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

Utah Court of Appeals

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DOCKET NO. 890259 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,

87

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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.

BRIEF OF RESPONDENTS

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

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JURISDICTION OF THE COURT

Respondents challenge the jurisdiction of the court over this appeal, as the order appealed from was not a final order. The basis for this challenge was set forth and fully briefed in the memorandum previously filed by respondent in this case, entitled "Appellee's Motion to Dismiss or in the Alternative Motion for Summary Disposition as to Rescission Claim."

STATEMENT OF ISSUES PRESENTED
FOR REVIEW

1. Did the trial court err in dismissing the rescission claim?

a. Is an allegation of restitution an essential element in pleading a claim for rescission?

b. Is the remedy of rescission available where restitution is impossible or impractical?

c. Is rescission available where it would cause inequity and harm to third parties whoses positions and circumstances it changed?

d. Are Appellants' claims for rescission barred by their delays in raising the issues in question?

e. Is the remedy of rescission available where the legal remedy of damages would be adequate?

2. Is the trial court's order, dismissing the Appellants' claims without prejudice and with leave to amend, a "final order" from which an appeal may be taken?

3. Is the trial court's denial of Appellants' request for class certification a "final order" from which an appeal may be taken?

4. Did the trial court abuse its discretion in denying Appellants' request to certify the Appellants as representatives of the proposed class?

5. Did the trial court commit reversible error in failing to issue formal findings of fact and conclusions of law?

STATEMENT OF CASE AND
DISPOSITION OF LOWER COURT

In February of 1987, a complaint was filed by Appellants asserting that the only way in which two or more agricultural cooperatives may consolidate their assets and operation is through a statutory merger pursuant to U.C.A. §3-1-30, et seq., and, on that basis, challenging the validity of a consolidation of four dairy cooperatives, which took place between 1984 and 1986. The complaint sought rescission and damages in behalf of a purported class (R. 1-26).

Respondents, who were defendants in the court below, responded, taking the legal position that a statutory merger was but one method of consolidating co-ops, with a transfer of assets being another proper method. Respondents conceded that the statutory merger provisions had not been followed and affirmatively asserted that there had not been any intent to do so (R. 197-223).

Plaintiffs/Appellants filed a motion for partial summary judgment, asserting no dispute of material facts (R. 52) and asking for judgment as a matter of law (R. 49). Plaintiffs also requested that they be certified as representatives of a proposed class, under Rule 23, Utah Rules of Civil Procedure (R. 8).

Defendants/Respondents filed countering motions for summary judgment (R. 177, 224), as well as a motion to dismiss (R. 91). The parties all filed memoranda in support of their

motions and in opposition to the opposing parties' motions (R. 94, 107, 117, 154, 184, 196, 247, 268, 469, 514, 525). A consolidated statement of undisputed facts was exchanged between the parties, resulting in agreement on many material facts (R. 140-153). Two affidavits were filed by Defendants/Respondents in support of their motion for partial summary judgment, those being the affidavits of Lynn Cottrell (R. 166-176, Addendum No. 5) and Douglas P. Larson (R. 180-183, Addendum No. 6). Subsequently, Plaintiffs/Appellants filed affidavits of Lyle Tuddenham (R. 239-242) and Gordon Zilles (R. 243-246). After the filing of those affidavits, the depositions of those two individuals were taken. When they were cross-examined at the depositions concerning their affidavits, they admitted that substantial portions of the statements made in the affidavits were not based on personal knowledge. Also, substantial additional portions were in the form of conclusions, rather than facts. Accordingly, Defendants/Respondents filed a motion to strike such affidavits with a supporting memorandum (R. 482-513, Addendum No. 8).

The depositions of the other plaintiffs were taken and are part of the record. Finally, the affidavits of LaThair Peterson and Leland Anderson were filed by Defendants/Respondents (R. 529-547, 548-551; Addendum No. 7 and 4).

A hearing was held before the court on June 8, 1987. At that hearing, counsel for Plaintiffs/Appellants took the position there was a central legal issue to the case, upon which all of the claims Plaintiffs/Appellants were founded, and there

was no factual dispute concerning that issue (R. Reporter's Partial Transcript of Proceedings, pages 1-3; Addendum No. 1) . That central issue, as represented by counsel, was whether Utah Code Ann. §3-1-30, Utah Code Ann. (1953, as amended 1965), (an agriculture cooperative merger statute), set forth the only way in which the assets of two or more cooperatives' could be consolidated. In that regard, counsel stated ". . . but the central issue of this case, once you decide that issue, if we lose, your Honor, we have to go home. We're through. All of the other issues fall" (R. Reporter's Partial Transcript of Proceedings, page 3, lines 3-5; Addendum No. 1).

On June 29, 1987, the trial court issued a memorandum decision, ruling on the pending motions (R. 552-554). The court, subsequently, executed an order pursuant to its memorandum decision signed on July 23, 1987 (R. 586-589; Addendum No. 3). By its order, the court denied Plaintiffs' request for class certification and dismissed Plaintiff's claims for rescission. The court also observed that since the Plaintiffs had made no individual claims, that its rulings on class certification and rescission required dismissal of the claims of the complaint as they were pled. However, the trial court also took care to point out that its ruling was without prejudice to any claims which the Plaintiffs themselves, individually, may have for damages. It made it clear that its ruling would not preclude such claims and expressly granted leave to Plaintiffs to amend their complaint to include them (R. 586-589; Addendum No. 3).

Also, the court issued its opinion with respect to the "central issue" of the case, finding that a statutory merger under Utah Code Ann. §3-1-30 (1953, as amended) was not the only way of consolidating the assets of cooperatives, but that a transfer of assets was also an acceptable method (R. 552-554).

The court specifically made no ruling as to whether the transfer of assets from CVDA to IMPA was wrongful and specifically reserved such factual determination, as well as related factual determinations, for future proceedings after the anticipated amendment of the Plaintiffs' complaint (R. 586-589; Addendum No. 3).

Even though they had been granted leave to do so, Plaintiffs elected not to amend their complaint and proceed with their own claims, but to pursue this appeal (R. 591-592).

PREFACE TO STATEMENT OF FACTS

The following statement is written as of the time of the trial court's ruling of June 29, 1987, and is based on the facts in the record at the time. Because of yet another consolidation of cooperatives, subsequent to the one in question, an even greater co-mingling of assets, liabilities and operations has occurred. However, because that consolidation was approved only a week before the trial court's ruling, the details of such co-mingling are not in the record in this case.

FACTS

This case involves several agricultural cooperatives which are or were involved in the dairy business. Such cooperatives exist for the purposes of assembling, processing and marketing milk and milk products. The membership of each is made up entirely of active producers of milk. When a member ceases to be an active milk producer, his eligibility for membership ends (R. 141, 167; Addendum No. 9 and 5).

