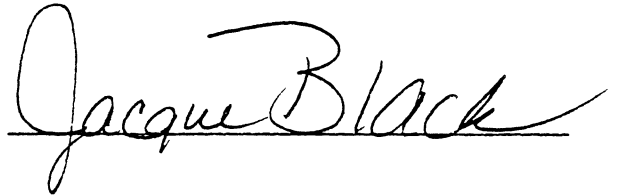
N. George Daines  
DAINES & KANE  
128 North Main  
Logan, Utah 84321

hand delivered 6/26/87 *GP*

J. Anthony Eyre  
KIPP & CHRISTIAN  
330 City Centre  
Salt Lake City, Utah 84111

R. Brent Stephens and  
Robert H. Henderson  
SNOW, CHRISTENSEN & MARTINEAU  
1100 Newhouse Building  
10 Exchange Place  
Salt Lake City, Utah 84111

M. David Eckersley  
HOUPPT, ECKERSLEY & DOWNES  
419 Boston Building  
Salt Lake City, Utah 84111

A handwritten signature in cursive script, reading "Jacques Black", written over a horizontal line.

## ADDENDUM

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ROGER FAIRBANKS, #3792  
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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT  
OF THE STATE OF UTAH, IN AND FOR THE COUNTY OF CACHE

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GENE BRICE, WILLIS HALL,  
JOSEPH R. MAY, DOUGLAS QUAYLE,  
THEDFORD ROPER, 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  
Certificates of Interest in  
Cache Valley Dairy Association,

AFFIDAVIT OF LYNN COTTRELL

Plaintiffs,

vs.

Civil No. 25514

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; SAN SOES 1-10,

Defendants.

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Number 25514-125

APR 12 1967  
SETH S. ALLEN Clerk

166

STATE OF UTAH :

COUNTY OF SALT LAKE :

The undersigned, Lynn Cottrell, being first duly sworn, upon oath, deposes and says that of his own personal knowledge, he knows the following to be true:

1. Beginning with its inception in 1975 and continuing until August of 1984, the undersigned was employed by Western General Dairies, Inc., an agricultural cooperative, in its marketing department.

2. During the period since August 1, 1984, to the present, the undersigned has been an employee of Intermountain Milk Producers Association, an agricultural cooperative, ("IMPA") assigned to the areas of marketing and administration.

3. He is generally familiar with and knowledgeable concerning the structuring and functioning of agricultural cooperatives, involving milk producers.

4. The membership of such cooperatives is entirely made up of active producers of milk. If a person either ceases dairy production or ceases to supply milk to the cooperative, his eligibility for membership ends.

5. Dairy cooperatives exist for the purposes of assembling, processing and marketing milk and milk products. The proceeds from the sale of milk products are, for the most part, paid back to the members of the cooperative, in accordance with the Federal Milk Market Order and formulas adopted by the board of directors.

6. A common way for a cooperative to obtain working

capital is to retain part of the proceeds realized from marketing the dairy products. As this occurs, the members of the cooperative obtain equity interests in the cooperative based upon such contributions to working capital. These are some times referred to as "producer equities".

7. Generally speaking, where revenues in future years permit, cooperatives attempt to make payments to members representing the value of their equity interests. Such payments are made over a period of years while new amounts are retained from current revenues to replenish working capital. This process is sometimes referred to as "rotating equities". An eight to ten year cycle for such rotation is not uncommon.

8. For various reasons, (such as going out of the dairy business, or joining a competing cooperative), a person's membership in a cooperative may cease. When that occurs, such former member ceases to actively participate in the cooperative, but retains an equity interest until the equity rotation cycle for the co-op has been completed. Because the co-op's ability to retire equities is dependent upon various economic factors, as well as the decisions of the cooperative's board of directors, the former member has no guarantee that his equity interest will ever be fully retired.

9. Because of his employment as described above, the undersigned has had an opportunity to observe events relating to the formation of Intermountain Milk Producers Association.

10. During the time from 1975 to 1984 in which the undersigned was employed with Western General Dairies, Inc., he

was aware of discussions and negotiations which were taking place involving four different dairy-oriented agricultural cooperatives, Western General Dairies, Inc., Cache Valley Dairy Association, ("CVDA"), Star Valley Cheese Cooperative, and Lake Mead Cooperative Association. The discussions and negotiations concerned the joining of the assets and resources of such cooperatives to work together in one larger cooperative for assembling, processing and marketing milk and milk products. As part of such discussions, the potential benefits which might be realized by Cache Valley Dairy Association were considered. Among them were the following:

a) The Cache Valley Dairy Association would gain immediate access to a Grade A market, which it did not have at that time. This would enable the members of Cache Valley Dairy Association, who desired to do so, to become Grade A milk producers and receive higher prices for their milk.

b) The cheese plants owned by Cache Valley Dairy Association, would secure commitments for a greater volume of milk, potentially allowing such plants to operate at greater efficiency.

c) Cache Valley Dairy Association would also realize the other benefits relating to "economies of scale" due to its membership in a larger organization with greater bargaining power, broader markets, and common management.

d) By unifying with several of its competitors, Cache Valley Dairy Association would enjoy the benefit of reduced competition for the procurement of raw milk supplies.

e) Cache Valley Dairy Association's liabilities and debts would be assumed by the larger organization.

11. In return, the new organization would realize the benefit of Cache Valley Dairy Association's assets, including its supply of milk, cheese plants, and its cutting and wrapping facility.

12. The negotiations among the four aforesaid cooperatives resulted in an agreement which was formalized in June of 1984 by a letter of intent among the four cooperatives, which went into effect on August 1, 1984. Such agreement as well as subsequent agreements, eventually led to the transfer of assets and liabilities, over a period of time, by the four cooperatives to Intermountain Milk Producers Association, the new larger cooperative. The transition process concluded on August 1, 1986.

13. As of August 1, 1986, all assets owned by Cache Valley Dairy Association had been transferred to IMPA and all liabilities of every kind, whether known or unknown, had been assumed by IMPA. Producer Membership Agreements had been assigned to IMPA as of said date and the producer equities then standing on the books of Cache Valley Dairy had been assumed by IMPA.

14. On or about March 28, 1986, IMPA caused certain producer equities standing in the name of former members of Cache Valley Dairy to be redeemed in the amount of \$1,173,989 in order to reduce the outstanding equities of Cache Valley Dairy from ten years to eight years in order to be on the same equity rotation

as other producers assigned to IMPA.

15. The principal borrowing of Cache Valley Dairy from the Sacramento Bank for Cooperatives has been consolidated into an \$18,000,000 line of credit from the Sacramento Bank for Cooperatives to IMPA and former Cache Valley Dairy assets have been pledged by IMPA as security for such loan.

16. All cash accounts from all functions of Cache Valley have been intermingled into common accounts of IMPA.

17. Since approximately August 1, 1984, the four cooperatives who formed IMPA, including Cache Valley Dairy, have been operating under a Letter of Intent whereby the parties agreed to "blend" their "bottom lines" in order that losses from one company might be offset as against gains in another company. Consolidated financial statements were prepared and joint tax returns filed for fiscal years ending July 31, 1985 and 1986.

18. Legal and auditing expenses have been paid by IMPA on behalf of Cache Valley Dairy, including substantial legal expenses to defend a case against Cache Valley Dairy filed by Cheryl Vause.

19. Approximately 82 former members of Cache Valley Dairy have converted from Grade B to Grade A status and have received payment for milk based upon Grade A pricing. They also were allocated IMPA base or quota which represents their proportionate share of the Grade A milk market. These producers did not have access to a Grade A market but were able to convert from Grade B to Grade A due to the established market for Grade A products which was provided through IMPA. This has had the effect of

producing more revenue for those 82 producers, as a group, and diminishing the revenue for existing Grade A producers of IMPA, as a group, through the adjustments of the Federal Milk Marketing Order blend price, as a result of a reduction in market utilization percentage. Producers which converted from Grade B to Grade A were required to expend considerable funds to upgrade their facilities which could not be recouped if the Grade A market of IMPA were no longer available to these Grade A producers.

20. The producer payroll and all of its components, to include quality program, cheese yield formula, milk market settlement and others, are all centrally computed and paid by IMPA. It would not be feasible to separate the former Cache Valley producers from IMPA for purposes of producer payroll due to the difficulty in obtaining funds from producers which would have been overpaid.

21. The amount of milk production in IMPA's operating area has been reduced through the dairy termination program and through other causes. This reduction has an effect on every cheese or surplus milk plant in terms of operating efficiency. Therefore, the milk available for processing in the former Cache Valley plants at Amalga and Beaver has been greatly diminished and it is estimated that only 340,000 pounds daily would have been available during the month of February, which would have permitted the Amalga plant to run at only 25-30% efficiency even with the Beaver plant closed. The Amalga plant cannot be operated profitably at this level of efficiency. The overhead of

the closed Beaver plant would also have to be covered. These losses would have to be born by producers.

22. All of the milk produced by producer members of Cache Valley has been collected and transported by IMPA since approximately August 1, 1984. Farm pick-up routes have been adjusted to achieve economies and equipment has been modified, reassigned, salvaged or sold.

23. Field men have been reassigned since August 1, 1984, and have been reduced from 11 to 8 in number during that time.

24. Over the period of time since August 1, 1984, insurance has been centrally purchased by IMPA for all fleet, liability, casualty, property and workmen's compensation and old policies have been cancelled. It is the belief of the undersigned that fleet insurance provided through IMPA resulted in substantial savings with respect to the fleet of vehicles formerly owned by Cache Valley Dairy.

25. Substantial capital purchases and leases have been made to provide for increases to the truck fleet, plant equipment, other plant improvements and computer capability, all in the name of IMPA. This also includes the construction of a \$10 million milk plant in Salt Lake County, the financing of which was arranged by IMPA. This plant was constructed to process a volume of milk produced by those producers assigned to IMPA.

26. Computers have been reprogrammed and expanded to accommodate the expanded business created by the assignment of assets to IMPA and the assumption of liabilities by IMPA.

27. Since August 1, 1984, when the Letter of Intent became effective, the central office facility of IMPA has been sold and new quarters have been leased for a period of six (6) years in the name of IMPA to accommodate the increased office needs.

28. Credit arrangements with customers, discounts, terms of sale and other matters relating to the sale of products have been negotiated in the name of IMPA and volume considerations have been made based on the increased sales volume of IMPA.

29. All employee payroll and records relating to employment have been transferred to IMPA and are administered centrally by IMPA and its computer. The availability of the greater computer capacity of IMPA has obviated the necessity of replacing a computer at Cache Valley Dairy.

30. The profit sharing plan of Cache Valley Dairy has been terminated and all proceeds have been paid out. Beginning August 1, 1986, the former Cache Valley Dairy employees were extended a pension plan under the sponsorship of IMPA. No pension or profit sharing plan now exists for Cache Valley Dairy.

31. Since August 1, 1984, significant changes have occurred in management personnel. Personnel have been transferred from Cache Valley Dairy to IMPA and many employees have been terminated with some hired in their place.

32. The corporate entities of the four cooperatives which formed IMPA possess no members, no assets, no liabilities, or any purpose for existing. These corporations are in varying stages of being dissolved.

33. Due to the excess plant capacity available in the IMPA system after transfer of all assets to IMPA, certain plants have been, or are in the process of being, closed or modified, which include the Cedar City plant, the Murray plant, the Ogden plant, and the Idaho Falls plant. This has substantially reduced the capability of the remaining plants to process and handle available milk if the former Cache Valley plants were not available. With the closure of the Ogden cheese plant, there is no Utah cheese plant capability left in IMPA without the former Cache Valley plant. Equipment has been removed from plants and sold off or placed in other plants at considerable expense.

34. The cheese cutting and wrapping operations formerly owned by Cache Valley Dairy have been utilized to handle cheese production not only from plants formerly associated with Cache Valley but from cheese available to IMPA from other sources. The reliance upon cheese cutting and wrapping capability is extremely important to IMPA and its future business.

35. IMPA has committed a full supply of raw milk to certain customers and substantial supply to other customers. It also has committed to operate its remaining plants at acceptable efficiency. These commitments were made in reliance upon the availability of producer milk to IMPA from all of the members assigned to it. A withdrawal of a substantial amount of milk would have a tremendous effect on the ability of IMPA to furnish raw milk to handlers, to operate its plants at a satisfactory level and to provide a supply balancing function for the market.

36. IMPA is operating under a Letter of Intent with

Mountain Empire Dairymen's Association ("MEDA") and Western Dairymen Cooperative, Inc. ("WDCI") with an intent to merge or otherwise consolidate assets. These parties have entered into a certain agreement whereby IMPA would operate a Twin Falls cheese plant for MEDA, whereby MEDA and WDCI would haul milk for IMPA, certain employees would handle all of the coordination of field work and many other functions. IMPA relies on these arrangements with MEDA and WDCI for its continued successful operation. The loss of the former members and facilities of Cache Valley Dairy Association from IMPA could jeopardize such arrangements with MEDA and WDCI.

DATED this 23rd day of April, 1987.

