SUPREME COURT COPY

Case No. S226538

IN THE SUPREME COURT OF CALIFORNIA

DELANO FARMS COMPANY, FOUR STAR FRUIT, INC., GERAWAN FARMING, INC., BIDART BROS., AND BLANC VINEYARDS
Plaintiffs and Petitioners,

v.

CALIFORNIA TABLE GRAPE COMMISSION
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL, FIFTH DISTRICT

Case No. F067956

Petitioners' Answer to the Amicus Curiae Brief of the California Department of Food and Agriculture

---

BRIAN C. LEIGHTON
Attorney At Law
701 Pollasky Avenue
Clovis, California 93612
Telephone: (559) 297-6190
Facsimile: (559) 297-6194
brian@lawleighton.com

MICHAEL W. McCONNELL*
Kirkland & Ellis LLP
655 15th Street NW #1200
Washington, D.C. 20005
T: (202) 879-5000 / F: (202) 879-5200
michael.mcconnell@kirkland.com

DANIELLE R. SASSOON*
Kirkland & Ellis LLP
601 Lexington Avenue
New York, N.Y. 10022
T: (212) 446-4800 / F: 212-446-6460
danielle.sassoon@kirkland.com

*Admitted *pro hac vice*

Attorneys for Plaintiffs and Petitioners Delano Farms Company, Four Star Fruit, Inc., Gerawan Farming, Inc., Bidart Bros., and Blanc Vineyards

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Unlike genuine government agencies, the Table Grape Commission ("TGC") is not represented in litigation by the State Attorney General—just as it receives no tax dollars, its budget is not subject to the legislative appropriations process or administrative review, and it is not audited by government auditors. Indeed, until this late stage in the litigation, the State of California and its relevant agency, the California Department of Food and Agriculture ("CDFA"), had stayed out of this case. That seemed odd, since Respondent claims to be engaging in "government speech." Now CDFA, represented by the Attorney General, has filed a brief *amicus curiae*, ostensibly in support of the TGC. But that brief is primarily focused on reasons why CDFA's *other programs* should survive even if this Court holds that the TGC is too independent of government control to render its promotional efforts "government speech." It provides no support for Respondent's claim of speaking in the name of the People of California.

First, CDFA explains that California uses a variety of institutional structures to regulate or promote agricultural commodities in the State. This explanation highlights the anomalous character of the TGC among agricultural promotion programs in California. By CDFA's own account, the TGC is virtually unique in its lack of review or oversight by CDFA. (*See* CDFA Br. at 8-15.)

If the legislature wished to subject the TGC to genuine control by a democratically accountable officer, it could easily do so, following the models used for other commodity promotion programs, as discussed in CDFA's brief. There is no practical—let alone compelling—reason why promotion of table grapes needs to be outsourced to a private, unaccountable industry group.

Second, CDFA endorses respondent's "government entity" theory for government speech—but the authority it cites, *Pleasant Grove City, Utah v. Summum* (2009) 555 U.S. 460, largely refutes the TGC's position. (*See* CDFA Br. at 15-16.) *Summum* supports the conclusion that without actual CDFA control of the TGC's speech, and without attribution of the speech to the government, the TGC cannot invoke a government speech defense.

ARGUMENT

A. CDFA Highlights that the TGC is an Outlier Among California Agricultural Committees that are Typically Controlled by the Government

CDFA devotes a substantial portion of its brief to explaining the importance of agricultural industries to California's economy, but this case is not a referendum on the value of California's agricultural industry. (*See* CDFA Br. at 4-9.) CDFA's excursus into economic geography does nothing to explain why out of 400 crops grown and marketed in this fertile state, only 31 are deemed to require collectivization of marketing. (Why

fresh carrots but not green beans? Why cherries but not plums, walnuts but not pecans, table grapes but not tangelos, blueberries, or Valencia oranges?) Nor does it explain why some marketing programs (e.g., pears and salmon) are tightly controlled by CDFA while table grape promotion is outsourced to a largely autonomous industry-dominated board. There is no consistent thread or rational pattern to these variegated arrangements, and CDFA does not even attempt to offer one.

