

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) AMA WRPA Docket No. 01-0001
)
Red Hawk Farming & Cooling,)
)
Petitioner) **Decision and Order**

PROCEDURAL HISTORY

Red Hawk Farming & Cooling [hereinafter Petitioner] filed a Second Amended Petition [hereinafter Petition] on January 3, 2002. Petitioner filed the Petition under the Watermelon Research and Promotion Act, as amended (7 U.S.C. §§ 4901-4916) [hereinafter the Watermelon Research and Promotion Act]; and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Research, Promotion and Information Programs (7 C.F.R. §§ 900.52(c)(2)-.71, 1200.50-.52).

Petitioner alleges the National Watermelon Promotion Board's assessments, interest, and penalties imposed on Petitioner and used to advertise and promote watermelons violate the First Amendment to the Constitution of the United States. Petitioner seeks an exemption from assessments, interest, and penalties imposed by the National Watermelon Promotion Board. (Pet. at 2.)

On January 22, 2002, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed Respondent's Answer in which Respondent denies the material allegations of the Petition and raises three affirmative defenses: (1) the Petition fails to state a claim upon which relief can be granted; (2) the Watermelon Research and Promotion Act and the plan and regulations issued under the Watermelon Research and Promotion Act (7 C.F.R. pt. 1210), as promulgated and applied, are constitutional under the doctrine of government speech; and (3) the Watermelon Research and Promotion Act and the plan and regulations issued under the Watermelon Research and Promotion Act (7 C.F.R. pt. 1210), as promulgated and applied, are constitutional under the standards in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), and *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990) (Respondent's Answer).

On March 12 and 13, 2002, and January 23, 2003, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] presided over a hearing in Phoenix, Arizona. Charles E. Buri, Friedl, Richter & Buri, P.A., Scottsdale, Arizona, represented Petitioner. Gregory Cooper and Frank Martin, Jr., Office of the General Counsel, United States Department of Agriculture, represented Respondent.¹

On March 28, 2003, Petitioner filed Petitioner's Proposed Findings of Fact and Conclusions of Law and Order and Petitioner's Opening Brief. On April 30, 2003,

¹Gregory Cooper withdrew as counsel for Respondent effective March 18, 2002 (Notice of Appearance filed March 18, 2002).

Respondent filed Respondent's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof. On May 19, 2003, Petitioner filed Petitioner's Reply Brief.

On August 23, 2005, the ALJ issued a Decision [hereinafter Initial Decision] concluding watermelon advertising and promotion authorized by the Watermelon Research and Promotion Act are government speech and denying Petitioner's Petition (Initial Decision at 1, 13).

On September 20, 2005, Petitioner appealed to the Judicial Officer. On September 27, 2005, Respondent filed a response to Petitioner's appeal petition. On October 5, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I adopt, with minor modifications, the ALJ's Initial Decision as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's conclusions of law, as restated.

Petitioner's exhibits are designated by "PX." Respondent's exhibits are designated by "RX." The transcript is divided into three volumes, one volume for each day of the 3-day hearing. References to "Tr. I" are to the volume of the transcript that relates to the March 12, 2002, segment of the hearing; references to "Tr. II" are to the volume of the transcript that relates to the March 13, 2002, segment of the hearing; and references to "Tr. III" are to the volume of the transcript that relates to the January 23, 2003, segment of the hearing.

**APPLICABLE CONSTITUTIONAL, STATUTORY,
AND REGULATORY PROVISIONS**

U.S. Const.

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

7 U.S.C.:

TITLE 7—AGRICULTURE

.....

CHAPTER 80—WATERMELON RESEARCH AND PROMOTION

§ 4901 Congressional findings and declaration of policy

(a) Congress finds that—

(1) the per capita consumption of watermelons in the United States has declined steadily in recent years;

(2) watermelons are an important cash crop to many farmers in the United States and are an economical, enjoyable, and healthful food for consumers;

(3) approximately 2,607,600,000 pounds of watermelons with a farm value of \$158,923,000 were produced in 1981 in the United States;

(4) watermelons move in the channels of interstate commerce, and watermelons that do not move in such channels directly affect interstate commerce;

(5) the maintenance and expansion of existing markets and the establishment of new or improved markets and uses for watermelons are vital to the welfare of watermelon growers and those concerned with marketing, using, handling, and importing watermelons, as well as the general economic welfare of the Nation; and

(6) the development and implementation of coordinated programs of research, development, advertising, and promotion are necessary to maintain and expand existing markets and establish new or improved markets and uses for watermelons.