The proceeds from the sale of milk products, after deduction of expenses, are, for the most part, paid back to the members of the cooperatives. A common way for the cooperative to raise working capital is to retain part of the proceeds realized from the sale of dairy products. This creates equity interests for the members of the cooperative based upon each member's share of the capital contribution, commonly referred to as "producer equities" (R. 141-142, 167-168; Addendum No. 9 and 5).

When an individual's membership ceases, the former member ceases to actively participate in the cooperative, but retains an equity interest. Generally speaking, if revenues are sufficient, the cooperative attempts to make payments to retire the former member's equity interest. Such payments are made over a period of years while new amounts are retained from current revenues to replenish working capital. This process is generally referred to as "rotating equities". An eight to ten year cycle for such rotation is not uncommon. Payment, of course, is contingent each year upon economic factors, and the former member

has no guarantee that his equity interest will ever be fully retired (R. 142, 168; Addendum No. 9 and 5).

Cache Valley Dairy Association ("CVDA") was for a number of years, an agricultural cooperative made up of milk producers (R. 141; Addendum No. 9).

During a several year period prior to 1984, various discussions and negotiations took place among CVDA and three separate dairy-oriented agricultural cooperatives; namely, Western General Dairies, Inc., 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 CVDA were considered. Among them were the following:

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

b) The cheese plants owned by CVDA, would would have a captive source for a greater volume of milk, potentially allowing such plants to operate at greater efficiency.

c) CVDA 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, CVDA would enjoy the benefit of reduced competition for the procurement of raw milk supplies (R. 143-144, 168-170; Addendum No. 9 and 5).

e) CVDA's liabilities and debts would be assumed by the larger organization (R. 143-144, 168-170; Addendum No. 9 and 5).

In return, the new organization would realize the benefit of CVDA's assets, including its supply of milk, cheese plants, and its cutting and wrapping facility (R. 144, 170; Addendum No. 9 and 5).

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 (R. 170, 530, 536-542; Addendum No. 9, 5 and 7). 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, ("IMPA"), the new larger cooperative. The transition process concluded on August 1, 1986 (R. 144, 170, 529-547; Addendum No. 9, 5 and 7).

During this period of time, there were several meetings of CVDA's board of directors where the Letter of Intent was considered. The Letter was consistently approved by the board with no more than 5 of the 21 member board ever voting against it (R. 144, 180-182, 529-547; Addendum No. 9, 5 and 7).

The transfer of assets was also presented to the Members of CVDA for approval. On December 16, 1985, a special meeting of members of CVDA was held at which a vote of the members was taken. The members also approved and authorized the transfer (R. 429-547; Addendum No. 7).

Former members, including those still holding some equity interest in the four co-ops, were not included in the vote (R. 145, 182; Addendum No. 9 and 6).

As a result of the negotiations and bargained-for exchanges of these cooperatives, all four cooperatives transferred their assets to IMPA, which was completed August 1, 1986. IMPA thereafter assumed all liabilities of the four cooperatives. Producers Membership Agreements were also assigned to IMPA and the producer equities then standing on the books of CVDA and the others were assumed by IMPA (R. 145, 170; Addendum No. 9 and 5).

Numerous metamorphosis have occurred as a result of the joinder of these four cooperatives. On or about March 28, 1986, IMPA caused certain producer equities standing in the name of former members of CVDA to be redeemed in the amount of \$1,173,989 and paid to equity holders. This payment reduced the outstanding equities of CVDA from ten years to eight years in order to be on the same equity rotation as other producers assigned to IMPA (R. 145-146, 170-171; Addendum No. 9 and 5).

The principal borrowing of CVDA from 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 CVDA, as well as the assets of the other cooperatives, have been pledged by IMPA as security for such loans (R. 146, 171; Addendum No. 9 and 5).

Since August 1, 1984, the four cooperatives have blended their bottom lines to offset losses from one company with gains from another. Consolidated financial statements were prepared and joint tax returns filed for the fiscal years ending July 31, 1985 and 1986. Legal and auditing expenses have been paid by IMPA on behalf of CVDA and the others, including substantial legal costs to defend a case filed by Cheryl Vause against CVDA (R. 146, 171, 530-531; Addendum No. 9, 5 and 7).

Approximately 82 former members of CVDA 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. It has also diminished the revenue for other Grade A producers of IMPA 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 (R. 146-147, 171-172; Addendum No. 9 and 5).

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 CVDA producers from IMPA for purposes of producer payroll due to the difficulty in obtaining funds from producers which would have been overpaid (R. 147, 172; Addendum No. 9 and 5).

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 so that as of early 1987 it was estimated that the Amalga plant could run at only 25-30 percent 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 (R. 147-148, 172-173; Addendum No. 9 and 5).

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 (R. 148, 173; Addendum No. 9 and 5).

Field men have been reassigned since August 1, 1984, and have been reduced from 11 to 8 in number during that time. (R. 148, 173; Addendum No. 9 and 5).

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 CVDA (R. 148, 173, Addendum No. 9 and 5).

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, including CVDA (R. 148-149, 173; Addendum No. 9 and 5).

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 (R. 149, 173; Addendum No. 9 and 5).

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 (R. 149, 174; Addendum No. 9 and 5).

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 (R. 149, 174; Addendum No. 9 and 5).

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 CVDA (R. 149, 174; Addendum No. 9 and 5).

The profit sharing plan of CVDA has been terminated and all proceeds have been paid out. Beginning August 1, 1986, the former CVDA employees were extended a pension plan under the sponsorship of IMPA. No pension or profit sharing plan now exists for CVDA (R. 149, 174; Addendum No. 9 and 5).

Since August 1, 1984, significant changes have occurred in management personnel. Personnel have been transferred from CVDA to IMPA and many employees have been terminated with some hired in their place (R. 149-150, 174; Addendum No. 9 and 5).

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 (R. 150, 174; Addendum No. 9 and 5).

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 (R. 150, 175; Addendum No. 9 and 5).

The cheese cutting and wrapping operations formerly owned by CVDA 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 (R. 150, 175; Addendum No. 9 and 5).

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, including CVDA. 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 (R. 150-151, 175; Addendum No. 9 and 5).

Not only has the characterization of these four cooperatives changed, but IMPA has also now merged with the dairy cooperative, Mountain Empire Dairyman's Association (MEDA) and Western Dairyman Cooperative, Inc. (WDCI). IMPA is to operate a Twin Falls cheese plant for MEDA, whereby MEDA and WDCI are to haul milk to IMPA. IMPA relies on these arrangements for its continued successful operations (R. 151, 175-176, 549-550; Addendum No. 9, 5 and 4).

The merger of MEDA, WDCI and IMPA was performed in accordance with the Agricultural Co-operative Associations Merger statute, Utah Code Ann. §3-1-30 (1953, as amended). On June 19, 1987, in Salt Lake City, Utah, and on June 22, 1987 in Denver, Colorado members of IMPA and MEDA gathered to vote on the proposed merger of IMPA with MEDA (R. 549; Addendum No. 4).