Lynn Cottrell  
Lynn Cottrell

Subscribed and sworn to before me this 23rd day of April, 1987.

Donna B. ...  
Notary Public ✓  
Residing at: 5581 6th

My commission expires: 10-1-88

ADDENDUM

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT  
OF THE STATE OF UTAH, IN AND FOR THE COUNTY OF CACHE

---

GENE BRICE, WILLIS HALL,  
JOSEPH R. MAY, DOUGLAS QUAYLE,  
THEDFORD ROPER, 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  
Certificates of Interest in  
Cache Valley Dairy Association,

AFFIDAVIT OF DOUGLAS P. LARSON

Plaintiffs,

vs.

Civil No. 25514

CACHE VALLEY DAIRY ASSOCIATION,  
a Utah Agricultural Cooperative;  
INTERMOUNTAIN MILK PRODUCERS

Number

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; SAN SOES 1-10,

Defendants.

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The undersigned, Douglas P. Larson, states as follows:

1. Beginning in February, of 1982 and continuing until January, of 1985, the undersigned was employed by Cache Valley Dairy Association, ("CVDA") an agricultural cooperative, initially as director of marketing and later as director of operations.

2. During the period since January, 1985, to the present, the undersigned has been an employee of Intermountain Milk Producers Association ("IMPA") an agricultural cooperative, initially as a vice-president of operations, cheese division, then as vice-president of administration and presently vice-president, cheese division.

3. In the capacities for Cache Valley Dairy, he has had the opportunity of being in attendance at various meetings of the Board of Directors of the CVDA, at which the Board considered and voted upon the Letter of Intent among CVDA, IMPA and others.

4. He also was in attendance at the special Meeting of Members of the CVDA held on December 16, 1985, at which a vote of the members was taken on the transfer of assets from Cache Valley

Dairy Association to IMPA.

5. He has personal knowledge of the facts stated herein.

6. At the meetings of the CVDA Board which he attended in which votes were taken on the Letter of Intent between CVDA and IMPA there were never more than five members of the twenty-one member board who voted against approving the Letter of Intent.

7. At the meetings of the CVDA Board of which he is aware and in which votes were taken on the Letter of Intent, there were never more than three or four of the seven individual plaintiffs who, in any one vote, voted against the Letter of Intent. Gene Brice, Thedford Roper, and Gordon Zilles all voted consistently in favor of the Letter of Intent.

8. From the period beginning in June of 1984, when the Letter of Intent was executed until August of 1986 when the transfer of assets was completed, none of the seven individual plaintiffs took affirmative action to formally notify CVDA or IMPA that he intended to prevent the transfer of assets from taking place, or otherwise legally contest the transaction.

9. It was not until February of 1987, six months after the transfer of assets was completed and 2½ years after the letter of intent was executed, that IMPA became aware that some of the former CVDA directors intended to legally contest the transaction.

10. Included among the non-producer equity holders of the CVDA at the time of the membership vote on December 16, 1985, were individuals who were producing milk for other co-ops or



## ADDENDUM

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Telephone: (801) 521-3773

IN THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY

STATE OF UTAH

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GENE BRICE, et al., :  
Plaintiffs, : AFFIDAVIT OF LATHAIR  
vs. : PETERSON  
CACHE VALLEY DAIRY :  
ASSOCIATION, et al., :  
Defendants. : Civil No. 25514

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STATE OF IDAHO )  
County of Bear Lake ) ss.

LaThair Peterson, being first duly sworn, deposes  
and states:

1. I am one of the defendants in the above  
entitled action.

2. During the years 1984 through 1986, inclusive,  
I was a Member of the Board of Directors of Cache Valley  
Dairy Association (hereinafter CVDA).

Number 25514-63

JUN 20 1987  
SETH G. ALLEN Clerk

3. On July 27, 1984, the Board of Directors of CVDA voted to authorize CVDA to enter into an agreement with Western General Dairies, Inc. (hereinafter WGD) and Star Valley Dairy Producers (hereinafter SV) and Lake Mead Cooperative Association (hereinafter LM), to become members of a new cooperative association known as Intermountain Milk Producers Associations (hereinafter IMPA). This authorization is set forth in the Minutes of the Meeting of the Board of Directors of CVDA dated June 27, 1984, which is attached as Exhibit "A".

4. As a result of the authorization of the Board of Directors of CVDA on June 27, 1984, a Letter of Intent was entered into between CVDA, WGD, SV and LM. The Letter of Intent dated June 15, 1984 is attached as Exhibit "B".

5. As a result of the Letter of Intent, CVDA, WGD, SV and LM contemplated the ultimate consolidation of all of the assets of the parties into IMPA with the obligations of the parties to be assumed by IMPA. The Letter of Intent provides in part as follows:

"6. The ultimate goal of the Parties is to consolidate their operations into IMPA, however, this consolidation will take place over a period of time in phases which will not be completely

specified at this time but will require further Board and/or membership approval of the parties as may be required by law at that time."

6. From approximately August 1, 1984 through December, 1985, CVDA, WGD, SV and LM conducted their operations through IMPA in accordance with the Letter of Intent.

7. On November 27, 1985, the Board of Directors of CVDA voted to favor the ultimate consolidation of the assets of CVDA into IMPA and to submit the decision as to whether to proceed with that action to the Members of CVDA. This decision is set forth in the Minutes of the Meeting of the Board of Directors of CVDA dated November 27, 1985, which is attached as Exhibit "C".

8. As a result of the authorization of the Board of Directors of CVDA on November 27, 1985, a Meeting of the Members of CVDA to vote upon the proposed consolidation of the assets of CVDA into IMPA was scheduled for December 15, 1985. The Notice to Members of Cache Valley Dairy Association and Summary of Plan of Merger (Consolidation) which were mailed to the Members of CVDA prior to the meeting are attached as Exhibit "D".

9. On December 15, 1985, a meeting of the Members of CVDA was held at which time I made a motion to authorize

the representatives of CVDA to take appropriate steps to merge or alternatively to transfer the assets of CVDA into IMPA. The motion made by me was as follows:

"[T]hat we approve the merger (consolidation) with IMPA or in the alternative that the Board may proceed to carry out a plan to transfer assets and Membership Agreements of this Cooperative to IMPA in exchange for assumption of debt and producer equities."

The motion is attached as Exhibit "E".

10. As a result of the authorization by the Members of CVDA on December 15, 1985, the assets of CVDA were thereafter transferred into IMPA and IMPA assumed the liabilities of CVDA.

11. On December 17, 1986, the Board of Directors of CVDA voted to affirm the action taken to transfer the assets of CVDA into IMPA and to take no action to attempt to set aside that transaction. The Minutes of the Meeting of the Board of Directors of CVDA dated December 17, 1986 is attached as Exhibit "F".

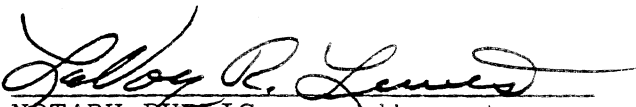
12. All of the foregoing actions taken by the Board of Directors and/or Officers of CVDA were undertaken with the belief that they were appropriate and authorized by the Board of Directors and/or Members of CVDA. Further, the actions were undertaken in good faith

and with full expectation that they would be relied upon by the directors, officers and members of the other parties to the Letter of Intent, specifically WGD, SV and LM, whom I believe have substantially relied upon the same.

DATED this 25<sup>th</sup> day of June, 1987.

  
LaThair Peterson

SUBSCRIBED AND SWORN to before me this 25<sup>th</sup> day of June, 1987.

  
NOTARY PUBLIC, residing at  
Montpelier, Idaho

My Commission Expires:

Dec 17-1991

CERTIFICATE OF MAILING

MAILED, postage prepaid, this 26 day of  
June, 1987, a true and correct copy of the foregoing  
Affidavit of LaThair Peterson, to the following:

N. George Daines  
Kevin E. Kane  
DAINES & KANE  
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M. David Eckersley  
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Attorneys for CVDA  
419 Boston Building  
Salt Lake City, Utah 84111

Shelley Exeter

CACHE VALLEY DAIRY ASSOCIATION  
BOARD OF DIRECTORS  
June 27, 1984 8:00 pm  
Cheese Plant

President William Lindley conducting.

Invocation given by LaThair Peterson.

All members present.

Lyle Tuddenham presented to the Board the financial statement. He expressed that we are showing a small profit.

The capital budget for 1984-85 was presented to the Board by Lyle Tuddenham and Doug Larsen. The items were presented one by one and an explanation was given. Evan Skinner made a motion to accept the capital budget and Wilford Meek seconded and motion carried.

Willis Hall, Rulon King and Gene Brice expressed interest in attending the co-op meetings in Bozeman, Montana. The Board decided to think about it and make some decisions about it next meeting.

Manager Rich explained to the Board that cheese had gone up  $1\frac{1}{2}$  cents on the cheese market. He suggested that we raise our price 15 cents a hundred. Lynn Meikle made the motion, seconded by Rulon King and motion carried.

The memberships of James and Joyce Minton, Kanosh, Utah, Violet Brandon, Wellsville, Utah and Bryan R. Booth, Weston, Idaho were read and approved on a motion by Joe May and seconded by Jeff Hyde.

Evan Skinner made a motion that we transfer Cache Valley Dairy Association Certificate from Mark E Kungler to James Spencer Kungler of Paul, Idaho. Bob Jackson seconded and motion carried.

The Board reviewed the wages of Cache Valley Dairy employees. It was decided that we raise the hourly wages a maximum of 3% on a motion by Lynn Meikle and seconded by Willis Hall.

Manager Rich handed out to the Board a letter of intent that would give the management the go ahead ~~and~~ put together the IMPA. It was necessary to have Board approval for the President to sign the letter of intent. Lynn Meikle made a motion that we accept the letter of intent with Rulon King seconding and motion carried.

Elections of the Directors to represent Cache Valley Dairy Association as Directors of the new IMPA Board are Frank Olsen, Larry Pitcher, LaThair Peterson, Vernon Bankhead, Lynn Meikle, Douglas Quayle and Wilford Meek. With William Lindley being appointed as Vice-chairman of the committee.

Doug Larsen said that we are now a USDA approved plant. Meeting adjourned.

Gordon A. Zilles  
Secretary

## LETTER OF INTENT

THIS LETTER OF INTENT is among CACHE VALLEY DAIRY ASSOCIATION of Smithfield, Utah, hereinafter called "CV"; WESTERN GENERAL DAIRIES, INC. of Midvale, Utah, hereinafter called "WG"; STAR VALLEY PRODUCERS, INC. of Thayne, Wyoming, hereinafter called "SV" and LAKE MEAD COOPERATIVE ASSOCIATION of Las Vegas, Nevada, hereinafter called "LM" and all of which are sometimes hereinafter collectively referred to as "Parties".

1. The Parties are all agricultural cooperatives without capital stock, with producer members and operate in the intermountain area. The Parties have determined after considerable discussion and negotiation to form a marketing agency in common to be called "INTERMOUNTAIN MILK PRODUCERS ASSOCIATION", a Utah agricultural cooperative, hereinafter called "IMPA" and to pursue other common goals as set out in this letter.

2. The Board of Directors of IMPA will initially consist of eight (8) members from CV, eight (8) members from WG, one (1) member from SV and one (1) member from LM for a total of eighteen (18) members. A majority of the Board members are required to constitute a quorum for board meetings and sixty percent (60%) of a quorum must approve any action by the Board.

3. It is the intention of the Parties to proceed immediately to form IMPA and to make appropriate notifications and applications to government agencies which would allow for the commencement of operation of IMPA by August 1, 1984 (hereinafter called the "Commencement Date"). The implementation of IMPA is contingent upon the approval by the Board of Directors of all of the Parties hereto of definitive documents and agreements and upon review by the United States Department of Justice and the Federal Trade Commission.

4. It will be necessary for all Parties to obtain as of July 31 or such other day as IMPA commences operations, a formal audit by a Certified Public Accountant which will be completed as soon after said date as possible and which will be made available to the all Parties and to their agents in implementing IMPA.

5. It is the intent of the Parties that the combined net profits of all the parties and of IMPA be allocated to said parties based on the milk delivered by each party to IMPA after considering all the combined income and expenses of the parties including IMPA. A formal audit by certified public accountants of each of the parties will be made on all of the parties as of the year-end when allocation of the combined income is made to all of the parties by IMPA.

6. The ultimate goal of the Parties is to consolidate their operations into IMPA, however, this

consolidation will take place over a period of time in phases which will not be completely specified at this time but will require further Board and/or membership approval of the parties as may be required by law at that time.

7. On the Commencement Date, IMPA will provide management to all existing milk processing plants and all other functions of the Parties, including but not limited to reviewing existing union contracts, wage rates and other personnel matters and benefits, etc.

8. Plants and physical assets of the Parties will remain under the ownership of the Parties and will be made available through lease or other mechanisms to IMPA.

9. All employees except certain management employees remain employees of existing employers and will carry out functions delegated by IMPA. Certain management employees will become employees of IMPA and any existing contracts relating to said employees shall be honored. Employers will be reimbursed all costs of providing labor as directed by IMPA.

