

**UNITED STATES DEPARTMENT OF AGRICULTURE**  
**BEFORE THE SECRETARY OF AGRICULTURE**

In re:	)	
	)	01 AMA Docket No.
GERAWAN FARMING, INC.,	)	F&V 916-1 and 917-1
	)	
Petitioner	)	
	and	
In re:	)	
	)	AMAA Docket No. 02-0008
GERAWAN FARMING, INC.,	)	
	)	
Respondent	)	<b>Decision and Order</b>

**Three U.S. Supreme Court Cases**

[1] Three U.S. Supreme Court cases, each of which has addressed the compelled subsidy of generic advertising for agricultural commodities, direct this Decision:

(a) *Johanns v. Livestock Marketing Ass’n*, 544 U.S. 550, 125 S.Ct. 2055, 161 L. Ed. 2d 896 (2005) (herein frequently “*Livestock Marketing*”);

(b) *United States v. United Foods, Inc.*, 533 U.S. 405, 121 S.Ct. 2334, 150 L.Ed.2d 438 (2001) (herein frequently “*United Foods*”); and

(c) *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997) (herein frequently “*Glickman v. Wileman*”).

[2] The result in both *Glickman v. Wileman* and *Livestock Marketing* suggests that First Amendment claims such as Gerawan Farming, Inc.’s are trumped by the Secretary of Agriculture’s involvement in the promotion of agricultural commodities. But *United Foods* is not overruled. And the description in *Glickman v. Wileman* and *United Foods* of the extent of

Gerawan Farming, Inc.  
01 AMA Docket No. F&V 916-1 and 917-1  
AMAA Docket No. 02-0008

the AMAA's provisions<sup>1</sup> does not match the reality of marketing California-grown nectarines and California-grown peaches.

### **Introduction**

[3] Gerawan Farming, Inc. ("Gerawan" or "Petitioner"), a handler of California-grown nectarines and California-grown peaches, is required to comply with marketing orders which are federal regulations. These federal marketing orders have required Gerawan to pay assessments of about 19-20 cents per 25 pound box shipped. Gerawan is Petitioner (in the 15(A)<sup>2</sup> case) and Respondent (in the "injunction and penalty" case). Gerawan both grows and handles nectarines and peaches (and other agricultural commodities) and participates in the California Tree Fruit Agreement.

[4] Gerawan initiated this case, petitioning to modify (or to be exempted from) requirements to pay that portion of the assessments used to pay for promotion including paid advertising, and for research (under the Nectarine Marketing Order<sup>3</sup> and the Peach Marketing Order<sup>4</sup>).

[5] Gerawan argues that it is being forced to speak when it does not wish to speak, that it does not agree with the message or the messenger. Gerawan claims that the promotion violates

---

<sup>1</sup> the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. §§ 601-627 (AMAA).

<sup>2</sup> 7 U.S.C. § 608c(15)(A).

<sup>3</sup> 7 C.F.R. § 916 *et seq.*

<sup>4</sup> 7 C.F.R. § 917 *et seq.*

Gerawan Farming, Inc.  
01 AMA Docket No. F&V 916-1 and 917-1  
AMAA Docket No. 02-0008

its First Amendment rights and is illegal. Gerawan asks: Why should a handler lose its First Amendment rights<sup>5</sup> simply by participating in a regulated industry?

[6] Since May 2001 (through five marketing seasons, now into the sixth marketing season), Gerawan has been paying about one-half of each assessment and withholding payment of the other half. Gerawan states that it bases the amount it withholds on estimates obtained from the California Tree Fruit Agreement former President or CEO Jon Field, who had estimated that the “speech-related services” amounted to eight or nine cents (out of the 18 or 19 or 20 cent assessment).

[7] The half that Gerawan has withheld, roughly a quarter million dollars per year, now amounts to more than \$1,391,981.97 (the amount withheld as of September 28, 2005). *See* AMS’s Status Report filed October 13, 2005. Gerawan has been depositing the withheld payments in an interest-bearing account, awaiting the outcome of this litigation.

[8] The Administrator of the Agricultural Marketing Service of the United States Department of Agriculture (“AMS” or “Complainant”), argues that Gerawan has no justification for withholding payment, particularly in light of *Glickman v. Wileman*.

---

<sup>5</sup> *See* Justice Breyer’s dissent in *United Foods*, 533 U.S. at 419, including at 428 “the Court’s unreasoned distinction between heavily regulated and less heavily regulated speakers could lead to less First Amendment protection in that it would deprive the former of protection. But see *Consolidated Edison Co. of N.Y. v. Public Serv. Comm’n. of N.Y.*, 447 U.S. 530, 534, n. 1, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980) (Even “heavily regulated businesses may enjoy constitutional protection”) (citing, as an example, *Virginia Bd. of Pharmacy, supra*, at 763-765, 96 S.Ct. 1817)”.

Gerawan Farming, Inc.  
01 AMA Docket No. F&V 916-1 and 917-1  
AMAA Docket No. 02-0008

[9] AMS is Respondent (in the 15(A) case) and Complainant (in the “injunction and penalty” case). AMS requested not only findings regarding the unpaid portions of the assessments (more than \$1,391,981.97), but also a \$150,000 civil penalty, for having withheld payment. Tr. 743, 744-767; CX 68.

[10] Gerawan explains that it is forced to withhold payment, because the assessments paid are fully spent every year, so there will be nothing to recover if Gerawan prevails. Gerawan, motivated and bolstered by *United Foods*, explains that it is acting in good faith and not for delay and has good grounds for its expectation that it will prevail. Gerawan states that it offered to abide by an appropriate escrow arrangement with USDA, but USDA made no such arrangement available.

#### **Gerawan Relies on the First Amendment**

[11] To oppose paying part of its nectarine and peach marketing orders assessments (that portion used for promotion and research), Gerawan relies on its freedom of speech and freedom of association, guaranteed by the First Amendment to the United States Constitution.

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.

Gerawan Farming, Inc.  
01 AMA Docket No. F&V 916-1 and 917-1  
AMAA Docket No. 02-0008

U.S. Const. amend. I.

### **Procedural History**

[12] The hearing was held in Fresno, California, on February 18-21, and Sept 8-9, 2003.

Gerawan, Petitioner is represented by Brian C. Leighton, Esq. and James A. Moody, Esq. AMS, Complainant, is represented by Sharlene A. Deskins, Esq.

[13] The transcript is cited as “Tr.” The proposed transcript corrections, filed September 20, 2004, and October 15, 2004, are accepted. Additional transcript corrections, on my own motion, are reflected in quotations from the transcript found in this Decision.

[14] Gerawan called three witnesses: Mr. Raymond M. (“Ray”) Gerawan (Tr. 26-144); Mr. Dan Gerawan (Tr. 148-234, 240-393, 1389-1412); and Mr. Marco Luna (Tr. 395-430).

[15] AMS called seven witnesses: Dr. Melvin Peter Enns (Tr. 432-489); Mr. Douglas Andrew Phillips (Tr. 496-554); Mr. Jonathan W. (“Jon”) Field (Tr. 554-712, 928-1132); Mr. Ronald Cioffi (Tr. 721-908); Mr. Kurt Kimmel (Tr. 1133-1160, 1168-1227); Ms. Jacqueline Terry (“Terry”) Vawter (Tr. 1228-1273); and Mr. Blair Robin Richardson (Tr. 1275-1387).

[16] The following exhibits were admitted into evidence.

Petitioner’s (Gerawan’s) Exhibits: PX 1, 2, 4, 5, 8-12, 20-28.

Complainant’s (AMS’s) Exhibits: CX 1-3, 5-12, 14-24, 26-61, 66, 68-69, 72, 74-75,  
77, 79-83, 85-86.

[17] The record includes the following transcripts:

Gerawan Farming, Inc.  
 01 AMA Docket No. F&V 916-1 and 917-1  
 AMAA Docket No. 02-0008

Transcripts *Final Set* (Tr.) Volumes I - VI (Feb 18-21, Sept 8-9, 2003):

<b>Volumes</b>	<b>2003</b>	<b>Pages</b>	<b>rec'd by Hearing Clerk</b>
I	February 18	1-237	September 22, 2003
II	February 19	238-492	September 22, 2003
III	February 20	493-716	September 22, 2003
IV	February 21	717-916	September 22, 2003
V	September 8	917-1161	September 22, 2003
VI	September 9	1162-1418	September 30, 2003.

[18] [Also part of the record are the *initial* transcripts<sup>6</sup> (which are superceded by the *Final Set*):

<b>2003</b>	<b>Pages</b>	<b>rec'd by Hearing Clerk</b>
February 18	1-237	February 26, 2003
February 19	236-508	March 3, 2003
February 20	508-630	March 4, 2003
February 20 (revised)	509-732	August 28, 2003
February 21	631-830	March 12, 2003.]

---

<sup>6</sup> These superceded transcripts are retained because their page numbers may be cited in briefs or elsewhere in the record. The page numbers can be used for orientation to the Final Set of transcripts.

Gerawan Farming, Inc.  
01 AMA Docket No. F&V 916-1 and 917-1  
AMAA Docket No. 02-0008

[19] AMS's Findings of Fact, Conclusions of Law and Brief in Support Thereof was timely filed on September 20, 2004; AMS's reply was timely filed on January 25, 2005.

[20] Gerawan's Post-Hearing Findings of Fact and Conclusions of Law was filed late (but nevertheless accepted) on October 15, 2004.

[21] AMS's Status Report was filed on October 13, 2005, and Gerawan filed no objection or other response.

### **Analysis**

[22] Gerawan Farming, Inc. ("Gerawan") is a corporation with its main offices located in Sanger, California. Gerawan is one of the largest growers (producers) of nectarines and peaches in California, if not the largest. Gerawan has developed its own varieties of nectarines and peaches that it markets under the brand name Prima. Gerawan promotes its Prima brand to the retail trade with brochures, and the Prima brand includes peaches, nectarines, plums, and table grapes. PX-2.

