

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,
Department of Justice
Antitrust Division
325 7th Street, N.W.,
Washington, D.C. 20530,
Plaintiff,

v.

EASTERN MUSHROOM MARKETING
COOPERATIVE, INC.
649 West South Street
Kennett Square, Pennsylvania 19348
Defendant.

CIVIL CASE NO.: 2:04-CV-5829

JUDGE Thomas N. O'Neill, Jr.

DATE STAMP: 12/16/2004

COMPLAINT

The United States of America, acting under the direction of the Attorney General, brings this antitrust action against Eastern Mushroom Marketing Cooperative, Inc. (“EMMC”), the nation’s largest mushroom cooperative, to enjoin it and its members from purchasing or leasing mushroom farms and shutting them down.

I.

SUMMARY OF CLAIMS

1. Each year, American consumers spend over \$800 million on mushrooms. EMMC members accounted for over 60 percent of those sales during the 2001-2002 growing season.

2. The EMMC is organized pursuant to the Capper-Volstead Act (“Capper-

Volstead”), 7 U.S.C. §291 *et seq.* Under Capper-Volstead, farmers have a limited immunity from the antitrust laws to act together voluntarily in “collectively processing, preparing for market, handling, and marketing” their products, and “may make the necessary contracts and agreements to effect such purposes.” Capper-Volstead provides no immunity, however, for cooperative members to conspire to prevent independent, nonmember farmers from competing with the cooperative or its members.

3. Between May 2001 and August 2002, the EMMC conducted a “Supply Control” campaign to prevent nonmember farmers from buying or leasing certain of the very few available mushroom farms. The purpose of this campaign was to prevent nonmember farmers from competing with EMMC and its members.

4. Starting in May 2001, the EMMC bought four mushroom farms in the eastern United States with annual combined growing capacity of approximately 29 million pounds. The EMMC then resold the four properties at a combined total loss of over \$1.2 million and placed permanent deed restrictions on the properties at the time of each resale. The deed restrictions all prohibited the conduct of any business related to the growing of mushrooms. For example, one deed restriction reads:

This property shall never be used for the cultivation, growing, marketing, sale or distribution of fresh mushrooms, canned and/or processed mushrooms or related endeavors.

No mushrooms have been grown on these properties since they were resold by the EMMC.

5. In February and August 2002, the EMMC purchased lease options, at a cost of over one million dollars, on two additional mushroom farms with a combined annual growing

capacity of approximately 14 million pounds. The lease options allowed the EMMC to file deed restrictions on the two properties prohibiting the use of the properties for any business related to growing mushrooms for a period of ten years. The EMMC never entered into leases on these farms, but did file the deed restrictions. No mushrooms have been grown on these properties since the deed restrictions were filed by the EMMC.

6. The EMMC touted the success of the Supply Control campaign to its membership, claiming it had “[a]nnually taken over 50 million pounds out of production from facilities which could have easily been purchased and remained in production.”

7. The agreement among the EMMC members to restrict, forestall, and exclude competition from nonmember farmers is an unreasonable restraint of trade in violation of Section 1 of the Sherman Act. As a result of the EMMC’s violations, the acreage and facilities available to produce mushrooms for American consumers was artificially reduced, and consumers were deprived of the benefits of competition.

II.

JURISDICTION AND VENUE

8. This Complaint is filed and this action is instituted under Section 15 of the Clayton Act, 15 U.S.C. § 25, in order to prevent and restrain the defendant from violating Section 1 of the Sherman Act, 15 U.S.C. § 1.

9. The Defendant is an agricultural cooperative whose members are engaged in the production and sale of fresh market mushrooms in interstate commerce. The Defendant’s members’ activities in the production and sale of mushrooms substantially affect interstate commerce. The Court has subject matter jurisdiction over this action pursuant to 28 U.S.C.

§§ 1331, 1337(a) and 1345.

10. The Defendant has consented to personal jurisdiction and venue in this judicial district.

III.

THE DEFENDANT

11. The EMMC began operations in January 2001, and is the largest mushroom cooperative in the United States. The EMMC is incorporated in the Commonwealth of Pennsylvania and is headquartered in Kennett Square, Pennsylvania. The members of the EMMC grow, sell, and ship mushrooms to retail and food service outlets across the United States. During the 2001-2002 growing season, the EMMC had approximately 19 members with control of more than 500 million pounds of mushrooms valued in excess of \$425 million.

IV.

TRADE AND COMMERCE

12. Agaricus mushrooms are the common table variety, accounting for the vast majority of mushrooms grown and sold in the United States. In 2002, domestic sales of all mushrooms were over \$800 million.