10. IMPA will cause the Parties to be reimbursed for the use of their plants through the payment of debt and other reimbursement.

11. Each plant will be operated as a "profit center" in order to assist management in evaluating the operation of said plant and to provide "profit figures" for purposes of profit sharing contribution where required.

12. Milk will be received at the farm of members of the parties and will be delivered by the Parties at the farm to IMPA which will transport the milk to the plants for processing and marketing.

13. Initially, IMPA will assess Grade A milk, a per unit retain of \$.15 per cwt and Grade B milk, a per unit retain of \$.10 per cwt.

14. Payment of IMPA to the Parties for milk will be made at such uniform prices and on such component pricing as shall be set by IMPA.

15. Those members of the parties who do not hold base and who desire and are able to qualify for Grade A permits and who commence shipping Grade A milk shall be allocated base equal to fifty percent (50%) of their production, which base will increase by two percent (2%) per month for the next twenty-five (25) months. Base of members of the parties who are Grade A producers holding base will be adjusted over twenty-five (25) months to be at 100% of production at the end of twenty-five (25) months. Allocations and adjustments to base hereunder are based on production levels as of the date hereof, provided that base as allocated and adjusted will not exceed the daily average production of a producer with a member for the year 1983. The Board of Directors of IMPA will be empowered to make exceptions on a case by case basis to the 1983 limitation where necessary to avoid unforeseen hardship to a member.

16. IMPA shall process producer payrolls for the Parties and shall provide bookkeeping service for the Parties. Existing bookkeeping systems will be maintained until such time as the Parties are satisfied that the bookkeeping system of IMPA is adequate for utilization of the Parties in event the consolidation does not take place. Effective on the commencement date or as soon thereafter as is practicable, inventories of milk and other products will be transferred to IMPA along with accounts receivable, cash and other current assets and IMPA shall assume all accounts payable and shall provide funds with which the Parties may pay any debts or obligations which are not assumed.

17. IMPA shall cause all products to be marketed through existing personnel and marketing channels of the Parties.

18. IMPA will be charged with responsibility of cash management, arranging credit and other bookkeeping and managerial duties.

19. At the time the consolidation is accomplished, all members of the parties will terminate their membership in the parties and will be given membership in IMPA. All remaining assets of the Parties will be transferred to IMPA at book value and all remaining debts will be assumed by IMPA. All employees will be transferred to IMPA, subject to any labor

contracts which may then exist. Producer equities held by the Parties will be assumed by IMPA and will be rotated on a uniform basis.

20. The Board of Directors of IMPA will provide for districts from which directors will be seated at the annual meeting of IMPA in 1987 or at the time of full consolidation and directors will be elected from said districts at that time.

21. The Parties hereto will negotiate in good faith definitive agreements and documents for the purpose of implementing IMPA. In the event definitive agreements and documents are not entered into by the Commencement Date, the matters set forth in this letter shall be terminated and shall become null and void.

22. The Parties shall furnish to each other and to their designated officials such financial or other information as is required and necessary to carry out the intention expressed herein.

IN WITNESS WHEREOF, the parties have executed this Letter of Intent as of the 15th day of June, 1984.

CACHE VALLEY DAIRY ASSOCIATION

By W<sup>th</sup> L. Lindley

WESTERN GENERAL DAIRIES, INC.

By Joseph F. Hill

STAR VALLEY DAIRY PRODUCERS

By Thymon F. Lirach

LAKE MEAD COOPERATIVE ASSOCIATION

By Charles Cameron

0199W  
RWW

CACHE VALLEY DAIRY ASSOCIATION  
BOARD OF DIRECTORS  
November 27, 1985 11:00 am  
Cheese Plant

President William Lindley conducting.

Invocation given by Randy Bradshaw.

All members present except for Bob Jackson.

Randy Anderson presented a financial statement for the month of October.

Kip Winget shared with the Board some overhead slides to show the Board the sales trend for the year. He showed where sales had increased 11.25%. He also showed that the price of cheese had come down the past year.

Randy Bradshaw made a motion that we inform Mr. Bill Calahan that Cache Valley Dairy Drivers will not open and shut the gates to pick up his milk. Seconded by Larry Pitcher.

The capital budget for 1985-86 was presented by Doug Larsen. The budget was approved on a motion by Lynn Meikle and seconded by LaThair Peterson.

The Board gave approval of a Christmas bonus to employees of Cache Valley Dairy. The date of December 20 was set for the employees Christmas party at UVU beginning at 6:30 pm.

On a motion approved by the Board, it was decided not to buy the property from Lee Gertle or Bill Kehr.

Earl Strub presented to the Board more information of co-generation on a motion by Willis Hall and seconded by Randy Bradshaw the Board gave approval to have Vestec perform a site analysis.

Equity transfer from Theon Merrill to Walton Feed was approved by the Board.

Farm Store profits will be distributed to members on the 15th of December.

Profit sharing of \$93,000 will be put into the profit sharing fund. On a motion by Lynn Meikle and seconded by Randy Bradshaw.

A meeting to merge the coop together was discussed. On a motion by the Board, they voted 20 for and 1 voted against. Meeting adjourned.

Cordon A. Zilles  
Secretary

NOTICE TO MEMBERS OF CACHE VALLEY DAIRY ASSOCIATION

The Board of Directors of Cache Valley Dairy Association has adopted a Resolution directing that a Plan of Merger (Consolidation) under Section 3-1-30, et. seq., Utah Code Annotated, be submitted to a vote of the members of Cache Valley Dairy Association at a special meeting of members to be held at 10:30 o'clock a.m. on Monday, December 16, 1985, at the Smithfield Armory, 10 East Center Street, Smithfield, Utah.

The principal purpose of the meeting is to consider and vote upon the Plan of Merger (Consolidation) of Cache Valley Dairy Association, Western General Dairies, Inc., Star Valley Producers, Inc. and Lake Mead Cooperative Association into Intermountain Milk Producers Association.

A summary of the Plan of Merger (Consolidation) is enclosed with this Notice. A full copy of the plan shall be furnished to any member upon request without charge. Requests should be made to Intermountain Milk Producers Association, 195 West 7200 South, Midvale, Utah 84047.

Passage of this plan will require a simple majority of the members present at the meeting and voting thereon.

By order of the President as of this 25th day of November, 1985.

CACHE VALLEY DAIRY ASSOCIATION

By /s/ Wm. L. Lindley  
President

EXHIBIT D

## SUMMARY OF PLAN OF MERGER (CONSOLIDATION)

1. Cache Valley Dairy Association, Western General Dairies, Inc. Lake Mead Cooperative Association and Star Valley Producers, Inc. ("Consolidating Cooperatives") propose to consolidate their assets into Intermountain Milk Producers Association, formed under Title 3, Utah Code Annotated, as an agricultural cooperative association ("IMPA")

2. The terms and conditions are: 1) the Consolidating Cooperatives will transfer to IMPA all of their assets at book value in exchange for the promise by IMPA to assume all liabilities of said cooperatives; b) All membership agreements held by said cooperatives shall be assigned to and assumed by IMPA in accordance with their terms; c) all milk base held by members shall become milk base of IMPA on a pound-for-pound basis subject to the same rules, regulations and agreements in effect on the day the plan is adopted; d) all equities held by members of said cooperatives shall become equities of IMPA on a dollar-for-dollar basis subject to existing rules, regulations and agreements; f) all agreements, contracts, claims and obligations whatsoever, of said cooperatives shall be assumed by IMPA as though originally held by IMPA; g) All employees employed by said cooperatives as of the date of approval of the plan shall become employees of IMPA and all retirement plans, vacation accruals or other employee benefits shall be assumed by IMPA; and h) all other provisions of the Agreement of Merger (Consolidation).

3. The surviving corporation, IMPA, shall be governed by the Utah Uniform Agricultural Cooperative Association Act.

4. No changes will be required in the Articles of Incorporation of IMPA.

5. The eighteen (18) board members of IMPA shall establish districts which shall include all areas in which IMPA members reside and shall arrange for the election of directors from said districts at the fall 1986 district meetings for seating as the annual meeting of IMPA in January 1987.

6. The Presidents and Secretaries of the respective Consolidating Cooperatives shall execute such documents as are necessary to carry out the plan.

## Motion

that we approve the merger (consolidate)  
with IMPA, ~~with the proviso~~

~~that the board may~~

~~withdraw and abandon the~~

~~plan if it so chooses. and~~

or in the alternative that the

~~we pro~~ board <sup>may</sup> proceed

to carry out ~~the~~ a

plan to transfer

certain assets <sup>and membership agree</sup> of this

Cooperative to IMPA in

exchange for assumption of

debt and producer equities.

CACHE VALLEY DAIRY ASSOCIATION  
BOARD OF DIRECTORS  
December 17, 1966 7:00 pm  
George Daines Law Office

Frank Olsen conducting.

Invocation given by Gordon Zilles.

Those present were Bill Lindley, Willis Hall, Randy Bradshaw, Larry Pitcher, Vernon Baulhead, Gordon Zilles, Wilford Meek, Ernn Skinner, Don Nye, Lathair Peterson, Lynn Meikle, Jeff Hyde, Doug Quayle, Joe May, Rolfe Tuddenham, Gene Erics and Frank Olsen. Also present were 4 lawyers, Joe Chambers, George Daines, Kevin Kaine and Randon Wilson.

The minutes of a previous meeting held December 6th were read by Gordon Zilles and approved on a motion by Joe May and seconded by Douglas Quayle.

Lynn Meikle made a motion that we dismiss all people present except Randon Wilson and the Board members. Lathair Peterson seconded. The vote was taken, 6 voted for and 7 against. Motion didn't carry.

The time was turned over to Randon Wilson and he began to explain to the Board the reasons behind putting the merger together the way he did. He explained that it was a consolidation, transfer of assets and an assumption of producer equity. He also explained to the Board that we no longer exist as a Board and that we are trifling with matters that we no longer have authority to deal with. He also explained that we become liable and can be exposed legally. Many other things were discussed and questions were asked and answered.

On a motion by Gordon Zilles and seconded by Randy Bradshaw, the lawyers were asked to leave. 12 voted for with 5 against. Motion carried.

Joe Chambers asked if he could make a comment before they left. Which he did, stating that he was upset and unhappy that the Board had never asked his opinion of this matter.

After everyone had left, except Board members, Lynn Meikle made a motion that we have IMFA indemnify our action as Board members of Cache Valley Dairy Association. That after this is done we go home and continue to milk cows. Lathair Peterson seconded. A vote was taken with 12 for and 4 against. Gene Erics refrained from voting. Those voting against were Rolfe Tuddenham, Willis Hall, Joe May and Douglas Quayle. Meeting adjourned.

Gordon A. Zilles  
Secretary

## ADDENDUM

Roger P. Christensen  
Roger R. Fairbanks  
CHRISTENSEN, JENSEN & POWELL, P.C.  
175 South West Temple  
510 Clark Leaming Building  
Salt Lake City, Utah 84101  
Telephone: 801-355-3431

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JUN 27 1964  
CASH

James C. Jenkins  
JENKINS, McKEAN & ASSOCIATES  
67 East 100 North  
Logan, Utah 84321  
Telephone: 801-752-4107

Attorneys for Cache Valley Dairy  
and Intermountain Milk Producers

IN THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY  
STATE OF UTAH

GENE BRICE, WILLIS<sup>3</sup> HALL,  
JOSEPH R. MAY, DOUGLAS QUAYLE,  
THEDFORD ROPER, 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,

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.

MOTION TO STRIKE

Civil No: 25514

Pursuant to Rule 56(e) of the Utah Rules of Civil Procedure, defendants move the court for an order striking the Affidavits of Lyle Tuddenham and Gordon Zilles on the ground that such affidavits are not made on personal knowledge, do not set forth facts as would be admissible in evidence and fail to make an affirmative showing that either affiant is competent to testify to the matters stated therein.

In support of this motion defendants submit the attached Memorandum of Points and Authorities.

DATED this 24<sup>th</sup> day of June, 1987.

CHRISTENSEN, JENSEN & POWELL, P.C.

By Roger R. Fairbanks  
Roger F. Christensen  
Roger R. Fairbanks  
Attorneys for IMPA

JENIKINS, MCKEAN and ASSOCIATES

By James C. Jenkins  
James C. Jenkins  
Co-counsel for IMPA

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing Motion to Strike has been hand delivered, addressed to the following this 24<sup>th</sup> day of June, 1987:

N. George Daines  
Daines & Kane  
128 North Main  
Logan, Utah 84321

*Jacque Black*

J. Anthony Eyre  
Kipp & Christian  
330 City Centre  
Salt Lake City, Utah 84111

R. Brent Stephens and  
Robert H. Henderson  
Snow, Christensen & Martineau  
1100 Newhouse Building  
10 Exchange Place  
Salt Lake City, Utah 84111

M. David Eckersley  
Haupt, Eckersley & Downes  
419 Boston Building  
Salt Lake City, Utah 84111

*Steven Perry*

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JUN 25 1987  
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Attorneys for Cache Valley Dairy  
and Intermountain Milk Producers

IN THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY

STATE OF UTAH

GENE BRICE, WILLIS HALL, )  
JOSEPH R. MAY, DOUGLAS QUAYLE, )  
THEDFORD ROPER, 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, )

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. )

MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT  
OF MOTION TO STRIKE

Civil No: 25514

Number

25514-59

JUN 25 1987

SETH S. ALLEN, Clerk

Deputy

485

Rule 56(e) of the Utah Rules of Civil Procedure provides, in pertinent part, as follows:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits... .

