BAILEY v. FLUE-CURED TOBACCO COOPERATIVE STABILIZATION CORP.,
2002 NCBC 3

NORTH CAROLINA
WILSON COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
02 CVS 448

MALCOLM L. BAILEY, individually and MALCOLM L. BAILEY d/b/a VIRGINIA CAROLINA TOBACCO WAREHOUSE, INC.; BIG THREE WAREHOUSE, INC., a Virginia corporation; SOUTH GA. GOLDEN LEAF, INC., a Georgia corporation; CAROLINA WAREHOUSE, INC., a South Carolina corporation; CAROLINA TOBACCO WAREHOUSE, INC., a South Carolina corporation; CENTER TOBACCO WAREHOUSE, INCORPORATED, a North Carolina corporation; DRAKE JOYCE; LYNCH'S TOBACCO WAREHOUSE, INC., a South Carolina corporation; NEW DUPLIN TOBACCO WAREHOUSE, INC., a North Carolina corporation; NEW INDEPENDENT WAREHOUSES, LIMITED PARTNERSHIP, a North Carolina limited partnership; PEPPER'S WAREHOUSE, INC., a North Carolina corporation; PLANTERS WAREHOUSE, a Virginia partnership; PLANTERS WAREHOUSE OF ROXBORO, INC., a North Carolina corporation; STAR-NEW HOME TOBACCO WAREHOUSE, INC., a South Carolina corporation; and W.W. (BILLY) YEARGIN, III, individually and W.W. (BILLY) YEARGIN, III d/b/a YEARGIN TOBACCO WAREHOUSE,

Plaintiffs,

v.

FLUE-CURED TOBACCO COOPERATIVE STABILIZATION CORPORATION, a North Carolina corporation; BRUCE L. FLYE, President in his official capacity; LIONEL S. EDWARDS, General Manager and Secretary in his official capacity; TRI-COUNTY TOBACCO WAREHOUSE, INC., a Georgia corporation; JAMIE A. BRANNEN d/b/a BRANNEN'S TOBACCO; PLANTERS AND GROWERS GOLDEN LEAF

WAREHOUSE, INC., a South Carolina corporation;	)
JOHNNY SHELLEY d/b/a BIG L WAREHOUSE;	)
JOEY HARDIN d/b/a PEOPLES WAREHOUSE;	)
SAMPSON TOBACCO WAREHOUSE, INC. a	)
North Carolina corporation; JOE PARKER d/b/a	)
KINSTON MARKETING CENTER; ROGER'S	)
WAREHOUSE, INC., a North Carolina corporation;	)
LIBERTY TOBACCO WAREHOUSE, INC., a	)
North Carolina corporation; KENNETH KELLY	)
d/b/a LIBERTY WAREHOUSE; ROBERT	)
BROADWAY d/b/a LIBERTY WAREHOUSE;	)
WILLIAM EDWARD STEPHENSON d/b/a	)
BRIGHTLEAF-RIVERSIDE; GRANVILLE	)
WAREHOUSE, INC., a North Carolina corporation;	)
OLD BELT FARMERS COOPERATIVE, INC., a	)
North Carolina corporation; MOTLEY'S TOBACCO	)
WAREHOUSE, INC., a Virginia corporation;	)
EXCHANGE WAREHOUSE, INC., a Virginia	)
corporation,	)
	)
Defendants.	)

ORDER AND OPINION

{1} This matter is before the court on cross motions for summary judgment and plaintiffs' request for a permanent injunction. At issue at this stage of the proceedings are two questions: (1) Is the marketing center plan adopted by the Flue-Cured Tobacco Cooperative Stabilization Corporation exempt from the North Carolina Antitrust Laws? and (2) If it is not, does it violate those antitrust laws or constitute a tortious interference with business relations? For the reasons set forth below, the court will grant defendants' motion for summary judgment and deny plaintiffs' motion for summary judgment and request for permanent injunction.

Penry Riemann, PLLC, by J. Anthony Penry; Allen & Pinnix, P.A., by Michael L. Weisel and M. Jackson Nichols, for plaintiffs.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by C. Ernest Simons, Jr., Donald H. Tucker, Jackson W. Moore and Jane R. Langdell; Rose, Rand, Orcutt, Cauley, Blake & Ellis, P.A., by David S. Orcutt, for Defendants Flue-Cured Tobacco Cooperative Stabilization Corporation, Bruce L. Flye and Lionel S. Edwards.