Because by that point in time the suit was pending challenging a transfer of assets, rather than a statutory merger as a means to consolidate cooperatives, to avoid any future dispute, 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 (R. 549; Addendum No. 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 percent in favor and slightly less than 10 percent in opposition (R. 549; Addendum No. 4).

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 CVDA than in other areas of the organization (R. 549-550; Addendum No. 4).

Among the members of MEDA, 442 total votes were cast, with 402 in favor and 40 against (R. 550; Addendum No. 4).

Plaintiffs, in this lawsuit, are disgruntled former directors of CVDA. Each was a director through the time of the transfer of the assets of CVDA to IMPA. They are as follows: J. Rolfe Tuddenham, age 78 (Deposition of J. Rolfe Tuddenham, pps. 3-4); Willis Hall, age 71 (Deposition of Willis Hall, pps. 3, 6-7); Thedford Roper, who has not been formally dismissed, but has requested Plaintiffs' counsel to officially remove him as a party Plaintiff to this action; Douglas Quayle, age 77, who was also elected to represent CVDA on the IMPA board for two years until he became disgruntled and resigned (Deposition of Douglas R. Quayle, pps. 4-7); Joseph R. May, age 66, who retired from the dairy business in October 1986 (Deposition of Joseph R. May, pps. 6-9); Gene Brice, age 49, who is now a member, and founder of Magic Valley Milk Producers, a cooperative in competition for milk with IMPA. When his contract with IMPA expired, he became president of the board of directors of Magic Valley (Deposition

of Gene Brice, pps. 3, 4-10); Gordon Zilles, age 31, who was the secretary, of CVDA at the time of the transfer of assets. In June of 1984 his operation converted to Grade A (Deposition of Gordon Zilles, pps. 5, 8-9, 11-12).

Defendant Randon Wilson is an attorney who allegedly provided negligent legal advice concerning the consolidation. The remaining individual defendants are the former officers and directors of CVDA, (who held such positions at the time of the transfer of assets), who were unwilling to join with Plaintiffs in this lawsuit, which was filed February 13, 1987 (R. 2-3).

As members of the board, Plaintiffs were, for the most part, present at the several meetings considering the transfer of assets. The Letter of Intent for the transfer was approved by the board of directors at each meeting with no more than five of the 21 member board voting against it. Plaintiffs Gene Brice Thedford Roper and Gordon Zilles voted consistently in favor of the Letter of Intent. It was not until February of 1987, six months after the transfer of assets was completed, two and one-half years after the Letter of Intent was executed, that IMPA became aware that the Plaintiffs' intended to legally contest the transaction (R. 144-145, 181-182; Addendum No. 9 and 6).

SUMMARY OF ARGUMENT

A careful review of the decision and order of the trial court reveals that the issues presented on appeal are narrower

than Appellant claims them to be. The trial court's ruling was simple and straight forward. First, the trial court ruled that the Plaintiffs were not entitled to rescission. Second, the court denied the Plaintiff's request that they be designated as representatives of a class. Because the amended complaint did not assert individual damage claims, the court's decision on the class and rescission issues, required dismissal of the amended complaint. However, the trial court expressly ruled that its decision did not preclude the Plaintiffs from pursuing their own individual damage claims against the Defendants and leave was granted in the order allowing the complaint to be amended to assert such claims. Apparently because the court expected such an amendment, it did, as a guide to defendants in pursuing such claims, issue its finding that merger, pursuant to state statute, was not the exclusive method by which the assets of two or more agricultural cooperatives could be consolidated (R. 586-588; Addendum No. 3).

Because a citizen has no right to assert the claims of another, but his rights are only in his own claims, the court's denial of the Plaintiff's request for class certification did not deprive them of any right. On the contrary, it was merely an exercise of discretion regarding the procedural format of the case. Nor were they deprived of the right to seek relief against Defendants for the alleged wrongs committed as the court's decision expressly preserved the Plaintiffs' legal right to seek damages. Consequently, the court's ruling only precluded the

Plaintiff's from seeking one of two mutually exclusive remedies, i.e. rescission. Therefore, the only real issue on appeal is whether the trial court acted properly in precluding Plaintiffs from pursuing the equitable remedy of rescission.

Because the court's ruling on the rescission claims is the chief issue before the court, it is addressed first. The denial of the request for class certification is addressed next. Finally, because the trial court did render an opinion with respect to the nonexclusivity of the cooperative merger statute, that issue is also addressed, as is the question of whether the trial court was required to issue formal findings of fact and conclusions of law.

Respondents also maintain their contention that the order in question is not a "final order" and, hence, not an appealable one. However, that issue was briefed in a prior memorandum before this Court, "Appellee's Motion to Dismiss or in the Alternative Motion for Summary Disposition of Rescission Claim." Consequently, the points raised in that memorandum will not be repeated here. (A copy of that memorandum is included in the Addendum as No. 2).

The Respondents' arguments on the foregoing matters may be summarized as follows:

1. Restitution is an essential element of a claim for rescission. Because that element is absent from the allegations of the amended complaint, it is defective on its face. Also, because the Appellants/Plaintiffs, by their own admission, are

neither able nor willing to return the consideration received in the transaction in question, they are not entitled to rescission, as a matter of law. Furthermore, the undisputed facts in the record establish that hundreds of innocent third parties have changed their positions in good faith reliance on the validity of the transaction and would be greatly harmed through rescission. Because rescission is an equitable remedy, the inequity which would result to such innocent third parties makes that remedy unavailable in this case. A final point, with respect to the rescission issue, is that the Appellants/Plaintiffs did not first raise their challenge of the validity of the transaction until two and one-half years from the date that the initial letter of intent was signed and six months from the date that the transfer of assets was fully completed. This delay also precludes rescission as an available remedy.

Whether a case will be allowed to proceed in a class action format and whether the Plaintiffs should be designated as representatives of the proposed class are not matters of right, but are purely discretionary with the trial court. The Appellant/Plaintiffs, who all actively participated in the decisions and in the voting, were not even members of the proposed class; i.e. non-member equityholders who were not allowed to vote. Moreover, the undisputed facts disclosed a clear conflict of interest between the Plaintiffs and the proposed class. Under such circumstances, the contention that the court abused its discretion in denying the request for class

certification is untenable.

Strict compliance with the statutory requirements of the co-op merger statute, Utah Code Ann. §3-1-30, et seq., is not the only way in which the assets of two or more agricultural cooperatives may be consolidated. Another method is to transfer the assets of one or more cooperatives into another. This is clear both from the 28 year history of agricultural cooperatives prior to the enactment of the merger statutes in 1965, from the comments in the legislative record around the time of the enactment of the merger statutes, and from the language of the statutes themselves.

The express language of Rule 52, Utah Rules of Civil Procedure, allows a trial court rendering rulings pursuant to motions such as the ones in question, to make such ruling by a brief written statement of the decision and grounds in lieu of findings of fact and conclusions of law. Accordingly, by issuing a memorandum decision setting forth the ruling and the grounds, coupled with a corresponding order, the trial court was in complete compliance with the rules, and formal findings of fact and conclusions of law were unnecessary.