[23] The Nectarine Marketing Order<sup>7</sup> and the Peach Marketing Order<sup>8</sup> (the Marketing Orders) are operated through the California Tree Fruit Agreement. The Marketing Orders concern fresh California-grown nectarines and peaches, which are perishable and are marketed principally during May through October each year.

---

<sup>7</sup> 7 C.F.R. part 916.

<sup>8</sup> 7 C.F.R. part 917.

Gerawan Farming, Inc.  
01 AMA Docket No. F&V 916-1 and 917-1  
AMAA Docket No. 02-0008

[24] The California-grown nectarine and peach marketing reality is far more competitive than cooperative. Neither producers nor handlers have been deprived of their ability to compete. Producers and handlers make their own marketing decisions regarding sellers, buyers, price, and terms; the standardization provided by the Marketing Orders has little effect on competition but does establish minimum requirements for grade, size, and maturity, and for standard packaging. Justice Souter's dissent in *Glickman v. Wileman* accurately characterizes the use to which the Marketing Orders are put. 521 U.S. 457.

[25] Gerawan both produces and handles nectarines and peaches. As a handler, Gerawan is required to belong to the group of handlers who operate according to the Marketing Orders in order to ship nectarines and peaches. Gerawan handles nectarines and peaches in a highly competitive free market with razor-thin margins.

[26] Gerawan, in its capacity as a handler of nectarines and peaches, in May of 2001, and at subsequent times during 2001, 2002, 2003, 2004, and 2005, shipped nectarines and peaches that were subject to assessments imposed under the California Tree Fruit Agreement. CX 66; Tr. 1305-1309; AMS's Status Report filed October 13, 2005.

[27] Gerawan objects to paying the portion of the assessments imposed under the California Tree Fruit Agreement used to pay for promotion including paid advertising, and research (roughly half of the total assessment).

Gerawan Farming, Inc.  
01 AMA Docket No. F&V 916-1 and 917-1  
AMAA Docket No. 02-0008

[28] Mr. Dan Gerawan is Gerawan's corporate President; he testified that he concentrates on the administrative aspects of running the company and mostly on the packing and shipping operations. Tr. 149.

[29] Since May 2001, Gerawan has chosen to pay roughly half of each assessment imposed for nectarines and peaches that it shipped, and to withhold the other half, the amount that Gerawan estimates would be devoted to promotion including paid advertising and research. The amount withheld is roughly a quarter million dollars per year (CX 66, CX 71), and as of September 28, 2005, totaled \$1,391,981.97. AMS's Status Report filed October 13, 2005.

[30] Awaiting the outcome of this litigation, Gerawan has reserved the withheld amount, depositing that amount in an interest-bearing account.

[31] On May 23, 2005, the Supreme Court of the United States issued its third decision in 8 years, *Livestock Marketing*, which considered "whether a federal program that finances generic advertising to promote an agricultural product violates the First Amendment." *Livestock Marketing* 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 courts of appeals for further consideration, in light of

Gerawan Farming, Inc.  
01 AMA Docket No. F&V 916-1 and 917-1  
AMAA Docket No. 02-0008

*Livestock Marketing*, cases involving the constitutionality of compelled assessments to pay for generic advertising of pork,<sup>9</sup> alligator products,<sup>10</sup> and milk.<sup>11</sup>

[32] In *Livestock Marketing*, the Supreme Court held that the beef promotion program is government speech; Congress had 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*, 125 S.Ct. at 2063.

[33] In this case, I determine that under *Livestock Marketing*, the California-grown nectarine and peach promotion is not government speech. I determine that under *Glickman v. Wileman* (which previously addressed the California-grown nectarine and peach marketing orders), the “restrictions on marketing autonomy” are minimal compared with the free market characteristics of California-grown nectarine and peach marketing.

[34] *Glickman v. Wileman* describes what the AMAA authorizes, but because the Nectarine Marketing Order and the Peach Marketing Order do not employ much that the AMAA authorizes, marketing is fiercely competitive and marketing autonomy is not significantly

---

<sup>9</sup> *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).

<sup>10</sup> *Landreneau v. Pelts & Skins, LLC*, 125 S.Ct. 2511 (2005) (remanding the case to the United States Court of Appeals for the Fifth Circuit).

<sup>11</sup> *Johanns v. Cochran*, 125 S.Ct. 2512 (2005) (remanding the case to the United States Court of Appeals for the Third Circuit); and see *Cochran v. Veneman*, 252 F.Supp.2d 126 (M.D.Pa. 2003) *aff'd upon review of Livestock Marketing, Cochran v. Secretary of Agriculture*, 2005 WL 2755711, \*1 (3rd Cir. Sep 15, 2005) (upholding constitutionality of the Dairy Promotion and Research Program and Dairy Promotion Stabilization Act of 1983, 7 U.S.C. § 4501 et seq.).

impacted. The Nectarine Marketing Order and the Peach Marketing Order restrictions ensure baseline minimum standards for the size, maturity and grade of the fruit, and standard packaging.

[35] The California-grown nectarine and peach industry cannot be characterized as “collectivist” or “cooperative” to any significant degree, even though the AMAA reads as if it could be. Even though the AMAA seems to grant an anti-trust exemption, the Department of Justice is vigilant against anti-trust activities and has, with the USDA, made clear how limited that apparent exemption is. *See* PX 22; Tr. 1207. Further, even though volume control or market allotments or reserves or pools or price supports or price controls appear to be AMAA methodology, such tools are not employed in the California-grown nectarine and peach industry.

[36] I determine that under the three cases, *United Foods*, *Glickman v. Wileman*, and *Livestock Marketing*, read together, while the promotion here is not government speech, the speech is germane to the purpose of the AMAA, and the government has reasonable interests in the speech. Consequently, Gerawan’s First Amendment rights must be balanced against the government’s reasonable interests.

[37] If, on balance, Gerawan’s First Amendment rights are outweighed by the government’s reasonable interests, Gerawan must endure those messages that Gerawan finds to be damaging with regard to its own marketing and not truthful with regard to the nectarines and peaches that Gerawan markets, and Gerawan must pay the withheld portion of the assessments to the California Tree Fruit Agreement.

[38] If, on the other hand, on balance, the government's reasonable interests are outweighed by Gerawan's First Amendment rights, the government must exempt Gerawan from the promotion provisions of the Marketing Orders, and Gerawan must return the withheld portions of assessments to the grower(s) from which it was collected (presumably largely from itself).

[39] If requiring Gerawan to participate in promotion including paid advertising were found to be unconstitutional, the unconstitutional provisions would be legally and practically "severable" from the remaining portions of the Marketing Orders, which would remain intact. *See* 7 U.S.C. § 614, regarding "Separability". The Committees would remain empowered to undertake their remaining activities. USDA officials expressed reservations, however, with whether the industry would choose to keep the remaining provisions in effect absent the promotion provisions.

[40] Either way, Gerawan must disgorge the interest it accumulated on the monies it withheld; when Gerawan pays the withheld portion of the assessments, the interest earned thereon shall also be paid, whether to California Tree Fruit Agreement (if Gerawan loses), or to the grower(s) (if Gerawan prevails).

[41] Regarding being required to subsidize research, even if that research were strictly for promotion, Gerawan's First Amendment defense must fail. Research is conduct, not speech. Consequently, Gerawan must pay to the California Tree Fruit Agreement the withheld assessment portion proportional to research, regardless of the outcome otherwise.

[42] I determine that the efficacy of the promotion materials and efforts is not relevant to this Decision.

**APPLICABLE STATUTORY  
PROVISIONS**

[43] 7 U.S.C.:

**TITLE 7—AGRICULTURE**

.....

**CHAPTER 26—AGRICULTURAL ADJUSTMENT**

**SUBCHAPTER I—DECLARATION OF CONDITIONS AND POLICY**

**§ 601. Declaration of conditions**

It is declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.

**§ 602. Declaration of policy; establishment of price basing period; marketing standards; orderly supply flow; circumstances for continued regulation**

It is declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301 (a)(1) of this title.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this chapter which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(3) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such production research, marketing research, and development projects provided in section 608c (6)(I) of this title, such container and pack requirements provided in section 608c (6)(H) of this title [1] such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in section 608c (2) of this title, other than milk and its products, in interstate commerce as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest.

(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608c (2) of this title as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices.

(5) Through the exercise of the power conferred upon the Secretary of Agriculture under this chapter, to continue for the remainder of any marketing season or marketing year, such regulation pursuant to any order as will tend to avoid a disruption of the orderly marketing of any commodity and be in the public interest, if the regulation of such commodity under such order has been initiated during such marketing season or marketing year on the basis of its need to effectuate the policy of this chapter.

....

### **SUBCHAPTER III—COMMODITY BENEFITS**

....

#### **§ 608c. Orders regulating handling of commodity**

##### **(1) Issuance by Secretary**

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as “handlers.”

....

**(6) Other commodities; terms and conditions of orders**

In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

**(A)** Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size, or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

**(B)** Allotting, or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts sold by such producers in such prior period as the Secretary determines to be representative, or upon the current quantities available for sale by such producers, or both, to the end that the total quantity thereof to be purchased, or handled during any specified period or periods shall be apportioned equitably among producers.

**(C)** Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified

period or periods shall be equitably apportioned among all of the handlers thereof.

**(D)** Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

**(E)** Establishing or providing for the establishment of reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

**(F)** Requiring or providing for the requirement of inspection of any such commodity or product produced during specified periods and marketed by handlers.

.....

