

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

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

Decision Summary

[1] The watermelon advertising and promotion authorized by the Watermelon Research and Promotion Act, as amended (7 U.S.C. §§ 4901-4916) are government speech, according to *Johanns v. Livestock Marketing Assn.*, 125 S.Ct. 2055, 544 U.S. ____ (2005). Consequently, Red Hawk Farming & Cooling’s Petition must be denied.

Discussion

[2] On June 25, 2001, the U. S. Supreme Court in *United States v. United Foods, Inc.*, 533 U.S. 405, 121 S.Ct. 2334, 150 L.Ed.2d 438 (2001) (herein frequently “*United Foods*”), struck down on First Amendment grounds the mushroom checkoff program created under the Mushroom Promotion, Research, and Consumer Information Act (the “Mushroom Act”), 7 U.S.C. § 6101, *et seq.*

[3] The reliance of Petitioner Red Hawk Farming & Cooling, also known as Red Hawk Farming, and as Red Hawk Farms (herein frequently “Red Hawk”), on *United Foods* was, at the time, justified. Red Hawk’s position was reinforced in the Ninth Circuit by *Delano Farms*

Company v. California Table Grape Commission, 318 F.3d 895 (9th Cir. 2003), which held that the assessment of independent and competing firms to pay for generic advertising is a violation of the First Amendment. *Id.*, at 898-899.

[4] In response to *United Foods*, actions involving a number of other agricultural products subject to assessments used to pay for generic advertising, were filed and eventually reached the U. S. Supreme Court.

[5] On May 23, 2005, the U. S. Supreme Court issued its third decision in eight years which considered “whether a federal program that finances generic advertising to promote an agricultural product violates the First Amendment.” *Johanns v. Livestock Marketing Assn.*, *supra*, (herein frequently “*Livestock Marketing Assn.*”). *Livestock Marketing Assn.* upheld the constitutionality of compelled assessments used to pay for generic advertising where the advertising is government speech.

[6] *Livestock Marketing Assn.* came out of the Eighth Circuit. The U. S. Supreme Court remanded on May 31, 2005, to various other Courts of Appeals for further consideration in light of *Livestock Marketing Assn.*, cases involving pork (Sixth Circuit), 544 U.S. ____ (2005); alligators (Fifth Circuit), 544 U.S. ____ (2005); and milk (Third Circuit), 544 U.S. ____ (2005).

[7] Not until the U. S. Supreme Court ruled in May 2005 regarding government speech in *Livestock Marketing Assn.*, did it become clear that Red Hawk’s arguments would fail. In light of *Livestock Marketing Assn.*, Red Hawk’s Petition must be denied.

[8] The U. S. Supreme Court’s explanation of why the “Beef Promotion” program is government speech is found mainly at pages 8-10, *Livestock Marketing Assn.* Congress directed

the implementation of a “coordinated program” of promotion, “including paid advertising, to advance the image and desirability of beef and beef products.” *Id.* at 9.

[9] Here, likewise, the “Watermelon Promotion” program is directed by Congress. The Watermelon Research and Promotion Act, as amended (herein frequently “the WRPA” or “the Act”), 7 U.S.C. §§ 4901-4916, 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.

[10] “‘Compelled support of government’ - - even those programs of government one does not approve - - is of course perfectly constitutional, as every taxpayer must attest. 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 Assn.*, at p. 8.

[11] In both the Beef Promotion program and the Watermelon Promotion program, the message of the promotional campaigns is effectively controlled by the Federal Government itself. The degree of governmental control over the message funded by the (targeted assessments) distinguishes these cases from *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990). *See Livestock Marketing Assn.* at p. 10.

[12] “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 Assn.* at p. 10.

[13] “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.

[footnote omitted] And Congress, of course, retains oversight authority, not to mention the ability to reform the program at any time. No more is required.” [footnote omitted] *Livestock Marketing Assn.* at p. 12. I conclude that the within case, Red Hawk’s case, cannot be distinguished from *Livestock Marketing Assn.*

Procedural History

[14] Red Hawk filed its Second Amended Petition (“Petition” herein) on January 3, 2002. The Petition alleges, among other things, that, in violation of the First Amendment to the United States Constitution, the National Watermelon Promotion Board (herein frequently “Watermelon Board”) imposed assessments, penalties, and interest charges upon Red Hawk.