In the case of Treloggan v. Treloggan, 699 P.2d 747, 748 (Utah 1985), the Utah Supreme Court considered the sufficiency of an affidavit filed in support of a Motion for Summary Judgment against the requirements of Rule 56(e). The court held that affidavits which were not based upon personal knowledge and did not reveal evidentiary facts, but merely reflected the affiant's unsubstantiated opinions and conclusions regarding the transactions concerned, would be disregarded. Id. at 748. The case of North v. Blackham, 669 P.2d, 859 (Utah 1983), is also in accord. There, the court held that statements in an affidavit which are largely conclusory in form, without being specific as to evidentiary facts, would not be admissible into evidence and not be considered on a motion for summary judgment. Id. at 859. Walker v. Rocky Mountain Recreation Corp., 508 P.2d 538 (Utah 1973), also holds that an affidavit does not comport with the requirements of Rule 56(e) where it reveals no evidentiary facts but merely reflects the affiant's unsubstantiated opinions and conclusions regarding the transactions considered. Id. at 542.

The court specifically stated that opinion testimony is inadmissible in an affidavit. Id.

The Utah Supreme Court has also adopted a rule of law that an affiant should not be permitted to contradict his own deposition testimony by way of an affidavit. In Webster v. Sill, 675 P.2d 1170 (Utah 1983), the court stated:

As a matter of general evidence law, a deposition is generally more reliable a means of ascertaining the truth than an affidavit, since a deponent is subject to cross-examination and an affiant is not. 6 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice §56.11(4) at 56-277 (1983).

Id. at 1172.

As set forth below, the affidavits of Lyle Tuddenham and Gordon Zilles do not purport to be based upon personal knowledge, fail to set forth facts as would be admissible in evidence, and fail to make an affirmative showing that either affiant is competent to testify to the matters stated therein. In addition, deposition testimony of both of these affiants has been taken in this case, and such testimony contradicts much of the testimony submitted by way of affidavit. Defendants have obtained from the court reporter rough drafts of the transcripts of the depositions of Lyle Tuddenham and Gordon Zilles, and, in addition, have obtained a final draft of the deposition transcript of Gordon Zilles. These deposition transcripts have not yet been signed by the witnesses, and defendants will submit an appropriate motion to publish the transcripts as soon as possible. Copies of pertinent pages of from deposition transcripts are attached hereto.

The entire affidavit of Lyle Tuddenham fails to comply with the requirements of Rule 56(e), in that nowhere does the affiant purport to have personal knowledge of any of the matters set forth. More specifically, it is clear that Mr. Tuddenham was never a member of the Cache Valley Dairy Board of Directors, was never authorized to speak on their behalf, and, in fact, did not attend all of the board meetings. Deposition of Lyle Tuddenham pages 108, Lines 20-25 and 109, Lines 1-15. Accordingly, it is clear that paragraphs 7 through 11 should be stricken on the ground that Mr. Tuddenham is not competent to testify as to the intent of the board of directors, matters proposed to the board of directors, or matters considered or authorized by the board of directors. These paragraphs amount to conclusory statements on the part of Mr. Tuddenham not based upon personal knowledge. In addition, paragraph 10 is contradicted by Mr. Tuddenham's deposition testimony to the effect that during the year 1984, Burton Harris was Cache Valley Dairy's lawyer (Tuddenham deposition page 50, lines 3-5), and that he does not recall Randon Wilson ever attending a Cache Valley Dairy Board meeting. Tuddenham deposition pages 50, lines 22-25 and 51, 1-3.

Paragraph 12 of Mr. Tuddenham's affidavit clearly comes under the rule of the Treloggan case, supra, in that it is simply a conclusory statement not based upon Mr. Tuddenham's personal knowledge but based upon his own unsubstantiated opinion, which is, in fact, contradicted by Mr. Tuddenham's own deposition. Paragraph 12 expresses an opinion that there is nothing irreversible about the creation of IMPA. However, from Mr. Tuddenham's deposition testimony, it is clear that he does not

have sufficient personal knowledge and is not competent to testify as to whether or not the transaction could be reversed. For example, Mr. Tuddenham agreed at his deposition, that reversing the transaction would involve the unwinding the consolidation of the loans with the Sacramento bank for cooperatives. Tuddenham deposition pages 102, lines 20-25 and 103, line 1. However, both he and his attorney admitted that he has no way of knowing how the loan consolidation was transacted and simply does not have enough information to make a determination from a business or legal standpoint as to whether or not the loan transaction could be undone. Tuddenham deposition pages 103, lines 2-25 and 104, lines 1-3. Mr. Tuddenham further admitted that he does not know what it would take to unwind the transactions connected with the building of the new Centennial Milk Plant. Tuddenham deposition pages 92, lines 22-25 and 93, lines 1-14.

Paragraph 13 of the Tuddenham affidavit amounts to a conclusory statement unsupported by specific facts. Even if it can be assumed that grammatical sense could be made of the statement "members do have reasonable access of their desire to grade A markets", such a statement would not be admissible in evidence as there is no showing that Mr. Tuddenham is competent to testify concerning the Grade A market in Cache Valley or as to how much milk would be available to Cache Valley Dairy in the event the transaction were to be reversed.

Paragraph 14 should be stricken, as it also constitutes a conclusory statement unsupported by facts as to when members and equity holders learned of the transfer of assets, and what

specific action was taken.

The Affidavit of Gordon Zilles, for the most part, is identical in substance to the Affidavit of Lyle Tuddenham, and many of the arguments above pertaining to the Affidavit of Lyle Tuddenham are equally applicable to the Affidavit of Gordon Zilles. As with the Affidavit of Mr. Tuddenham, Mr. Zilles' Affidavit does not purport to be based upon personal knowledge. In fact, Mr. Zilles testified at his own deposition that the statements made in paragraph 11 concerning the reversibility of the transaction are based upon information from Lyle Tuddenham and others. Zilles deposition pages 224-229. In addition, upon examination by counsel for the defendants, Mr. Zilles admitted that he really did not know whether a division would be in the best economic interests of CVD and IMPA and that he "would like to hear some really good explanation from all sides as to whether this thing should be continued or whether it shouldn't." Zilles deposition page 229, lines 5 - 7.

Paragraph 5 of the Zilles Affidavit should be stricken as there is no showing that the affiant is competent to testify as to the "Intent" of the Board of Directors of Cache Valley Dairy, and does not set forth facts as would be admissible in evidence.

Paragraph 6 of Mr. Zilles' Affidavit is inconsistent with his deposition testimony to the effect that prior to the December 16, 1985 vote of the members of the Cache Valley Dairy Association, all of the members, including members of the CVD Board had received a copy of a summary of the proposed plan of merger (consolidation) which Mr. Zilles read. Zilles deposition page 216, lines 6 - 16. A copy of the summary of plan of merger

is attached hereto. Said document lists as the first term and condition that "the consolidating cooperatives will transfer to IMPA all of their assets. . . ."

Paragraphs 7 and 9 of the Zilles Affidavit are likewise controverted by the deposition testimony of Mr. Zilles that after the meeting in December of 1986 he felt that he and Mr. Lindley were authorized on behalf of the Cache Valley Dairy Association to sign the necessary documents to implement the transaction. Zilles deposition page 220, lines 11 - 17. In light of this testimony, it cannot be maintained that there was no approval for the signing of any transfer of assets by corporate officers.

Paragraph 8 of the Zilles deposition is controverted by Mr. Zilles' own deposition testimony that during the time of the letter of intent formation, Burton Harris was acting as attorney for CVDA. Zilles deposition page 217, lines 15 - 17. He further testified that Mr. Wilson never attended a CVDA Board meeting other than the one in December of 1986. Zilles deposition page 219, lines 5 - 8.

The second sentence of paragraph 10 of the Zilles Affidavit is likewise inconsistent with his deposition testimony that he was aware of the terms of the summary of plan of merger, supra, and further aware that those terms included the transfer of the assets of CVDA to IMPA. Zilles Deposition page 222, lines 8 - 14.

Paragraph 12 of the Zilles Affidavit should be stricken, as Mr. Zilles has admitted, in deposition testimony that the assertions of paragraph 12 are based upon information that he received from Gene Brice and Blaine Rich. Zilles deposition,

page 230, lines 7 - 10. Accordingly, it is clear that this paragraph is not based upon personal knowledge and that Mr. Zilles is not competent to testify thereto.

Paragraph 13 of the Zilles Affidavit is contradicted by Mr. Zilles' deposition testimony, that he learned in February of 1986 that the assets of CVDA had been transferred to IMPA, and in fact, that he signed the documents to effectuate the transfer. Zilles deposition page 232, lines 6 - 11.

The second sentence of paragraph 14 of the Zilles deposition should be stricken, as it is contradicted by to his deposition testimony, which states: "I'll have to be honest and say I don't know where that figure came from. I don't how many equity holders there were". Zilles deposition page 234, lines 1 - 3.

#### CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Affidavits of Gordon Zilles and Lyle Tuddenham should be stricken and not considered by the court in connection with any matter to be decided herein.

DATED this 24<sup>th</sup> day of June, 1987.

CHRISTENSEN, JENSEN & POWELL, P.C.

By Roger R. Fairbanks  
Roger R. Christensen  
Roger R. Fairbanks  
Attorneys for IMPA

JENIKINS, MCKEAN and ASSOCIATES

By James C. Jenkins  
James C. Jenkins  
Co-counsel for IMPA

1 Q And you haven't done the calculations either, have  
2 you?

3 A No, I have not done that calculation.

4 Q Now, you referred --

5 A But given the records I can make that calculation.

6 Q Given the records, apparently you can unwind  
7 anything?

8 A Certainly.

9 Q And that's your belief, isn't it?

10 A Certainly.

11 Q And if given the records, I guess you could unwind  
12 the biggest merger in the oil industry that's ever taken place  
13 over the last 10 years, is that correct?

14 I'll withdraw that. Turn to paragraph eight and  
15 nine of your affidavit. Paragraph eight states, "That at no  
16 time did anyone ever propose anything other than a merger to  
17 the CVD board."

18 MR. DAINES: I think the term is merger  
19 (consolidation) to the CVD board.

20 Q (BY MR. STEPHENS) You're correct. Paragraph nine  
21 states, "At no time did the CVD board authorize anything  
22 relative to the "combination" other than submitting the  
23 question of merger to the members." Now, Mr. Tuddenham, were  
24 you ever authorized to speak on behalf of the Cache Valley  
25 Dairy board? I guess putting it another way, you were never a

1 member of the Cache Valley Dairy board, were you?

2 A No, I was not.

3 Q I guess what was presented to the Cache Valley Dairy  
4 board and what they considered, the board themselves would  
5 have to tell us, wouldn't they?

6 A I would assume so. At the meetings that I attended  
7 there was nothing other than what I have stated in my  
8 affidavit. And I attended most of the boards meetings.

9 Q But you did not deliberate as part of the board, did  
10 you?

11 A There was times that opinions were asked of the  
12 staff of what was taking place and what their opinions were.

13 Q You didn't even attend all of the board meetings,  
14 did you?

15 A I attended most of those board meetings.

16 MR. STEPHENS: What time do you have so I'll know?

17 MR. EYRE: Five minutes.

18 MR. DAINES: You've got five minutes left.

19 Q (BY MR. STEPHENS) Let me turn you to exhibit, with  
20 what time I've got left --

21 MR. DAINES: I'm not going to cut you the off right  
22 on the minute, Mr. Stephens.

23 MR. STEPHENS: Well, I have a couple of areas of  
24 inquiry that I'd like to get to before my time is up.

25 MR. STEPHENS: Let me refer you to Exhibit 23,

1 of note or significance as you sit here today?

2 A I don't recall anything specifically.

3 Q Now, during the year 1984, is it true that Burton  
4 Harris was Cache Valley Dairy's lawyer?

5 A Yes.

6 Q During the year 1984, I take it you had no contact  
7 or communication much with Randon Wilson?

8 A I think I was in meetings that he was present to.

9 Q Did you after the consolidation, attend IMPA  
10 meetings, IMPA board meetings?

11 A Yes.

12 Q Did you attend the IMPA board meetings on a regular  
13 basis?

14 A Yes.

15 Q And what was your input with respect to those IMPA  
16 board meetings? Why were you there and what did you do?

17 A Most of the staff attended those meetings. They  
18 also gave reports on their areas of responsibility.

19 Q Randon Wilson attended some of those IMPA board  
20 meetings?

21 A Many of them.

22 Q But during the your 1984, to your knowledge he would  
23 never have attended a Cache Valley Dairy board meeting as  
24 Cache Valley Dairy? The Cache Valley Dairy board meetings?