13. Mushrooms are grown on farms, usually in one-story windowless cinder block buildings called “doubles.” Doubles are kept cool and dark at an optimum ground temperature of 64 degrees year round. Mushrooms are grown in stacks of beds, usually six beds to a stack and 24 beds to a double. The growing process takes approximately eight weeks to harvest from the introduction of mushroom seed, or “spawn” into the growing medium, usually compost. Once

harvested, mushrooms are usually kept in refrigerated storage on the farms until packaged and shipped in refrigerated trucks to customers.

14. Agaricus mushrooms of better quality are sold to fresh market retailers such as grocery store chains and food distributors. Lesser quality agaricus mushrooms are often sold to canneries. The majority of the agaricus mushrooms grown by EMMC members are sold to the fresh market.

15. According to the U.S. Department of Agriculture, approximately 66 percent of the domestic agaricus mushrooms grown in the United States are grown in the eastern United States, with 55 percent grown in Pennsylvania. Fresh market mushroom prices historically have been lowest in the east, and some fresh mushrooms grown in the eastern United States are shipped west.

V.

ANTICOMPETITIVE EFFECTS

16. In January 2001, shortly after its formation, the EMMC and its members agreed to set increased minimum prices at which they would sell fresh mushrooms in six different geographic regions, covering the entire continental United States. The minimum prices they agreed to were higher, on average, than the prices prevailing in those regions prior to the EMMC's formation. The price increases averaged about 8 percent nationwide.

17. The EMMC controlled over 60 percent of all agaricus mushrooms grown in the United States during the 2001-2002 growing season and approximately 90 percent of all agaricus mushrooms grown in the eastern United States during the same growing season.

18. Within three months of instituting its price increases, the EMMC launched a campaign to control the mushroom supply by acquiring and subsequently dismantling non-EMMC mushroom growing operations in the eastern United States. The campaign was planned to include the purchase of mushroom farms in other regions of the country as well. The EMMC's objective was to reduce overall mushroom supply as a means to support its price increases of early 2001.

19. Through membership dues and a "Supply Control Assessment" the EMMC collected approximately six million dollars from its members during 2001-2002. EMMC then spent approximately three million dollars to purchase four mushroom farms and to acquire lease options on two additional mushroom farms in the eastern United States for the purpose of shutting them down and reducing the mushroom production capacity available for nonmembers to grow mushrooms in competition with the EMMC.

20. In May 2001, the EMMC purchased a farm in Dublin, Georgia at a bankruptcy auction. The Dublin farm had an annual mushroom production capacity of approximately eight million pounds. At the auction, the EMMC outbid a nonmember mushroom grower based in Colorado that was attempting to enter mushroom farming in the eastern United States in competition with EMMC. Three months later, the EMMC entered into a land exchange with a land developer not connected to the mushroom industry, in which the EMMC exchanged the Dublin farm for another mushroom farm consisting of two parcels in Evansville, Pennsylvania, plus cash. As part of the exchange, the EMMC placed a permanent deed restriction on the Dublin farm prohibiting the conduct of any business related to the growing of mushrooms. The EMMC

lost approximately \$525,000 on the Dublin farm purchase and exchange transactions.

21. Within three months of the Dublin farm/Evansville land exchange, the EMMC sold the largest parcel of the Evansville, Pennsylvania farm to a third party, with a permanent deed restriction prohibiting the conduct of any business related to the growing of mushrooms. Less than a year later, the EMMC sold the second parcel with the same permanent deed restriction. The two parcels making up the Evansville, Pennsylvania farm, with an annual mushroom growing capacity of 15 million pounds, were sold at a collective loss of \$137,000.

22. In January 2002, the EMMC purchased Gallo's Mushroom Farm ("Gallo's), in Berks County, Pennsylvania. Gallo's had an annual mushroom growing capacity of two million pounds. Less than four months later, the EMMC sold Gallo's at a loss of \$77,500 with a permanent deed restriction prohibiting the conduct of any business related to the growing of mushrooms.

23. In February 2002, the EMMC agreed to pay one million dollars to the owners of Ohio Valley Mushroom Farms for, among other things, a non-compete agreement, a right of first refusal to lease the mushroom growing operations, a right of first refusal to purchase the properties, and the right to record a deed restriction prohibiting the conduct of any business related to mushroom growing on the property for ten years. The EMMC did not lease or purchase the property, but filed the deed restriction on the Ohio Valley Farm, which had recently been operated as a mushroom growing concern with annual capacity of nine million pounds.