[15] The Respondent is the Administrator of the Agricultural Marketing Service, United States Department of Agriculture (herein frequently “AMS”). The Answer, filed on January 22, 2002, among other things, defends the relevant statute, plan, and regulations, as promulgated and

as applied, under the doctrine of government speech.

[16] The three-day hearing was held before me in Phoenix, Arizona on March 12-13, 2002, and on January 23, 2003. AMS has been ably represented by Gregory Cooper, Esq. and by Frank Martin, Jr., Esq., each with the Office of the General Counsel, United States Department of Agriculture, Washington, D.C. Red Hawk has been ably represented by Charles E. Buri, Esq., of Friedl Richter & Buri, P.A., Scottsdale, Arizona. The transcript is referred to as Tr., except that the third day is referred to as Tr. (23Jan2003).

[17] Red Hawk called 2 witnesses (Jack Lewis Dixon, a farmer and watermelon broker who is a partner (with his parents) in Red Hawk, Tr. 27-67, and 523-526; and William Rayford Collier Watson, Executive Director of the National Watermelon Promotion Board, Tr. 69-139).

[18] AMS called four witnesses (William Joseph McGin, Compliance Director of the National Watermelon Promotion Board, Tr. 141-153; William Rayford Collier Watson, Tr. 155-277, 284-428, 433-445; Martha B. Ransom, Chief of the Research and Promotion Branch for Fruits and Vegetables, AMS, Tr. 446-522; Tr. 7-29 (23Jan2003); and Ronald W. Ward, Ph.D., expert witness in agricultural economics and commodity promotion, Tr. 33-180 (23Jan2003)).

[19] Red Hawk submitted 10 exhibits, Petitioner Exhibits, referred to as PX. PX 1 was admitted into evidence, consisting of PX 1A through PX 1J. PX 2 and PX 3, actual watermelon bins, were admitted into evidence (Tr. 66), but thereafter PX 2 and PX 3 were withdrawn and photographs were substituted (*see* Tr. 523). (PX 2 was the bin designed especially for Red Hawk, and PX 3 was standard watermelon bin used in the general watermelon business. Tr. 41-42.) PX 4 and PX 5 were admitted into evidence. By mail filed May 2, 2002, Red Hawk submitted photographs PX 6 through PX 10, which were admitted into evidence (Tr 5

(23Jan2003)), consisting of photographs of Red Hawk's watermelon bins and cartons which were too bulky to be kept as evidence.

[20] AMS submitted 49 exhibits, Respondent Exhibits, referred to as RX. RX 1, RX 2A, RX 2B, and RX 3 through RX 22 were admitted into evidence. RX 23, which is a duplicate of PX 4, was not admitted (Tr. 152). RX 24 through RX 41 were admitted into evidence. RX 43 through RX 49 were admitted into evidence.

[21] ALJX 1 and ALJX 2 (*see* Tr. 179 (23Jan2003)), were admitted into evidence.

[22] Red Hawk's Proposed Findings of Fact and Conclusions of Law and Order was timely filed with supporting Opening Brief on March 28, 2003. Red Hawk's Reply Brief was timely filed on May 19, 2003.

[23] AMS's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support thereof was timely filed on April 30, 2003.

Red Hawk's Position

[24] Red Hawk principal Jack Dixon, a partner, testified, in part, as follows:

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

Mr. Dixon: No, sir.

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

Mr. Dixon: I don't believe so.

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

Mr. Dixon: 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.

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

Mr. Dixon: No, sir. We feel that our quality does.

Mr. Buri: Would you explain that a bit more, please?

Mr. Dixon: 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.

Mr. Buri: 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?

Mr. Dixon: No, sir.

Mr. Buri: 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?

Mr. Dixon: Yes, sir.

Mr. Buri: Would you belong to this organization if you didn't have to?

Mr. Dixon: No, sir.

Mr. Buri: And why is that?

Mr. Dixon: 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.

Mr. Buri: Do you believe the marketplace works to your advantage?

Mr. Dixon: Definitely.