**(H)** Providing a method for fixing the size, capacity, weight, dimensions, or pack of the container, or containers, which may be used in the packaging, transportation, sale, shipment, or handling of any fresh or dried fruits, vegetables, or tree nuts: Provided, however, That no action taken hereunder shall conflict with the Standard Containers Act of 1916 (15 U.S.C. 251–256) and the Standard Containers Act of 1928 (15 U.S.C. 257–257i).

**(I)** Establishing or providing for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order: *Provided*, That with respect to orders applicable to almonds, filberts (otherwise known as hazelnuts), California-grown peaches, cherries, papayas, carrots, citrus fruits, onions, Tokay grapes, pears, dates, plums, nectarines, celery, sweet corn, limes, olives, pecans, eggs, avocados, apples, raisins, walnuts, tomatoes, caneberries (including raspberries, blackberries, and loganberries), Florida grown strawberries, or cranberries, such projects may provide for any form of marketing promotion including paid advertising and with respect to almonds, filberts (otherwise known as hazelnuts), raisins, walnuts, olives, Florida Indian River grapefruit, and cranberries may

provide for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order and when the handling of any commodity for canning or freezing is regulated, then any such projects may also deal with the commodity or its products in canned or frozen form: *Provided further*, That the inclusion in a Federal marketing order of provisions for research and marketing promotion, including paid advertising, shall not be deemed to preclude, preempt or supersede any such provisions in any State program covering the same commodity.

....

(7) Terms common to all orders

In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

- (A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.
- (B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.
- (C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:
  - (i) To administer such order in accordance with its terms and provisions;
  - (ii) To make rules and regulations to effectuate the terms and provisions of such order;
  - (iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and
  - (iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph shall be deemed to be acting in an official capacity, within the meaning of section 610 (g) of this title, unless such person receives compensation for his personal services from funds of the United States. There shall be included in the membership of any agency selected to administer a marketing order applicable to grapefruit or pears for canning or freezing one or more representatives of processors of the commodity specified in such order: *Provided*, That in a marketing order applicable to pears for canning or freezing the representation of processors and producers on such agency shall be equal.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5) to (7) of this section and necessary to effectuate the other provisions of such order.

7 U.S.C. §§ 601, 602(1)-(5), 608c(1), (6)(A)-(F), (6)(H)-(I), & (7) [excerpts from the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. §§ 601-627].

[44] The AMAA, the statute under which the Marketing Orders were promulgated, was established primarily as a supply and volume control type program with traditional mechanisms of volume control.<sup>12</sup> Tr. 560. Promotion activities were brought within the federal order and terminated from the state orders in 1975. Tr. 562.

[45] Use of the AMAA is different today than at its inception during the Great Depression. The statute is amended on an ongoing basis upon a determination by Congress recommended by the Secretary of Agriculture that authorization is appropriate for new or revised marketing orders. Several rulemaking hearings are held each year to consider new marketing orders or revisions to those already in place. Likewise, marketing orders are terminated on occasion and proposed marketing orders are occasionally denied. The Fruits and Vegetables Program marketing orders website shows current events and provides background:

<http://www.ams.usda.gov/fv/moab.html>

[46] Of approximately 35 fruit and vegetable marketing orders operating under the AMAA, about half of them (17) have active promotion programs; the other half do not, according to USDA employee (since 1968) Mr. Ronald Cioffi, then Chief (since 1986) of the Marketing Order Administration Branch (MOAB). Tr. 815.

---

<sup>12</sup> Volume control and supply control are not employed under the Marketing Orders here.

Gerawan Farming, Inc.  
01 AMA Docket No. F&V 916-1 and 917-1  
AMAA Docket No. 02-0008

[47] USDA employee Mr. Kurt Kimmel, regional office manager, was, with the help of staff, overseeing and administering 11 of those marketing orders, those within California, Hawaii, and parts of Arizona, including the ones at issue here. Tr. 1135, 1201-02.

[48] Under the AMAA, marketing orders are basically self-help programs which operate under the supervision of USDA. Tr. 723. Congress has established majority rule programs that have government oversight.<sup>13</sup>

[49] Unlike the mushroom promotion act or the beef promotion act, though, the overarching message for the promotion including paid advertising is not specified by the AMAA or the Marketing Orders or the Secretary of Agriculture or the Committees or the Subcommittees; there has been no rulemaking regarding the overarching message.

[50] Orderly marketing is the purpose of the AMAA. Ronald Cioffi testified that the purpose of promotion including paid advertising is to promote the product to expand markets, to develop new markets (foreign and domestic), and to develop new uses for those products. Tr. 751.

[51] The purpose of the promotion program for California-grown nectarines and California-grown peaches, is to increase the consumption of tree fruit. Tr. 812. . . . (W)e expect advertising to have a positive return to producers. Tr. 814.

---

<sup>13</sup> See Justice Breyer's dissent in *United Foods*, 533 U.S. at 419, including at 422 "Compared with traditional 'command and control,' price or output regulation, this kind of regulation - - which relies upon self-regulation through industry trade associations and upon the dissemination of information - - is more consistent, not less consistent, with producer choice." (Justice Breyer was discussing the mushroom promotion act, but this statement would apply also to marketing orders under the AMAA.)

[52] The purpose of promotion including paid advertising has also been expressed as follows: to increase demand for nectarines and peaches; to increase demand for California-grown nectarines and California-grown peaches; to promote sales of California-grown nectarines and California-grown peaches; and to raise the prices for producers of California-grown nectarines and California-grown peaches.

[53] The AMAA restricts marketing orders “to the smallest regional production areas . . . practicable” (7 U.S.C. § 608c(9)(B)); perhaps it is awkward for the U.S. government to lay claim to the promotion of California nectarines and peaches, when so many states produce fine nectarines and peaches.

[54] The California nectarine and peach handlers and growers are not exempted from the antitrust laws. “Antitrust Guidelines” prepared by the USDA and the Department of Justice designed to advise the members and employees of Federal marketing order committees with regard to the U.S. antitrust law make that clear. Price fixing is not permitted; there is no uniform price. PX 22; Tr. 1207.

[55] There are no price support subsidies available to those within the California nectarine and peach industry.

[56] Cooperatives exist within the California nectarine and peach industry but are not the norm. Tr. 840, 190-191.

[57] In contrast to *Livestock Marketing*, the AMAA does not control the overarching message of the advertising - - how could it? Under the AMAA, marketing orders addressing an array of

Gerawan Farming, Inc.  
01 AMA Docket No. F&V 916-1 and 917-1  
AMAA Docket No. 02-0008

agricultural commodities have been authorized. The AMAA has been put to different uses as marketing needs have evolved. The *merely authorized* promotion and advertising under the AMAA are in sharp contrast to the *specified and controlled* promotion and advertising that the U.S. Supreme Court characterized as government speech. When the government appropriates public funds to promote a particular policy of its own, it is entitled to say what it wishes.

*Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995).

[58] One attribute of government speech is strict compliance with Congressional or other legislative directives, but under the AMAA, the Congressional directives are neither *specific* nor *controlling*.

[59] Likewise, the Regulations promulgated under the AMAA, do not establish the overarching message. Like the statute, the marketing orders authorize but do not control the promotion including advertising. The marketing orders do not “set the overall message” (as in *Livestock Marketing*) or establish the message from beginning to end.

[60] The two marketing orders promulgated pursuant to the AMAA at issue here are 7 C.F.R. Part 916 (Nectarine Order) and Part 917 (Peach Order). 7 C.F.R. Parts 916 and 917. Pertinent parts follow.

Gerawan Farming, Inc.  
01 AMA Docket No. F&V 916-1 and 917-1  
AMAA Docket No. 02-0008

**APPLICABLE REGULATORY  
PROVISIONS**

[61] 7 C.F.R.:

**TITLE 7—AGRICULTURE**

....

**SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE**

....

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

....

[regarding nectarines]

**PART 916—NECTARINES GROWN IN CALIFORNIA**

Subpart—Order Regulating Handling

....

**RESEARCH**

**§ 916.45 Marketing research and development.**

The committee, with the approval of the Secretary, may establish or provide for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution and consumption or efficient production of nectarines. Such projects may provide for any form of marketing promotion including paid advertising. The expense of such projects shall be paid by funds collected pursuant to § 916.41.

Gerawan Farming, Inc.  
01 AMA Docket No. F&V 916-1 and 917-1  
AMAA Docket No. 02-0008

[36 FR 9290, May 22, 1971]

7 C.F.R. § 916.45.

[AND, regarding peaches]

**PART 917—FRESH . . . . PEACHES GROWN IN CALIFORNIA**

Subpart—Order Regulating Handling

. . . .

RESEARCH

**§ 917.39 Production research, market research and development.**

The committees, with the approval of the Secretary, may establish or provide for the establishment of production research, marketing research, and development projects designed to assist, improve, or promote the marketing, distribution and consumption or efficient production of fruit. Such projects may provide for any form of marketing promotion including paid advertising. The expenses of such projects shall be paid by funds collected pursuant to § 917.37.

7 C.F.R. § 917.39.

[62] Lack of attribution of the message to the government<sup>14</sup> - - is a contributing factor to the determination that the speech here is not government speech.

---

<sup>14</sup> Justice Souter's dissent in *Livestock Marketing* explains why, for speech to be regarded as government speech, the government must put that speech forward as its own. 125 S.Ct. at 2068-69. The majority in *Livestock Marketing*, where there were so many other indicia of government speech, did not find the lack of attribution to the government to be fatal to the claim of government speech.

Gerawan Farming, Inc.  
01 AMA Docket No. F&V 916-1 and 917-1  
AMAA Docket No. 02-0008

[63] The “funding tagline” of the nectarines and peaches promotional materials varies. Most often the funding tagline is “California Tree Fruit Agreement”, “California Peaches, Plums and Nectarines”, “California Summer Fruits” (CX 42-51, 54-61, 73, 76), or nothing at all. A few of the promotional materials in evidence are attributed to the author of the article (a model/actress/author, a Ph.D., an M.D.), such as CX 39-41.