Because the order in question was without prejudice to the Plaintiffs/Appellants' right to seek relief through individual damage claims and because class action descisions are, inherently and under the express language of Rule 23, interlocutory in nature, the order in question is not a "final order" which is appealable at this stage of the proceedings.

ARGUMENT

POINT I.

THE TRIAL COURT DID NOT ERR IN DISMISSING
THE RESCISSION CLAIM.

The trial court's dismissal of the rescission claim was not only proper, but the trial court would have committed error if it had not dismissed such claim.

A. Due to Plaintiff's failure to plead restitution of the exchanged consideration, their purported claim for rescission is defective on its face.

For obvious reasons, the courts have always recognized that restitution is an essential part of rescission. In other words, courts have applied the basic rule of fairness that before a party may get back what it gave up in a transaction, it must demonstrate its willingness and ability to give back what the other parties gave. The Restatement of Restitution, §65, entitled "Offer of Restoration as a Condition of Restitution" states as follows:

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

Id. at 255. See also, Peterson v. Hodges, 239 P.2d 180, 184 (Utah 1951). If the parties cannot be completely restored to their pre-transaction positions, the remedy of rescission is unavailable. The case of McIntyre v. KDI Corporation, *infra*, is

a good example. There, a group of shareholders of KDI Corporation sought the rescission of a corporate merger. The court held that rescission was unavailable, stating:

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

* * *

That the plaintiff in an action under the federal securities acts 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. See, e.g., Parker v. Baltimore Paint & Chemical Corp., 244 F.Supp. 267 (D.Colo. 1965). Also, see: Meis v. Sanitas Service Corporation, 511 P.2d 655, 658 (10th Cir., 1975); Fox v. Kane-Miller Corp., et al., 398 F.Supp. 609 (D.Md., 1975); Bowers v. Columbia General Corporation, 336 F.Supp. 609, 613-615 (D. Del., 1971). Cf., Goldman v. Bank of Commonwealth, 467 F.2d 439, 446 (6th Cir., 1972); Restatement Law of Restitution, §65; 3 Loss, Securities Regulation 1793.

Id., at 597. Accordingly, it is horn book law that restitution is an essential element of a claim for rescission.

A review of the complaint reveals that although Plaintiffs asked the court to set the transaction aside and return consideration to them, they made no tender of restitution themselves. Lacking this essential element, the rescission claim of the complaint was clearly defective and properly dismissed.

B. The trial court properly ruled that the remedy of rescission is not available where it is impossible or impractical to restore the parties concerned to the status quo ante.

As noted above, well-established principles of equity dictate that a party seeking rescission and restitution must be in a position to restore any benefit he has received as part of the transaction. See Restatement of Restitution §65, p.255.

In Peterson v. Hodges, 239 P.2d 180 (Utah 1951), the Utah Supreme Court followed the Rule of §65 when it held that the plaintiff, who sought to rescind a lease, had a duty to restore the defendant to the status quo and to indemnify him for his labor and resources invested in the property. Id. at 184.

Where restoration to the status quo is impossible or impracticable, courts have held that the remedies of rescission and restitution are unavailable. The case of McIntyre v. KDI Corporation, 406 F.Supp. 592 (S.D. Ohio 1957), is illustrative. There, the plaintiffs were shareholders of KDI Corporation who sought rescission of a merger agreement under which their stock was exchanged for the stock of the corporation into which KDI was merged. First, the court recognized the basic rule that parties seeking rescission must be in a position to return the other parties to the status quo ante. Id. at 597. It then considered the facts relating to the impossibility of rescission and restitution, noting that the plaintiffs, who were only 65 percent of the KDI shareholders, could not possibly restore 100 percent of the shares exchanged. After so noting, it went on to find:

...the futility of proceeding on that basis in the present case is apparent from the fact that defendants cannot make a . . . restoration to plaintiffs of the consideration given up by them in exchange for the KDI securities. Verkamp Corporation

no longer exists, having been merged into KDI-Verkamp. Thus, defendant plainly cannot give back Verkamp Corporation stock

* * *

But even this would not substantially restore plaintiffs to their former position as the former Verkamp Corporation is bound to KDI by management contracts which plaintiffs clearly do not have standing to set aside in this action; additionally, the KDI-held stock of KDI's various subsidiaries, apparently including KDI-Verkamp, and/or the assets of these subsidiaries, have been pledged to defendant First National Bank and--allegedly--to other banks as well. (Cites omitted).

Accordingly, we hold the ultimate relief sought--rescission--is not available.

Id. at 597-598.

The circumstances of the parties in this action are similar to those of the parties in the McIntyre case, *supra*. Here, the plaintiffs are only seven (now six) former members of CVDA. As a result of the sale of assets and assumption of liabilities their membership and equity interests were exchanged for membership and equity interests in IMPA. The affidavit of Lynn Cottrell points out that as part of this transaction, IMPA procured \$1,173,989 which was paid in advance to CVDA members and equity holders in order to reduce the term of their equity rotation (R. 170-171; Addendum No. 5). In addition, IMPA assumed all of CVDA's debts and liabilities and accepted the transfer of all of CVDA's assets, which have been pledged, together with all other IMPA assets, to the Sacramento Bank for Cooperatives as security for an \$18,000,000 line of credit (R. 171; Addendum No. 5).

It is obvious that rescission of this transaction is impossible. Plaintiffs cannot possibly be in a position to cause all of the former CVDA members to return the \$1,173,989 paid to them as a part of the transaction. They also cannot force all of the former members of CVDA to give up their current IMPA membership. Clearly, the 14 individual defendants in this case, who are current members of IMPA, are unwilling to do so. Neither plaintiffs nor IMPA can obtain a release of the collateral which secures the line of credit with the bank, and even if this were possible, the plaintiffs cannot purport to be able to assume or cause the bank to accept assumption by them of the debt pertaining to the collateral they seek to recover.

The additional problems which an attempt to rescind the transaction would have created are too numerous to be practical to discuss in this brief. However, it will be apparent to the Court upon consideration of the factual statement (R. 140-153; Addendum No. 9), as well as the affidavits of Douglas Larsen (R. 180-183; Addendum No. 6) and Lynn Cottrell (R. 166-176; Addendum No. 5), that the possibility of rescission was foreclosed by irreversible changes in position made by all the parties concerned.

Furthermore, the Plaintiffs were clearly not only unable to affect restitution, but were also unwilling to do so. For example, Plaintiff Gordon Zilles testified in his deposition that he was unwilling to return the consideration which he had received as a result of the consolidation. (Deposition of Gordon

Zilles, pages 282-284).

C. Rescission is an equitable remedy which is not available where it will cause inequity by harming parties whose positions and circumstances have changed.