(b) It is declared to be the policy of Congress that it is essential in the public interest, through the exercise of the powers provided herein, to authorize the establishment of an orderly procedure for the development, financing (through adequate assessments on watermelons harvested in the United States, or imported into the United States, for commercial use), and carrying out of an effective, continuous, and coordinated program of research, development, advertising, and promotion designed to strengthen the watermelon's competitive position in the marketplace, and establish, maintain, and expand domestic and foreign markets for watermelons. The purpose of this chapter is to so authorize the establishment of such procedure and the development, financing, and carrying out of such program. Nothing in this chapter may be construed to dictate quality standards nor provide for the control of production or otherwise limit the right of individual watermelon producers to produce watermelons.

§ 4903. Issuance of plans

To effectuate the declared policy of this chapter, the Secretary shall, under the provisions of this chapter, issue, and from time to time may amend, orders (applicable to producers, handlers, and importers of watermelons) authorizing the collection of assessments on watermelons under this chapter and the use of such funds to cover the costs of research, development, advertising, and promotion with respect to watermelons under this chapter. Any plan shall be applicable to watermelons produced in the United States or imported into the United States.

§ 4905. Regulations

The Secretary may issue such regulations as may be necessary to carry out the provisions of this chapter and the powers vested in the Secretary under this chapter.

§ 4906. Required terms in plans

(a) Description of terms and provisions

Any plan issued under this chapter shall contain the terms and provisions described in this section.

(b) Establishment and powers of National Watermelon Promotion Board

The plan shall provide for the establishment by the Secretary of the National Watermelon Promotion Board and for defining its powers and duties, which shall include the powers to—

- (1) administer the plan in accordance with its terms and conditions;
- (2) make rules and regulations to effectuate the terms and conditions of the plan;
- (3) receive, investigate, and report to the Secretary complaints of violations of the plan; and
- (4) recommend to the Secretary amendments to the plan.

(c) Membership of Board; representation of interests; appointment; nomination; eligibility of producers; importer representation

(1) The plan shall provide that the Board shall be composed of representatives of producers and handlers, and one representative of the public, appointed by the Secretary from nominations submitted in accordance with this subsection. An equal number of representatives of producers and handlers shall be nominated by producers and handlers, and the representative of the public shall be nominated by the other members of the Board, in such manner as may be prescribed by the Secretary. If producers and handlers fail to select nominees for appointment to the Board, the Secretary may appoint persons on the basis of representation as provided for in the plan. If the Board fails to nominate a public representative, the Secretary shall choose such representative for appointment.

(2) A producer shall be eligible to serve on the Board only as a representative of handlers, and not as a representative of producers, if—

- (A) the producer purchases watermelons from other producers, in combined total volume that is equal to 25 percent or more of the producer's own production; or

(B) the combined total volume of watermelons handled by the producer from the producer's own production and purchases from other producers' production is more than 50 percent of the producer's own production.

(3)(A) If importers are subject to the plan, the Board shall also include 1 or more representatives of importers, who shall be appointed by the Secretary from nominations submitted by importers in such manner as may be prescribed by the Secretary.

(B) Importer representation on the Board shall be proportionate to the percentage of assessments paid by importers to the Board, except that at least 1 representative of importers shall serve on the Board.

(C) If importers are subject to the plan and fail to select nominees for appointment to the Board, the Secretary may appoint any importers as the representatives of importers.

(D) Not later than 5 years after the date that importers are subjected to the plan, and every 5 years thereafter, the Secretary shall evaluate the average annual percentage of assessments paid by importers during the 3-year period preceding the date of the evaluation and adjust, to the extent practicable, the number of importer representatives on the Board.

....

(e) Budget on fiscal period basis

The plan shall provide that the Board shall prepare and submit to the Secretary for the Secretary's approval a budget, on a fiscal period basis, of its anticipated expenses and disbursements in the administration of the plan, including probable costs of research, development, advertising, and promotion.

