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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

WILEMAN BROS. & ELLIOTT, INC., Plaintiff and Appellant, v. WILLIAM LYONS, JR., as Secretary, etc., Defendant and Respondent.	F032298 (Super. Ct. No. 94-166231) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Patrick J. O'Hara, Judge.

Thomas E. Campagne & Associates and Jeffrey C. Heeren for Plaintiff and Appellant.

Bill Lockyer, Attorney General, Richard M. Frank and Charles W. Getz IV, Assistant Attorneys General, Edna Walz, Ronald A. Reiter, Seth E. Mermin and Tracy L. Winsor, Deputy Attorneys General, for Defendant and Respondent.

SEE DISSENTING OPINION OF LEVY, J.

Kahn, Soares & Conway, George H. Soares, Dale A. Stern and Robert S. Hedrick for California Avocado Commission, California Apple Commission, California Asparagus Commission, California Cut Flower Commission, California Date Commission, California Egg Commission, California Forest Products

Commission, California Grape Rootstock Improvement Commission, California Kiwifruit Commission, Lake County Winegrape Growers Commission, Lodi-Woodbridge Winegrape Growers Commission, California Pepper Commission, California Pistachio Commission, California Rice Commission, California Sheep Commission, California Strawberry Commission, California Tomato Commission, California Walnut Commission, and California Wheat Commission as Amici Curiae on behalf of Defendant and Respondent.

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This is an appeal from a final judgment rejecting constitutional challenges by appellant Wileman Bros. & Elliott, Inc., to a marketing order for California plums implemented by respondent's predecessor as Secretary of the Department of Food and Agriculture (collectively, the Secretary) in 1994. In addition, appellant challenges an order requiring it to pay to the Secretary $37,343.13 in collection fees and penalties for late payment of marketing order assessments.

Facts and Procedural History

Various state and federal agencies impose assessments on producers and handlers of foods to pay for generic advertising programs involving the particular foods. These programs do not specifically target a particular brand of beef, milk, plums, or other food; instead, they generally encourage the public to eat more of the product. (See generally *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 476-480.)

For over 12 years, appellant has been fighting against laws imposing advertising assessments on plums produced in California. (See *Glickman v. Wileman Bros. & Elliott* (1997) ___ U.S. ___, ___ [117 S.Ct. 2130, 2135].) Beginning in 1988, appellant filed an administrative challenge to advertising assessments imposed under a

federal plum marketing order. That challenge eventually was rejected by the United States Supreme Court. (*Id*. at p. ___ [117 S.Ct. at p. 2142].)

The federal marketing order was terminated in 1991. The state marketing order was implemented in the 1994 harvest season. Appellant filed this action challenging the state order in June of 1994. The complaint raised issues under the state Administrative Procedures Act (APA) (Gov. Code, § 58601 et seq.) and under the state and federal Constitutions.

Appellant initially prevailed in the trial court on its APA claim. That judgment, however, was reversed on appeal. (*Voss v. Superior Court* (1996) 46 Cal.App.4th 900.) After the United States Supreme Court issued its opinion in *Glickman*, the Secretary filed a motion for judgment on the pleadings on appellant's speech-related constitutional claims. By order of April 16, 1998, the trial court granted judgment on those claims, which were the first and second causes of action in appellant's first amended complaint. Subsequently, appellant filed a voluntary dismissal without prejudice of its remaining causes of action. On April 8, 1999, judgment was entered on all counts.

When the trial court granted judgment on APA grounds in 1994, it ordered appellant, pending the Secretary's appeal, to pay into a segregated, interest-bearing trust account all then-due and future assessments against appellant under the plum marketing order. The order provided: "Payments of future assessments shall be paid as they are due. In the event that payments are not timely made, cost and penalty amounts provided by Food and Agricultural Code section 58930 shall automatically be added to the amount due." This order subsequently was amended to permit appellant to withhold in the trust account only those portions of the assessment attributable to the generic advertising program.

As part of the judgment on the pleadings entered in 1998, the court ordered appellant's attorney to "pay all monies in said [trust] account(s), including all amounts and penalties charged due to untimely payment and all interest accrued in the trust account(s)," to the Secretary's collection agent. By check dated May 4, 1998, appellant's attorney paid to the Secretary's agent $101,715.79, which purported to be all remaining assessments, plus interest.

On October 14, 1998, the Secretary filed a "motion to enforce court orders with regard to monies maintained in trust by counsel for plaintiff." By minute order of November 19, 1998, and by formal order filed February 25, 1999, the court found appellant owed additional collection costs and penalties in the amount of $37,343.13. The court ordered appellant to pay that sum to the Secretary's collection agent.