It is a well-established principle of equity that requests for rescission and restitution are addressed to the equity powers of the Court and that such relief is not to be granted where it will cause inequity. Alden Auto Parts v. Dolphin Equipment Leasing, 682 F.2d 330, 333 (2nd Cir. 1982). The Restatement of the Law of Restitution, in Sections 69 and 142, clearly states that:

The right of a person to restitution from another because of a benefit received is terminated or diminished if, after the receipt of the benefit, circumstances have so changed that it would be inequitable to require the other to make full restitution.

Restatement of the Law, Restitution, §69, 142, pp. 284, 567.

The Utah Supreme Court recognized the validity of this principle in the case of Toscano v. Social Services, 624 P.2d 1156 (Utah 1981), wherein the Court cited the Restatement of Restitution §142 as authority for the proposition that a change in circumstances such as would make restitution inequitable, will prevent restitution. Id. at 1158. See also, Christensen v. Abbot, 671 P.2d 121, 122 (Utah 1983).

The undisputed facts set forth in the affidavits of Lynn Cottrell and Douglas Larson establish, without question, that IMPA, and, more importantly, many other entities and people, (including hundreds of other members of IMPA and the other

cooperatives), have so changed their positions in reliance upon the transfer of assets that it would be grossly inequitable for the Court to consider the remedies of rescission and restitution.

IMPA has now been functioning as a cooperative with one thousand plus members for almost 3 years, and Cache Valley Dairy's assets, which were assigned to IMPA have been upgraded, improved and fully integrated into a dairy production system which encompasses the entire Intermountain region. Plants have been closed and trucking routes changed in order to increase efficiency. All of the assets of IMPA have been pledged as collateral for \$18,000,000.00 of debt. Many individual producers have invested hundreds of thousands of dollars to upgrade their production facilities to Grade A standards in reliance upon a market made available to them by the formation of IMPA. The list of other substantial changes in position and circumstances is extensive (R. 146-151, 156, 171-176).

In view of these substantial changes in position and circumstances, any attempt at rescission and restitution would not only be impossible to implement, but would result in gross inequity to hundreds of other people. For example, producers would be left without a Grade A market after substantial investment in their production facilities. Processing plants of IMPA and CVDA would be left without a sufficient supply of milk to run at efficient or profitable levels. IMPA would face the prospect of losing its substantial investment in the improvements made to Cache Valley facilities and be forced to consider the

tremendous expense of re-opening closed plants. Such economic losses would create great economic hardship for the dairy farmers remaining in IMPA. In addition, almost \$2 million of equity payments received by hundreds of former members of CVDA would have to be returned. Moreover, IMPA's merger with MEDA and WDCI and the accompanying changes, would cause further inequities. These are but a few of the many inequities which would result to hundreds of people who have relied in good faith on what has long since occurred.

In accordance with the rule accepted by the Utah Supreme Court, this court should not consider equitable remedies which due to changed circumstances will cause widespread inequity and harm.

D. The Appellants' claims for rescission are barred by their own delay in bringing suit and in failing to take reasonably prompt action to contest the transaction in question.

A party who seeks rescission and restitution may be barred by his own unreasonable delay. The Restatement of Restitution has articulated this principle as follows:

An unreasonable delay in manifesting an avoidance of a transaction after the acquisition of knowledge of the facts terminates the power of rescission for fraud or mistake, and the consequent right to restitution, if the interests of the transferee or of a third person are harmed or were likely to be harmed by such delay.

Restatement of Restitution §64, p. 248.

In proceedings in equity, a person otherwise entitled to restitution is barred from recovery if he has failed to bring or, having

brought has failed to prosecute, a suit for so long a time and under such circumstances that it would be inequitable to permit him now to prosecute the suit.

Restatement of Restitution §148, p. 589.

The courts have applied this equitable principle in cases similar to the present case. In Andrews v. Precision Apparatus, Inc., 271 F.Supp. 679 (S.D.N.Y. 1963), the plaintiff brought an action to enjoin a corporate merger and to enjoin the use of corporate assets to pay debts of the other merging corporation. The Court denied the plaintiff the equitable relief sought based upon a 10-day delay, stating:

Plaintiff made no effort to attack the plan of consolidation during the period from February 26, 1963, when notice of meeting of stockholders was sent out, to March 22, 1963, when this action was commenced; meanwhile, on March 12, consolidation documents had been filed in the proper public offices. By such filing the consolidation became effective and rights thereby accrued to third parties. It would be inequitable to permit plaintiff to attack the consolidation after he had delayed until it became effective. Katz v. R. Hoe & Co., 279 App.Div. 766, 104 N.Y.S.2d 14 (1st Dept., 1951).

Id., at 687.

The plaintiffs in this case made no effort to attack the transfer of assets from CVDA to IMPA during a 2½ year period from June of 1984, when the initial Letter of Intent was signed, until February of 1987, 6 months after the transfer of assets was fully completed (R. 145, 182; Addendum No. 9 and 6). In fact, at least three of them consistently voted in favor of the transfer (R. 144, 182; Addendum No. 9 and 6). By the time the transfer

was complete, rights had accrued and commitments had been made to numerous other parties, including the 1,000 plus members of the co-ops involved, as well as all of the parties with whom IMPA has contracted to deal. It would be inequitable to permit six disgruntled individuals to attack the transfer at this late stage.

Harman v. Masonelan International, Inc., 418 A.2d 1004 (Del Chanc. 1980), is also on point. There, the Delaware court of Chancery held that a shareholder who sat idly by for two years while other investors drastically changed their positions in connection with a corporate merger, was barred by laches from seeking rescission of the merger. The court concluded:

Accordingly, whether or not it would be technically possible to undo the results of the two mergers . . . which occurred over a two year period, which is extremely doubtful, . . . , I conclude that the only feasible relief to which plaintiff would be entitled is damages

Id., at 1007.

Similarly, in this case, the plaintiffs sat by for well over two years without attacking the transfer of assets until long after it had been completed. They are likewise barred by laches.

E. The equitable remedy of rescission is not available where the legal remedy of damages would be adequate.

Claims for rescission and restitution fall within the exclusive jurisdiction of equity and because they are controlled by equitable principles, are remedies which can only be conferred

by equity. Ionic Petroleum Limited v. Third Finance Corp., 411 P.2d 492, 495 (Okla. 1966). It is a fundamental principle of equity jurisdiction that rescission or cancellation are not available remedies, where the complainant has a "plain, adequate and complete remedy at law" Id., at 495. In Niles v. Builders Service & Supply, Inc., 667 P.2d 770 (Colo.App. 1983), a Colorado appellate court stated:

A party seeking rescission must show that damages would not adequately compensate for the loss, Dumas v. Klatt, 132 Colo. 333, 288 P.2d 642 (1955). Furthermore, where rescission is granted, the parties must be placed in the status quo before the sale. Rice v. Hilty, 38 Colo.App. 338, 559 P.2d 725 (1976).

Id., at 772.

The Appellants herein failed to demonstrate, or even assert that damages would not adequately compensate them for the loss allegedly sustained by them. Accordingly, the trial court acted properly in preserving their right to seek relief in the form of damages, rather than rescission.