(f) Assessments; payments; notice

The plan shall provide for the fixing by the Secretary of assessments to cover costs incurred under the budgets provided for in subsection (e) of this section, and under section 4907(f) of this title, based on the Board's recommendation as to the appropriate rate of assessment, and for the payment of the assessments to the Board. In fixing or changing the rate of assessment pursuant to the plan, the Secretary shall comply with the notice and comment procedures established under section 553 of title 5. Sections 556 and 557 of such title shall not apply with respect to fixing or changing the rate of assessment.

(g) Scope of expenditures; restrictions; assessments on per-unit basis; importers

The plan shall provide the following:

(1) Funds received by the Board shall be used for research, development, advertising, or promotion of watermelons and such other expenses for the administration, maintenance, and functioning of the Board as may be authorized by the Secretary, including any referendum and administrative costs incurred by the Department of Agriculture under this chapter.

(2) No advertising or sales promotion program under this chapter shall make any reference to private brand names nor use false or unwarranted claims in behalf of watermelons or their products or false or unwarranted statements with respect to attributes or use of any competing products.

(3) No funds received by the Board shall in any manner be used for the purpose of influencing governmental policy or action, except as provided by subsections (b)(4) and (f) of this section.

(4) Assessments shall be made on watermelons produced by producers and watermelons handled by handlers, and the rate of such assessments in the case of producers and handlers shall be the same, on a per-unit basis, for producers and handlers. If a person performs both producing and handling functions, both assessments shall be paid by such person.

(5) If importers are subject to the plan, an assessment shall also be made on watermelons imported into the United States by the importers. The rate of assessment for importers who are subject to the plan shall be equal to the combined rate for producers and handlers.

§ 4909. Petition and review

(a) Any person subject to a plan may file a written petition with the Secretary, stating that the plan or any provision of the plan, or any obligation imposed in connection therewith, is not in accordance with law and praying for a modification thereof or to be exempted therefrom. The person shall be given an opportunity for a hearing on the petition, in accordance with regulations prescribed by the Secretary. After the hearing, the Secretary shall make a ruling on the petition, which shall be final if in accordance with law.

(b) The district courts of the United States in any district in which the person is an inhabitant, or in which the person's principal place of business is located, are hereby vested with jurisdiction to review such ruling, provided that a complaint for that purpose is filed within twenty days from the date of the entry of the ruling. Service of process in such proceedings may be had on the Secretary by delivering to the Secretary a copy of the complaint. If the court determines that the ruling is not in accordance with law, it shall remand the proceedings to the Secretary with directions either to (1) make such ruling as the court shall determine to be in accordance with law, or (2) take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted under subsection (a) of this section shall not impede or delay the United States or the Secretary from obtaining relief under section 4910(a) of this title.

§ 4913. Suspension or termination of plans

(a) Whenever the Secretary finds that a plan or any provision thereof obstructs or does not tend to effectuate the declared policy of this chapter, the Secretary shall terminate or suspend the operation of the plan or provision.

(b) The Secretary may conduct a referendum at any time, and shall hold a referendum on request of the Board or at least 10 percent of the combined total of the watermelon producers, handlers, and importers eligible to vote in a referendum, to determine if watermelon producers, handlers, and importers favor the termination or suspension of the plan. The Secretary shall terminate or suspend the plan at the end of the marketing year whenever the Secretary determines that the termination or suspension is favored by a majority of those voting in the referendum, and who produce, handle, or import more than 50 per cent of the combined total of the volume of the watermelons produced by the producers, handled by the handlers, or imported by the importers voting in the referendum.

7 C.F.R.:

TITLE 7—AGRICULTURE

....

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

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**CHAPTER XI—AGRICULTURAL MARKETING SERVICE
(MARKETING AGREEMENTS AND ORDERS;
MISCELLANEOUS COMMODITIES),
DEPARTMENT OF AGRICULTURE**

....

PART 1210—WATERMELON RESEARCH AND PROMOTION PLAN

Subpart A—Watermelon Research and Promotion Plan

DEFINITIONS

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§ 1210.304 Board.