{2} At the outset, the court must address several concerns. One is the procedural posture of the case. It has been only 26 days since the first complaint was filed. Not all of the defendants have even answered. Limited discovery has taken place. The case was assigned to this court on March 27, 2002, the last reply brief received on April 5, 2002, and oral argument heard on April 8, 2002.

{3} Counsel have informed the court that there is an April 15, 2002 deadline by which tobacco farmers are required to designate the warehouse at which they will offer their tobacco for auction. Although the designations are subject to change under certain rules, the first designation is critical for the farmers, the warehouses and the agencies which run the federal tobacco support program. The deadlines are federally mandated, and this court lacks any authority or basis upon which to alter those deadlines in any way.

{4} The parties and their counsel have agreed to the procedure of filing cross motions for summary judgment because of the time constraints under which they are operating. It is clear to the court that the parties need a prompt decision from this court and an expedited appeal. For that reason and with the consent of counsel for all parties, the court has undertaken to address the limited but critical issues of the application of the North Carolina antitrust laws to the actions of the Flue-Cured Tobacco Cooperative Stabilization Corporation ("Stabilization" or the "Stabilization Board") and the question of whether those actions are exempt from the application of those laws. The court does so with some trepidation given the short history of the case and the differing characterizations applied to the facts by the parties. However, the court has concluded that there are sufficient undisputed facts upon which the court can determine the issues currently before it and that there is ample justification for the parties' unusual request for such expedited consideration. There are other issues in the case which will not be addressed in this order and opinion, and there may exist disputed facts which are not material to the issue of the application of the statutory exemption relied upon by the defendants.

{5} The court also notes that this is a situation where the fundamental economic structure which existed at the time specific legislation was enacted—in this case, 1921—has been

radically altered without fault of any party to this lawsuit. The court is called upon to interpret the statute under circumstances which were obviously not considered by the Legislature in adopting the statute because these circumstances simply did not exist at the time. The powers afforded to the Stabilization Board by statute inherently involve matters of public policy which lie in the purview of the Legislature. The Legislature can and should review the statute in light of these changed circumstances. Given the court's interpretation, the Legislature may amend the statute to make any changes it deems necessary to carry out its public policy. This court is not attempting to determine public policy but only to apply the statute as it currently exists to the situation before the court.

I.

{6} The court finds the following facts to be undisputed. Defendant Flue-Cured Tobacco Cooperative Stabilization Corporation is a not-for-profit organization that is owned by and serves the flue-cured tobacco farmers of Florida, Alabama, Georgia, South Carolina, North Carolina and Virginia. Stabilization is organized as a "marketing association" under North Carolina General Statutes, Chapter 54, Article 19. Its mandate under this enabling statute, first enacted in 1921, is broad: the creation of these organizations is allowed

> to promote, foster, and encourage the intelligent and orderly producing and marketing of agricultural products through cooperation, and to eliminate speculation and waste, and to make the distribution of agricultural products as direct as can be efficiently done between producer and consumer, and to stabilize the marketing problems of agricultural products . . . .

N.C.G.S. § 54-129 (2001). Further defining the scope and purpose of marketing associations—also in broad terms—is section 54-132, which provides:

> An association may be organized to engage in any activity in connection with the producing, marketing or selling of the agricultural products of its members and other farmers, or with the harvesting, preserving, drying, processing, canning, packing, storing, handling, shipping, or utilization thereof, of the manufacturing or marketing of the by-products thereof; or in connection with the manufacturing, selling, or supplying to its members of machinery, equipment, or supplies; or in

the financing of the above-enumerated activities; or in any one or more of the activities specified herein.

{7} Since its inception in 1946, Stabilization's primary function has been to administer the price component of the federal tobacco program[1] under contractual agreement with the United States Department of Agriculture's (USDA) Commodity Credit Corporation (CCC). The program was established under the Agricultural Adjustment Act of 1938 as a means to raise and stabilize tobacco prices and income. Under the program, tobacco growers agreed to restrict supply via marketing quotas in exchange for minimum price guarantees.

{8} Under the agreement with the CCC and auction warehouses, Stabilization makes loans to eligible flue-cured tobacco growers whose tobacco has been grown within the allotted quota and does not bring the minimum price established for that grade at the auction market. Funds to advance loans to farmers are borrowed from the CCC. The farmers' tobacco that is consigned to Stabilization is pledged as collateral to CCC for the money borrowed.

{9} In order to administer the price support program, the USDA requires that all tobacco that Stabilization acquires through the program be graded at auction. The grade is assigned by USDA graders who evaluate each lot of tobacco under standards according to type and quality. The USDA uses this grade to determine the price support level to apply to the tobacco. Without the grade, a price level cannot be determined, and farmers therefore are not able to take advantage of the program.