[64] A few of the promotional materials in evidence are attributed to growers or handlers as a group. Tr. 337, 355-56, PX 5 at 18. Gerawan is a member of and required to belong to that group, in order to ship nectarines and peaches. The promotional messages are not attributed to the United States government or to the government of California and do not bear a government symbol. The promotional messages are not attributed to individual producers (growers) or handlers.

[65] The Secretary of Agriculture (through AMS) selects the members of the Committees (the Control Committee and the Commodity Committee) in accordance with the Marketing Orders. The Control Committee includes shipper (handler) members and grower members; the Commodity Committee also includes one public member, if nominated. Tr. 724-25.

[66] The Committees meet two times a year, sometimes three times a year. Tr. 1232-33. A USDA representative usually attends, sometimes more than one USDA representative attends. Tr. 726, 1233.

[67] Although the Committees are not government entities, they have been identified as “agents” of the United States. *Lion Raisins, Inc. v. U.S.*, 416 F.3d 1356, 1364 (2005).

[68] When USDA employee Ms. Terry Vawter, a marketing specialist with a bachelor's degree in agricultural economics and a masters degree in agriculture with a specialization in agricultural economics, being cross-examined by Mr. Moody, was asked “. . . . do you intend your regulations to have an economic impact?” she replied, “Well, we intend, we hope that they are a positive impact on the industry at large.” . . . Mr. Moody asked, “. . . .do you intend them to benefit, economically benefit somebody?” Ms. Vawter: “That is the anticipation.” Mr. Moody: “Okay. And that's the handlers or the growers?” Ms. Vawter: “We regulate handlers but we believe that that affects, those benefits affect growers as well.” Tr. 1258-59.

[69] Ms. Vawter testified that the Marketing Orders' flexibility has advantages in addressing changes that are inherent in the industry as far as what retailers demand; and that the Marketing Orders are reflective of the times, somewhat like the Constitution. Tr. 1256.

[70] Regarding promotional projects and materials, each year the process was from the bottom up, not the top down. The paid staff (not government agents) developed programs to present to the Subcommittees; once the Subcommittees and the staff had details and the proposed cost for the program, the Subcommittees recommended to the full Committees (both the Nectarine Committees and the Peach Committees); once the full Committees approved, the program became part of the budget and the budget was sent to USDA for approval. Tr. 1284-86.

[71] The USDA/AMS guidelines for review of promotional activities or items were not intended to control the message, but rather to check the message for certain limited factors: the promotional material must be truthful. It must not disparage another product. It must treat all

participants equitably. There ought to be a good quality product to promote. Promotional things that the Committees do are to be generic and available to everybody. Tr. 781-82, 1243-44, 1246; PX 21.

[72] The USDA's review of promotional materials was focused on compliance with the AMAA and the Marketing Orders, discrimination laws, USDA diversity policies, AMS guidelines (paragraph [70]), Federal Trade Commission advertising laws and regulations, Food and Drug Administration labeling requirements, and antitrust rules. PX 21.

[73] The Secretary of Agriculture, through AMS, approved the budgets that included the promotion and advertising; and did look for compliance with requirements specified by Ms. Terry Vawter and Mr. Kimmel; but usually did not look at individual promotion pieces.

[74] The Promotion Subcommittees and the Committees approved the promotion, including paid advertising, but did not exercise tight control. Tr. 1122.

[75] In 2003 the USDA began reviewing specific pieces of promotional material for their content, a new approach. Tr. 734-36, 779-80, 1235, 1243-44, 1246-47, 1269-71. Prior to that, no piece-by-piece evaluation of the promotional materials was undertaken by the government or government agents. The message could not have been controlled from top to bottom.

[76] Paid staff had the authority to plan the promotional activities and then to obtain approvals at the various upper levels (the governmental levels), that is, the Subcommittees, the Committees, and the Secretary of Agriculture (through AMS). Whether the expenditures, or even proposed expenses in the budget, were reasonably necessary (Tr. 728) to accomplish the

mission is difficult to know because “the mission” evolved from paid staff’s starting place. Tr. 781-83.

[77] Whether an objective under the Marketing Orders was to heighten awareness on the part of retailers and consumers (a) of the diversity among California-grown nectarines and California-grown peaches; and (b) of the characteristics held in common among California-grown nectarines and California-grown peaches, is unclear.

[78] The Marketing Orders establish a minimum grade and distinguish two grades, U.S. #1 and utility grade, but the promotion and advertising do not appear to highlight either the minimum or the distinction.

[79] The Marketing Orders establish a minimum maturity standard and distinguish two maturity standards, California well-mature and U.S. mature, but the promotion and advertising do not appear to highlight either the minimum or the distinction.

[80] The Marketing Orders establish minimum size requirements, but the promotion and advertising do not appear to highlight the size requirements.

[81] The Marketing Orders establish standard packaging, but the promotion and advertising do not appear to highlight the packaging requirements.

[82] Ideally, compelled “generic” advertising would promote the agricultural commodities group’s common interests and would avoid spending the grouped money in ways that are divisive. Leaving off brand names is not always adequate protection, however, against favoring one producer over another, one handler over another, or one target market area over another.

[83] “Generic” advertising can be unfair in a highly competitive market such as that for California-grown nectarines and peaches. Established market areas differ from one competitor to the next, and the choice of what market areas to target can make a difference in the benefits that growers or handlers will derive from promotional efforts. Distinct qualities of fruit belonging to one competitor and not another can make a difference in the benefits that growers or handlers will derive from promotional efforts.

[84] The evidence did not answer the following questions: What market areas are the targets for which messages? How are marketing target areas chosen so that there is no favoritism toward some producers at the expense of others, and no favoritism toward some handlers at the expense of others?

[85] Gerawan complains that featuring the SUMMERWHITE® (trademarked) nectarines and peaches, which Gerawan does not grow or handle, helps Gerawan’s competitor at Gerawan’s expense. Tr. 783-85; CX 47. The government evidence showed that featuring white nectarines and peaches increases sales of both white and yellow nectarines and peaches.

[86] Gerawan complains that the message “ripen your peaches in a paper bag on the counter for a few days” is false as to Gerawan’s peaches, because Gerawan’s peaches are ripened on the tree and ripe enough when purchased at retail to ripen without going into a bag. Tr. 38-39, 196-97. Gerawan harvests multiple times from the same tree, as many as eight to ten times per season, each time taking only the tree-ripened fruit and leaving the rest to continue ripening. Tr.

39, 41-45, 47. Gerawan complains that advertising such as the “paper bag campaign” does not increase the demand for peaches but has the opposite effect.

[87] Even if the promotion under the Marketing Orders had a well-meaning purpose to educate retailers and consumers how to care for California-grown nectarines and California-grown peaches upon acquisition, Gerawan argues that the message is false at least to its fruit and damaging.

[88] Thus, argues Gerawan, promotion including paid advertising, if designed to deliver a pleasurable eating experience to consumers of California-grown nectarines and California-grown peaches, would send entirely different messages from the ones being sent under the Marketing Orders. Dan Gerawan believes the best way to promote Gerawan’s fruit is to stop the Marketing Orders promotion altogether. Tr. 164.

[89] Gerawan would avoid generic advertising altogether and concentrate on the distinctions of the fruit it handles. Gerawan complains that generic advertising fails to address important distinctions from one brand to the next. For example, Gerawan believes that its practices result in a higher sugar content per piece of fruit and consequently a much more enjoyable eating experience for the consumer; that the available sugar of the tree, divided among fewer pieces of fruit, makes each piece of fruit sweeter. Tr. 39-45, 49-52, 192-94.

Gerawan Farming, Inc.  
01 AMA Docket No. F&V 916-1 and 917-1  
AMAA Docket No. 02-0008

**I. Not Government Speech;  
rather, Commercial Speech,  
in which the Government has Reasonable Interests.**

[90] The California Tree Fruit Agreement promotion including advertising for nectarines and peaches, funded through compelled assessments paid by handlers such as Gerawan, is not government speech as delineated by *Livestock Marketing* and as previously suggested in *United Foods*; rather, it is commercial speech paid for by marketing orders assessments, authorized by both statute and the marketing orders, in which the government has reasonable interests.

[91] The AMAA does not establish the overarching message. (The overarching message is not established by the statute or the regulations; the overarching message is not established by the Secretary of Agriculture, or even by the Committees that administer the Marketing Orders.) The AMAA is not comparable to the Beef Promotion and Research Act of 1985, 7 U.S.C. § 2901, *et seq.*, addressed by “*Livestock Marketing*”.

[92] As U.S. District Judge Gladys Kessler wrote of *Livestock Marketing*, while considering the Hass Avocado Promotion, Research, and Information Act of 2000, 7 U.S.C. § 7801, *et seq.*, in her Memorandum Opinion issued in the United States District Court for the District of Columbia on March 15, 2006:

Writing for a 6-3 majority, Justice Scalia concluded that the Beef Act advertising programs constituted government speech to which the producers had

Gerawan Farming, Inc.  
01 AMA Docket No. F&V 916-1 and 917-1  
AMAA Docket No. 02-0008

no First Amendment right to object.<sup>15</sup> The Court rejected respondents' argument that because the Beef Board and state beef councils play such a central role in creating and disseminating those advertisements, the government speech doctrine does not apply. "When, as here, the government sets the overall message to be communicated and approves every word that is disseminated," the Court held, "it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages." *Id.* at 2063. In other words, when a "message . . . is from beginning to end . . . established by the federal government" it constitutes government speech even if private actors are enlisted to convey it. *Id.* at 2062. *Avocados Plus Inc. v. Johanns*, Civil Action No. 02-1798, at 11-12 (GK), 2006 U.S. Dist. LEXIS 10144, 2006 WL 637108 (D.D.C. Mar. 15, 2006).