Board means the National Watermelon Promotion Board, hereinafter established pursuant to § 1210.320.

....

NATIONAL WATERMELON PROMOTION BOARD

§ 1210.321 Nominations and selection.

The Secretary shall appoint the members of the Board from nominations to be made in the following manner:

(a) There shall be two individuals nominated for each vacant position.

(b) The Board shall issue a call for nominations by February first of each year in which an election is to be held. The call shall include at a minimum, the following information:

(1) A list of the vacancies and qualifications as to producers and handlers by district and to importers nationally for which nominees may be submitted.

(2) The date by which the nominees shall be submitted to the Secretary for consideration to be in compliance with § 1210.323 of this subpart.

(3) A list of those States, by district, entitled to participate in the nomination process.

(4) The date, time, and location of any next scheduled meeting of the Board, national and State producer or handler associations, importers, and district conventions, if any.

(c) Nominations for producer and handler positions that will become vacant shall be made by district convention in the district entitled to nominate. Notice of such convention shall be publicized to all producers and handlers within such district, and the Secretary at least ten days prior to said event. The notice shall have attached to it the call for nominations from the Board. The responsibility for convening and publicizing the district convention shall be that of the then members of the Board from that district.

(d) Nominations for importers positions that become vacant may be made by mail ballot, nomination conventions, or by other means prescribed by the Secretary. The Board shall provide notice of such vacancies and the nomination process to all importers through press releases and any other available means as well as direct mailing to known importers. All importers may participate in the nomination process: *Provided*, That a person who both imports and handles watermelons may vote for importer members and serve as an importer member if that person imports 50 percent or more of the combined total volume of watermelons handled and imported by that person.

(e) All producers and handlers within the district may participate in the convention: *Provided*, That a person that produces and handles watermelons may vote for handler members only if the producer purchased watermelons from other producers, in a combined total volume that is equal to 25 percent or more of the producer's own production; or the combined total volume of watermelon handled by the producer from the producer's own production and purchases from other producer's production is more than 50 percent of the producer's own production; and *provided further*, That if a producer or handler is engaged in the production or handling of watermelons in more than one State or district, the producer or handler shall participate within the State or district in which the producer or handler so

elects in writing to the Board and such election shall remain controlling until revoked in writing to the Board.

(f) The district convention chairperson shall conduct the selection process for the nominees in accordance with procedures to be adopted at each such convention, subject to requirements set in § 1210.321(e).

(1) No State in Districts 3, 4, 5, and 7 as currently constituted shall have more than three producers and handlers representatives concurrently on the Board.

(2) Each State represented at the district convention shall have one vote for each producer position and one vote for each handler position from the District on the Board, which vote shall be determined by the producers and handlers from that State by majority vote. Each State shall further have an additional vote for each five hundred thousand hundredweight volume as determined by the three year average annual crop production summary reports of the USDA, or if such reports are not published, then the three year average of the Board assessment reports; *Provided*, That for the first two calls for nominees, the USDA Crop Production Annual Summary Reports for 1979, 1980, and 1981 will be controlling as to any additional production volume votes.

§ 1210.323 Acceptance.

Each person nominated for membership on the Board shall qualify by filing a written acceptance with the Secretary. Such written acceptance shall accompany the nominations list required by § 1210.321.

MISCELLANEOUS

§ 1210.360 Right of the Secretary.

All fiscal matters, programs or projects, rules or regulations, reports, or other substantive actions proposed and prepared by the Board shall be submitted to the Secretary for approval.

7 C.F.R. §§ 1210.304, .321, .323, .360.

**ADMINISTRATIVE LAW JUDGE'S
INITIAL DECISION
(AS RESTATED)**

Decision Summary

Based upon *Johanns v. Livestock Marketing Ass'n*, 125 S. Ct. 2055 (2005), I conclude watermelon advertising and promotion authorized by the Watermelon Research and Promotion Act are government speech not susceptible to First Amendment compelled-subsidy challenge. Consequently, Petitioner's Petition, filed January 3, 2002, in which Petitioner seeks exemption from assessments, interest, and penalties imposed by the National Watermelon Promotion Board and used for generic advertising and promotion of watermelons, must be denied.