This appeal is about the structure of only one marketing program. It presents the narrow question whether the promotional campaigns of the *TGC*, which are not reviewed or approved by any politically accountable government agency, are nonetheless government speech, such that TGC can compel petitioners to subsidize its speech without having to satisfy ordinary First Amendment standards for compelled speech. The CDFA amicus brief strongly suggests the answer to that question is "no."

CDFA candidly states that its reason for filing an amicus brief at this late stage in the litigation is its concern that "the legal principles established [in this case] may also apply to other marketing programs, to the extent their authorizing legislation, purpose and function, and messages are similar." (CDFA Br. at 2.) Fair enough. CDFA then goes on to describe how the TGC operates *differently* from other agricultural marketing programs in the State, which are designed on a "commodity-specific" basis. (*Ibid.*) CDFA catalogues the "wide array of marketing programs," (*id.* at

8), clarifies that "these programs take many forms," (*id.* at 9), and explains that the "Legislature has also developed new administrative structures for these programs," (*id.* at 10). An entire section of the brief is devoted to the proposition that "Agricultural Marketing Programs Operate Through a Variety of Means." (*Ibid.*)

Just so. The biggest difference among the programs lies in whether they are operationally overseen by a democratically accountable state agency—the very difference that this case is about.

In its understandable desire that other programs not be tarred with the table grapes brush, CDFA confirms that the TGC is an outlier. CDFA describes three different operative structures in California used to regulate and promote agricultural commodities: advisory boards, commissions, and councils. (*Id.* at 10.) Advisory boards and councils categorically lack the independent power to implement promotional programs. Advisory boards are just that—"advisory only." (*Id.* at 11.) As CDFA puts it, they "have no powers independent of the Department." (*Ibid.*) They may "recommend programs to the Department, and administer these programs subject to the Department's approval." (*Ibid.*) Similarly, "councils lack statutory authority to independently design and carry out their programs." (*Id.* at 13-14.) Like the boards, "councils make recommendations ... for their respective commodities, and administer those programs subject to the Department's approval." (*Id.* at 14.)

The dependence of boards and councils on CDFA approval sits in stark contrast to the practical and legal status of the TGC. The Secretary of CDFA exercises no de facto or routine control over the TGC's advertisement campaigns and has no statutory authority to do so. CDFA has authority to review TGC advertising messages only upon petition by an "aggrieved party"—and then its review is limited to certain narrow legal defects. (Cal. Food & Agric. Code § 65650.5.) As the factual record of this case makes clear, that review has never happened. (*See, e.g.*, Petitioners' Opening Brief on the Merits ("Pet. Br.") at 10, 14; Petitioners' Reply to Respondent's Answer Brief on the Merits ("Pet. Reply") at 14.) CDFA thus implicitly makes Petitioners' point: it points to not a single instance where the Secretary or his subordinates actually approved or disapproved (or even read) the TGC's advertising content.

As CDFA is at pains to establish, even the marketing programs conducted by commissions are distinguishable from the TGC. CDFA explains that "the purpose and function of the commissions vary according to the laws that created them," and the legislature has "provided the Department with a wide range of mechanisms for overseeing commissions." (CDFA Br. at 12.) The Ketchum Act, which created the TGC, was the first of the collective marketing programs passed by the legislature; subsequent agricultural research and advertising programs have invariably entailed greater governmental involvement, oversight, and

control. As CDFA explains, for example, unlike the TGC, other commissions are required to submit for CDFA approval annual statements of contemplated activity, including marketing, and annual budgets. (*Id.* at 13.) Notably, CDFA does not mention *even one* commission that, like the TGC, runs promotional campaigns with no government oversight or whose marketing program would be directly jeopardized by a reversal here.