[93] The specific and controlling language, of both the **Beef** Promotion and Research Act of 1985 (addressed in "*Livestock Marketing*"), and the **Mushroom** Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. § 6101-6112 (addressed in "*United Foods*"), is comparable to that of the following statutes that also generate "government speech": (a) the **Pork** Promotion, Research and Consumer Information Act, 7 U.S.C. § 4801 *et seq.*; *see Johanns v. Campaign for Family Farms*, 125 S.Ct. 2511 (2005) (remanding the case to the United States

---

<sup>15</sup> The Court included a lengthy analysis of the government speech doctrine which, in general, precludes citizens from challenging expressive activities by government actors or the government itself. *See Livestock Marketing*, 125 S.Ct. at 2060-63.

Gerawan Farming, Inc.  
01 AMA Docket No. F&V 916-1 and 917-1  
AMAA Docket No. 02-0008

Court of Appeals for the Sixth Circuit); (b) The **Dairy** Promotion Stabilization Act of 1983, 7 U.S.C. § 4501 *et seq.*; *see Johanns v. Cochran*, 125 S.Ct. 2512 (2005) (remanding the case to the United States Court of Appeals for the Third Circuit); (c) the **Cotton** Research and Promotion Act of 1966, as amended, 7 U.S.C. § 2101, *et seq.*; *see Cricket Hosiery, Inc. v. United States*, 28 CIT \_\_\_\_ slip op. 06-56, Court of International Trade, Judge R. Kenton Misgave (April 24, 2006); (d) the Has **Avocado** Promotion, Research, and Information Act of 2000, 7 U.S.C. § 7801, *et seq.*; *see Avocados Plus Inc. v. Johanns*, 2006 WL 637108 (D.D.C. March 15, 2006); (e) the **Honey** Research, Promotion, and Consumer Information Act, as amended, 7 U.S.C. §§ 4601-4613; *see Walter L. Wilson, d/b/a Buzz 76 Apiaries*, 64 Agric. Dec. \_\_\_\_ slip op., USDA Judicial Officer, HRPCIA Docket No. 01-0001 (November 28, 2005); and (f) the **Watermelon** Research and Promotion Act, 7 U.S.C. § 4901, *et seq.*; *see Red Hawk Farming & Cooling*, 64 Agric. Dec. \_\_\_\_ slip op., USDA Judicial Officer, AMA WRPA Docket No. 01-0001 (November 8, 2005). *Emphasis added.*

[94] Both the Beef Promotion and Research Act of 1985, 7 U.S.C. § 2901, *et seq.*, addressed by *Livestock Marketing*, and the Mushroom Promotion, Research, and Consumer Information Act of 1990, addressed by *United Foods*, are characterized by *specific* and *controlling* Congressional directives. So are the other Acts including those identified in paragraph [93]

Gerawan Farming, Inc.  
01 AMA Docket No. F&V 916-1 and 917-1  
AMAA Docket No. 02-0008

under which advertising and promotion are regarded as government speech, instead of government facilitation of private speech.<sup>16</sup>

[95] The AMAA, in sharp contrast, authorizes but does not control the promotion and advertising. The AMAA does not “set the overall message” (as in *Livestock Marketing*) or establish the message from beginning to end. The AMAA authorizes the Secretary of Agriculture to issue marketing orders (regulations) that, among other things, establish or provide for the establishment of “**production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order**”; and regarding numerous agricultural commodities including California peaches and nectarines, “**such projects may provide for any form of marketing promotion including paid advertising.**” 7 U.S.C. § 608c(6)(I).

[96] The attributes of government speech identified in *Livestock Marketing* are missing under the California Tree Fruit Agreement. The statute (the AMAA), and the regulations (the Marketing Orders): (a) do not specifically identify the government interest in promoting nectarines and peaches; (b) do not specifically articulate the purpose of the promotion and the

---

<sup>16</sup> But contrast the **Alligator** case, *Landreneau v. Pelts & Skins, LLC*, 125 S.Ct. 2511 (2005) (remanding the case to the United States Court of Appeals for the Fifth Circuit).

Gerawan Farming, Inc.  
01 AMA Docket No. F&V 916-1 and 917-1  
AMAA Docket No. 02-0008

advertising; (c) do not specify the overarching message to be communicated; (d) do not control the message from the top down; and (e) do not control the message from beginning to end.

[97] Whether the compelled monetary contributions are necessary and proportionate to the legitimate promotional goals of the Committees and Subcommittees is difficult to determine.<sup>17</sup>

[98] The U.S. Supreme Court's guidance in compelled subsidy cases has perhaps impacted the business of promoting California-grown nectarines and peaches. Perhaps adequately detailed initial government control has been undertaken, by the Committees or the Subcommittees, or by the Secretary of Agriculture, with specificity that serves as a yardstick for the promotion projects initiated.

[99] Based on the evidence before me, which predated *Glickman v. Wileman* and is now 2-1/2 years old, the U.S. government had not definitively controlled the overall purpose or objective for promotion including paid advertising. Rather, the governmental components reacted in a somewhat cursory review of what paid staff had undertaken.

[100] Not a factor to be addressed in this 15(A) action is the effectiveness of the expenditures for promotion including paid advertising. *Glickman v. Wileman*. Consequently, Dan Gerawan's testimony that the forced assessments are largely wasted; that much of the money is spent on

---

<sup>17</sup> The Committees and Subcommittees identified and articulated and circulated a general theme of "working on category management and how to help improve the demand and movement of California peaches and nectarines through the marketing channels." Tr. 1286. Determining the governmental connection in the promotion undertaken, and whether the assessments for promotion are reasonably necessary and proportionate to the legitimate promotional goals, is difficult without clearly delineated Committees' objectives prior to development of the promotion. The Committees' objectives for promotion, including paid advertising, are formulated year-by-year in response to input from below.

Gerawan Farming, Inc.  
01 AMA Docket No. F&V 916-1 and 917-1  
AMAA Docket No. 02-0008

point of sale (retail store) display items that end up in the trash, will not be evaluated here. Nor will Gerawan's complaint that the promotion reduces rather than increases consumption be evaluated here, because the effectiveness of the promotion is not relevant. Also, except for determining that the materials were germane to the purposes of the AMAA, I do not evaluate or describe the promotion and advertising materials in evidence. Tr. 806.

[101] Likewise, since the effectiveness of the expenditures for promotion including paid advertising is not a factor for me to consider, I will not evaluate the Apex study or the assumptions upon which the Apex study is based. Tr. 734, 736.

[102] The effectiveness of the expenditures is of course of concern to those who set the assessment amounts and who approve the budgets, including the Secretary of Agriculture, the Committees and Subcommittees.

[103] During 2003, the assessment rate was 20 cents per box of California nectarines and peaches. Tr. 1311. The assessment had been 19 cents per box. Tr. 1311. The President of the California Tree Agreement, Mr. Richardson, attributed the penny per box increase to Gerawan's withholding (about half) of its payment of each amount assessed. Tr. 1310-11. The assessment had previously been 18.5 cents for nectarines and 19 cents for peaches per 25 pound container. CX 6. From year-to-year there is rulemaking regarding the amount of the assessment only if a change in the amount is to be considered.

Gerawan Farming, Inc.  
01 AMA Docket No. F&V 916-1 and 917-1  
AMAA Docket No. 02-0008

[104] The Nectarine and Peach Marketing Orders do not employ volume controls *per se* (Tr. 776, 853-54), or restrictions on supply such as “reserves” or “surplus”.

[105] Under the guise of quality control, Dan Gerawan testified, the Nectarine and Peach Marketing Orders accomplished volume control, during 1985-1990. Tr. 150-153. Discussion at the California Tree Fruit Agreement meetings would frequently address reducing the volume of fruit on the market in the hopes of increasing prices back to the grower. Tr. 152. The changes since 1990 have resulted in less talk among members of the industry of volume control, and USDA does not support volume control.

[106] Dan Gerawan testified that the California Tree Fruit industry experienced “a big deregulation” since 1990 (when the record closed in “*Glickman v. Wileman*”). Tr. 149. Since 1990, Dan Gerawan testified, the relaxation of standards through the addition of utility grade has given Gerawan the freedom to market all the fruit which customers will buy.

[107] Dan Gerawan testified that when “*Glickman v. Wileman*” was filed, although there were not volume controls *per se*, fruit for which there would have been customers was kept off the market through (a) the minimum size regulations, (b) the regulations against cosmetically challenged fruit, which is blemished fruit, and (c) the maturity regulations. Tr. 149.

**II. Highly Competitive, Minimally “Collectivistic” or  
“Cooperative” and Not in a Manner that Displaces Competition**

[108] *Glickman v. Wileman and United Foods* describe “collectivistic” and “cooperative” marketing that displaces competition, in a way that does not apply to the marketing of nectarines and peaches at issue here, by handlers such as Gerawan, under the California Tree Fruit Agreement.

[109] Under the AMAA, agricultural commodities are regulated to varying degrees. Milk is an example of a commodity that can be tightly regulated under the AMAA. Milk marketing orders can involve pooling, and redistributing certain sales receipts. It can be argued that certain milk marketing orders under the AMAA may establish the type of cooperative marketing that displaces competition. Most agricultural commodities addressed by the AMAA are not so highly regulated.

[110] Actions taken under the AMAA range from **highly** regulating marketing orders, to **minimally** regulating marketing orders. Examples of **highly** regulating marketing orders could include dairy (regulated in numerous but not all regions of the country). Other agricultural commodities, including the California nectarines and peaches here, and including other fruits or vegetables in various regions, are examples of **minimally** regulating marketing orders. The

specifics for one marketing order addressed by the AMAA would not be appropriate for another.