Discussion

On May 23, 2005, the Supreme Court of the United States issued its third decision in 8 years which considered "whether a federal program that finances generic advertising to promote an agricultural product violates the First Amendment." *Johanns v. Livestock Marketing Ass'n*, 125 S. Ct. at 2058. *Livestock Marketing Ass'n* upheld the constitutionality of compelled assessments used to pay for generic advertising where the advertising is government speech. On May 31, 2005, the Supreme Court of the United States remanded to various other courts of appeals for further consideration, in light of

Livestock Marketing Ass'n, cases involving the constitutionality of compelled assessments to pay for generic advertising of pork,² alligator products,³ and milk.⁴

In *Livestock Marketing Ass'n*, the High Court explained that the beef promotion program is government speech because Congress directed the implementation of a “coordinated program” of promotion, “including paid advertising, to advance the image and desirability of beef and beef products.” *Livestock Marketing Ass'n*, 125 S. Ct. at 2063. Here, likewise, the watermelon promotion program is directed by Congress. The Watermelon Research and Promotion Act authorizes “the establishment of an orderly procedure for the development, financing (through adequate assessments on watermelons harvested in the United States, or imported into the United States, for commercial use), and carrying out of an effective, continuous, and coordinated program of research, development, advertising, and promotion designed to strengthen the watermelon’s competitive position in the marketplace, and establish, maintain, and expand domestic and foreign markets for watermelons.” 7 U.S.C. § 4901(b).

“‘Compelled support of government’--even those programs of government one does not approve--is of course perfectly constitutional, as every taxpayer must attest.

²*Johanns v. Campaign for Family Farms*, 125 S. Ct. 2511 (2005) (remanding the case to the United States Court of Appeals for the Sixth Circuit).

³*Landreneau v. Pelts & Skins, LLC*, 125 S. Ct. 2511 (2005) (remanding the case to the United States Court of Appeals for the Fifth Circuit).

⁴*Johanns v. Cochran*, 125 S. Ct. 2512 (2005) (remanding the case to the United States Court of Appeals for the Third Circuit).

And some government programs involve, or entirely consist of, advocating a position.

‘The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies.’ *Southworth*, 529 U.S., at 229.”

Livestock Marketing Ass’n, 125 S. Ct. at 2062.

In both the beef promotion program and the watermelon promotion program, the message of the promotional campaigns is effectively controlled by the United States government itself. The degree of governmental control over the message funded by targeted assessments distinguishes these promotional programs from the state bar’s communicative activities which were at issue in *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990). *See Livestock Marketing Ass’n*, 125 S. Ct. at 2063.

“When, as here, the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages.” *Livestock Marketing Ass’n*, 125 S. Ct. at 2063.

“Here, the beef advertisements are subject to political safeguards more than adequate to set them apart from private messages. The program is authorized and the basic message prescribed by federal statute, and specific requirements for the promotions’ content are imposed by federal regulations promulgated after notice and comment. The Secretary of Agriculture, a politically accountable official, oversees the program, appoints

and dismisses the key personnel, and retains absolute veto power over the advertisements' content, right down to the wording. [(7 C.F.R. § 1210.360.)] And Congress, of course, retains oversight authority, not to mention the ability to reform the program at any time. No more is required." *Livestock Marketing Ass'n*, 125 S. Ct. at 2064 (footnotes omitted). I conclude the instant case cannot be distinguished from *Livestock Marketing Ass'n*.

Petitioner's Position

Petitioner's principal, Jack Lewis Dixon, a partner, testified, as follows:

BY Mr. BURI:

Q. Mr. Dixon, have you paid any of the assessments set forth in Petitioner's Exhibit Number 4?

A. No, sir.

Q. Have you paid any assessments to the National Watermelon Promotion Board since June of 1999?

A. I don't believe so.

Q. Mr. Dixon, why is it that you object to paying the assessments imposed by the National Watermelon Promotion Board?

A. I believe that -- we do not believe that we should pay an assessment to promote our competition, and to actually help promote watermelons that would cause competition for our company, since we are an individual company.

Q. In your opinion, promoting watermelon consumption, does that benefit you as a handler, importer, grower of watermelons?