Tr. 52-54.

[25] Mr. Dixon testified that Red Hawk sorts out all the culls, all the second grade product, and puts the best quality product in Red Hawk cartons and ships them. Tr. 33. Mr. Dixon testified that Red Hawk puts up a premium quality product compared to its competitors. Tr. 33. Mr. Dixon testified that Red Hawk likes to put out what used to be called U.S. Number 1's, a top grade product. Tr. 34. To promote recognition of its product, Red Hawk puts a sticker label on each watermelon. Tr. 36-38, PX 1.

Mr. Buri: Mr. Dixon, why is it that Red Hawk Farming & Cooling places these stickers, 1B through 1J, on individual watermelons that it processes?

Mr. Dixon: 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 label¹, that's why we do that.

Mr. Buri: Are you trying to develop brand awareness for Red Hawk Farming & Cooling? Mr. Dixon: Yes, sir.

Tr. 39-40.

[26] Mr. Dixon testified that Red Hawk uses a three-color high graphic bin that is designed especially for Red Hawk, to promote and advertise its watermelons. Tr. 42, PX 2.

Mr. Buri: 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?

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

Mr. Buri: Again, are you trying to develop brand awareness for Red Hawk Farms?

Mr. Dixon: That is correct.

Tr. 42-43.

[27] Mr. Dixon testified that the smaller, individual labels (found in PX 1) cost Red Hawk around \$6,000 a year; and that Red Hawk's graphic bins cost Red Hawk an additional \$2.25 per bin for advertisement. Tr. 44. (See PX 7 and PX 8, photographs which represent PX 2.) Mr. Dixon estimated the number of bins used the previous year (2001) to have been roughly 40,000

¹ 1A is a larger label (4" x 6") that goes on the bin; 1E is a watermelon honey label (an oval 2" across); 1B, 1C, 1D, 1F, 1G, 1H, 1I, and 1J are labels (ovals from 2" to 2-1/2" across) that go on individual watermelons.

to 50,000. Tr. 44-45. Mr. Dixon confirmed that Red Hawk was spending approximately \$100,000 or more per year promoting its Red Hawk Farms brand. Tr. 45.

Findings Of Fact

[28] The Secretary of Agriculture (herein frequently “the Secretary”) administers the Watermelon Research and Promotion Act, as amended (herein frequently “the WRPA” or “the Act”), 7 U.S.C. §§ 4901-4916, which became law in 1985.

[29] The National Watermelon Promotion Board “opened for business” in 1990, following the referendum in 1989, to administer the program mandated by Congress under the WRPA. Tr. 69-70.

[30] The National Watermelon Promotion Board is not a government entity, but it is tightly supervised by the Secretary, and, on behalf of the Secretary, by personnel of the United States Department of Agriculture (herein frequently “USDA”), specifically, the Chief of the Research and Promotion Branch for Fruits and Vegetables, AMS, and her staff. Tr. 74, 138, 433-35, 449, 506.

[31] The Watermelon Board's Board of Directors, at the time of the hearing (2002), consisted of 14 grower members (producers), 14 first handler members, 2 importer members, and one public member. Tr. 73.

[32] The Watermelon Board's Board of Directors is appointed by the Secretary of Agriculture, who also oversees the industry members' nomination process. Tr. 434-35. RX 41. 7 U.S.C. § 4901.

[33] The Watermelon Board's Board of Directors' marketing plan and communications plan, including budget, were reviewed and approved by the Secretary of Agriculture or on her or his

behalf by USDA personnel. Tr. 435, 506.

[34] The WRPA provides for termination or suspension of the plan. 7 U.S.C. § 4913.

[35] The Watermelon Board, as part of its effort to increase demand for watermelon, communicates watermelon safety information and precautions, such as educating retailers to take affirmative hygiene action to avoid cross-contamination, especially since 25% of the watermelon that is shipped is eventually sold to consumers cut-up; and communicating to the media as was necessary in July 2000, after watermelon on a salad bar had been cross-contaminated in the back of the restaurant by tainted beef which had dripped on the watermelon, and several people were sickened from E.coli and a little girl died. Tr. 195-98, 343-46, RX 17.