24. In March, 2002, the EMMC purchased the La Conca D'Oro mushroom farm in Berks County, Pennsylvania. The La Conca D'Oro farm had an annual production capacity of

approximately five million pounds. The EMMC sold the farm and the mushroom-growing equipment on the farm approximately three months later at a loss of \$500,000. Like the other EMMC-acquired properties, this land was sold with a deed restriction prohibiting anyone from conducting any business related to the growing of mushrooms on the property.

25. In August 2002, the EMMC purchased a ten-year lease option on the Amadio Farm in Berks County, Pennsylvania for \$230,000. The Amadio Farm had an annual mushroom production capacity of approximately five million pounds. The owner of the property agreed with the EMMC to the filing of a deed restriction on the property prohibiting anyone other than the EMMC from conducting any business related to the growing of mushrooms for ten years. EMMC never entered into a lease on the property.

26. As a result of the deed restrictions placed by the EMMC on these six mushroom farms in the eastern United States, the EMMC removed more than 42 million pounds of annual growing capacity from that region, or approximately 8 percent of the total capacity in the eastern United States.

27. The EMMC's purpose in entering into the purchase and lease transactions was to reduce or eliminate the agaricus mushroom growing capacity available to potential independent competitors in the eastern United States, thereby improving the ability of its members to maintain the price increases to which they had agreed.

28. Depending on the size and location, building a new mushroom growing and production facility costs millions of dollars and generally requires zoning approval. Building a new facility takes much longer to generate any revenue than purchasing or leasing an existing

growing operation. By eliminating the existing available productive capacity, the EMMC effectively forestalled competitive entry by at least 18 months.

VI.

CAPPER-VOLSTEAD

29. The EMMC was formed pursuant to the Capper-Volstead Act. Congress enacted the Capper-Volstead Act to improve the bargaining power of individual farmers when dealing with the corporate purchasers of their products by allowing farmers to act collectively without violating the antitrust laws. Under the Capper-Volstead Act, farmers in a cooperative may collectively market their crops, including jointly setting prices, but they may not engage in exclusionary practices, monopolize trade or suppress competition with the cooperative.

VII.

VIOLATIONS ALLEGED

30. Fresh agaricus mushrooms is a relevant product market within the meaning of Section 1 of the Sherman Act, 15 U.S.C. § 1. The eastern United States is a relevant geographic market within the meaning of Section 1 of the Sherman Act.

31. The Supply Control campaign adopted and implemented by the EMMC constitutes a conspiracy in unreasonable restraint of trade to prevent, forestall and restrict competition from independent mushroom producers in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

32. To form and effectuate this conspiracy, EMMC and its members did the following things, among others:

- a. collectively funded the Supply Control campaign;

- b. sold four properties with permanent deed restrictions forbidding the conduct of any business related to the production of mushrooms;
- c. entered agreements with nonmembers to place deed restrictions on two properties for which the cooperative purchased lease options; and
- d. filed deed restrictions on the two lease-optioned properties prohibiting the conduct of any business related to the production of mushrooms for ten years.

33. The Supply Control campaign is not a joint activity protected by the exemption from the antitrust laws created by the Capper Volstead Act, 7 U.S.C. §291, *et seq.*

34. Unless the deed restrictions are voided and similar transactions are restrained in the future, the EMMC's violations likely will have the following effects, among others:

- a. competition generally in fresh market agaricus mushrooms in the eastern United States will be restrained;
- b. actual and potential competition between the cooperative's members and other mushroom farmers will be prevented, forestalled and restricted;
- c. acreage and facilities available to produce mushrooms in the eastern United States will be artificially reduced; and
- d. consumers will be deprived of the benefits of competition.

VIII.

REQUESTED RELIEF

WHEREFORE, Plaintiff requests:

1. That the deed restrictions the EMMC placed on the six properties identified above be adjudged and decreed to be unlawful and in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.
2. That the Defendant and all persons acting on its behalf be permanently enjoined and restrained from enforcing the deed restrictions on the above-mentioned properties and from entering into or carrying out any contract, agreement, understanding, or plan, the effect of which would be to limit, forestall or prohibit the conduct of any business related to the growing of mushrooms on any property in the United States;
3. That the Defendant be ordered to file appropriate documents in the land records of each jurisdiction in Georgia, Pennsylvania and Ohio where the EMMC previously filed deed restrictions, to nullify the recorded deed restrictions that had the effect of prohibiting the conduct of business related to the cultivation, growing, production or marketing of mushrooms; and

4. That Plaintiff have such other relief as the Court may deem just and proper.

Respectfully submitted,

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December 16th, 2004