A. No, sir. We feel that our quality does.

Q. Would you explain that a bit more, please?

A. We really take a lot of pride in our label. We take a lot of pride in -- not only myself, but the people around me, in the quality of the fruit we pack. We try to pack the best quality grown in the United States, if [not] anywhere.

Q. If you were not compelled to pay for advertising or promotion activities that encourage the consumption of watermelons, would you do so for anyone other than yourself or the Red Hawk Farms brand?

A. No, sir.

Q. Mr. Dixon, are you at all bothered by the -- I want to say requirement of the National Watermelon Promotion Act requiring you to be a part of the activities of the National Watermelon Promotion Board?

A. Yes, sir.

Q. Would you belong to this organization if you didn't have to?

A. No, sir.

Q. And why is that?

A. We feel that we -- we feel that we live in a [free] country, and we should be allowed to build our own business without being forced into a group. We feel like we put up a superior product.

We feel like that we have got a little more money for our product because we do put up a superior product. And what we actually [have] to say, that we can display our watermelons against other people's watermelons, we think that we have a lot better product and the market seems to show that.

Q. Do you believe the marketplace works to your advantage?

A. Definitely.

Tr. I at 52-54.

Mr. Dixon testified that Petitioner sorts out all the culls, all the second grade product, and puts the best quality product in Red Hawk cartons and ships them.

Mr. Dixon testified that Petitioner offers a premium quality product compared to its competitors and likes to offer what was previously called “U.S. Number 1’s,” a top grade product. To promote recognition of its product, Petitioner puts a sticker label on each watermelon. (PX 1; Tr. I at 33-38.)

BY MR. BURI:

Q. Mr. Dixon, why is it that Red Hawk Farming & Cooling places these stickers, 1b through 1j, on individual watermelons that it processes?

A. Mr. Buri, if you notice, on the bottom of those labels, they have a phone number on there. And we put these labels on there advertising our product, and we want them to know when they buy this label or this product, they have a better watermelon than usual.

They should have a superior watermelon than the average watermelon sold in the store. And that’s also why we have our numbers there, because we’ve had a lot of compliments, as far as Canada, Florida, and we’ve had a few complaints too. But we’re awful proud of this label,⁵ that’s why we do that.

Q. Are you trying to develop brand awareness for Red Hawk Farming & Cooling?

A. Yes, sir.

Tr. I at 39-40.

Mr. Dixon testified that Petitioner uses a three-color high graphic bin, specially designed for Petitioner, to promote and advertise its watermelons (PX 2; Tr. I at 42).

⁵PX 1a is a larger label (4” x 6”) that is placed on the bin; PX 1e is a watermelon honey label (an oval 2” across); PX 1b-PX 1d and PX 1f-PX 1j are labels (ovals from 2” to 2½” across) that are placed on individual watermelons.

[BY MR. BURI:]

Q. Now, again, why do you have the Red Hawk Farms watermelons' logo premium quality, things of that sort on the outside of [Petitioner's] Exhibit Number 2?

A. We do that to advertise our company and make sure the public are getting the best watermelon that they can possibly buy.

Q. Again, are you trying to develop brand awareness for Red Hawk Farms?

A. That is correct.

Tr. I at 42-43.

Mr. Dixon testified the smaller, individual labels (found in PX 1) cost Petitioner around \$6,000 a year and the graphic bins cost Petitioner an additional \$2.25 per bin for advertisement. Mr. Dixon estimated the number of bins used in 2001 to have been roughly 40,000 or 50,000. Mr. Dixon confirmed Petitioner was spending approximately \$100,000 or more per year promoting its Red Hawk Farming & Cooling brand. (PX 7, PX 8; Tr. I at 44-45.)

Findings of Fact

1. The Secretary of Agriculture administers the Watermelon Research and Promotion Act (7 U.S.C. §§ 4901-4916).

2. Following a referendum in 1989, the National Watermelon Promotion Board began, in 1990, to administer the program mandated by Congress under the Watermelon Research and Promotion Act (Tr. I at 69-70).

3. The National Watermelon Promotion Board is not a government entity, but it is supervised by the Secretary of Agriculture, and, on behalf of the Secretary of Agriculture, by personnel of the United States Department of Agriculture, specifically, the Chief of the Research and Promotion Branch for Fruits and Vegetables, Agricultural Marketing Service, and her staff (Tr. I at 74, 137-39; Tr. II at 433-36, 449, 506).