CDFA's amicus brief confirms not only that is it "eminently practicable to design a commodity program with the government oversight necessary to confer constitutional immunity on a program's speech," (Pet. Reply at 18), but also that the California legislature has done exactly that in many instances. The programs that operate with actual CDFA supervision and true political accountability will not be disturbed if the Court reverses the decision below on the rationale advanced by petitioners here.

B. CDFA Fails to Demonstrate that the TGC's Promotional Campaigns are Government Speech

Parroting Respondent's brief, CDFA argues that "[t]here are two independent bases upon which an agricultural marketing program can be considered speech of the government," the first being "if the promoting speaker is itself a governmental entity." (CDFA Br. at 15.) The authority on which CDFA rests that argument, however, demonstrates the weakness of the argument. CDFA relies on *Pleasant Grove City, Utah v. Summum* (2009) 555 U.S. 460. *Summum* held that the monuments chosen by the

government for display in a public park qualify as government speech even though they were originally donated by private groups. When the Court observed in the opinion that "a government entity has the right to 'speak for itself,'" (CDFA Br. at 15 (quoting *Summum*, 555 U.S. at 467)), it took as a given that a government entity, for purposes of the government speech doctrine, must be a politically accountable body. The Court explained: "*of course*, a government entity is ultimately accountable to the electorate and the political process for its advocacy." (*Summum*, 555 U.S. at 468 (internal quotation marks omitted) (emphasis added).)

That is decidedly not the case here. As this Court already recognized, these marketing bodies are "not so much a mechanism of regulation ... of an agricultural commodity by a governmental agency, as a mechanism of self-regulation by the producers and handlers themselves." (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 503 n.8.) And even CDFA describes *Johanns* as a case involving the government's effort to "enlist a private speaker." (CDFA Br. at 16; *see also Johanns v. Livestock Marketing Assn.* (2005) 544 U.S. 550, 562 (explaining that the government "solicit[ed] assistance from nongovernmental sources [the Beef Board] in developing specific messages").)[1] If the Beef Board in *Johanns*

---

[1] *Johanns* did not, as CDFA claims, distinguish the State Bar in *Keller v. State Bar of California* (1990) 496 U.S. 1 (which the U.S. Supreme Court held was *not* a government entity for First Amendment purposes) from *all* agricultural marketing boards and commissions. (*See* CDFA

was "a private speaker," as CDFA acknowledges, the TGC must be a "private speaker"—or a "nongovernmental speaker" in the U.S. Supreme Court's words—here.

Moreover, *Summum* recognized that an essential component of the political accountability that justifies the government speech exception to the First Amendment is that the audience for the message must reasonably perceive that message as emanating from the government. As the Court emphasized, the city "has selected those monuments that it wants to display for the purpose of presenting the image of the City that it wishes to project to all who frequent the park." (*Summum*, 555 U.S. at 473.) It was important to the holding of the Court that viewers attributed the monuments' messages to the city, as owner of the park:

> [P]ersons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owners' behalf. In this context, there is little chance that observers will fail to appreciate the identity of the speaker. ... Public parks are often closely identified in the public mind with the government unit that owns the land.

(*Summum*, 555 U.S. at 471-72.) This Court made the same point in *Gerawan II*. (*See Gerawan Farming, Inc. v. Kawamura* (2004) 33 Cal.4th 1, 28; Pet. Br. at 25-27.)

Br. at 17.) Rather, it distinguished the circumstances in *Johanns* from those in *Keller* because of the "*degree of government control over the message*" of the Beef Board, which was "developed under official government supervision." (*Johanns*, 544 U.S. at 561-62.)

Because the "monuments that are accepted ... are meant to convey and *have the effect of conveying* a government message," the Court concluded that they "constitute government speech." (*Summum*, 555 U.S. at 472 (emphasis added); *see also id.* at 481-82 (Stevens, J., concurring) ("Nor is it likely, given the near certainty that observers will associate permanent displays with the governmental property owner, that the government will be able to avoid political accountability for the views that it endorses or expresses through this means.").) CDFA's effort to discredit the attribution requirement is thus refuted by the very authority on which it relies. (*See* CDFA Br. at 18-19.)