CONCLUSION OF POINT I.

For one or more of the foregoing reasons, the trial court acted properly in dismissing the Appellant's claims for rescission. Accordingly, it is respectfully submitted that the trial court's ruling in that regard should be sustained.

POINT II.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION
IN DENYING PLAINTIFFS' REQUEST TO CERTIFY
THE PLAINTIFFS AS REPRESENTATIVES OF THE
PROPOSED CLASS.

Pursuing claims under the format of a class action is not a matter of right, but is a matter clearly within the court's discretion. This Court will only consider upsetting the trial court's decision on class certification where there has been a clear abuse of discretion. Call v. City of West Jordan, 727 P.2d (Utah 1986). A review of the undisputed facts before the court at the time of its decision, reveals no such abuse of discretion. The undisputed facts in the record demonstrate that the Plaintiffs, the proposed representatives of the proposed class, were not truly "representative" of the class as required. For example, in their complaint, the Plaintiffs purported to speak for former CVDA members, who still held equity interests, but were not allowed to vote (R. 3). None of the Plaintiffs was a former member and none of them was not allowed to vote (R. 2). In fact, all the Plaintiffs were not only current voting members, but they were also members of the board of directors and had been allowed to vote on the issue in question on several occasions (R. 2, 182). Furthermore, several of the Plaintiffs now admit that they voted in favor of the transaction in question (R. 144, 182; J. Rolfe Tuddenham Deposition, pps. 46, 54, 55, 61).

It is also undisputed that the Plaintiffs had interests conflicting with the interests of the proposed members of the

class. For example, Plaintiff, Gene Brice, admitted in his deposition, that he had participated in the formation of a competing cooperative and, in fact, was president elect of that new organization. (Deposition of Gene Brice, pps. 6-9). In such capacity, he would be competing with the people he was purporting to represent. Also, the Plaintiffs, in their verified complaint, alleged that the former officers and directors of CVDA had acted improperly in carrying out the transaction in question (R. 1-25). (All of the individual Defendants in the case were former officers and/or directors of CVDA). However, the Plaintiffs themselves were also former officers and/or directors, and were serving in that capacity at the time of the transaction in question (R. 2). As such, they were also potential defendants. Accordingly, they had an unquestionable conflict of interests.

It is further clear from the record that the class Plaintiffs are purporting to represent are in agreement with the transfer of assets to IMPA. Since CVDA and the other three cooperatives transferred their assets to IMPA, IMPA has now formally merged with WDCI and MEDA. As stated by the Affidavit of LeLand Anderson, T.R. 548-550, Addendum 4, all non-member equity holders of IMPA, which included all non-member equity holders of CVDA, were given the opportunity to vote. The vote of the equity and non-equity holders overwhelmingly approved the merger.

Not only does this subsequent development illustrate that Plaintiffs are not representative of the purported class,

but such developments may even render this entire appeal moot. The Utah Supreme Court has consistently held that in order for the Court to retain jurisdiction of the appeal, the issue before the court must not be moot or academic. Lyon v. Bateman, 228 P.2d 818, 821 (Utah 1951); McRae v. Jackson, 526 P.2d 1190, 1191 (Utah 1974). As stated by the Court in McRae:

Although no Utah case precisely in point has been found, the general principle, to which we adhere, is stated in 5 Am.Jur.2d., Appeal and Error, SS761:

"The function of appellate courts, like that of courts generally, is not to give opinions on merely abstract or theoretical matters, but only to decide actual controversies injuriously affecting the rights of some party to the litigation, and it has been held that questions or case which have become moot or academic are not a proper subject to review."

Id.

Furthermore, as stated under U.R.C.P. Rule 23(c)(1), an order determining whether a class action may be maintained, is not a final order upon which an appeal may be taken. As stated in Rule 23(c)(1): "An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits." (Addendum No. 12; see also Appellee's Motion to Dismiss or in the Alternative Motion for Summary Disposition as to Rescission Claim, Addendum No. 2)

Under such circumstances, the trial court clearly did not abuse its discretion in denying class certification and, in fact, would have acted improperly if it had certified the Plaintiffs as representatives of the proposed class.

INTRODUCTION TO POINT III.

A finding by this court that the trial court acted properly with respect to the rescission and class action claims would render the remaining issues raised in this appeal moot. Accordingly, the balance of the issues need not be reached. However, because Respondent does not know what issues the Court will choose to treat in its decision, the additional issues will be addressed below.

POINT III.

STRICT COMPLIANCE WITH THE COOPERATIVE MERGER STATUTES (U.C.A. 3-1-30, ET SEQ.) IS NOT THE ONLY METHOD BY WHICH THE ASSETS OF A COOPERATIVE MAY BE TRANSFERRED.

At the hearing on the motions in question, counsel for Appellants made the affirmative representation to the court that if compliance with merger statutes is not the exclusive method by which the assets of an agricultural cooperative can be legally transferred to another cooperative, then his clients' case failed as a matter of law and the remaining issues would become moot (See Reporter's Partial Transcript of Proceedings, pages 2 and 3; Addendum No. 1).

Therefore, the Appellants invited the court to rule on the exclusivity of the merger statutes, a purely legal issue, and to dismiss their claims, as a matter of law, if the court disagreed with their interpretation of those statutes. Accordingly, even though Appellants now contend that factual issues precluded the court's ruling, they took the opposite position below. Both in their own motion for partial summary

judgment and at the hearing itself they denied the existence of material disputed facts and specifically requested a ruling on the very issue in question. (See Reporter's Partial Transcript of Proceedings, pages 2 and 3; Addendum No. 1). Also contrary to Appellant's current assertions, the trial court did limit its decision to an interpretation of the law and expressly reserved ruling on the related factual issues. The court made it clear that those factual issues would be dealt with as part of the individual damage claims which Plaintiffs were allowed to assert by an amendment to the complaint (R. 586-588; Addendum 3). Therefore, only the legal issue, i.e. statutory interpretation, is properly before the Court on this appeal.

An example of a factual issue which remains for resolution is the question of whether the notices and vote of the membership authorized a consolidation by a transfer of assets. The Respondents contend that the vote of the membership expressly allowed either method to be used (See Affidavit of LaThair Peterson, Addendum No. 7).

A review of the relevant sections of the Utah Code, as well as the legislative history of those sections, reveals that it is the Appellants, not the trial court, who are in error in the interpretation of the statutes.

Strict compliance with the merger provisions of Title 3, Chapter 1 of the Utah Code is not the only way that the assets of agricultural cooperatives can be consolidated. Cooperatives may use other techniques to consolidate and, in fact, many of

them did so in the 28 years which transpired between the time that the state cooperative statutes were enacted and when the merger provisions were first adopted.

Title 3, Chapter 1, does not state that its provisions are the only method of merging and does not state that non-use of its provisions is actionable. Title 3, Chapter 1, simply provides one method of merger that cooperatives can use if they so choose.