Appellant filed a notice of appeal on December 3, 1998. The appeal purported to be from the April 17, 1998, order granting partial judgment on the pleadings and from the November 19, 1998, minute order for payment of collection costs and penalties. Prior to the filing of the record on appeal, appellant filed a dismissal without prejudice of its remaining causes of action, which asserted alternative constitutional theories concerning the invalidity of certain aspects of the plum marketing order and its enforcement. On April 8, 1999, the trial court entered a judgment for the Secretary on the first and second causes of action and dismissing the remaining causes of action without prejudice. We deem the premature notice of appeal to constitute a timely notice of appeal from the judgment of April 8, 1999, and from the interim order for payment of February 25, 1999. (*Smith v. County of Kern* (1993) 20 Cal.App.4th 1826, 1829, fn. 2.)[1]

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1 In response to this court's inquiry, citing *Hill v. City of Clovis* (1998) 63 Cal.App.4th 434, appellant has informed the court that it waives its right to adjudicate

Discussion

We have today filed an opinion for publication in *Gerawan Farming, Inc. v. Lyons* (Dec. 17, 2001, F031142) ___ Cal.App.4th ___. That opinion, in which we conclude the California Plum Marketing Program,[2] in relevant part, violates the free speech rights of dissenting plum growers under article I, section 2, subdivision (a) of the California Constitution, resolves all of the issues presented by the present appeal.

For the reasons stated in our opinion in *Gerawan Farming, Inc. v. Lyons*, *supra*, ___ Cal.App.4th ___, we reverse the judgment in the present case. Further, we reverse the order of November 19, 1998, which had ordered payment of collection costs and penalties against appellant. In the present case, it appears the parties have stipulated to the portion of the Plum Marketing Order assessments that are attributable to the non-speech-related functions of the California Plum Marketing Board. As noted in our procedural summary above, appellant paid all non-speech-related portions of the assessment after this litigation began. The order of November 19, 1998, concerned only those portions of appellant's Plum Marketing Order assessments attributable to the generic advertising program. Thus, it is our understanding that respondent does not contend appellant still owes any assessments not attributable to advertising. If, contrary to appearances based on the present record, respondent does contend

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those causes of action previously dismissed without prejudice. Pursuant to *Sullivan v. Delta Air Lines, Inc.* (1995) 15 Cal.4th 288, 308-309, we elect to give effect to this waiver; we deem the original judgment dismisses those causes of action with prejudice. Accordingly, we deem this a timely appeal from a final judgment.

[2] The California Plum Marketing Program was established pursuant to the California Marketing Act of 1937, as amended, Food and Agriculture Code section 58601 et seq.

appellant still owes nonadvertising assessments, respondent may petition for enforcement of those assessments in the trial court after remand.

Disposition

The judgment is reversed. The matter is remanded to the trial court for further proceedings consistent with this opinion and the opinion in *Gerawan Farming, Inc. v. Lyons*, *supra*, ___ Cal.App.4th ____. In particular, appellant is entitled to an injunction prohibiting enforcement of assessments against objecting growers and handlers to the extent those assessments are for speech-related purposes. The amount of assessments allocable to speech functions shall be determined by the trial court. Appellant is entitled to its costs on appeal.

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Vartabedian, Acting P. J.

I CONCUR:

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Harris, J.

LEVY, J.

I respectfully dissent.

In *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 517, the California Supreme Court instructed this court to address, in the first instance, various questions engendered by the confluence of the right to freedom of speech under California Constitution, article I, section 2, subdivision (a) (article I) and the California Plum Marketing Program. The court phrased this legal quandary as follows:

> "Our conclusion, however, brings no conclusion to this cause. That the California Plum Marketing Program implicates Gerawan's right to freedom of speech under article I does not mean that it violates such right. But it does indeed raise the question. That question, in turn, raises others, including what test is appropriate for use in determining a violation. And *that* question, in *its* turn, raises still others as well, including what protection, precisely, does article I afford commercial speech, at what level, of what kind, and, perhaps 'most difficult,' subject to what test." (*Gerawan Farming, Inc. v. Lyons, supra,* 24 Cal.4th at p. 517.)

In its opinion on remand in *Gerawan Farming, Inc. v. Lyons* (Dec. 17, 2001, F031142) ___ Cal.App.4th ___, the majority concludes that the generic advertising portion of the California Plum Marketing Program violates article I because its operation does not demonstrate the exercise of a substantial government interest. Since this case presents the same issue, the majority opinion reverses this judgment for the same reason.

However, I disagree with the majority's conclusion. Therefore, I write separately in an effort to respond to the Supreme Court's directive to formulate a test applicable to compelled funding of generic advertising in the context of this mandated cooperative association.