{10} The price supports made possible by the federal tobacco program provide a "safety net" for growers—the importance of which no party to this suit questions. By ensuring farmers a minimum price for their crop every year, farmers can plan, borrow and invest in their farms, thus permitting thousands of individual farmers to pursue their livelihoods with a degree of security that would otherwise not be available.

{11} For most of the past century, the primary method tobacco farmers used to sell their crops was through one of many auction warehouses located throughout the region. Recently, however, the auction warehouse system has been facing a severe challenge. Rather than designating their

crop for sale at auction, many farmers are choosing to sell their crops under contract directly to buyers, such as large tobacco companies. The reason is straightforward: Over the past two years, the price that Stabilization's cooperative members have received for tobacco sold through the auction warehouse system is approximately nine to ten cents per pound less than they would have received if they sold the same tobacco under contract outside the auction system. This price differential subsumes two components: First, the average price per pound of tobacco is approximately five cents per pound higher than that received on the auction floor. Second, the farmers must pay the warehouse operators fees and commissions that reduce the net price the farmers receive at auction by approximately five cents per pound.

{12} These higher prices available to farmers who are willing to contract directly with the buyers has impacted the traditional auction system dramatically. From 2000 to 2001 the percentage of tobacco production sold under contract to the tobacco companies increased from 10 percent to over 80 percent. (Flye Aff. ¶ 15.) Over the same period, the total number of independent warehouses in Stabilization's geographic area decreased from 147 to 67. (*Id*. at ¶ 16.) Additionally, as the amount of tobacco sold at auction diminishes, the number of USDA graders working in the auction system diminishes as well. USDA graders work in teams with buyers. The buyers and graders form only as many teams as are required by the amount of flue-cured tobacco sold at auction during any given year. USDA graders are experts in assigning one of 88 USDA-recognized grades to tobacco. A decline in buyer/grader sets means that graders must seek alternative employment. Should the need arise to hire additional graders in the future, the skilled workers would be difficult to replace. Therefore, any reduction in the number of buyer/grader sets portends a permanent decline in the auction system because even if demand for auctions were to increase, the USDA would confront a serious challenge in being able to provide the required personnel.

{13} Overall, if these grower selling patterns continue to favor direct contract sales rather than auction sales, the existence of the auction system may be threatened, and, accordingly, the continuation of the federal tobacco program price supports would also be jeopardized.

{14} Throughout most of its existence, Stabilization has had little or no involvement with the operation of tobacco auction warehouses. In 2001, however, Stabilization established a pilot program involving two warehouses, located in Wilson, North Carolina, and Statesboro, Georgia, that it would operate. According to Stabilization, the purpose of this program was to see whether Stabilization could encourage a sufficient number of its members to stay with the auction system if Stabilization took the auction "in house" for the benefit of its members. For the 2002 season, Stabilization's board of directors considered and approved a program to open fourteen new "marketing centers" in Stabilization's territory. In an effort to make these centers an economically viable option for growers who felt financial pressure to sell their crop directly under contract, Stabilization's board agreed to waive the fees and commissions normally charged by warehouse operators. In effect the Stabilization Board decided to use its cash reserve to subsidize the operation of the market centers. That subsidy directly benefited its members, who did not have to pay fees and commissions if they used the market centers.

{15} Warehouses chosen as marketing centers would be leased for five months out of the year and would not be purchased by Stabilization. The lease agreements give the lessors no rights with respect to the operation of the marketing centers. Additionally, the lessors have no involvement in the decision to charge or waive fees, and they do not participate in the profits or losses of the marketing centers. Stabilization has no obligation to renew the lease beyond the current marketing season.

{16} In accordance with its agreement with the CCC, Stabilization submitted its plan for the marketing centers to the CCC. The USDA's Office of General Counsel reviewed and approved the plan. (Flye Aff. ¶ 35.)

II.

{17} As stated above, this case centers upon application of North Carolina law governing agricultural cooperative organizations. The statutory provisions (hereinafter the "Act" or the "statute") relevant to the court's inquiry are as follows:

{18} N.C.G.S. § 54-141 (Associations not in restraint of trade):

No association organized hereunder shall be deemed to be a combination in restraint of trade or an illegal monopoly; or an attempt to lessen competition or fix prices arbitrarily, nor shall the marketing contracts or agreements between the association and its members, or any agreements authorized in this Subchapter be considered illegal or in restraint of trade.