4. The National Watermelon Promotion Board, at the time of the hearing, consisted of 14 grower members (producers), 14 first handler members, 2 importer members, and 1 public member (Tr. I at 73).

5. The National Watermelon Promotion Board members are appointed by the Secretary of Agriculture, who also oversees the National Watermelon Promotion Board members' nomination process (Tr. II at 434-35). (7 U.S.C. § 4906(c); 7 C.F.R. §§ 1210.321, .323.)

6. The National Watermelon Promotion Board's marketing plan and communication plan, including budget, were reviewed and approved by the Secretary of Agriculture or on the Secretary's behalf by United States Department of Agriculture personnel (RX 41; Tr. II at 434-35, 506).

7. The Watermelon Research and Promotion Act authorizes the Secretary of Agriculture to terminate or suspend the watermelon research and promotion plan, whenever the Secretary finds that the watermelon research and promotion plan obstructs or does not tend to effectuate the declared policy of the Watermelon Research and Promotion Act (7 U.S.C. § 4913).

8. The National Watermelon Promotion Board, as part of its effort to increase demand for watermelons, provides watermelon safety information to retailers and the media (RX 17; Tr. I at 195-98; Tr II at 343-46).

9. The National Watermelon Promotion Board, as part of its effort to increase demand for watermelons, educates retailers and others that, to extend watermelon shelf-life, a consistent temperature for the watermelons should be maintained and watermelons should not be placed next to products, such as bananas, that emit substantial quantities of ethylene (Tr. I at 198-202).

10. The National Watermelon Promotion Board, as part of its effort to increase demand for watermelons, advertises the nutritional and health benefits of watermelons (RX 2A; Tr. I at 205, 225-26).

11. The United States Department of Agriculture's oversight and control of the National Watermelon Promotion Board includes acting as an advisor to the Board in the developmental process of promotion, research, and information activities (RX 25-RX 41; Tr. II at 449-96; Tr. III at 8).

12. The United States Department of Agriculture's oversight includes the review and approval of each individual research contract (Tr. II at 435-36).

13. All National Watermelon Promotion Board budgets, contracts, and projects are submitted to the United States Department of Agriculture for review and approval (RX 25-RX 41; Tr. II at 449-96; Tr. III at 9-10).

14. The United States Department of Agriculture's oversight includes review and approval (a meticulous, detail-oriented, sometimes intense, word-for-word process) of any materials that the National Watermelon Promotion Board prepares for use (RX 41; Tr. I at 219-20, 233, 267-68; Tr. II at 433, 442-43, 506-07, 518-21).

15. The United States Department of Agriculture's oversight of the National Watermelon Promotion Board includes final approval authority over every assessment dollar spent. Through the budget process, the United States Department of Agriculture retains final approval authority over all administrative expenses and each specific promotion and research expense. (Tr. II at 506; Tr. III at 7-8.)

16. A representative of the United States Department of Agriculture attends and actively participates in every National Watermelon Promotion Board meeting, providing comments or feedback (Tr. II at 449-50; Tr. III at 8-9).

Conclusions of Law

1. The Watermelon Research and Promotion Act specifically authorizes the compelled subsidy of generic advertising of watermelons (7 U.S.C. § 4906(f), (g)).

2. Congress finds that establishing, maintaining, and expanding domestic and foreign markets for watermelons to be vital to the welfare of not only watermelon growers and those concerned with marketing, using, handling, and importing watermelons, but also to "the general economic welfare of the Nation" (7 U.S.C. § 4901(a)(5)) and to be "essential in the public interest" (7 U.S.C. § 4901(b)).

3. “[A]dvertising” and “promotion” are specifically and repeatedly identified in the Watermelon Research and Promotion Act as essential elements of the program designed to strengthen the watermelon’s competitive position in the marketplace (7 U.S.C. § 4901(a)(6), (b)).

4. Congress declares “adequate assessments” on watermelons harvested in the United States, or imported into the United States, for commercial use, are necessary to the watermelon research and promotion program authorized under the Watermelon Research and Promotion Act (7 U.S.C. § 4901(b)).