Utah Code Ann. §3-1-1, "Declaration of policy", states that "it is the declared policy of the state, as one means of improving the economic position of agriculture, to encourage the producers of agricultural products into effective associations. . . and to that end this act should be liberally construed." (emphasis added). The "declaration of policy" makes two points important to this case. First, the act is just "one" means--it is not the only means--and second, the act "encourages," it does not require.

The merger provision itself, §3-1-30, states that any cooperative "may merge with one or more agricultural cooperative associates. . . pursuant to a plan of merger approved in the manner provided by this act. . . .". §3-1-30 does not say a merger must be in the manner provided by the act, nor does it say a "merger" is the only method two entities can consolidate, sell assets, trade assets, or otherwise interact.

The legislative history of the Agricultural Cooperative Association Act, and that specifically relating to the merger

provision itself, support this conclusion.

The Utah statutes allowing for the establishment of agricultural cooperative associations were originally enacted in 1937 and have existed as part of Utah law since that time. It was not until 1965, that the Utah legislature enacted the sections of the code dealing with the merger of cooperatives. Accordingly, agricultural cooperatives existed and functioned within this state for 28 years before the statutes in question were even in existence. During that period, there undoubtedly were numerous cooperatives which consolidated with other cooperatives by transferring their assets to such cooperatives.

The provisions of §3-1-9 of the Agricultural Cooperative Association Act, which were part of the original act in 1937 and which remain as part of the current act, provide very broad powers relating to holding and transferring assets. For example, in §3-1-9(I) the Act states:

"An association formed under this Act or an association which might be formed under this Act and which existed at the time this Act took effect, shall have power and capacity to act possessed by natural persons and may do each and everything necessary, suitable or proper for the accomplishment of any one or more of the purposes, or the attainment of any one or more of the objects herein enumerated or conducive to or expedient for the interests or benefit of the association, . . ."

Subdivision (II) of this section provides that without limiting the grant of authority contained in subdivision (I)

(above), certain powers were specifically provided for each agricultural cooperative, this subdivision of the Act then contains subparagraphs (a)-(n), each containing very broadly worded language. Included in that language is the power to "sell, dispose of, pledge, or mortgage any property," (see subparagraph (f)).

The very broad powers provided in subdivision (I), as well as the specifically enumerated powers in subdivision (II), indisputably grant sufficient power to an agricultural co-op to transfer its assets. This fact is confirmed by the language of such provisions as well as by the numerous transfers which occurred in the 28 years preceding enactment of the merger section. This fact is also confirmed clearly by the legislative history, as reflected in the comments of Senator Harwood, when he presented the merger statutes on the floor of the Senate in 1965. In that presentation, he expressly stated:

"Evidently there has not been provided the means for corporations and cooperatives--agricultural cooperatives--to merge, as such, one into another without the tedious procedure of either buying assets or buying stock or some other means that sometimes makes it difficult or even impossible." (See Transcript of Legislative History, page 13).

Therefore, the enactment of the merger statutes were never intended to provide the exclusive means for consolidating cooperatives, but merely as an alternative to the "tedious procedure of buying assets." It follows, therefore, that if a

cooperative is willing to go through the procedure of transferring its assets, it is empowered to do so and the trial court properly so held.

There is no factual dispute covering whether, in the instant case, the merger statutes were followed, as Defendants admit that they were not. The transaction in question was handled by way of a transfer of assets, not as a statutory merger. Whether proper procedures were used in effecting that transfer is one of the factual issues which the trial court expressly reserved and, consequently, that issue is not before the court on this appeal.

A. In deciding an issue of first impression, the court should look not only to the legal issue itself, but to the equitable and practical effect of its decision.

The issue before the Court is one of first impression. This is apparently due to the fact that the approach of consolidating co-ops by a transfer of assets has never previously been challenged. Because the issue is one of first impression, the Court is in a position to establish the applicable law on the subject. Any time new law is established, it is appropriate to consider the equitable and practical impact of such law.

The Plaintiffs have taken a very inequitable legal position in this case. In essence, they are contending that they, as members of Cache Valley Dairy Association, should be allowed to retain the benefits of the consolidation with Western General, and the other members of IMPA, while getting back the

consideration which they gave. The inequity of the Plaintiffs' position is perhaps most graphically demonstrated by three excerpts from the deposition of Plaintiff, Gordon Zilles:

"Q. I'm going to refer you now to Exhibit 7. Want me to help you find that?

MR. DAINES: Have you them in order, Mr. Eyre?

MR. EYRE: Yes. They're in order.

MR. DAINES: I'd be happy to find them one by one as we go through this again.

THE WITNESS: Okay. I have it.

Q. (Mr. Christensen) The second paragraph from the top, apparently Mr. Rich in a memo makes the statement, "As you all know, from the standpoint of financial statements we are not in a good position." Do you know whether that was a truthful statement as of February 13, 1984?

A. That is correct.

Q. What were the financial concerns at that time as you recall them?

A. As I recall them at this time, we had just opened up a new plant, and through that year we had experienced a great deal of startup costs, starting up new equipment, making bad cheese, having to sell bad cheese at a reduced rate. All the necessary concerns that comes from putting a new facility on the line. As a result, we were really hurting at that time financially. I don't know if you would say really hurting, but we were not showing a profit that we had other years.

Q. Was this also something that from your perception made an arrangement with Western General somewhat attractive at that period?

A. The thing that made the attraction to go with, begin some discussion with Western General, was two things. One is it gave

producers like myself an opportunity to get on the A grade market. And the second thing was that the surplus milk gave us an opportunity to run it through the Cache Valley plant. Also, we felt that there was a possibility of some savings in trucking by not having to follow each other around.

Q. So some potential cost efficiencies by having one company picking up milk in the same area rather than two companies running two different sets of truck?

A. That's correct. That's correct.

Q. Did you have an understanding as to what the attraction was from Western General's side?

A. The attraction as I would understand it, and as I had talked to their directors, is they wanted the cheese plant really bad. the reason they wanted that cheese plant, is after we got into the negotiation of this I found out that they was selling cheese at three cents a pound below what Cache Valley Dairy was, which would equal to a regular farm about 30 to 40 cents. So it was very attractive to them to be able to market 40 to 50 percent of their milk through cheese through a better source." (Zilles Deposition, pages 112-114.)

Later in Mr. Zilles' deposition, he testified as follows:

"Q. Just to orient us on time frame, I'm going to refer you to the November 27, 1985 vote of the board of directors of Cache Valley Dairy. That was the one we discussed earlier. It was a 20 to one vote. You and I discussed it, concluded it was probably really a 19 to one vote. Do you know what I'm talking about?

A. Yes.

Q. That was the vote, as understood, it put the decision on whether Cache Valley, so to speak, was going to marry Western General?

A. That's correct.

Q. You expected as you voted on that and it passed, to go to the membership, that if the membership passed it that the assets of Cache Valley Dairy would end up in IMPA?