Finally, the Court in *Summum* expressly endorsed the reasoning in *Johanns* that if the government "solicits assistance from nongovernmental sources" to develop a message, (*Summum*, 555 U.S. at 468 (quoting *Johanns*, 544 U.S. at 562)), it must "approve[] every word that is disseminated," (*Johanns*, 544 U.S. at 562), for the speech to qualify as the government's own. It was critical to the holding in *Summum* that the city, in choosing which privately-designed monuments to place in the park, had (as in *Johanns*) "'effectively controlled' the messages sent by the monuments in the Park by exercising 'final approval authority' over their selection." (*Summum*, 555 U.S. at 473 (quoting *Johanns*, 544 U.S. at 560-61).) That is not an alternative, independent basis for a government speech defense, but a necessary limiting condition where, as here, the speaker is

not itself a politically-accountable body. (*See* Pet. Br. at 17-27.) On the *facts*, CDFA does not dispute that its Secretary has never reviewed or approved a *single* TGC advertisement before it has been disseminated.

CDFA attempts to distinguish *Walker v. Texas Division, Sons of Confederate Veterans, Inc.* (2015) 135 S.Ct. 2239, on the superficial basis that *Walker* involved specialty license plates, whereas this case involves market promotion messages. (CDFA Br. at 19.) That is like distinguishing *New York Times Company v. Sullivan* (1964) 376 U.S. 254, on the basis that it involved a newspaper rather than a magazine. Even in this final argument, CDFA turns out to support Petitioner rather than Respondent. As CDFA describes *Walker*, "the State's review and approval of the messages" in *Walker* "transformed what were originally private messages into government speech." (CDFA Br. at 19.) Because in this case there was no CDFA "review and approval of the messages," the TGC's industry-contrived messages were not "transformed" into "government speech."

Remarkably for an amicus purportedly in support of the Respondent, CDFA concedes that unlike advisory boards that operate under the umbrella of the CDFA, commissions like the TGC are "not part of the Department," but are "instead separate ... entities." (*Id.* at 12.) For purposes of this case, CDFA claims that commissions are "separate *government* entities," (*ibid.* (emphasis added)), but elsewhere it has seized on the legal difference between these autonomous commissions and the State to foreswear state

liability for the commissions' actions. In *Country Eggs, Inc. v. Kawamura*, for example, CDFA successfully took the position that the State should not be required to pay a refund assessment owed by the Egg Commission because the commission was so separate and independent that the State was not liable for its debt. (*See* (2005) 129 Cal.App.4th 589.) CDFA argued, among other things, that the "State retained virtually no control over the Commission or its activities" and that the Egg Commission "acted in an independent, not an advisory role, when administering its program." (*See* Respondents' Br. filed in *Country Eggs Inc. v. Kawamura*, at 24-25, attached as Appendix A.) If an industry-run commission is not part of the State for purposes of liability, it is not part of the State for purposes of the government speech doctrine.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeal should be reversed and the case remanded for further proceedings.

Dated: March 18, 2016 Respectfully submitted,

Brian C. Leighton for Michael W. McConnell

MICHAEL W. McCONNELL*
KIRKLAND & ELLIS LLP
655 15th Street NW #1200
Washington, D.C. 20005
michael.mcconnell@kirkland.com

DANIELLE R. SASSOON*
Kirkland & Ellis LLP
601 Lexington Avenue
New York, N.Y. 10022
danielle.sassoon@kirkland.com

BRIAN C. LEIGHTON
Attorney At Law
701 Pollasky Avenue
Clovis, California 93612
brian@lawleighton.com

*Admitted *pro hac vice*

Attorneys for Plaintiffs and Petitioners Delano Farms Company, Four Star Fruit, Inc., Gerawan Farming, Inc., Bidart Bros., and Blanc Vineyards

CERTIFICATE OF WORD COUNT

Counsel for Petitioners hereby certifies that the number of words contained in this ANSWER TO THE AMICUS CURIAE BRIEF OF THE CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, including footnotes but excluding the Table of Contents, Table of Authorities, Issues on Review, and this Certificate, is 2,501 words as calculated using the word count feature of the computer program used to prepare the brief.