5. Petitioner is compelled to pay for government speech with which it does not agree. Petitioner is not actually compelled to speak when it does not wish to speak, because the watermelon advertising is not attributed to Petitioner; Petitioner is not identified as the speaker; and Petitioner is not compelled to “utter” the message with which it does not agree.

6. Petitioner has no constitutional right to avoid paying for government speech with which it does not agree. *Johanns v. Livestock Marketing Ass’n*, 125 S. Ct. at 2062.

7. “The compelled-*subsidy* analysis is altogether unaffected by whether the funds for the promotions are raised by general taxes or through a targeted assessment. Citizens may challenge compelled support of private speech, but have no First

Amendment right not to fund government speech. And that is no less true when the funding is achieved through targeted assessments devoted exclusively to the program to which the assessed citizens object. *Johanns v. Livestock Marketing Ass'n*, 125 S. Ct. at 2063.

8. In light of *Johanns v. Livestock Marketing Ass'n*, 125 S. Ct. 2055 (2005), Petitioner's Petition, filed January 3, 2002, must be denied.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioner raises one issue in its Appeal Petition. Petitioner argues the ALJ erroneously failed to consider whether the Watermelon Research and Promotion Act is unconstitutional, as applied. Petitioner asserts the National Watermelon Promotion Board attributes its advertising and promotion to watermelon producers, handlers, and importers in a way that makes them appear to endorse the National Watermelon Promotion Board's messages; thus, the National Watermelon Promotion Board, in violation of the First Amendment, associates Petitioner involuntarily with speech by attributing an unwanted message to Petitioner. (Appeal Pet. at 2-9.)

The Supreme Court of the United States stated in *Livestock Marketing Ass'n* that a First Amendment "as-applied" challenge to speech can be sustained if a party establishes that advertisements are attributable to that party. The High Court found a funding tagline stating that an advertisement comes from "America's Beef Producers" is not sufficiently specific to convince a reasonable fact finder that the advertisement is attributable to any particular beef producer, or even all beef producers. *Johanns v. Livestock Marketing*

Ass'n, 125 S. Ct. at 2065-66. Justice Thomas, concurring, agreed that “[t]he present record . . . does not show that the advertisements objectively associate their message with any individual [beef producer]. . . . The targeted nature of the funding is also too attenuated a link.” *Johanns v. Livestock Marketing Ass'n*, 125 S. Ct. at 2067 (footnote omitted).

In the instant proceeding, the advertising and promotional materials (RX 1-RX 22) are not attributable to any particular watermelon producer, handler, or importer or even all watermelon producers, handlers, and importers. Thus, the advertisements and promotional materials do not provide information sufficiently specific to find that the speech is attributable to Petitioner.

Petitioner’s “as-applied” First Amendment claim, based upon references in advertising and promotional materials to watermelon producers, handlers, and importers, cannot be squared with *Livestock Marketing Ass'n*. The Supreme Court of the United States made clear that the mere assertion that attribution to “America’s Beef Producers” includes a particular beef producer is insufficient to sustain a First Amendment claim for violation of associational rights. Accordingly, Petitioner’s assertion that attribution to watermelon producers, handlers, and importers includes Petitioner as a particular handler or importer is insufficient to sustain Petitioner’s “as-applied” First Amendment claim.

For the foregoing reasons, the following Order should be issued.

ORDER

The relief requested by Petitioner is denied. Petitioner's Petition, filed January 3, 2002, is dismissed. This Order shall become effective on the day after service on Petitioner.

RIGHT TO JUDICIAL REVIEW

Petitioner has the right to obtain review of the Order in this Decision and Order in any district court of the United States in which district Petitioner is an inhabitant or Petitioner's principal place of business is located. A complaint for the purpose of review of the Order in this Decision and Order must be filed within 20 days from the date of entry of the Order. Service of process in any such proceeding may be had upon the Secretary of Agriculture by delivering a copy of the complaint to the Secretary of Agriculture.⁶ The date of entry of the Order in this Decision and Order is November 8, 2005.

Done at Washington, DC

November 8, 2005

William G. Jenson
Judicial Officer

⁶7 U.S.C. § 4909(b).