25 A Prior to the letter of intent he did not.

1 we'll have to continue the deposition.

2 MR. DAINES: Well, the problem I have, Mr. Stephens,  
3 is -- if I thought you could finish him in another half hour,  
4 fine. Let's go to 12:30. But we're not going to finish him.  
5 So it really doesn't solve the problem.

6 MR. STEPHENS: I have no problem with your desires.  
7 If you want to terminate at noon, we'll do that. We could  
8 take a break and see what we need to ask him within the next  
9 20 minutes.

10 MR. DAINES: Yes.

11 MR. STEPHENS: So we will plan according to your --

12 MR. CHRISTENSEN: So is the plan at noon we're  
13 through with him today and we'll start Joe May at two?

14 MR. DAINES: Yeah. We're again trying to follow  
15 your schedule and time period. So that's all I think we can  
16 do, Roger.

17 MR. CHRISTENSEN: That's fine. Okay.

18 (Discussion held off the record.)

19 (Whereupon, a five minute break was taken.)

20 Q (BY MR. STEPHENS) We were talking, Mr. Tuddenham,  
21 how simple this would be to unwind this transaction. One of  
22 the areas that you have to unwind, is if not true, if you're  
23 going to separate CVDA from IMPA, would be specifically the  
24 consolidation of the loan with Sacramento bank for  
25 cooperatives. Isn't that true?

1           A     That's correct.

2           Q     And I take it that that would require to unwind that  
3 transaction, and to did he consolidate that loan, that would  
4 probably require the consent of Sacramento bank, wouldn't it?

5           MR. DAINES: I'm going to object to that. That  
6 requests a legal conclusion from the witness as to what it  
7 would require. He's already testified that he hasn't seen the  
8 exact document, nor does he know the exact way IMPA handled  
9 that transaction. On that basis I think the question is  
10 improper. He simply doesn't have the information to answer  
11 the question questions<sup>7</sup> to that point, Mr. Stephens.

12          Q     (BY MR. STEPHENS) I think that is absolutely  
13 accurate. You just don't know what it would take to unwind  
14 that loan portfolio, do you?

15          A     From a legal standpoint I do not.

16          Q     In fact, you do not know what position Sacramento  
17 bank would take, do you?

18          A     From a legal viewpoint, no.

19          Q     Or from a business standpoint you don't know what  
20 position the Sacramento bank would take?

21          A     I guess it would depend upon what their  
22 classification or what their holdings are, if their position  
23 is perfected.

24          Q     Well, it would be basically a business and legal  
25 judgment from Sacramento bank, and you're just not a banker

1 and you're certainly not an employee of Sacramento bank, are  
2 you?

3 A No, I'm not.

4 Q What are we going to do about the payment of  
5 equities? Do we just let them keep it, or do you know what it  
6 would take for the equity holders to pay back the reduction in  
7 rotation? Do you have any estimate as to how much money that  
8 was?

9 A I recall that it was somewhere around -- there were  
10 two years that were put in, one was small, probably 1.2  
11 million, somewhere in that area.

12 Q Well, your use of the word small in comparison to  
13 one million to one point two million.

14 A One year was less, one was only three or four  
15 hundred thousand, the other was a little more than that, maybe  
16 total up around 1.2 million.

17 Q Do you know what the feasibility or even the ability  
18 would be for IMPA to require the equity holders that were paid  
19 to have that returned?

20 A I'm sure there would be some offsets on it. What's  
21 IMPA going to do with the profits that they obtained.

22 Q Well, basically you don't know what it would take,  
23 do you?

24 MR. DAINES: Now, would you repeat that question? I  
25 didn't here the question.

1 purchases occurred since 1986, the transfers of assets in  
2 August. I think that fact is not in evidence.

3 Q (BY MR. STEPHENS) When was the Centennial milk  
4 plant built?

5 A I think that started probably in 1985.

6 Q When was it completed?

7 A It was completed in summer of '86.

8 Q That capital purchase was participated in by  
9 previous CVDA assets as well as WGDI assets, wasn't it?

10 A In the period that I was involved with the finance  
11 on that, all of those expenditures came from Western General  
12 funds. Now, what they did with loans or encumbrances or  
13 consolidations or lines of credit or what have you after  
14 that,, after that point I don't know.

15 Q So you don't know what it would take to unwind that  
16 particular transaction, do you?

17 A Well, it's very evident that in an accounting  
18 function, that when you built capital assets you keep records,  
19 and that those records would be available, and it would be  
20 able to be determined as to where they came from and what was  
21 -- and how much was involved.

22 Q That may be true. But you as you sit here today  
23 don't know what it would take for unwind that transaction,  
24 because you haven't seen the records and don't know about  
25 them. Isn't that fair?

1           A     No. I don't think that is fair. Because from an  
2 accounting standpoint I know that from accounting records that  
3 much can be established from accounting records.

4           Q     I have no argument about that. But as you sit here  
5 today, since you haven't viewed the records, you don't know  
6 what steps or what transactions would have to be unwound, if  
7 this transaction were to be unwound, with respect to that  
8 particular capital purchase, do you?

9           A     I did not participate in that capital purchase. But  
10 with the review of the records I could give an opinion as to  
11 what it would take.

12          Q     But since you haven't reviewed it, you don't know  
13 what it would take?

14          A     At this point, no, I do not know what it would take.

15          Q     You also realize that purchasing has been common  
16 since at least the transfer of assets?

17          A     Purchasing of what?

18          Q     Of general purchasing.

19          Q     General purchasing of all types and manners?

20          A     I don't think it has.

21          Q     Don't you? Some common purchasing has gone into  
22 effect, do you know that?

23          A     Have little.

24          Q     Well, do you know specifically what purchasing in  
25 common has occurred since February of '86?

1 concerning how the transaction, the ultimate coming together  
2 of CVDA and IMPA, was to take place?

3 A I am not aware of him ever being approached. In  
4 fact, he told me that he wasn't.

5 Q He Harris?

6 A Yes.

7 Q Let's move on, Mr. Zilles, to paragraph number 11.  
8 First sentence, "That there is nothing irreversible about the  
9 present combination. CVD is contained as a separate division  
10 with its property, personnel and assets generally intact as  
11 the cheese division of IMPA." Is that a correct reading of  
12 your statement?

13 A That's correct the way I understand the books are  
14 being kept.

15 Q What is the basis upon which you make that  
16 statement?

17 A After visiting with Lyle Tuddenham, he has told me.  
18 And it was also in the letter of intent that there would be  
19 separate books kept on each division, so the cheese division  
20 is separate than the fluid division.

21 Q The letter of intent is superseded, in your  
22 understanding, by the actual transfer of assets and assumption  
23 of liabilities?

24 A That's correct.

25 MR. DAINES: That's a legal question. I'd direct

1       whereas with the combined of them, there's a loss.

2               Q       So you'd like a divorce?

3               MR. DAINES: I think the proper term is an annulment  
4       when there hasn't been a marriage.

5               THE WITNESS: I would like to hear some really good  
6       explanation from all sides as to whether this thing should be  
7       continued or whether it shouldn't. I cannot say that I would  
8       necessarily want a divorce. I'm saying that that's something  
9       that I would entertain.

10              Q       (BY MR. EYRE) You would agree, would you not, that  
11       you don't purport to be an economist or an expert in dairy  
12       economics on a large scale basis?

13              A       I'm very good on a dairy farm, but I'm not good in a  
14       milk plant, no.

15              Q       Paragraph number 12 reads, "That there is sufficient  
16       milk to operate CVD, and its members do have reasonable access  
17       to their desire to grade A markets." What's the basis for  
18       that statement?

19              A       There's no question in the spring time that there's  
20       milk to burn. And so there is plenty of milk to operate CVDA.  
21       The milk has got to be put somewhere. That's the only real  
22       cheese plant around. So no matter who controls it, it will be  
23       available, whether under purchase or under contract or  
24       something.

25              The second phase of that is the desire to grade A

1 voted for or against this format, but simply that they did not  
2 have it at the meeting. It assumes something that's  
3 incorrect.

4 Q (BY MR. EYRE) Do you have my question in mind?

5 A Repeat it.

6 Q You have received Exhibit 4 in its entirety before  
7 the December 16, 1985 meeting of the members, is that true?

8 A I had received it.

9 MR. CHRISTENSEN: You said Exhibit 4, Tony.

10 Q (BY MR. EYRE) Pardon me. Exhibit 6. And you did  
11 not voice to any other director or to members at the December  
12 meeting that you were dissatisfied or disagreed with what was  
13 contained in Exhibit 6, is that true?

14 A That is correct.

15 Q Okay.

16 A But I will stipulate I never read section 3-1-30.

17 Q But you did read Exhibit 6?

18 A Yes. I did.

19 Q Paragraph number seven states, "That at no time did  
20 the CVD board authorize anything relative to the combination  
21 other than submitting the question of merger to the members."  
22 That's your statement, is that correct?

23 A That's correct.

24 Q And your testimony is that by submitting the  
25 proposal to the members, the board of CVDA was indicating that

1 that meeting, or did you just sit there?

2 A I don't remember. I just sat there. I didn't even  
3 participate.

4 Q Paragraph number nine says, "That between November,  
5 1985 and November, 1986 the CVD board never met and there was  
6 no vote or decision even considered relative to "transfer of  
7 assets" or approving the signing of any transfer documents by  
8 any corporate officers." Is that correct? I correctly read  
9 your statement?

10 A That's correct.

11 Q It's true, is it not, Mr. Zilles, that it was your  
12 view in December of 1986, that after the special meeting of  
13 the members of CVDA that you felt that you were authorized,  
14 you and Mr. Lindley, were authorized on behalf of CVDA to sign  
15 the necessary documents to implement the transaction of  
16 whatever it was?

17 A That is correct.

18 Q And the next meetings of, formal meetings of board  
19 of directors of CVDA, took place in the fall of 1986, and  
20 we've talked about those, is that true?

21 A That's correct.

22 Q And they started with the, to the best of your  
23 memory, the meeting at the Weston Lamplighter in Logan?

24 A That's correct.

25 Q And then there were two other meetings in Mr.

1 it approved or recommended the proposal as outlined in  
2 Exhibit 6. Is that true?

3 A Correct.

4 Q Paragraph number eight, "That Randon Wilson and his  
5 firm provided the legal advice to CVD regarding the  
6 combination. He specifically instructed CVD how to proceed  
7 and his instructions were followed." That's your statement,  
8 is that true?

9 A That's correct.

10 Q Do you contend that Mr. Wilson gave legal advice to  
11 CVDA concerning the letter of intent? Or do you have any  
12 information to support such?

13 A I was involved in the letter of intent. And he put  
14 information in it and so did Burton Harris.

15 Q Burton Harris was acting as attorney for CVDA?

16 A During the time of the letter of intent formation,  
17 yes.

18 Q Is the instruction and advice that you were talking  
19 about in that paragraph that came from Mr. Wilson, relating to  
20 his participation at the time you signed the transfer  
21 documents in approximately February of 1986?

22 A The advice that he was given -- repeat that. I was  
23 trying to follow you. I lost you.

24 Q Is the legal advice and instructions that you're  
25 referring to in paragraph eight from Mr. Wilson, what he

1 Q Which meetings are these?

2 A The meetings that our eight directors went down to.

3 MR. STEPHENS: The IMPA board?

4 THE WITNESS: The IMPA board, yes.

5 Q (BY MR. EYRE) Mr. Wilson did not ever attend a CVDA  
6 board meeting other than the one in December of 1986 that we  
7 just talked about, is that true?

8 A Not a specific Cache Valley Dairy board meeting.

9 Q He did attend, it's your understanding at least,  
10 some or all of the IMPA board meetings, is that true?

11 A That is correct.

12 Q Were you at any of those?

13 A Yes, I was. I was invited as a special invite to  
14 one of them. I don't know why, but I was.

15 Q Is that the only one you attended?

16 A Just one, yes.

17 Q Do you recall approximately when that was?

18 A I do not.

19 Q And was Mr. Wilson there?

20 A He was there.

21 Q Do you recall anything that was said that might tie  
22 us into a time frame as to when that occurred?

23 A No. There was nothing I remember that was that  
24 important of anything.

25 Q Did Mr. Wilson give advice to the IMPA board during

1 about is a resolution which appears to be resolution of the  
2 IMPA board of December 19, 1985, is that true?

3 A Yeah. I wasn't involved in the meeting, and I  
4 wasn't aware that this was ever discussed.

5 Q You were, were you not, aware of the terms of the  
6 Summary of Plan of Merger (Consolidation) that were contained  
7 in Exhibit No. 6. Is that true?

8 A Now, ask the question again?

9 Q You were aware of the terms of the Summary of Plan  
10 of Merger (Consolidation) as contained in Exhibit 6?

11 A Yes, I was.

12 Q And those refer, do they not, to the fact that the  
13 assets of CVDA will be transferred to IMPA?

14 A (Witness indicating affirmatively.)

15 Q Yes?

16 A You know, I remember that statement, and I've read  
17 it, but to be honest with you, I did not understand, to know  
18 that you could do anything more. I guess I'm not really sure  
19 what you're asking me. I don't understand the consolidation  
20 until December. I'd never even heard of one. Didn't know  
21 what it was. Still don't.