{19} N.C.G.S. § 54-151 (Powers):

Each association incorporated under this Subchapter shall have the following powers: (1) To engage in any activity in connection with the producing, marketing, selling, harvesting, preserving, drying, processing, canning, packing, storing, handling, or utilization of any agricultural products produced or delivered to it by its members and other farmers; or the manufacturing or marketing of the by-products thereof; or in connection with the purchase, hiring, or use by its members of supplies, machinery, or equipment; or in the financing of any such activities; or in any one or more of the activities specified in this section. No such association, during any fiscal year thereof, shall deal in or handle products, machinery, equipment, supplies, and/or perform services for and on behalf of nonmembers to an amount greater in value than such as are dealt in, handled, and/or performed by it for and on behalf of members during the same period. (2) To borrow money and to make advances to members and other farmers who deliver agricultural products to the association. (3) To act as the agent or representative of any member or members in any of the above-mentioned activities. (4) To purchase or otherwise acquire, and to hold, own, and exercise all rights or ownership in, and to sell, transfer, or pledge shares of the capital stock or bonds of any corporation or association engaged in any related activity or in the handling or marketing of any of the products handled by the association, or engaged in the financing of the association. (5) To establish reserves and to invest the funds thereof in bonds or such other property as may be provided in the bylaws. (6) To buy, hold, and exercise all privileges of ownership, over such real or personal property as may be necessary or convenient for the conducting and operation of any of the business of the association, or incidental thereto. (7) To do each and everything necessary, suitable, or proper for the accomplishment of any one of the purposes or the attainment of any one or more of the objects herein enumerated; or conducive to or expedient for the interest or benefit of the association; and to contract accordingly; and in addition, to exercise and possess all powers, rights, and privileges necessary or incidental to the purposes for which the association is organized or to the activities in which it is engaged; and in addition, any other rights and powers, and privileges granted by the laws of this State to ordinary corporations, except such as are inconsistent with the express provisions of this Subchapter; and to do any such thing anywhere.

{20} N.C.G.S. § 54-152 (a) (Marketing contract):

> The association and its members may make and execute marketing contracts, requiring the members to sell, for any period of time, not over 10 years, all or any specified part of their agricultural products or specified commodities exclusively to or through the association or any facilities to be created by the association.

III.

{21} Pursuant to Rule 56(c) of the North Carolina Rules of Civil Procedure, summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law. *See* N.C. R. Civ. P. 56(c); *see also Beam v. Kerlee*, 120 N.C. App. 203, 209, 461 S.E.2d 911, 916 (1995) (recognizing that summary judgment is appropriate only when "there is no dispute as to any material fact"). The moving parties have "the burden of showing there is no triable issue of material fact." *Farrelly v. Hamilton Square*, 119 N.C. App. 541, 543, 459 S.E.2d 23, 25-26; *see also Taylor v. Ashburn*, 112 N.C. App. 604, 606, 436 S.E.2d 276, 278 (1993). In determining whether that burden has been met, the court "must view all the evidence in the light most favorable to the non-moving party, accepting all its asserted facts as true, and drawing all reasonable inferences in its favor." *Lilley v. Blue Ridge Elec. Membership Corp.*, 133 N.C. App. 256, 258, 515 S.E.2d 483, 485 (1999); *see also Murray v. Nationwide Mut. Ins. Co.*, 123 N.C. App. 1, 472 S.E.2d 358, 362 (1996). Summary judgment is proper where only questions of law exist. *Baugh v. Woodard*, 56 N.C. App. 180, 183, 287 S.E.2d 412, 413 (1982).

IV.

{22} The controlling legal issue in this case, which the parties agree needs to be determined at this stage, is whether the exemption contained in N.C.G.S. § 54-141 applies to the actions of the Stabilization Board in creating the marketing centers and, more specifically, in subsidizing the warehouse operations so that its members do not pay commissions or fees normally incurred at

auctions conducted in public warehouses such as those operated by the plaintiffs. If the exemption applies, the actions of the Stabilization Board are protected even though they might otherwise be in restraint of trade. The court believes that issue is ripe for summary judgment.