Dated: March 18, 2016

Respectfully submitted,

By: Michael W. McConnell

Michael W. McConnell

PROOF OF SERVICE

I declare that:

I am employed in the County of Fresno, California.

I am over the age of eighteen years and not a party to the within action; my business address is 701 Pollasky, Clovis, California 93612.

On March 18, 2016, I served a copy of the attached ANSWER TO THE AMICUS CURIAE BRIEF OF THE CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE on the interested parties herein by placing a true copy thereof in a sealed envelope, fully prepaid, and addressed as follows:

Mr. Seth P. Waxman
WILMER CUTLER PICKERING HALE and DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Counsel for Defendant/Respondent California Table Grape Commission

Mr. Robert Wilkinson
BAKER, MANOCK & JENSEN
5260 N. Palm Avenue, 4th Floor
Fresno, CA 93704
Co-Counsel for Defendant/Respondent California Table Grape Commission

Mr. Howard A. Sagaser
SAGASER & ASSOCIATES
7550 N. Palm Avenue, Suite 201
Fresno, CA 93711
Co-Counsel for Plaintiffs

Mr. Jack Campbell
DELANO FARMS COMPANY &
BLANC VINEYARDS, LLC
10025 Reed Road
Delano, CA 93215
Clients - Plaintiffs/Petitioners

Mr. Dan Gerawan
GERAWAN FARMING
7108 N. Fresno, Suite 450
Fresno, California 93720
Client - Plaintiff/Petitioner

Mr. Byron Campbell
FOUR STAR FRUIT, INC.
2800 Road 136
Delano, CA 93215
Client - Plaintiff/Petitioner

Messrs. John & Leonard Bidart
Bidart Bros.
4813 Calloway Drive
Bakersfield, CA 93312
Client - Plaintiff/Petitioner

Honorable Judge Donald S. Black
Fresno County Superior Court
1130 "O" Street
Fresno, CA 93721-2220
Superior Court Judge

Clerk of the Court
COURT OF APPEAL
FIFTH APPELLATE DISTRICT
2424 Ventura Street
Fresno, CA 93721
Appellate Court

I declare under penalty of perjury of the State of California that the foregoing is true and correct and that this Declaration was executed this 18 day of March, 2016, at Clovis, California. I declare that I am employed in the office of a member of the Bar of this Court at whose direction this service was made.

Kimberly R. Barker

Appendix A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

COUNTRY EGGS, INC., a California corporation,

Plaintiff and Appellant,

v.

A.G. KAWAMURA, in his official capacity as the Secretary of the California Department of Food and Agriculture; CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE; and STATE OF CALIFORNIA,

Defendants and Respondents.

Case No. C046153

Sacramento County Superior Court No. 02AS04521
The Honorable Loren E. McMaster, Judge

RESPONDENTS' BRIEF

BILL LOCKYER
Attorney General of the State of California
MARY E. HACKENBRACHT
Senior Assistant Attorney General
LINDA L. BERG
Deputy Attorney General
State Bar No. 194667
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 327-5484
Fax: (916) 327-2319

Attorneys for Defendants and Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Page

Page

Statutes and Regulations

Other Authorities

INTRODUCTION.

This action arises out of a series of disputes involving Country Eggs, Inc. (Country Eggs) and the California Egg Commission (the Commission), a public corporation that was dedicated to promotion of eggs and egg products.[1] In 1997, Country Eggs brought its first action against the Egg Commission in federal court, arguing that compelled payment of assessments to fund the Commission's generic promotion program violated the First Amendment. (*Country Eggs, Inc., et al. v. California Egg Commission, et al.*, United States District Court for the Eastern District of California, Case No. 97-0260 (*Country Eggs I*).) Believing that it was not going to prevail in that action, Country Eggs agreed to dismiss this federal court action and entered into a stipulated injunction requiring it to timely pay its assessments. These assessments are the subject of the present action.