22 Q Have you ever heard of the concept of transfer of  
23 assets and assumption of liabilities from one entity to  
24 another entity?

25 A Not until Randon really explained it to us in

1 markets. There's a possibility that if this was to end up not  
2 affiliated together, there would be people out looking for  
3 grade A markets. And the information that Mr. Rich has shared  
4 with me, as well as Mr. Gene Brice, I'm pretty well convinced  
5 that there's an opportunity for us to sell milk in a grade A  
6 market.

7 Q Is it correct then, Mr. Zilles, that some of the  
8 basis for the statement contained in paragraph 12 was based  
9 upon information that you have received from Mr. Gene Brice  
10 and Mr. Blaine Rich?

11 A That is correct.

12 Q It's true, is it not, Mr. Zilles, that at the time  
13 the letter of intent was entered into between CVDA and IMPA,  
14 that there was a shortage of milk to go into the new Cache  
15 Valley plant? Is that true?

16 A Prior to the letter of intent?

17 Q Yes. That was one of the reasons it was entered  
18 into?

19 A That is correct.

20 Q And so based upon this statement, it appears that  
21 that situation has changed from 1984, 1985, to the present  
22 time?

23 A That's correct.

24 Q And it's also true, is it not, that at the time the  
25 letter of intent was entered into in 1984, and at the time the

1 members of CVDA and members and equity holders learned that  
2 CVDA assets had been transferred, actions to review and set  
3 aside their transfer began. These activities began within 60  
4 days after the period actually began." Is that your  
5 statement?

6 A That is.

7 Q It's true, is it not, Mr. Zilles, that you learned  
8 in February of 1986 that the assets of CVDA had been  
9 transferred to IMPA, and in fact you signed the documents to  
10 transfer? Is that correct?

11 A That's correct.

12 MR. DAINES: I'm just going to add as a legal  
13 question there, Mr. Zilles won't necessarily have an opinion  
14 as to when the transaction occurred because of his lack of  
15 knowledge of recordation date of deeds as opposed to when  
16 deeds are executed and held by one's own counsel. Just note  
17 that for the record.

18 THE WITNESS: Maybe I should qualify my statement  
19 there. I'm aware it took many, many months from the time I  
20 filed it till whether it was filed with the state. So this 60  
21 day thing is very accurate.

22 Q (BY MR. EYRE) In any event, you knew in February of  
23 1986 that you signed documents which your understanding was  
24 transferred the assets of CVDA to IMPA. Is that true?

25 A Understanding also, I will say yes to that. But

1           A     I'll have to be honest and say I don't know where  
2     that figure came from. I don't know how many equity holders  
3     there were.

4                     (Discussion held off the record.)

5           Q     (BY MR. EYRE)   Mr. Zilles, you talked about a  
6     meeting that you had in March of 1987 where you went to lunch  
7     with Mr. Daines, Mr. Kane and Mr. Lyle Tuddenham. Is that  
8     true?

9           A     Mr. Rich was there also.

10          Q     Okay. Mr. Rich. Did you obtain some of the  
11     information that you've referred to in your affidavit from Mr.  
12     Tuddenham at that visit?

13          A     I would say possibly not. I don't remember where  
14     all that information come. I've talked with Mr. Tuddenham  
15     many times.

16          Q     How long did that meeting take place, that lunch  
17     meeting?

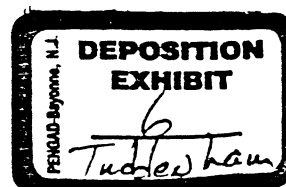
18          A     Probably less than an hour.

19          Q     Was the purpose of it to discuss this lawsuit with  
20     Mr. Tuddenham and Mr. Rich?

21          A     We initially went for lunch. I was surprised when  
22     Blaine came. I didn't know he was going to come. So he just  
23     -- what I was there for is to have lunch and get more  
24     information about the lawsuit from Mr. Daines and Kane.

25          Q     But there was some discussion with Mr. Tuddenham and

## EXHIBIT A



## NOTICE TO MEMBERS OF CACHE VALLEY DAIRY ASSOCIATION

The Board of Directors of Cache Valley Dairy Association has adopted a Resolution directing that a Plan of Merger (Consolidation) under Section 3-1-30, et. seq., Utah Code Annotated, be submitted to a vote of the members of Cache Valley Dairy Association at a special meeting of members to be held at 10:30 o'clock a.m. on Monday, December 16, 1985, at the Smithfield Armory, 10 East Center Street, Smithfield, Utah.

The principal purpose of the meeting is to consider and vote upon the Plan of Merger (Consolidation) of Cache Valley Dairy Association, Western General Dairies, Inc., Star Valley Producers, Inc. and Lake Mead Cooperative Association into Intermountain Milk Producers Association.

A summary of the Plan of Merger (Consolidation) is enclosed with this Notice. A full copy of the plan shall be furnished to any member upon request without charge. Requests should be made to Intermountain Milk Producers Association, 195 West 7200 South, Midvale, Utah 84047.

Passage of this plan will require a simple majority of the members present at the meeting and voting thereon.

By order of the President as of this 25th day of November, 1985.

CACHE VALLEY DAIRY ASSOCIATION

By /s/ Wm. L. Lindley  
President

## SUMMARY OF PLAN OF MERGER (CONSOLIDATION)

1. Cache Valley Dairy Association, Western General Dairies, Inc. Lake Mead Cooperative Association and Star Valley Producers, Inc. ("Consolidating Cooperatives") propose to consolidate their assets into Intermountain Milk Producers Association, formed under Title 3, Utah Code Annotated, as an agricultural cooperative association ("IMPA")

2. The terms and conditions are: 1) the Consolidating Cooperatives will transfer to IMPA all of their assets at book value in exchange for the promise by IMPA to assume all liabilities of said cooperatives; b) All membership agreements held by said cooperatives shall be assigned to and assumed by IMPA in accordance with their terms; c) all milk base held by members shall become milk base of IMPA on a pound-for-pound basis subject to the same rules, regulations and agreements in effect on the day the plan is adopted; d) all equities held by members of said cooperatives shall become equities of IMPA on a dollar-for-dollar basis subject to existing rules, regulations and agreements; f) all agreements, contracts, claims and obligations whatsoever, of said cooperatives shall be assumed by IMPA as though originally held by IMPA; g) All employees employed by said cooperatives as of the date of approval of the plan shall become employees of IMPA and all retirement plans, vacation accruals or other employee benefits shall be assumed by IMPA; and h) all other provisions of the Agreement of Merger (Consolidation).

3. The surviving corporation, IMPA, shall be governed by the Utah Uniform Agricultural Cooperative Association Act.

4. No changes will be required in the Articles of Incorporation of IMPA.

5. The eighteen (18) board members of IMPA shall establish districts which shall include all areas in which IMPA members reside and shall arrange for the election of directors from said districts at the fall 1986 district meetings for seating as the annual meeting of IMPA in January 1987.

6. The Presidents and Secretaries of the respective Consolidating Cooperatives shall execute such documents as are necessary to carry out the plan.

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing Memorandum in Support of Motion to Strike has been hand delivered, addressed to the following this 24th day of June, 1987:

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Logan, Utah 84321

*Jacqueline Black*

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## ADDENDUM

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT  
OF THE STATE OF UTAH, IN AND FOR THE COUNTY OF CACHE

---

GENE BRICE, WILLIS HALL,  
JOSEPH R. MAY, DOUGLAS QUAYLE,  
THEDFORD ROPER, 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  
Certificates of Interest in  
Cache Valley Dairy Association,

Plaintiffs,

vs.

DEFENDANTS' STATEMENT OF  
UNDISPUTED FACTS

Civil No. 25514

CACHE VALLEY DAIRY ASSOCIATION,  
a Utah Agricultural Cooperative;  
INTERMOUNTAIN MILK PRODUCERS

Number 25514

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; SAN SOES 1-10,

Defendants.

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Because the following facts relate to several pending motions, and because such facts are relied on by the various defendants, to avoid unnecessary duplication, the defendants jointly submit the following statement of undisputed facts to be used with respect to all of the pending motions. This Statement of Facts is based upon the affidavits of Lynn Cotrell and Douglas P. Larson, filed herewith.:

1. Defendants Intermountain Milk Producers Association ("IMPA") and Cache Valley Dairy Association ("CVDA"), are agricultural cooperatives involved in the dairy business. They are similar to numerous other cooperatives throughout the United States.

2. The membership of such cooperatives is entirely made up of active producers of milk. If a person either ceases dairy production or ceases to supply milk to the cooperative, his eligibility for membership ends.

3. Dairy cooperatives exist for the purposes of assembling, processing and marketing milk and milk products. The proceeds from the sale of milk products are, for the most part,

paid back to the members of the cooperative, in accordance with the Federal Milk Market Order and formulas adopted by the board of directors.

4. A common way for a cooperative to obtain working capital is to retain part of the proceeds realized from marketing the dairy products. As this occurs, the members of the cooperative obtain equity interests in the cooperative based upon such contributions to working capital. These are some times referred to as "producer equities".

5. Generally speaking, where revenues in future years permit, cooperatives attempt to make payments to members representing the value of their equity interests. Such payments are made over a period of years while new amounts are retained from current revenues to replenish working capital. This process is sometimes referred to as "rotating equities". An eight to ten year cycle for such rotation is not uncommon.

6. For various reasons, (such as going out of the dairy business, or joining a competing cooperative), a person's membership in a cooperative may cease. When that occurs, such former member ceases to actively participate in the cooperative, but retains an equity interest until the equity rotation cycle for the co-op has been completed. Because the co-op's ability to retire equities is dependent upon various economic factors, as well as the decisions of the cooperative's board of directors, the former member has no guarantee that his equity interest will ever be fully retired.

7. During a several year period prior to 1984, various discussions and negotiations took place involving four different dairy-oriented agricultural cooperatives, Western General Dairies, Inc., Cache Valley Dairy Association, ("CVDA"), Star Valley Cheese Cooperative, and Lake Mead Cooperative Association. The discussions and negotiations concerned the joining of the assets and resources of such cooperatives to work together in one larger cooperative for assembling, processing and marketing milk and milk products. As part of such discussions, the potential benefits which might be realized by Cache Valley Dairy Association were considered. Among them were the following:

a) The Cache Valley Dairy Association would gain immediate access to a Grade A market, which it did not have at that time. This would enable the members of Cache Valley Dairy Association, who desired to do so, to become Grade A milk producers and receive higher prices for their milk.

b) The cheese plants owned by Cache Valley Dairy Association, would secure commitments for a greater volume of milk, potentially allowing such plants to operate at greater efficiency.

c) Cache Valley Dairy Association would also realize the other benefits relating to "economies of scale" due to its membership in a larger organization with greater bargaining power, broader markets, and common management.

d) By unifying with several of its competitors, Cache Valley Dairy Association would enjoy the benefit of reduced

competition for the procurement of raw milk supplies.

e) Cache Valley Dairy Association's liabilities and debts would be assumed by the larger organization.

8. In return, the new organization would realize the benefit of Cache Valley Dairy Association's assets, including its supply of milk, cheese plants, and its cutting and wrapping facility.

9. The negotiations among the four aforesaid cooperatives resulted in an agreement which was formalized in June of 1984 by a letter of intent among the four cooperatives, which went into effect on August 1, 1984. Such agreement as well as subsequent agreements, eventually led to the transfer of assets and liabilities, over a period of time, by the four cooperatives to Intermountain Milk Producers Association, the new larger cooperative. The transition process concluded on August 1, 1986.

10. There were several meetings of CVDA's board of directors where the Letter of Intent was considered. The Letter was approved by the board of directors at each such meeting with no more than 5 of the 21 member board voting against it.

11. At such meetings several of the plaintiffs voted in favor of the Letter of Intent and plaintiffs, Gene Brice, Thedford Roper and Gordon Zilles voted consistently in favor of it.

12. From the period beginning in June of 1984, when the Letter of Intent was executed until August of 1986 when the transfer of assets was completed, none of the seven individual

plaintiffs took affirmative action to formally notify CVDA or IMPA that he intended to prevent the transfer of assets from taking place, or otherwise legally contest the transaction.

13. It was not until February of 1987, six months after the transfer of assets was completed and 2½ years after the letter of intent was executed, that IMPA became aware that some of the former CVDA directors intended to legally contest the transaction.

14. On December 16, 1985, at a special Meeting of Members of CVDA was held, at which a vote of the members was taken on the transfer of assets from Cache Valley Dairy Association to IMPA.

15. Included among the non-producer equity holders of the CVDA at the time of the membership vote on December 16, 1985, were individuals who were producing milk for other co-ops or concerns which were in direct competition with the CVDA. Some equities of CVDA were owned by institutions or individuals which were not dairy producers on said date.