{23} Deciding that issue requires interpretation of the statutes set forth in Section II above and application of the holding of the North Carolina Supreme Court in *Tobacco Growers Cooperative Ass'n v. Jones*, 185 N.C. 265, 117 S.E. 174 (1923), the only existing appellate authority. With respect to interpretation of the statute, the court is cognizant that the exemption created by the statute is in derogation of the common law, and thus the court should be careful in its application of the statute so that it does not extend the exemption beyond that which the Legislature intended. *See Vogel v. Reed Supply Co.*, 277 N.C. 119, 131, 177 S.E.2d 273, 280 (1970). It is equally clear that where the intent of the Legislature is apparent, that intent should be given full effect. *See Burgess v. Joseph Schlitz Brewing Co.*, 298 N.C. 520, 523-24, 259 S.E.2d 248, 251 (1979).

{24} The parties are not in disagreement over the historical context in which the statute was passed. In the 1920's tobacco farmers were at the mercy of a small group of manufacturers that could control the price they paid for tobacco. Only by combining in a cooperative could the tobacco farmers protect themselves from being picked off one by one by the manufacturers. The Cooperative Marketing Act was originally passed to give the farmer producers the leverage to act in cooperation to deal with the large manufacturers. Because that authority carried with it the potential for violation of the antitrust laws, the Legislature specifically created an exemption for the farmer producers. That intent was clearly acknowledged by the Court in *Jones*. 185 N.C. at 270-71, 117 S.E.2d at 176.

{25} As appears from the undisputed facts set forth above, the market for tobacco has changed in dramatic ways since the statute was originally enacted. The exemption has never been rewritten. The court is called upon to interpret the statute in the current environment in which the parties are operating. That environment includes the dramatic shift in 2001 from auction to contract purchasing by the still limited number of manufacturers of tobacco products. There is a

legitimate disagreement between the parties over the question of whether the trend to contract purchasing will ultimately result in the complete elimination of the auction system. There is no dispute for purposes of these motions that the threat of the elimination of the auction market is real and that the Stabilization Board was acting in response to that threat. Nor is there any dispute that the elimination of the auction market could result in potentially fatal damage to the federal tobacco price support program and significant disruption to the available market for many small farmers in rural areas of this and other states. The result would leave the small farmer with no auction system and at the mercy of the still limited number of potential purchasers. Nor has the threat of price fixing by those manufacturers disappeared since 1921.[2]

{26} It is equally important to look at what is not involved here. There are no allegations that the Stabilization Board is attempting to manipulate the price of tobacco. Indeed, it is probably impossible for them to do so under the present system. Nor is there any dispute that the motivation of the Stabilization Board is to assist its members. The members are the beneficiaries of the subsidy that eliminates the auction warehouse commissions and fees, and it is the members' money that is providing that subsidy. It is also clear that there is no prospect that the Stabilization Board is eliminating the competition from other warehouses for the purpose of or with the intent to subsequently raise the fees and commissions to artificially high prices. The Stabilization Board is controlled by its members, who would not tolerate such a situation. Also, Stabilization is a nonprofit corporation that would be prohibited from making a profit from such activity. Thus, the use of monopoly power to artificially raise the price of either tobacco or the commissions and fees paid at auction by tobacco farmers is not an issue here.

{27} Against this background the court begins a detailed look at the language of the statute. The pertinent part of N.C.G.S. § 54-141 for this case is the language which reads: "nor shall the marketing contracts or agreements between the association and its members, or any agreement authorized in this Subchapter be considered illegal or in restraint of trade." Plaintiffs contend that this exemption does not apply for several reasons. First, they contend that there is no contract between the Stabilization Board and its members and that a contract is a prerequisite to

claiming the exemption. That reading of the words of the statute is too narrow. The statute refers to "agreements" as well as contracts—evidencing the intent to exempt not only the contracts which were used in the early 1920's as described in the *Jones* case, but also other arrangements between the cooperative and its members to permit the members to act together to market their products on a level playing field with the manufacturers. The Board has agreed with its members to use their money to subsidize their use of the auction markets by establishing commission-free market centers. It is that subsidy which is at the core of plaintiffs' complaint and is the source of their problem. The subsidy is the draw to the Stabilization market centers and the price differential that makes the remaining public warehouses noncompetitive with those market centers. The Stabilization Board has not agreed with anyone other than its members to provide that subsidy.

{28} The exemption also extends to "any agreements authorized in this Subchapter." N.C.G.S. § 54-141. That provision requires the court to examine the powers conferred on the Stabilization Board by section 54-151. If the Stabilization Board is granted specific powers, it may, within the exemption, enter into agreements to exercise those powers. In subparagraph (1), the Board is authorized to engage in any activity in connection with the *marketing, selling*, processing, storing and handling of any agricultural products *produced or* delivered to it by its members. Plaintiffs contend that the Stabilization Board may only act with respect to product delivered to it. The language emphasized above clearly authorizes the Board to act with respect to the marketing or sale of agricultural products produced by its members. The authority is not limited to delivered product in the possession of the Board. Such an interpretation would not make sense because the only tobacco the Board ever takes possession of is that tobacco which it purchases under the federal price support program. Plaintiffs' interpretation would divest the Board of any power to act with respect to tobacco offered for sale by its members and purchased by manufacturers at auction. The Act was passed to provide leverage and assistance to farmer producers in that precise buy-sell relationship.