A. That's correct.

Q. And you also expected that Cache Valley Dairy would cease to function?

A. That is correct.

Q. And that the members of Cache Valley Dairy Association would, so to speak, join the IMPA family?

A. That is correct.

Q. And that henceforth, the decisions would be made by the IMPA board of directors and management?

A. That is correct.

Q. And I assume you knew that as part of that IMPA would set some prices?

A. That is correct.

Q. I assume you'd been a member of a co-op long enough to know that some of the decisions that were made you'd like and some you wouldn't like?

A. That is correct.

Q. And as of that point in time it had never crossed your mind, had it, Mr. Zilles, whether there was a legal distinction between a merger, consolidation, or transfer of assets?

A. It never crossed my mind. Never even heard of those others.

Q. All you knew was that if this thing passed, the assets of Cache Valley Dairy were going to end up by some means in IMPA?

A. That is correct.

Q. And isn't that, in fact, exactly what happened?

A. That is correct.

Q. Your contention is not with the fact that IMPA now has Cache Valley Dairy's assets, it's simply that you understand that the merger statute wasn't followed? Is that true?

A. That is true. And maybe I ought to stay that if the statute wasn't followed and it was illegal, I illegally transferred because I was the secretary. Myself and Bill Lindley.

Q. But your sole concern is how they got there, not that they're there?

A. That is correct."
(Zilles Deposition, pages 275-277.)

At the conclusion of Mr. Zilles' deposition, some summary questions were asked and he testified as follows:

"Q. (MR. CHRISTENSEN) Mr. Zilles, isn't it true that Cache Valley Dairy wanted out of this, among several things, but among those some of the major ones was an additional source of milk for their cheese plants and an access to grade A markets?

MR. DAINES: I'm going to indulge you, and I'll stipulate that the answer to that question is yes. Now, let's have something new.

THE WITNESS: Ask whatever you're leading up to. Everything you've asked so far I know I've answered three times. I can deal through my lawyer that it's probably true. What's your question? Please ask.

Q. (MR. CHRISTENSEN) I don't want you to tell me what you think your lawyer wants you to say. I want you to tell me what is true.

A. I've already answered those questions,

Mr. Christensen. Hey, you know, come on.

Q. You've personally benefitted by going Grade A, have you not?

A. That is correct.

Q. Do you have an estimate as to how many additional dollars you have realized since going grade A, that you would not have realized had you not gone grade A?

A. I have not put a pencil to that, no.

Q. It would be substantial, would it not?

A. It would be an amount of money, yes.

Q. Would it be more than \$100,000?

A. No, it would not be that much.

Q. Would it be more than \$50,000?

A. Probably less.

Q. But maybe in the range of \$50,000?

A. Somewhere around that area.

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

A. That's what we've asked.

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

A. Absolutely not.

Q. And Cache Valley Dairy no longer needs the extra supply of milk from your perception because there's now milk surplus, is that true?

A. There's plenty of milk around you.

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

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

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

Q. Do you have reason to believe that the representatives of these other co-ops didn't enter into this agreement in good faith?

A. No, I do not."
(Zilles Deposition, pages 282-284.)

It is apparent by Mr. Zilles' own admissions, that the members of Cache Valley Dairy Association received precisely what they bargained for in the consolidation. It is also apparent that the consolidation worked to their benefit. By Mr. Zilles' own admissions, their entire case is not based on substance, but merely on procedural technicalities. The Plaintiffs' current case amounts to nothing more than an attempt by a very small minority of former Cache Valley Dairy members to reap a windfall at the expense of all of the other members of IMPA, who have dealt in good faith.

It is respectfully submitted that fairness and equity should not allow such a result.

Also, to interpret the statutes as Appellants urge, would also call into question the validity of numerous other co-ops which arose from multi-cooperative consolidations. The resulting turmoil and damage would clearly not be in the public interest.

POINT IV.

THE TRIAL COURT CORRECTLY PREPARED A
MEMORANDUM DECISION AND ORDER IN
ACCORDANCE WITH UTAH RULES OF CIVIL
PROCEDURE RULE 52(a).

The court issued a memorandum decision on this case from which the order was prepared. This procedure is in direct compliance with Utah Rules of Procedure, Rule 52(a) (Addendum No. 11). Rule 52(a) requires the Court to only issue a brief statement of the grounds for its decision and its Order. The Court is not required to enter specific findings of fact and conclusions of law in addition to its written memorandum decision. Utah Rule of Civil Procedure Rule 52(a) specifically states as follows:

The trial court need not enter findings of fact and conclusions of law in ruling on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement on the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), and 56 and 59 when a motion is based on more than one ground.
(emphasis added)

Judge Christoffersen, of the First Judicial District Court, specifically followed Rule 52(a) in this matter, by issuing the brief written statement of the grounds for his decision and the Order. Specific findings of fact and conclusions of law are not required.

Findings of fact and conclusions of law are also unnecessary for the Court's denial of the class certification.


Utah Rules of Civil Procedure, Rule 23(c)(1) states: "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, may be altered or amended before the decision on the merits" (Addendum No. 12). As the Rule itself sets forth, all that is required by the Court is to enter an order as to whether the class action may be maintained. This order may thereafter be altered, or amended at anytime before the final decision on the merits. It is very debatable whether denial of the class is even an appealable order in this case. Rule 23(c)(1) specifically states that it may be altered or amended before final decision on the merits and the lower Court expressly left open the issue of damages and further findings on the merit. (For a detailed discussion of this issue, see Addendum No. 2, incorporated herewith by reference).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the decision and order of the trial court should be affirmed; or, in the alternative, that the appeal should be dismissed.

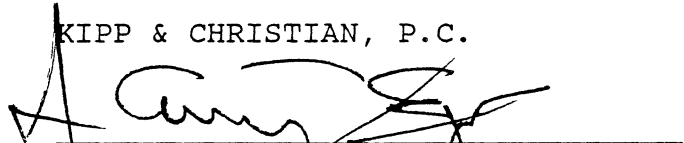
DATED this 16th day of May, 1988.

CHRISTENSEN, JENSEN & POWELL, P.C.



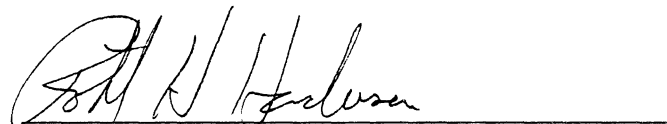
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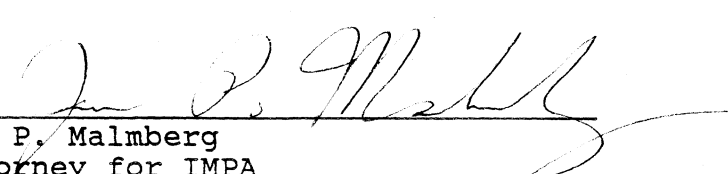
I do hereby certify that four true and correct copies of Brief of Respondents and Addendum to Brief of Respondents has been mailed, postage prepaid, addressed to the following this 16th ___ day of May, 1988:

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