16. As of August 1, 1986, all assets owned by Cache Valley Dairy Association as well as the assets of the other three cooperatives had been transferred to IMPA and all liabilities of every kind, whether known or unknown, had been assumed by IMPA. Producer Membership Agreements had been assigned to IMPA as of said date and the producer equities then standing on the books of Cache Valley Dairy and the others had been assumed by IMPA.

17. On or about March 28, 1986, IMPA caused certain producer equities standing in the name of former members of Cache

Valley Dairy to be redeemed in the amount of \$1,173,989 in order to reduce the outstanding equities of Cache Valley Dairy from ten years to eight years in order to be on the same equity rotation as other producers assigned to IMPA.

18. The principal borrowing of Cache Valley Dairy from the Sacramento Bank for Cooperatives has been consolidated into an \$18,000,000 line of credit from the Sacramento Bank for Cooperatives to IMPA and former Cache Valley Dairy assets have been pledged by IMPA as security for such loan.

19. All cash accounts from all functions of Cache Valley have been intermingled into common accounts of IMPA.

20. Since approximately August 1, 1984, the four cooperatives who formed IMPA, including Cache Valley Dairy, have been operating under a Letter of Intent whereby the parties agreed to "blend" their "bottom lines" in order that losses from one company might be offset as against gains in another company. Consolidated financial statements were prepared and joint tax returns filed for fiscal years ending July 31, 1985 and 1986.

21. Legal and auditing expenses have been paid by IMPA on behalf of Cache Valley Dairy, including substantial legal expenses to defend a case against Cache Valley Dairy filed by Cheryl Vause.

22. Approximately 82 former members of Cache Valley Dairy have converted from Grade B to Grade A status and have received payment for milk based upon Grade A pricing. They also were allocated IMPA base or quota which represents their proportionate

share of the Grade A milk market. These producers did not have access to a Grade A market but were able to convert from Grade B to Grade A due to the established market for Grade A products which was provided through IMPA. This has had the effect of producing more revenue for those 82 producers, as a group, and diminishing the revenue for existing Grade A producers of IMPA, as a group, through the adjustments of the Federal Milk Marketing Order blend price, as a result of a reduction in market utilization percentage. Producers which converted from Grade B to Grade A were required to expend considerable funds to upgrade their facilities which could not be recouped if the Grade A market of IMPA were no longer available to these Grade A producers.

23. The producer payroll and all of its components, to include quality program, cheese yield formula, milk market settlement and others, are all centrally computed and paid by IMPA. It would not be feasible to separate the former Cache Valley producers from IMPA for purposes of producer payroll due to the difficulty in obtaining funds from producers which would have been overpaid.

24. The amount of milk production in IMPA's operating area has been reduced through the dairy termination program and through other causes. This reduction has an effect on every cheese or surplus milk plant in terms of operating efficiency. Therefore, the milk available for processing in the former Cache Valley plants at Amalga and Beaver has been greatly diminished

and it is estimated that only 340,000 pounds daily would have been available during the month of February, which would have permitted the Amalga plant to run at only 25-30% efficiency even with the Beaver plant closed. The Amalga plant cannot be operated profitably at this level of efficiency. The overhead of the closed Beaver plant would also have to be covered. These losses would have to be born by producers.

25. All of the milk produced by producer members of Cache Valley has been collected and transported by IMPA since approximately August 1, 1984. Farm pick-up routes have been adjusted to achieve economies and equipment has been modified, reassigned, salvaged or sold.

26. Field men have been reassigned since August 1, 1984, and have been reduced from 11 to 8 in number during that time.

27. Over the period of time since August 1, 1984, insurance has been centrally purchased by IMPA for all fleet, liability, casualty, property and workmen's compensation and old policies have been cancelled. The fleet insurance provided through IMPA resulted in substantial savings with respect to the fleet of vehicles formerly owned by Cache Valley Dairy.

28. Substantial capital purchases and leases have been made to provide for increases to the truck fleet, plant equipment, other plant improvements and computer capability, all in the name of IMPA. This also includes the construction of a \$10 million milk plant in Salt Lake County, the financing of which was arranged by IMPA. This plant was constructed to

process a volume of milk produced by those producers assigned to IMPA.

29. Computers have been reprogrammed and expanded to accommodate the expanded business created by the assignment of assets to IMPA and the assumption of liabilities by IMPA.

30. Since August 1, 1984, when the Letter of Intent became effective, the central office facility of IMPA has been sold and new quarters have been leased for a period of six (6) years in the name of IMPA to accommodate the increased office needs.

31. Credit arrangements with customers, discounts, terms of sale and other matters relating to the sale of products have been negotiated in the name of IMPA and volume considerations have been made based on the increased sales volume of IMPA.

32. All employee payroll and records relating to employment have been transferred to IMPA and are administered centrally by IMPA and its computer. The availability of the greater computer capacity of IMPA has obviated the necessity of replacing a computer at Cache Valley Dairy.

33. The profit sharing plan of Cache Valley Dairy has been terminated and all proceeds have been paid out. Beginning August 1, 1986, the former Cache Valley Dairy employees were extended a pension plan under the sponsorship of IMPA. No pension or profit sharing plan now exists for Cache Valley Dairy.

34. Since August 1, 1984, significant changes have occurred in management personnel. Personnel have been

transferred from Cache Valley Dairy to IMPA and many employees have been terminated with some hired in their place.

35. The corporate entities of the four cooperatives which formed IMPA possess no members, no assets, no liabilities, or any purpose for existing. These corporations are in varying stages of being dissolved.

36. Due to the excess plant capacity available in the IMPA system after transfer of all assets to IMPA, certain plants have been, or are in the process of being, closed or modified, which include the Cedar City plant, the Murray plant, the Ogden plant, and the Idaho Falls plant. This has substantially reduced the capability of the remaining plants to process and handle available milk if the former Cache Valley plants were not available. With the closure of the Ogden cheese plant, there is no Utah cheese plant capability left in IMPA without the former Cache Valley plant. Equipment has been removed from plants and sold off or placed in other plants at considerable expense.

37. The cheese cutting and wrapping operations formerly owned by Cache Valley Dairy have been utilized to handle cheese production not only from plants formerly associated with Cache Valley but from cheese available to IMPA from other sources. The reliance upon cheese cutting and wrapping capability is extremely important to IMPA and its future business.

38. IMPA has committed a full supply of raw milk to certain customers and substantial supply to other customers. It also has committed to operate its remaining plants at acceptable

efficiency. These commitments were made in reliance upon the availability of producer milk to IMPA from all of the members assigned to it. A withdrawal of a substantial amount of milk would have a tremendous effect on the ability of IMPA to furnish raw milk to handlers, to operate its plants at a satisfactory level and to provide a supply balancing function for the market.

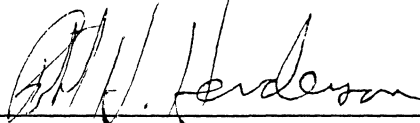
39. IMPA is operating under a Letter of Intent with Mountain Empire Dairymen's Association ("MEDA") and Western Dairymen Cooperative, Inc. ("WDCI") with an intent to merge or otherwise consolidate assets. These parties have entered into a certain agreement whereby IMPA would operate a Twin Falls cheese plant for MEDA, whereby MEDA and WDCI would haul milk for IMPA, certain employees would handle all of the coordination of field work and many other functions. IMPA relies on these arrangements with MEDA and WDCI for its continued successful operation. The loss of the former members and facilities of Cache Valley Dairy Association from IMPA could jeopardize such arrangements with MEDA and WDCI.

DATED this 23rd day of April, 1987.

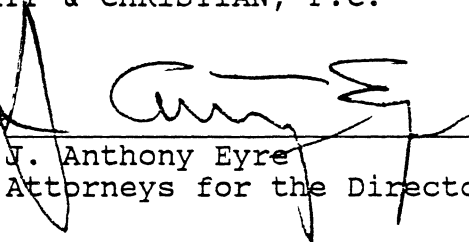
CHRISTENSEN, JENSEN & POWELL, P.C.

By Roger R. Christensen  
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Attorneys for Defendants IMPA  
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SNOW, CHRISTENSEN & MARTINEAU

By   
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R. Brent Stephens  
Robert H. Henderson  
Attorneys for Defendant  
Randon Wilson

KIPP & CHRISTIAN, P.C.

By   
\_\_\_\_\_  
J. Anthony Eyre  
Attorneys for the Directors

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing Defendants' Statement of Undisputed Facts has been mailed, postage prepaid, addressed to the following this 22nd day of April, 1987:

N. George Daines  
DAINES & KANE  
128 North Main  
Logan, Utah 84321

R. Brent Stephens  
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Attorneys for the Directors  
32 Exchange Place, #600  
Salt Lake City Utah 84111

Witness my hand and seal

ADDENDUM

10

Plaintiffs bring this Motion for Summary Judgment to decide the central issues of law. The critical facts appurtenant to this determination are not disputed.

#### STATEMENT OF RELEVANT FACTS

The Verified Complaint before the court establishes the following facts:

1. That Plaintiffs are directors, members, former members and/or equity holders of more than \$50.00 in CVD. Verified Complaint at 3, 5, and 6.

2. That CVD and IMPA are both Utah Agricultural Cooperative Associations (corporations) organized and operated under Title 3, U.C.A. Verified Complaint at 1, 7.

3. That the Board of Directors of CVD did not approve at any time a plan of merger as required by Section 3-1-31. Verified Complaint at 25.

4. That the Notice attached hereto as Exhibit A is a true copy of the notice used to advertise a meeting to consider the merger of CVD into IMPA. Verified Complaint at 26.

5. That said notice states that the merger is to be completed in accordance with Section 3-1-30 et. seq. Verified Complaint at 27.

6. That in clear violation of Section 3-1-33 holders of certificates of interest (Equity Holders) in CVD of \$50 or more were not provided with any notice whatsoever of a merger or of any meeting or specifically of the CVD special meeting of members

held on December 16, 1985 to consider the IMPA plan of merger.  
Verified Complaint at 28.

7. That at the said special meeting Equity Holders of \$50 or more were not allowed to vote on the plan of merger. Verified Complaint at 29.

8. That at the said special meeting, no voting was allowed by delegate or proxy. Verified Complaint at 30.

9. That Defendant CVD and Defendant IMPA have refused to acknowledge dissenter's rights pursuant to Section 3-1-39. Verified Complaint at 32.

10. There have been no Articles of Merger approved or even presented to the Board of Directors of CVD nor have they been filed with the Secretary of State nor has a Certification of Merger been obtained. Verified Complaint at 34.

11. That all the assets and goodwill of CVD have been purportedly assigned to IMPA. Verified Complaint at 36.

12. That IMPA has appropriated CVD's plants, personnel and labels to its own use. IMPA has treated this property in every way as its own since in or about December 1985. Verified Complaint at 37.

Clearly the statutory procedures were not followed and the Defendants readily admit and have published this noncompliance:

There is no question about the fact that if there were a merger specific steps would have to be taken as outlined in the statute. [Section 3-1-30, et. seq.] There is no question that we did not take these steps . . .

Letter of IMPA attorneys, JONES, WALDO HOLBROOK & McDONOUGH by

Randon W. Wilson to IMPA Director H. Ray Gibbons dated March 9, 1987, attached hereto as Exhibit B. [Emphasis added.]

He [Gene Luke, President of IMPA] also agreed that . . . holders of equity certificates were not allowed to vote on the merger/consolidation. . . . "It depends on whether it was a merger or a consolidation," Luke said. "This was done under statutes of consolidation."

Under statutes of consolidation, holders of certificates of equity are not considered members of an agricultural cooperative, as they would be under statutes of merger, Luke said.

Herald Journal, February 25, 1987, at page 2, attached hereto as Exhibit C. [Emphasis added.]

All current members of Cache Valley and Western General were given notice of member meetings to approve the consolidation with IMPA. The members were asked to approve a consolidation with IMPA or, in the alternative, a transfer of assets. The Board of Directors of IMPA determined to follow the alternative of the transfer of assets and all assets of the member cooperative of IMPA have been transferred. The applicable code section [discussing 3-1-33] does not require that notice be sent to people who are not entitled to vote at a meeting of members. . . .

All of the four member cooperatives approved the consolidation with IMPA before it was commenced. The consolidation had been practiced nearly 18 months with approval of the various boards prior to submitting it to a vote of the members of Cache Valley and Western General. . .

Section 3-1-35 was not utilized in approving this transfer of assets.

The Board of Cache Valley, having approved the consolidation with IMPA before it even commenced, did not need to take action after the approval by the members in December of 1985.

Letter of IMPA Attorneys, JONES, WALDO, HOLBROOK & McDONOUGH, by Randon W. Wilson to all IMPA Directors dated November 19, 1985 attached hereto as Exhibit D.

PITCHER; LYNN MICKEL; ROBERT  
HAWORTH; JEFF HYDE; EVAN  
SKINNER; ROBERT JACKSON; and  
WILLIAM LINDLEY; RANDON WILSON;  
JOHN DOES 1-30; SAN SOES 1-10,

Defendants.