{29} Other provisions of section 54-151 are relevant as well. Subparagraph (3) authorizes the Board to act as agent or representative of any member or members in any of the above-mentioned activities. Subparagraph (6) authorizes the Board to acquire or hold an interest in such real estate and personal property as may be necessary or convenient for the operation or conduct of any business of the Board. If the specific powers enumerated above do not cover the activities of the Board in establishing the marketing centers, the catchall authorization in subparagraph (7) does. That subparagraph provides the Board with the power "[t]o do each and everything necessary, suitable, or proper for the accomplishment of any one of the purposes or the attainment of any one or more of the objects herein enumerated; or conducive to or expedient for the interest or benefit of the association; *and to contract accordingly*. . ." (emphasis added).

{30} It is difficult to conceive of a broader authorization of power. The language highlighted above from subparagraph (7) makes it clear that the Act was intended to authorize the Board to enter into any contract necessary or convenient to achieve the purpose of the Act. Thus, plaintiffs' contention that the Board could not contract with third parties to do what the Board itself could do is not supported by the language of the statute. The Board is authorized under section 54-151 to provide commission-free warehouse services for its members and may contract with others in order to provide those services.

{31} Further authority is found in N.C.G.S § 54-152. Under that section, the Stabilization Board is authorized to make marketing contracts which require its members to sell their products "exclusively to *or through* the association or *any facilities to be created by the association*." (emphasis added). Such marketing contracts were common when the Act was passed and were specifically upheld in *Jones*. For purposes of this case, the authority granted in section 54-152 is significant because it grants powers greater than those actually exercised by the Board in establishing the market centers. This section would authorize the Board to require its members to sell their product at Board-established warehouses. Here the Board will only make an opportunity available to its members to get a subsidized transaction if they use a Board market center. If the Board could require its members to use only Board warehouses, the statute clearly

contemplated that the Board could take action which would eliminate public warehouses for all intents and purposes and exempt such an action from the antitrust laws. If the action taken to establish the market centers has the same effect, it is covered by the exemption as well.

{32} In summary, the court finds that the clear language of the statute permits the Stabilization Board to operate its own market centers and to do so without charging its members a commission or fee. It is also clear from the statutory grant of power that the Stabilization Board is free to contract with third parties to do those things which its could do on its own. Such contracts are covered by the exemption.

{33} The court next turns to a consideration and application of the North Carolina Supreme Court's interpretation of the Act in *Tobacco Growers Cooperative Ass'n v. Jones*. The *Jones* case is factually distinguishable in that it dealt with enforcement of the cooperative's right to compel its members to enter into marketing contracts pursuant to which their product had to be sold to the cooperative. There is no such marketing contract at issue here. Although factually distinguishable, *Jones* is controlling legal authority on two critical points pertinent to this case. First, it upheld the constitutionality and validity of the Act. If that determination is to be changed, the Supreme Court must do so. Second, it provided guidance on the analysis courts should use in applying the exemption provided by the statute. That guidance makes it clear that where the cooperative action taken is designed to secure a fair and adequate price for the farmer producer and not to secure a monopoly in the farmer's product, the exemption should apply. The decision implies that the courts should look to determine the real party in interest in the transaction. If the transaction is designed to permit the members to act in a cooperative way to market their products so that they might combat the economic leverage of a limited number of purchasers and if the members are the real parties in interest or beneficiaries of the cooperative action, the action falls within the exemption. The decision also makes it clear that where the cooperative uses its own money to provide services that might be supplied by others for a profit, including public warehouses, the exemption applies. The following quotations from the opinion are pertinent here:

> The enemies of the cooperative system would be delighted if the courts were to hold that a cooperative association is not permitted to use its own money in establishing warehouses, prize houses, redrying and processing plants, and were forced to depend for these facilities upon such terms as the association could make with its competitors. The latter would be in the position of an army well armed, meeting in battle another army with no arms at all.
>
> The cooperative association is merely granted by the statute the privilege of building or constructing the necessary instrumentalities for carrying out the purposes of the association, and of using its own money therefor, under terms and conditions specified in the contract and agreed to by all its members. The cooperative marketing system has justified itself.
>
> . . . .
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> In this record there is no averment in the complaint or provision in the contract disclosing that appellant, by reason of the pool, proposed to sell the tobacco of appellee for a sum greater than its true and actual value, and all presumptions will be indulged in favor of the legality of the contract, and such presumption will only yield when its illegal character plainly appears. It may be well admitted that the statute under which the plaintiff association was organized was enacted by the Legislature to empower the tobacco farmers in this State to protect themselves against the restraint of trade in a market which was controlled by a trust of tobacco manufacturers, and had been so controlled for many years. There is no other motive or purpose that can be suggested. The purpose of the combination of the farmers joined in this association does not appear to be, in the language of the Indiana decision, "Other than to secure a fair and adequate price for the growers' product. We think such acts could not be held to be in conflict with the morals of the time or to contravene any established interest of society. Public policy does not ask that those who till the soil shall take less than a fair return for their labor. Public policy safeguards society from oppression; it is not an instrument of oppression."

{34} The *Jones* opinion not only upholds the constitutionality of the statute but also expressly permits cooperatives to provide to their members services which have a negative impact on for-profit providers of the same services. It held:

> Naturally the cooperative movement among the farmers has aroused the opposition of the financial combinations from whose unlimited power in fixing prices the farmers are seeking to free themselves, and also among some of the owners of the public warehouses, who are more or less allied with the big buyers . . . . Besides, the establishment of their own warehouses by the cooperative associations will curtail the profits of the public warehouse business.

185 N.C. at 284, 117 S.E. at 183 (citation omitted).

{35} Additionally, plaintiffs have submitted to the court several cases decided under the Capper-Volstead[3] and Clayton Acts,[4] two federal antitrust statutes. Though no federal antitrust claim is at issue in this case, plaintiffs present these cases as instructive in determining the application of the North Carolina antitrust exemption for farmers at the center of the present case.

{36} After reviewing these cases and considering plaintiffs' arguments, the court finds analogy to these cases to be misplaced. The cases cited interpreting the Capper-Volstead Act involve antitrust concerns not at issue in this case. Each of those cases involved an attempt by a cooperative to exercise monopolistic control over the supply or output of the commodity in question.[5] In the present case, plaintiffs have not alleged that Stabilization established its marketing centers in an attempt to manipulate the supply of tobacco. Stabilization's decision to make warehouse services available to its members on a cost-free basis does not affect the overall supply of tobacco sold in the market, nor does it give Stabilization any control over the third-party purchasers who buy at auction or the prices they may offer.

{37} The court has also considered plaintiffs' assertions that the Stabilization Board has lost its exemption by virtue of the fact that its membership includes some people who are not now active farmer producers, citing a case involving application of federal statutory exemptions.[6] The North Carolina statutory scheme is different from the federal statutes applied in the authority cited by plaintiffs. Membership is determined based upon status at the time the original share was obtained, but voting rights are restricted to active farmer producers, thus insuring that no non-farmer producers can control or benefit from the Stabilization Board's actions.

{38} Finally, the Court turns to a consideration of plaintiffs' argument that the Stabilization Board has conspired with the owners and operators of the 14 locations where market centers will be operated to create a monopoly in the provision of tobacco auction warehouse services. The simple answer is that the exemption plainly permits the Stabilization Board to provide services to its members that they might otherwise obtain from for-profit providers, even if such provision causes the for-profit providers to go out of business. The statute evidences a clear public policy,

admittedly adopted in 1921 but not altered since, that permits the Stabilization Board to take the action it proposes on behalf of its members. The action taken—elimination of costs, as opposed to action to increase the price of the product—is permissible under the statute. If the public policy embodied in the statute is to be changed, it is up to the Legislature to enact amendments to the statute.

{39} The troublesome aspect of the current environment is that contracting already threatens the viability of auction warehouses, and the provision of auction warehouse services for free to Stabilization members at the market centers further destabilizes the condition of the remaining public warehouses.[7] It does not require an extensive background in finance to understand what choice farmers will make when given the option of selling their tobacco at the market center with no commissions or fees charged and selling at a public warehouse and paying commissions and fees in excess of five cents a pound. There exists the possibility, if not the probability, that the market centers will be left as the only sites for public auction of tobacco in the current environment. That eventuality must be weighed against the eventuality that if the Stabilization Board does not act, no market for tobacco auction services will exist at all.