The appropriate level of scrutiny for the review of a regulation that restricts or compels speech is dependent on the nature of that regulation and the context in which it is applied. For example, under the First Amendment, a content-based regulation that affects speech, other than commercial speech, is subject to the most exacting scrutiny. To pass

constitutional muster, the government must show that the regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. (*Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.* (1991) 502 U.S. 105, 118.) However, if the regulation at issue is unrelated to the content of the speech, it qualifies for intermediate scrutiny review. Such a regulation will be upheld if it furthers an important or substantial government interest that would be achieved less effectively absent the regulation. (*Turner Broadcasting System, Inc. v. FCC* (1994) 512 U.S. 622, 662.) This intermediate test is also applied to First Amendment review of commercial speech. (*Central Hudson Gas & Elec. v. Public Serv. Comm'n.* (1980) 447 U.S. 557, 566.) Finally, the context in which the subject speech is compelled may impact the analysis. As discussed in further detail below, where there is a sufficient reason to require persons to associate with one another, those compelled to cooperate in this manner may also be compelled to fund speech that is "germane" to the purposes of the association. (*U.S. v. United Foods, Inc.* (2001) ___ U.S.___ [121 S.Ct. 2334, 2340].)

Here, the analysis must begin with the parameters set forth by our Supreme Court in *Gerawan.* As with the First Amendment, article I's right to freedom of speech may be implicated by the use of money. (*Gerawan Farming, Inc. v. Lyons, supra,* 24 Cal.4th at p. 491.) Further, the First Amendment and article I both protect commercial speech, at least in the form of truthful and nonmisleading messages about lawful products and services. (24 Cal.4th at pp. 493, 498-499.) However, unlike the First Amendment in this context, "article I's right to freedom of speech, without more, would *not* allow compelling one who engages in commercial speech to fund speech in the form of advertising that he would otherwise not, when his message is about a lawful product or service and is not otherwise false or misleading." (24 Cal.4th at pp. 509-510.) Consequently, compelled funding of generic advertising under the California Plum Marketing Program implicates article I's free speech clause.

The context in which this compelled funding arises is also critical to the analysis. The California Plum Marketing Program, a marketing order issued under the California Marketing Act (CMA), requires the speech subsidy as part of a broader collective enterprise. This program establishes and authorizes the California Plum Marketing Board to: pursue research; conduct advertising; implement sales promotion and market development programs; and institute grade and quality standards and inspections. (*Gerawan Farming, Inc. v. Lyons, supra,* 24 Cal.4th at p. 508; *Voss v. Superior Court* (1996) 46 Cal.App.4th 900, 905.) This detailed regulatory scheme displaces "'many aspects of independent business activity that characterize other portions of the economy in which competition is fully protected by the antitrust laws.'" (*Gerawan Farming, Inc. v. Lyons, supra,* 24 Cal.4th at p. 507, citing *Glickman v. Wileman Brothers & Elliott, Inc.* (1997) 521 U.S. 457, 469.)

The CMA was patterned after, and enacted within days of, the federal Agricultural Marketing Agreement Act of 1937 (AMAA). (*Gerawan Farming, Inc. v. Lyons, supra,* 24 Cal.4th at p. 478.) One purpose behind both Acts was to establish and maintain orderly marketing conditions and fair prices for agricultural commodities. (*Ibid.*)

It is beyond dispute that the CMA is critical to the California economy with respect to the future continued production of adequate supplies of food, fiber and other farm products. (*Voss v. Superior Court, supra,* 46 Cal.App.4th at pp. 907-908.) Before the CMA was promulgated, California agriculture was chaotic. (*Id.* at p. 907.) Each fruit or vegetable grower attempted to be the first in the market with his or her commodity in order to take advantage of the premium prices paid for early shipments. (*Ibid.*) This led to the marketing of inadequately ripened produce and the glutting of the market during the peak season with poor quality commodities. (*Ibid.*) In an attempt to enhance the attractiveness of the produce, growers would often resort to deceptive packaging, improper sampling, and false grading. (*Ibid.*) Consequently, consumer acceptance of

California fruits and vegetables was adversely affected and California's agricultural wealth was unreasonably and unnecessarily wasted. (*Ibid*.)

Thus, it must be concluded that the state-mandated association of plum producers through the California Plum Marketing Program is justified. Ensuring a stable and consistent plum market constitutes a sufficiently compelling reason to require cooperation among growers. In light of the existence of a legitimate basis for the compelled association, the next step is to determine how this association impacts the concomitant speech.

Analogous situations have arisen in the context of unions and state bar associations. For example, a state may compel nonunion employees who benefit from the union's collective bargaining efforts to pay service fees to the union. (*Abood v. Detroit Board of Education* (1977) 431 U.S. 209, 217-223.) This compelled association is justified by the state's interest in facilitating collective bargaining and preventing "'free riders.'" (*Id*. at pp. 220-222.) Nevertheless, there are limits on a union's use of the mandatory fee. The nonmembers may prevent the union from using their contributions to fund the expression of political and ideological views unrelated to collective bargaining. (*Id*. at p. 234.)