[36] The Watermelon Board, as part of its effort to increase demand for watermelon, educates retailers and others that to extend watermelon shelf life, a consistent temperature for the watermelons needs to be maintained; and watermelons should not be placed next to a product that emits a lot of ethylene (such as bananas). Tr. 198-200, 230-231.

[37] The Watermelon Board, as part of its effort to increase demand for watermelon, promotes and advertises watermelon's nutrition and health benefits ("watermelon has a terrific nutritional story"), including lycopene and antioxidants that may help prevent certain cancers, Vitamin A, Vitamin C, potassium, and fiber. RX 2A, Tr. 205, 225-226.

[38] USDA's oversight and control of the Watermelon Board includes acting as an advisor to the Board in the developmental process of promotion, research, and information activities. RX 25 through RX 41, Tr. 449-496, and Tr. 8 (23Jan2003).

[39] USDA's oversight includes the review and approval of each individual research contract. Tr. 436.

[40] All Watermelon Board budgets, contracts, and projects are submitted to USDA for review and approval. RX 25 through RX 41, Tr. 449-496, Tr. 9-10 (23Jan2003).

[41] USDA's oversight includes review and approval (a meticulous, detail-oriented, sometimes intense, word-for word process) of any materials that the Watermelon Board prepares for use. Tr. 219-20, 233, 267-68, 433, 442-43, 506-07, 518-521, RX 41.

[42] USDA's oversight of the Watermelon Board includes retaining final approval authority over every assessment dollar spent, through the budget process for the overall administrative expenses, plus individual and specific promotion and research expenses. Tr. 506, Tr. 7-8 (23Jan2003).

[43] A representative of USDA attends and actively participates in every Watermelon Board meeting, providing comments or feedback. Tr. 449-450, Tr. 8-9 (23Jan2003).

Conclusions

[44] The Watermelon Research and Promotion Act specifically authorizes the compelled subsidy of generic advertising of watermelons. 7 U.S.C. § 4901, *et seq.*

[45] Establishing, maintaining, and expanding domestic and foreign markets for watermelons is declared by the WRPA to be vital to the welfare of not only those concerned with watermelons, but also "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)).

[46] "(A)dvertising" and "promotion" are specifically and repeatedly identified in the WRPA as essential elements of the program designed to strengthen the watermelon's competitive position in the market place. 7 U.S.C. § 4901(a)(6) and (b).

[47] "(A)dequate assessments" on watermelons are recognized by Congress as necessary to

such program. 7 U.S.C. § 4901(b).

[48] What Red Hawk is compelled to do, is pay for government speech with which it does not agree. Red Hawk is not actually compelled to speak when it does not wish to speak, because the advertising is not attributed to Red Hawk; Red Hawk is not identified as the speaker; Red Hawk is not compelled to “utter” the message with which it does not agree.

[49] Red Hawk has no constitutional right to avoid paying for government speech with which it does not agree. *Livestock Marketing Assn.* at p. 8.

[50] “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. *Livestock Marketing Assn.* at p. 11.

[51] In the spirit of AMS’s proposed Order (*see* Respondent’s April 30, 2003 filing), AMS would have me direct Red Hawk to file all reports currently due to the Watermelon Board, and to pay all assessments and interest and penalties currently due to the Watermelon Board. However, AMS’s Answer (filed January 22, 2002), includes no such prayer for relief, and I question whether, within the context of Red Hawk’s Petition under 7 U.S.C. § 4909, it is appropriate for me to address those issues. Consequently, I refrain from entering any Order, but I do encourage the parties to resolve these issues of reports, assessments, interest, and penalties, on or before the 11th day after this Decision becomes final, to avoid further litigation expense and to avoid enforcement action.

[52] In light of *Livestock Marketing Assn.*, Red Hawk's Petition must be and hereby is denied.

Finality

[53] This Decision becomes final without further proceedings 35 days after service unless an appeal petition is filed with the Hearing Clerk within 30 days after service, in accordance with sections 900.64 and 900.65 of the Rules of Practice (7 C.F.R. §§ 900.64-900.65).

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.
this 23rd day of August 2005

Jill S. Clifton
Administrative Law Judge

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