The AMAA is versatile and has been put to many uses over more than 70 years.<sup>18</sup>

[111] The objective of the AMAA, “orderly marketing”, does not require the type of cooperative marketing that displaces competition. Tremendous diversity exists among the various marketing orders promulgated under the AMAA. Nectarine and peach handlers under the California Tree Fruit Agreement are fiercely competitive, among themselves, as well as among packers who are not part of the California Tree Fruit Agreement.

[112] Nectarine and peach handlers under the California Tree Fruit Agreement do provide buyers with some uniformity regarding certain aspects of their nectarines and peaches. These nectarine and peach handlers (a) are not exempt from antitrust requirements; (b) do not set minimum prices; (c) do not “pool” their fruit to provide buyers with only one source (such as a cooperative); and (d) do not use volume control to keep prices up. These handlers do (a) identify according to grades; (b) identify according to two standards for maturity: a minimum standard (U.S. Mature), and a higher standard (California Well-Mature); (c) specify the level of cosmetic defects, including blemishes; (d) predictably size the fruit, and (e) provide uniform packaging.

### **Fierce Competition Dominates the Tree Fruit Industry**

[113] On direct examination, Gerawan’s counsel questioned Gerawan’s President:

---

<sup>18</sup> The AMAA reenacted specified provisions of the Agricultural Adjustment Act of 1933, as amended).

Gerawan Farming, Inc.  
01 AMA Docket No. F&V 916-1 and 917-1  
AMAA Docket No. 02-0008

Mr. Moody: Well, as you -- if someone were to say to you -- ask you the question is the CTFA -  
- or is the tree fruit industry in California characterized by competition or is it a competitive  
industry, how would you answer that?

Mr. Dan Gerawan: It's extremely competitive.

Mr. Moody: Okay. And what do you mean by that?

Mr. Dan Gerawan: I mean that I'm trying to get my competitors' customers. He's trying to get  
mine. We're trying to get new customers. It's extremely competitive.

Tr. 165-66.

[114] On cross examination, Gerawan's President answered a question by AMS's counsel Ms.  
Deskins:

Mr. Dan Gerawan: This is a very highly competitive business we're in. The competition -- I  
don't know that you understand how competitive this business really is. But it's highly  
competitive. And we're -- the margins are cut razor thin. And when per capita consumption  
goes down, that is more indication that there's a general level of dissatisfaction of the people  
buying the fruit from this industry. And it's -- I'm being harmed by that.

Tr. 319.

[115] On direct examination, Gerawan's counsel questioned Gerawan's President:

Mr. Moody: But the price you get though is really subject to matter of negotiation between you  
and the buyer?

Mr. Dan Gerawan: Yes.

Gerawan Farming, Inc.  
01 AMA Docket No. F&V 916-1 and 917-1  
AMAA Docket No. 02-0008

Mr. Moody: And is there anything CTFA can do that affects the prices you're able to get?

Mr. Dan Gerawan: That's a pretty broad question. Yes.

Mr. Moody: Okay. What are some examples?

Mr. Dan Gerawan: Well, you used the conditional form of the verb, which means if they were to stop all their generic advertising we might be able to get a higher price for our product.

Mr. Moody: Okay. Is there anything CTFA can do to restrict entry into the business, meaning the new growers can come in and grow peaches and nectarines?

Mr. Dan Gerawan: Another broad question but there's nothing that CTFA could do to keep someone out. No, there isn't.

Mr. Moody: Okay. Is there anything CTFA can do to keep a packer out of the business?

Mr. Dan Gerawan: Aside from bringing some kind of USDA enforcement action for breaking some law or regulation, no.

Mr. Moody: And does CTFA have any control over relative market shares between the packers?

Mr. Dan Gerawan: No.

Mr. Moody: Does CTFA have any role in setting any form of producer allotment?

Mr. Dan Gerawan: No.

Mr. Moody: Does CTFA have any power to regulate the price?

Mr. Dan Gerawan: No.

Mr. Moody: Does CTFA have any power to grant anti-trust immunity in case of for example you and Fower Packing wanted to agree between the two of you on a price?

Gerawan Farming, Inc.  
01 AMA Docket No. F&V 916-1 and 917-1  
AMAA Docket No. 02-0008

Mr. Dan Gerawan: No.

Mr. Moody: Is it your understanding the anti-trust laws are fully applicable to your activities as a packer?

Mr. Dan Gerawan: Yes.

Mr. Moody: Is there any kind of market allocation regulation that CTFA is able to implement?

Mr. Dan Gerawan: No.

Tr. 164-65.

[116] The challenged assessment (roughly one-half of the total assessment) is part of a "broader regulatory system", but the extent to which it "collectivizes" aspects of the market is minimal.

The primary object of the Marketing Orders is to ensure some minimum standards including grade, maturity, blemishes, and size; and some uniformity in packaging. Under the Marketing Orders, customers will know the size, number of pieces and overall weight of fruit in each box.

[117] Is Gerawan part of a group that is "bound together and required ... to market their products according to cooperative rules?" The answer is "Yes" with respect to those items in paragraph [116]; but "No" with respect to many important aspects of marketing. The "No" answer: Under the Marketing Orders, the fruit is not jointly marketed (there is no Order-wide cooperative; a few cooperatives exist; they are the exception rather than the rule). The "No" answer continues, with the following important marketing features **not** set, variable: the market areas; the customers; the quantity of fruit that a handler may market; and the prices (and the prices best not be set, as there is no anti-trust exemption for price fixing!). Further, the "No"

Gerawan Farming, Inc.  
01 AMA Docket No. F&V 916-1 and 917-1  
AMAA Docket No. 02-0008

answer continues with the following, beyond the minimum standards, **not** set, variable in ways that make a tremendous difference in the consumer's eating experience: growing methods; harvesting methods; degree of ripeness when picked; the sugar content; the color; the variety; the flavor; the firmness; and other factors.

[118] I questioned Gerawan's President:

ALJ: How does Gerawan measure the maturity of a peach? What does it depend on? What are the factors?

Mr. Dan Gerawan: Measuring, what way, in order to determine harvest time?

ALJ: Well, I'm beginning to think that when you determine whether it meets the highest grade of maturity or the lesser grade of maturity, that perhaps it has to do with size and color. But I don't know for sure.

Mr. Dan Gerawan: Color, firmness, sweetness.

ALJ: Color, firmness, and sweetness.

Mr. Dan Gerawan: A mixture of those three. And depending on variety, you would give one or more of those factors more weight.

Tr. 366-67.

[119] Is the assessment regulation related to and in furtherance of other non-speech purposes, carrying out other aspects to further other economic, societal, or governmental goals? *See United Foods*, 533 U.S. at 415. The answer is Yes, but promotion including paid advertising is severable, and the expenses for the compelled generic advertising are severable.

Gerawan Farming, Inc.  
01 AMA Docket No. F&V 916-1 and 917-1  
AMAA Docket No. 02-0008

[120] Gerawan's Petition attacks neither the Act nor the regulations (the Marketing Orders). Gerawan's Petition attacks one of the Committees' activities, that of compelling Gerawan and the other handlers to pay assessments for generic advertising.

[121] On cross examination, AMS's counsel questioned Gerawan's person in charge of marketing (*See* Tr. 34-35):

Mr. Ray Gerawan: . . . . My - - the fact of CTFA, I'm not entirely against the agreement. I'm against the advertising portion of the agreement.

Ms. Deskins: Okay. Okay.

Mr. Ray Gerawan: . . . . - - my preference would be CTFA have a two-person office, and that's all, and all they would do is consumers would call in to get some information about California fruit. That would be my preference.

Ms. Deskins: Okay.

Mr. Ray Gerawan: I wouldn't want to do away with CTFA.

Ms. Deskins: Okay. Because you . . .

Mr. Ray Gerawan: I would say a two-person office, maybe three, and that's it.

Ms. Deskins: Okay. Because you believe the CTFA could inform people about California nectarines and peaches.

Mr. Ray Gerawan: Yeah. If they want to call in to find out, but I don't want them to use my money to put out advertisements on stuff that - - a product that I'm growing that's counter to my message.

Gerawan Farming, Inc.  
01 AMA Docket No. F&V 916-1 and 917-1  
AMAA Docket No. 02-0008

Tr. 98-99.

[122] Gerawan proved that the California nectarine and peach industry, although always competitive, is even more competitive since the *Glickman v. Wileman* decision. Gerawan was a proponent of changing the regulations to allow for a utility grade of peaches and nectarines. Gerawan finds that with a utility grade it is able to improve the quality of its premium label and provide a lower-priced label with fruit of reduced quality that was previously packed in the premium label or culled out of shipments.

[123] Douglas Andrew Phillips, a “grower, packer, shipper of fruits” since 1971, described the utility grade, and the allowing of the sale of “U.S. mature”, as regulation changes that did not cause his company to pack that much extra fruit but did allow the packing of some fruit that wouldn’t have been allowed 10 years earlier. Tr. 497-98, 533-34.

[124] Dr. Melvin Peter Enns is a businessman in a family of growers, packers, and shippers of fresh fruit, peaches, plums, nectarines, apricots, and persimmons. Tr. 432-33. Dr. Enns has his PhD in psychology and was a professor for 18 years. Tr. 434. He was Vice-Chair of the CTFA Executive Committee at the time of his testimony. Tr. 434.

[125] On direct examination, AMS’s counsel questioned Dr. Enns:

Ms. Deskins: Can you tell us what, if any, changes there have been in these size and maturity regulations?