{40} Plaintiffs are both angered and envious of the warehouse owners who have been selected as contracting parties with the Stabilization Board. Plaintiffs argue that if the market should ever turn around and public warehouses become economically viable again, those warehouses chosen by the Stabilization Board will be the only ones left to benefit from that market and will thus have monopoly power. No one can predict if that will happen or what the new environment might look like. The court must make its decision based upon the undisputed current reality. The parties have differed over the characterization of the contractual arrangements between the Stabilization Board and the owners of warehouses where market centers will be located. Plaintiffs deem them "sweetheart deals" for friends of Board members. The Board characterizes them as arm's length negotiated deals for the best facilities for use by its members spread over an adequate geographical base. The court finds that all the relevant facts are before it and that the differing characterizations of the agreements do not prohibit entry of summary judgment on the

issue of the application of the exemption. Because the court has determined that the members are the real parties in interest and beneficiaries of the subsidy provided from their funds and that the Stabilization Board is empowered to contract with third parties to accomplish its plan, the court need not make any determination concerning precise details of the lease agreements or service contracts. The fact that those who have been chosen are compensated for use of their warehouse space, for the services they provide and for passing up other business opportunities is not unusual. The exercise of business judgment by the management of the Stabilization Board in entering into those agreements and profitability of those agreements to the warehouse owners are not material to the issues to be determined at this stage.

{41} The plaintiffs' position was simply stated by their counsel at the conclusion of oral argument. They believe that the tobacco farmers have only two choices. They can sell on contract directly to the manufacturers or, if they wish to protect themselves from the tobacco manufacturers, they can sell at auction in public warehouses where they must pay commissions and fees. The court believes that they have the third option of using their own funds to provide auction services to themselves for free. The goals of the market center program are to insure the survival of the auction market and the federal price support system upon which so many small farmers depend. The Stabilization Board may contract with third parties to accomplish those goals.

{42} Finally, the court concludes as a matter of law that the plaintiffs have not been deprived of any protectible property rights without due process of law in violation of Article I, section 19 or Article I, section 34 of the North Carolina Constitution. *See Jones*, 185 N.C. at 271-85, 117 S.E. at 177-83.

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{43} Since the court has determined that the exemption applies, it is not necessary to determine if the actions of the Stabilization Board violate antitrust laws. Application of the exemption also defeats plaintiffs' claims for tortious interference with business relations. Since

the Stabilization Board is acting in furtherance of sound public policy, on behalf of its members' business interests and in a manner permitted by statute, it could not tortiously interfere with the plaintiffs' business relations with Stabilization's own members.

{44} IT IS THEREFORE ORDERED, ADJUDGED and DECREED that defendants' motion for summary judgment is granted, and plaintiffs' motion for summary judgment and request for permanent injunction are denied.

This the 10th day of April 2002.

Ben F. Tennille
Special Superior Court Judge
for Complex Business Cases

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[1] *See* 7 U.S.C. §§ 511, 723, 1311-1316, and 1445 (setting forth the legal requirements and authority for the federal tobacco program).

[2] *See Deloach v. Philip Morris Companies, Inc*., No. 1:00CV01235 (M.D.N.C. April 3, 2002) (order granting class certification in a suit alleging price fixing at tobacco auctions by the major cigarette manufacturers).

[3] 7 U.S.C. § 291.

[4] 15 U.S.C. §§ 12-27.

[5] *See, e.g., National Broiler Marketing Ass'n v. United States,* 436 U.S. 816 (1978); *Case-Swayne Co., Inc. v. Sunkist Growers, Inc.,* 389 U.S. 384 (1967); *Maryland & Virginia Milk Prod. Assoc. v. United States,* 362 U.S. 458 (1960); *United States v. Borden Co.,* 308 U.S. 188 (1939).

[6] *See Case-Swayne Co. v. Sunkist Growers, Inc.,* 389 U.S. 384 (1967).

[7] It should be noted that the Bright Belt Warehouse Association, Inc., a trade association of independent tobacco warehouse owners to which some of the plaintiff warehouse owners belong, sent a letter to Stabilization affirming that "Bright Belt Warehouse Association is not involved in any endeavor to bring a lawsuit against Stabilization and is not responsible for, or party to, any such litigious action brought forth by any individual warehouse member." Letter from Terry C. Campbell, Managing Director, Bright Belt Warehouse Association, Inc. to Lionel Edwards, General Manager, Flue-Cured Tobacco Cooperative Stabilization Corporation (March 11, 2002) (submitted to the court with defendants' supporting materials).