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STATEMENT OF UNDISPUTED MATERIAL FACTS

A. Defendants' Response to Plaintiff's Statement of Facts.

1. Defendants agree that each plaintiff was at one time either a director, member, former member, or equity holder of more than \$50.00 in CVD.

2. Defendants admit that CVD and IMPA are Utah agricultural cooperative associations organized and operated under Title 3, Utah Code Annotated.

3. Defendants admit that the Board of Directors of CVD did not approve at any time a plan of merger as contemplated by Utah Code Ann. § 3-1-31. In fact, no attempt was made to consummate a merger per Sections 3-1-30 through 41 of Utah Code Annotated.

4. Defendants admit that the notice attached to plaintiff's memo as Exhibit A is a true copy of the notice used to advertise a meeting to consider the transaction that had been under consideration since June of 1984. Defendants dispute

plaintiff's characterization that the meeting was to consider a "merger" of CVD into IMPA.

5. Defendants dispute that the notice "states that the merger is to be contemplated in accordance with Section 3-1-30, et seq." The notice does refer to Section 3-1-30. However, a summary of the plan is attached to the notice, and paragraph 2 of the summary of the plan clearly sets forth the nature of the transaction, i.e., a transfer of assets, an assignment of liabilities, etc.

6. Defendants admit that equity holders were not given notice. Defendants dispute that there is any requirement to give equity holders notice of the contemplated transaction. Defendants dispute that equity holders had any right to vote.

7. Defendants admit that at the meeting equity holders were not allowed to vote.

8. Defendants admit that at the meeting no voting was allowed by delegate or proxy.

9. Defendants admit that there has been no award of dissenter's rights pursuant to Section 3-1-39. However, no one, including these plaintiffs, has asserted dissenter's rights pursuant to Section 3-1-39.

10. Defendants admit that there have been no articles of merger approved or presented to the Board of Directors of CVD, nor filed with the Secretary of State, nor has the Certification of Merger been obtained.

11. Defendants admit that all the assets and goodwill of CVD have been assigned to IMPA.

12. Defendants admit that all the assets and goodwill of CVD have been assigned to IMPA, and that IMPA has treated this property in every way as property that has been assigned to IMPA. Defendants do not agree with plaintiffs' argumentative characterization that IMPA has "appropriated CVD's assets."

B. Defendants' Additional Undisputed Material Facts.

See defendants' Joint Statement of Undisputed Material Facts, incorporated herein by reference.

INTRODUCTION

On August 1, 1986, assets of Cache Valley Dairy Association ("CVD") were assigned to Intermountain Milk Producers Association ("IMPA") and IMPA assumed the liability of CVD (hereinafter referred to as "the transaction"), culminating a process that began with the execution of a Letter of Intent in June, 1984, and continued on through the filing of consolidated financial statements for CVD and IMPA as of August, 1985. Of the many Cache Valley Dairy members, defendants are the few disgruntled dissidents who now oppose the action.

Plaintiffs inaccurately characterize the transaction as a "merger," and, therefore, inaccurately conclude that the merger

ADDENDUM

An objection couched in language such as "the instruction is not suggested by and is contrary to law," or like terms, lacks the specificity required by this rule. *Morgan v. Quailbrook Condominium Co.*, 704 P.2d 573 (Utah 1985).

—**Specificity required.**

An objection to an instruction should be specific enough to bring to the attention of the court all claimed errors in the instructions and to give the court an opportunity to correct them if the court deems it proper. *Employers' Mut. Liab. Ins. Co. v. Allen Oil Co.*, 123 Utah 253, 258 P.2d 445 (1953).

—**Explanation of grounds.**

To appeal the giving or the refusal of an instruction, a party must properly object to the instructions in the trial court and explain its grounds, with specificity, for challenging the instructions. *Morgan v. Quailbrook Condominium Co.*, 704 P.2d 573 (Utah 1985).

**Written instructions.**

—**Failure to tender.**

—**Waiver.**

Where plaintiff had failed to tender a writ-

ten instruction on burden of proof he could not claim error in the lack of such instruction. *Fuller v. Zinik Sporting Goods Co.*, 538 P.2d 1036 (Utah 1975).

**Cited in** *Wellman v. Noble*, 12 Utah 2d 350, 366 P.2d 701 (1961); *Hill v. Cloward*, 14 Utah 2d 55, 377 P.2d 186 (1962); *Ortega v. Thomas*, 14 Utah 2d 296, 383 P.2d 406 (1963); *Meier v. Christensen*, 15 Utah 2d 182, 389 P.2d 734 (1964); *Memmott v. United States Fuel Co.*, 22 Utah 2d 356, 453 P.2d 155 (1969); *Telford v. Newell J. Olsen & Sons Constr. Co.*, 25 Utah 2d 270, 480 P.2d 462 (1971); *Flynn v. W.P. Harlin Constr. Co.*, 29 Utah 2d 327, 509 P.2d 356 (1973); *McGinn v. Utah Power & Light Co.*, 529 P.2d 423 (Utah 1974); *Henderson v. Meyer*, 533 P.2d 290 (Utah 1975); *Lamkin v. Lynch*, 600 P.2d 530 (Utah 1979); *State v. Hall*, 671 P.2d 201 (Utah 1983); *Highland Constr. Co. v. Union Pac. R.R.*, 683 P.2d 1042 (Utah 1984); *Gill v. Timm*, 720 P.2d 1352 (Utah 1986).

## COLLATERAL REFERENCES

**Am. Jur. 2d.** — 75 Am. Jur. 2d Trial § 573 et seq.

**C.J.S.** — 88 C.J.S. Trial §§ 266 to 448.

**A.L.R.** — Propriety and prejudicial effect of instructions in civil case as affected by the manner in which they are written. 10 A.L.R.3d 501.

Sufficiency of evidence, in personal injury action, to prove future pain and suffering and to warrant instructions to jury thereon, 18 A.L.R.3d 10.

Sufficiency of evidence, in personal injury action, to prove impairment of earning capacity and to warrant instructions to jury thereon, 18 A.L.R.3d 88.

Sufficiency of evidence, in personal injury action, to prove permanence of injuries and to warrant instructions to jury thereon, 18 A.L.R.3d 170.

Propriety and effect, in eminent domain proceeding, of instruction to the jury as to landowner's unwillingness to sell property, 20 A.L.R.3d 1081.

Verdict-urging instructions in civil case

stressing desirability and importance of agreement, 38 A.L.R.3d 1281.

Verdict-urging instructions in civil case commenting on weight of majority view or authorizing compromise, 41 A.L.R.3d 845.

Verdict-urging instructions in civil case admonishing jurors to refrain from intransigence or reflecting on integrity or intelligence of jurors, 41 A.L.R.3d 1154.

Construction of statutes or rules making mandatory the use of pattern or uniform approved jury instructions, 49 A.L.R.3d 12.

Necessity and propriety of instructing on alternative theories of negligence or breach of warranty, where instruction on strict liability in tort is given in products liability case, 52 A.L.R.3d 102.

Federal Rules of Civil Procedure, construction and effect of provision in Rule 51, and similar state rules, that counsel be given opportunity to make objections to instructions out of hearing of jury. 1 A.L.R. Fed. 310.

**Key Numbers.** — Trial 182 to 290

## Rule 52. Findings by the court.

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the

grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

(b) **Amendment.** Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment or a motion for a new trial.

(c) **Waiver of findings of fact and conclusions of law.** Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact:

- (1) by default or by failing to appear at the trial,
- (2) by consent in writing, filed in the cause,
- (3) by oral consent in open court, entered in the minutes.

(Amended, effective Jan. 1, 1987.)

**Amendment Notes** — The 1986 amendment in Subdivision (a) deleted and preceding in granting in the first sentence inserted the third and fifth sentences, rewrote the sixth sentence and added the last sentence.

**Compiler's Notes** — This rule is similar to Rule 52 F.R.C.P.

**Cross-References** — Masters, Rule 53.

## NOTES TO DECISIONS

### ANALYSIS

#### Adoption

- Abandonment of contract
- Advisory verdict
- Breach of contract
- Child custody
- Contempt
- In presence of court
- Written
- Credibility of witnesses
- Denial of motion
- Divorce decree modifications
- Easement
- Evidentiary disputes

ADDENDUM

**Attorney fees.****—Denial.**

If a party bringing an action has, through his own fault, caused the conflicting claims necessitating interpleader, it is proper to deny his attorney's fees *Capson v. Brisbois*, 592 P 2d 583 (Utah 1979)

**Escrow.**

Interpleader statute could be invoked by a person holding stock in escrow *Walker v. Bamberger*, 17 Utah 239, 54 P 108 (1898) (decided under prior law)

**Failure to interplead.****—Insurer.**

Failure of an insurer to bring an action in interpleader did not constitute an unreasonable delay on its part in making payment under a policy, so as to justify a judgment against such company for interest *Maycock v. Continental Life Ins. Co.*, 79 Utah 248, 9 P 2d 179 (1932)

**Function of interpleader.**

The function of an interpleader is to compel conflicting claimants to litigate their claims among themselves *Maycock v. Conti-*

*mental Life Ins. Co.*, 79 Utah 248, 9 P 2d 179 (1932)

An action in interpleader is a proceeding in equity in which a person who has possession of money or property which may be owned or claimed by others seeks to rid himself of risk of liability, or possible multiple liability, by disclaiming his interest and submitting the matter of ownership for adjudication by the court *Terry's Sales, Inc. v. Vander Veur*, 618 P 2d 29 (Utah 1980)

**Taxation.**

Complaint by taxpayer to compel two counties to interplead as to which was entitled to tax as result of apportionment by State Tax Commission was held insufficient. See *Union Pac. R.R. v. Summit County*, 48 Utah 540, 161 P 2d 463 (1916)

**Termination.****—Decision on all issues.**

If the action in interpleader accomplishes the purpose for which the plaintiff instituted it, it is not necessarily a requisite to its termination that it decide all of the issues between the adverse claimants *Terry's Sales, Inc. v. Vander Veur*, 618 P 2d 29 (Utah 1980)

## COLLATERAL REFERENCES

**Am. Jur. 2d.** — 45 Am. Jur. 2d Interpleader § 29 et seq.

**C.J.S.** — 48 C.J.S. Interpleader § 11

**A.L.R.** — Amount of attorney's compensa-

tion in absence of contract or statute fixing amount, 57 A.L.R. 3d 475

**Key Numbers.** — Interpleader ⇨ 14

**Rule 23. Class actions.**

(a) **Prerequisites to a class action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Class actions maintainable.** An action may be maintained as a class action if the prerequisites of Subdivision (a) are satisfied, and in addition:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of.

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of 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 a class action.

**(c) Determination by order whether class action to be maintained; notice; judgment; actions conducted partially as class actions.**

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under Subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under Subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under Subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in Subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

**(d) Orders in conduct of actions.** In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims

or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) **Dismissal or compromise.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

**Compiler's Notes.** — This rule is identical to Rule 23 F R C P

**Cross-References.** — Advancement, conduct, and hearing of actions orders for, reasonable notice Rule 78

Antidiscrimination Act, § 34-35-1 et seq

Appearance by attorney, proof of authority, § 78-51-33

Capacity to sue or be sued need not be averred, Rule 9(a)(1)

Claims for relief Rule 8(a)

Commencement of action Rule 3

Consolidation of actions Rule 42(a)

Defenses form of denials Rule 8(b)

Dismissal of actions Rule 41

Fact questions decided by jury, § 78-21-2

Form of orders, rules relating to pleadings applicable Rule 7(b)(4)

Intervention, Rule 24

Joinder of claims and remedies Rule 18

Judgment defined, Rule 54(a)

Jurisdiction and venue unaffected by Rules, Rule 82

Law questions decided by court, § 78-21-3

Misjoinder and non-joinder of parties Rule 21

Motion to dismiss and notice of motion, forms for Form 20

Necessary joinder of parties, Rule 19

One form of action Rule 2

Orders defined, Rule 7(b)(2)

Orders, enforcement of, by and against non-parties, Rule 71A

Orders, modification of, Rule 7(b)(2)

Orders, services of Rule 5(a) to (c)

Permissive joinder of parties, Rule 20

Venue of actions, Utah Const., Art. VIII, Sec. 5, § 78-13-1 et seq

## NOTES TO DECISIONS

### ANALYSIS

Amendment of rule

Notice

—Declaratory relief

Prerequisites

—“Common or general interest”

—Derivative actions by shareholders

—Impracticability of joinder

—Size of class

—Subdivision developers

Cited

### Amendment of rule.

Discussion of class actions prior to 1971 amendment of this Rule. See Salt Lake City v Utah Lake Farmers Ass'n, 4 Utah 2d 14, 286 P 2d 773 (1955)

### Notice.

—Declaratory relief.

The provisions of Subdivision (c)(2) concerning notice to the class are applicable only to class actions brought under Subdivision (b)(3),

and not to actions brought, such as for declaratory judgment, under Subdivision (b)(2). Holmgren v Utah-Idaho Sugar Co., 582 P 2d 856 (Utah 1978)

### Prerequisites.

—“Common or general interest.”

Former statute required that question of common or general interest to many persons be involved in action and that question to be determined should be one of common or general