Dr. Enns: I’ll use an analogy from an educational background. I perceive it as a two by two matrix. And if we have maturity on one (axis), we have Cal Well Mature being one category,

Gerawan Farming, Inc.  
01 AMA Docket No. F&V 916-1 and 917-1  
AMAA Docket No. 02-0008

and U.S. Mature being a second category. And then if we have grade on the other axis, we have U.S.#1 and Utility. so that would give you four boxes that you can pack,

a U.S.#1, Cal Well Mature;

a U.S.#1, U.S. Mature;

a Utility, Cal Well Mature, and

a Utility, U.S. Mature.

And I think the main change is we - - now to use my educational example - - we've gone from a pass/fail system, to a grading system. So instead of just having one box, and that being the passing box, and the rest failing, we now have an A box, a B box, a C box, and a D box.

Tr. 436.

[126] Dr. Enns identified PX 5, p. 7, the SUMMERIPE® ad. Tr. 459. He identified his company, WesPak (Tr. 459), as one of the four "Exclusive Distributors of SUMMERIPE® Premium Ready to Eat California Tree Fruit". PX 5 at 7.

[127] Dr. Enns confirmed: "The marketing order does not allow us to engage in price fixing. No. I don't think the marketing order is related to this issue. Tr. 462.

[128] On cross examination, Gerawan's counsel questioned Dr. Enns:

Mr. Moody: Okay. Would you characterize the California Tree Fruit Industry as fairly competitive?

Dr. Enns: Yes. I would.

Gerawan Farming, Inc.  
01 AMA Docket No. F&V 916-1 and 917-1  
AMAA Docket No. 02-0008

Mr. Moody: And what's the impact of the highest grade and maturity regulations on your ability to compete?

Dr. Enns: I look at it as allowing us to really go out, as the State of California, and bust through some really tough markets and present a product that consumers know is going to be an excellent product. And if it's not an excellent product, it is going to be graded as, and clearly stated as a second product, a third product, a fourth product. And it's going to allow people to buy a perishable product from thousands of miles away and have confidence that this product that they're buying is going to be what it was, and that they could buy it from Producer A, fill their load from Producer B, garner some of this and some of that, and it's coming from California. This stuff is quality regulated, and it's the finest in the world.

Mr. Moody: Okay.

Dr. Enns: You hit a hot spot.

Mr. Moody: Oh, good. And you believe that they help you compete more effectively in the marketplace?

Dr. Enns: I think they allow us to bust down trade into other countries. I think MAP funds allow us to have - - to double our promotion that we could never get as individuals. I think that they provide a level playing surface for all the growers, large and small, and I think California fresh fruit is the envy of everyplace in the world.

Tr. 477-79.

Gerawan Farming, Inc.  
01 AMA Docket No. F&V 916-1 and 917-1  
AMAA Docket No. 02-0008

Mr. Moody: Dr. Enns, does the marketing order place any restrictions of which customers you can sell to?

Dr. Enns: No.

Mr. Moody: Does it place any restrictions on the price you can offer your fruit for?

Dr. Enns: No.

Mr. Moody: Does it place any restrictions on the size of your grower base?

Dr. Enns: No.

Mr. Moody: Does it place any restrictions on the timing of your sales?

Dr. Enns: No.

Tr. 488.

[129] On redirect examination, AMS's counsel questioned Dr. Enns:

Ms. Deskins: Mr. Enns, I want you to clarify, you used the term MAP. What does that mean, the MAP Program?

Dr. Enns: Oh, this is where CTFA applies for matching funds for export markets.<sup>19</sup> And CTFA is awarded funds close to \$1 million a year for developing export markets.

Ms. Deskins: Okay.

Dr. Enns: And it's matching funds with our assessments that are used in primarily Taiwan, secondarily, and Hong Kong

---

<sup>19</sup> These are matching funds for promotion in foreign markets through USDA's Foreign Agriculture Service.

Gerawan Farming, Inc.  
01 AMA Docket No. F&V 916-1 and 917-1  
AMAA Docket No. 02-0008

Tr. 482.

[130] Ms. Vawter confirmed that California tree fruit marketing is competitive rather than cooperative in the following aspects: the growers are free to change handlers anytime they please; the handlers are free to sell to any customer they please; the committee does not take title to any of the commodity and sell it on behalf of the growers (as does the Date Committee). Tr. 1261, 864.

**III. Gerawan's Withholding Payment of a Portion  
of its Assessments was in Good Faith and Not for Delay**

[131] **Gerawan's withholding of payment of a portion of its assessments was in good faith and not for delay and in reliance on the advice of counsel.** Tr. 389-90.

[132] On direct examination, Gerawan's counsel questioned Gerawan's President:

Mr. Moody: Okay. In addition to what you told Ms. Deskins that motivated filing the Petition in May of 2001, did the Supreme Court's Decision of *United Foods* also play a role?

Mr. Dan Gerawan: Yes.

Mr. Moody: And why was that?

Mr. Dan Gerawan: When I read in *United Foods* that the Supreme Court presumed that a comprehensive scheme of regulations had displaced competition in the industry, and that that's what they based their *Wileman* Decision on, it was clear to me at that point that whatever the

Gerawan Farming, Inc.  
01 AMA Docket No. F&V 916-1 and 917-1  
AMAA Docket No. 02-0008

Supreme Court was thinking then, certainly is not the case now, especially since the great degree of deregulation we've had since then. So that's what I got from the *United Foods* decision.

Tr. 360-61.

[133] 7 U.S.C.:

**§ 608c. Orders regulating handling of commodity**

**(14) Violation of order; penalty**

**(B)** Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order may be assessed a civil penalty by the Secretary not exceeding \$1,000 for each violation. Each day during which such violation continues shall be deemed a separate violation, except that if the Secretary finds that a petition pursuant to paragraph (15) was filed and prosecuted by the handler in good faith and not for delay, no civil penalty may be assessed under this paragraph for such violations as occurred between the date on which the handler's petition was filed with the Secretary, and the date on which notice of the Secretary's ruling thereon was given to the handler in accordance with regulations prescribed pursuant to paragraph (15). The Secretary may issue an order assessing a civil penalty under this subsection only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable in the district courts of the United States in any district in which the handler subject to the order is an inhabitant, or has the handler's principal place of business. The validity of such order may not be reviewed in an action to collect such civil penalty.

7 U.S.C. § 608c(14)(B).

Gerawan Farming, Inc.  
01 AMA Docket No. F&V 916-1 and 917-1  
AMAA Docket No. 02-0008

[134] Gerawan's Petition has been on file since August 13, 2001. Gerawan's unpaid portion of assessments began to accrue with the production of May 2001, for which Gerawan's payment was due sometime thereafter.

[135] As counsel for Gerawan expressed (Mr. Moody at Tr. 13), it would be a pyrrhic victory to win a case ten years later and have no remedy at the end of the line.

[136] It is proper to deny AMS's request for a civil penalty. The 1946 case cited by AMS, *Ruzicka v. U.S.*, 329 U.S. 287 (1946), was decided during a time when promotional activities such as generic advertising had not been undertaken. The holding in *United Foods* sparked Gerawan's hope that it would win this time. Witness the numerous cases besides this one that sprang up in response to *United Foods*. See paragraph [93].

[137] On June 25, 2001, *United Foods* had 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.* Gerawan's reliance on *United Foods* was justified, particularly since Gerawan knew there is no government "collectivist" centralization of the market for tree fruit; competition has not been displaced by the regulations. Gerawan knew that the California nectarine and peach growers and handlers are engaged in deep-seated free enterprise that can be characterized as fiercely competitive.

[138] Before *Livestock Marketing*, the reasoning in *Pelts & Skins v. Landreneau*, 365 F.3d 423 (5th Cir. 2004) (the alligator case) was very persuasive.

Gerawan Farming, Inc.  
01 AMA Docket No. F&V 916-1 and 917-1  
AMAA Docket No. 02-0008

[139] Gerawan’s position was also reinforced by language in *Delano Farms Company v. California Table Grape Commission*, 318 F.3d 895 (9th Cir. 2003). Noting the distinction between *Glickman v. Wileman* and *United Foods*, the Court said the “grape growers do not operate under the 1937 statute that substituted ‘collective action’ for the ‘aggregate consequences of independent competitive choices’ and expressly exempted them from the antitrust laws”. Gerawan knew that the California nectarine and peach handlers in fact have not substituted collective action for their independent competitive choices and that they must abide by the antitrust laws.

[140] Further, Gerawan was justified in categorizing “research” with “promotion including paid advertising”, even though I have separated out research in this Decision. The phrase “promotion including paid advertising” is included in the research provisions of the Marketing Orders, as in the AMAA.

[141] Illustrative is the following provision in the Peach Marketing Order with regard to using handlers’ money:

§ 917.36 Expenses.

Each commodity committee is authorized to incur such expenses as the Secretary finds are reasonable and are likely to be incurred by the said commodity committee during each fiscal period for the maintenance and functioning of such committee, including its proportionate share of the expenses of the Control Committee; and for such research and service activities relating to handling of the fruit for which the commodity committee was established as the Secretary may determine to be appropriate. The funds to cover such expenses shall be acquired by the levying of assessments as provided in §§917.37.

7 C.F.R. § 917.36.

Gerawan Farming, Inc.  
01 AMA Docket No. F&V 916-1 and 917-1  
AMAA Docket No. 02-0008

Note the use of the term “research” - - it must be meant to encompass promotion including paid advertising; otherwise, would fundraising for paid advertising be authorized?

### **Findings of Fact**

[142] Congress has conferred powers on the Secretary of Agriculture to establish and maintain orderly marketing conditions for certain agricultural commodities specified within the Act known as the Agricultural Marketing Agreement Act of 1937, as amended (frequently herein, “the AMAA” or “the Act”). 7 U.S.C. §§ 601-627. (The AMAA reenacted specified provisions of the Agricultural Adjustment Act of 1933, as amended.)