Similarly, a state's interest in regulating the legal profession and improving the quality of legal services justifies compulsory bar membership. (*Keller v. State Bar of California* (1990) 496 U.S. 1, 13-14.) Therefore, the state bar association may "constitutionally fund activities germane to those goals out of the mandatory dues of all members." (*Id*. at p. 14.) However, the bar association may not fund its own political expression in this manner. (*Ibid*.)

In sum, the state may require a person to support an organization if there is a sufficiently compelling reason to do so. However, the organization's use of mandatory contributions must be "germane" to the purposes justifying the support.

As noted above, the compelled association under the Plum Marketing Program is justified by the state's interest in maintaining orderly marketing conditions and fair prices for agricultural commodities. In light of the significant role California agriculture plays with respect to both the economy and the food supply, it must be concluded that this interest is comparable in scope and importance to either facilitating collective bargaining or regulating the legal profession. In other words, as with the situations presented in *Abood* and *Keller*, there is an overriding associational purpose already requiring a contribution of money that may also allow a compelled subsidy for speech that is in furtherance of the program. (Cf. *U.S. v. United Foods, Inc., supra,* ___ U.S. at p. ___ [121 S.Ct. at p. 2340].) Consequently, the guidelines set forth in *Abood* and *Keller* should be used to determine what expenditures are permissible under article I's free speech clause.

The next task is to refine the *Abood*/*Keller* test. Although generally referred to as the "germaneness" test, it encompasses more than a determination of whether the speech is relevant to the goals of the association. Rather, when a member of a compelled association objects to being burdened with particular expenditures "the guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred" for the purpose of furthering those goals. (*Keller v. State Bar of California, supra,* 496 U.S. at p. 14.) Requiring more than a rational relationship and less than a narrowly tailored service of a compelling state interest, this test essentially constitutes an intermediate level of scrutiny. Moreover, this analysis is not specific to a particular type of speech. Compelled contributions to commercial speech, as well as political or ideological speech, are subject to this test. (*U.S. v. United Foods, Inc., supra,* ___ U.S. at p. ___ [121 S.Ct. at p. 2339].)

As stated above, the California Supreme Court opined that compelled generic advertising would not be allowed under article I "without more." (*Gerawan Farming, Inc. v. Lyons, supra,* 24 Cal.4th at pp. 509-510.) The "more" present in this case is the

overriding associational purpose behind the California Plum Marketing Program, i.e., the state's interest in maintaining orderly marketing conditions and fair prices for agricultural commodities. Accordingly, the intermediate level of review should be employed. Thus, to pass muster under article I's free speech clause, the expenditures for the generic advertising at issue must be found to be a necessary or reasonable means to achieve the program goal of maintaining and expanding the market for plums. The burden is on the state to show that the generic advertising meets this test. (*Rubin v. Coors Brewing Co.* (1995) 514 U.S. 476, 487.)

However, due to the procedural posture of this case, there is no evidentiary record. Accordingly, there is no basis for evaluating the validity of the compelled funding at this time. Any attempt to do so would entail nothing more than conjecture and speculation. As noted by the *Gerawan* court, "we know not what facts may one day be proved." *Gerawan Farming, Inc. v. Lyons, supra,* 24 Cal.4th at p. 514.) Consequently, I would remand this case for further proceedings to develop those facts.

The majority opinion turns on the conclusion that, because a proposed marketing program must be approved by a majority of the growers, the governmental interest in the underlying regulatory program is "tenuous" and "based on findings of necessity that are wholly illusory." Consequently, the majority holds that the operation of the generic advertising portion of the Plum Marketing Program does not demonstrate the exercise of a substantial government interest. The opinion implies that the holding might be otherwise if the Legislature could unilaterally impose a marketing order.

I disagree that permitting the growers to reject a proposed marketing order dilutes the governmental interest in establishing and maintaining orderly marketing conditions and fair prices for agricultural commodities. Rather, the Legislature has merely recognized its own limitations and has therefore entrusted certain aspects of the regulation of the agricultural commodities market to those who better understand the industry, i.e., those who produce or otherwise deal with such products. (*Voss v. Superior*

Court, supra, 46 Cal.App.4th at p. 907.) However, this recognition does not undermine the governmental interest in, and justification for, the compelled association of the growers.

In conclusion, I believe that compelled contributions to fund generic advertising should be evaluated through the use of the intermediate scrutiny test outlined above. Further, this matter should be remanded to develop a sufficient evidentiary record.

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Levy, J.