[143] Where majority rule conflicts with constitutional rights such as those Gerawan enjoys under the First Amendment, balancing tests are required. The question, as it was in *United Foods*, is “whether the government may underwrite and sponsor speech with a certain viewpoint using special subsidies exacted from a designated class of persons, some of whom object to the idea being advanced.” 533 U.S. at 410.

[144] In balancing Gerawan’s First Amendment rights against the government’s interests in promotion including paid advertising under the Marketing Orders, these factors weigh against Gerawan’s claim:

- a. The promotion including paid advertising under the Marketing Orders relates to and is consistent with the government’s goal under the AMAA of orderly marketing, including expanding and maintaining markets, creating demand, and increasing consumption.

- b. The Marketing Orders' promotion including paid advertising incorporates the will of the majority of those in California-grown nectarines and peaches industry, tempered by the Secretary's oversight which includes veto power, and eliminates "free-riders".
- c. The Secretary has a reasonable interest in developing promotion including paid advertising through the paid staff of "agents" of the United States (the Committees, *see* paragraph [67]), with subsequent approval by the Subcommittees, the Committees, and the Secretary.
- d. The Secretary has a reasonable interest in encouraging sales in foreign markets and encouraging CTFA's award of nearly \$1 million a year in matching funds for developing export markets through USDA's Foreign Agriculture Service's Market Access Program (MAP) and may have a particular interest in encouraging sales in primarily Taiwan, and secondarily, Hong Kong. (*See* paragraphs [128] and [129].)
- e. Government intervention in the marketplace has traditionally included collective research and promotion such as that being done under the Marketing Orders.
- f. The government has a substantial interest in communicating health and safety messages regarding the fruit, and the Marketing Orders' promotion including paid

advertising could and occasionally does include communications regarding health and safety.

g. The Secretary seeks not to compel Gerawan to speak, but to compel Gerawan to pay for the speech.

h. Gerawan is free to do its own advertising (as is each of the other handlers), to the extent it can afford to after paying its Marketing Orders assessments.

[145] In balancing Gerawan's First Amendment rights against the government's interests in promotion including paid advertising under the Marketing Orders, these factors weigh in favor of Gerawan's claim:

a. Gerawan has a vital interest in independence and competition in promotion including paid advertising that relates to and is consistent with the goal under the AMAA of orderly marketing, including expanding and maintaining markets, creating demand, and increasing consumption. (*See* paragraph [139], mentioning the 'aggregate consequences of independent competitive choices'.)

b. Gerawan has a reasonable interest in encouraging sales in foreign markets and may have a particular interest in encouraging sales in primarily Canada and Mexico. Tr. 115.

c. Applying the power of the United States government to force Gerawan to pay for promotion including paid advertising for its competitors, or even for itself,

absent reasonably necessary requirements to achieve governmental objectives, abridges Gerawan's freedom of speech.

d. Gerawan has a substantial interest in communicating health and safety messages regarding its fruit, and either independently or through voluntary trade associations, Gerawan's promotion including paid advertising could include communications regarding health and safety.

e. Gerawan has a reasonable interest in targeting its own marketing areas with its message.

f. Gerawan has a reasonable, Constitutionally-protected interest in speaking its own marketing message.

g. Gerawan has a reasonable, Constitutionally-protected interest in choosing its own marketing messenger.

h. Gerawan has a reasonable interest in not being required to subsidize the expense<sup>20</sup> of the Marketing Orders' promotion including paid advertising, all of which Gerawan considers to be generally wasted, and which Gerawan considers to be at times skewed in favor of Gerawan's competitors, at times damaging to Gerawan and its own message, and at times not truthful about Gerawan's fruit.

---

<sup>20</sup> Subsidizing includes not only helping pay for, but also enduring that speech that Gerawan was required to help pay for.

Gerawan Farming, Inc.  
01 AMA Docket No. F&V 916-1 and 917-1  
AMAA Docket No. 02-0008

i. Gerawan has a substantial interest in using its roughly one-quarter million dollars per year in its own way, rather than having that money spent in the Marketing Orders' promotion including paid advertising.

### **Conclusions of Law**

[146] Governmental control and foresight over promotion including paid advertising are not built into the AMAA or the Marketing Orders in the same way as under the Beef Promotion and Research Act Beef of 1985 (addressed in "*Livestock Marketing*"). Under the Beef Promotion Act, the message is government speech: "The message of the promotional campaigns is effectively controlled by the Federal Government itself."

[147] In contrast, under the California Tree Fruit Agreement, the compelled promotion including paid advertising is authorized but is not government speech. Congress authorized "any form of marketing promotion including paid advertising". 7 U.S.C. § 608c(6)(I). Nevertheless, the attributes of government speech are missing. *See* paragraphs [90] through [99].

[148] The speech at issue here is "the statement of one self-interested group the government is currently willing to invest with power";<sup>21</sup> but it is not government speech.

---

<sup>21</sup> *See* Justice Souter's dissent in *Livestock Marketing*, 125 S.Ct. at 2069.

Gerawan Farming, Inc.  
01 AMA Docket No. F&V 916-1 and 917-1  
AMAA Docket No. 02-0008

[149] While *Glickman v. Wileman* describes what the AMAA authorizes, and consequently how the Marketing Orders *could* be operated, it does not describe how the Marketing Orders here are operated, which is at a much more minimal level of restriction on marketing autonomy. See paragraphs [104] - [130].

[150] I disagree with Gerawan that it has a First Amendment claim not to pay for the research activities (even if they are marketing or promotion research activities) under the Marketing Orders. See paragraph [41]. Gerawan can be lawfully forced to pay for the research projects and activities under the Marketing Orders.

[151] Gerawan's First Amendment interests in not subsidizing promotion including paid advertising under the Marketing Orders outweigh the Secretary's interests in forcing Gerawan to pay; consequently, it is contrary to law for the Secretary to abridge Gerawan's First Amendment rights by confiscating Gerawan's money to pay for promotion including paid advertising.

[152] Gerawan had the burden of proof pursuant to section 8c(15)(A) of the AMAA. 7 U.S.C. § 608c(15)(A). Gerawan met its burden of proof.

[153] The Secretary's administration of the promotion including paid advertising under the Marketing Orders had a rational basis, was reasonable, was neither arbitrary nor capricious, and is entitled to deference, but nevertheless abridged Gerawan's freedom of speech guaranteed under the Constitution and thus was not in accordance with law; consequently, Gerawan's Petition must be granted in part.

Gerawan Farming, Inc.  
01 AMA Docket No. F&V 916-1 and 917-1  
AMAA Docket No. 02-0008

### **Order**

[154] Gerawan's Petition is **denied** in part and **granted** in part, as shown below.

[155] Gerawan's Petition is **denied** as to that proportion of withheld payment of assessments corresponding to research projects and activities under the Nectarine Marketing Order and the Peach Marketing Order; Gerawan's Petition is **granted**, and Gerawan is exempted from its obligation to pay, as to that proportion of withheld payment of assessments corresponding to promotion including paid advertising under the Nectarine Marketing Order and the Peach Marketing Order. Gerawan is exempted from any further obligation to pay assessments corresponding to promotion including paid advertising under the Nectarine Marketing Order and the Peach Marketing Order.

[156] This Order shall be effective on the 11th day after this Decision becomes final.

[157] No sooner than 30 days, and no later than 60 days, following the effective date of this Order, Gerawan shall pay to the California Tree Fruit Agreement that amount of withheld payment of assessments under the Nectarine Marketing Order and the Peach Marketing Order that is proportional to research projects and activities, plus interest actually accrued on that portion while it was held in an interest-bearing account; except that, if either party files an appeal with the Judicial Officer, Gerawan shall maintain status quo with regard to the withheld portions of the assessments on deposit, awaiting further Order from the Judicial Officer.

Gerawan Farming, Inc.  
01 AMA Docket No. F&V 916-1 and 917-1  
AMAA Docket No. 02-0008

[158] No sooner than 30 days, and no later than 60 days, following the effective date of this Order, Gerawan shall pay the remainder of the withheld payment of assessments under the Nectarine Marketing Order and the Peach Marketing Order to the producer(s) from which it was collected (presumably Gerawan, for the most part), plus interest actually accrued on that portion while it was held in an interest-bearing account; except that, if either party files an appeal with the Judicial Officer, Gerawan shall maintain status quo with regard to the withheld portions of the assessments on deposit, awaiting further Order from the Judicial Officer.

[159] AMS's Complaint is **granted** in part and **denied** in part, as shown below.

[160] Gerawan shall cease and desist from withholding payment of assessments that is proportional to research projects and activities under the Nectarine Marketing Order and the Peach Marketing Order.

[161] Gerawan shall not be required to pay any civil penalty pursuant to 7 U.S.C. § 608(c)(14)(B). AMS's request for a \$150,000 civil penalty is **denied**. AMS's request for a civil penalty is **denied** in any amount, because Gerawan in good faith and not for delay, in reliance in part on *United Foods* and the advice of counsel, reserved the challenged assessments which would otherwise have been spent and irretrievable. *See* paragraphs [131] through [141].

Gerawan Farming, Inc.  
01 AMA Docket No. F&V 916-1 and 917-1  
AMAA Docket No. 02-0008

### **Finality**

[162] This Decision becomes final without further proceedings 35 days after service unless an appeal to the Judicial Officer 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), and section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

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

Done at Washington, D.C.  
this 15<sup>th</sup> day of June 2006

Jill S. Clifton  
Administrative Law Judge

Hearing Clerk's Office  
U.S. Department of Agriculture  
South Building Room 1031  
1400 Independence Ave SW  
Washington, DC 20250-9203  
202-720-4443  
Fax: 202-720-9776