In early 2000, Country Eggs brought another action against the Commission, this time in Sacramento County Superior Court. (*Country Eggs, Inc. v. Lyons, et al.*, Sacramento County Superior Court, Case No. 00AS01418 (*Country Eggs II*) Country Eggs prevailed in this action and obtained a monetary judgment for a refund of its assessments. Because the

---

1. The Egg Commission conducted research and educational programs, as well as a generic egg promotion program. (Clerk's Transcript (CT) 282-283.) The "got milk?" and "IT'S THE CHEESE!" campaigns of the Fluid Milk Processors and California Milk Producers Advisory Boards are well-recognized examples of such programs' marketing efforts.

Legislature declared that the State is not responsible for the Commission's debts (Food & Agr. Code, § 75070, subd. (a))[2], the trial court ordered that the monetary judgment was directed solely against the Commission. The Commission suspended its activities and expended its funds, and Country Eggs did not collect the full amount of its judgment from the Commission.

In the present action, Country Eggs seeks the uncollected portion of the Superior Court judgment, not from Commission, but from defendants A.G. Kawamura, in his official capacity as the Secretary of the California Department of Food and Agriculture (the Secretary), the California Department of Food and Agriculture (the CDFA),[3] and the State of California (collectively Defendants). Country Eggs's claims have two basic flaws.

First, Country Eggs is seeking a refund from the wrong parties. The remedy that Country Eggs seeks is a refund of assessments that it paid to the Commission. But the Commission is a separate entity from the Defendants, and the assessments collected by the Commission were under the exclusive control of the Commission. Requiring Defendants to reimburse the money paid to the Commission would oblige them to substitute money from the

---

2. All statutory references are to the California Food and Agricultural Code unless otherwise noted.

3. The Secretary and the CDFA will be collectively referred to as the Department.

State treasury for money paid to the Commission. This remedy would not be a "refund" but would instead be akin to a damages award. Because the trial court found that Country Eggs' claims for damages fail (Clerk's Transcript (CT 661-662), and Country Eggs has not appealed that finding (Appellant's Opening Brief (AOB) at pp. 16, 36-37), there is no legal theory upon which to base liability against the Defendants in this action.

Second, Country Eggs seeks a refund of assessments that it paid pursuant to a "voluntary stipulated injunction that plaintiff [Country Eggs] was to continue paying its assessments." (CT 659.) There is no due process violation, and no basis for a refund, because the assessments Country Eggs now seeks were made pursuant to a voluntary stipulation. Furthermore, these payments were made pursuant to a final federal court judgment. To award Country Eggs the refund that it seeks would be awarding relief from that judgment, a result barred by comity and the respect accorded final federal judgments.

Accordingly, Country Eggs' claims for a refund against the State, the Department and the Secretary fail, and the trial court's grant of summary judgment should be affirmed.

PROCEDURAL BACKGROUND

Country Eggs I Case–country Eggs Enters Into a Federal Court Voluntary Stipulated Injunction That It Will Pay Its Assessments.

In the present action, Country Eggs seeks a refund of assessment that it paid pursuant to a stipulated injunction in *Country Eggs I.* In February 1997, Country Eggs filed *Country Eggs I* in federal court, invoking federal question jurisdiction. (CT 367, 369.) In its complaint, Country Eggs alleged that the Commission's activities violated its First Amendment and equal protection rights, and violated the dormant Commerce Clause.[4/] (CT 367-376.)

Country Eggs I was filed during a period of evolving case law. In February 1997, when *Country Eggs I* was filed, applicable case law raised serious questions regarding whether mandated assessments to fund generic marketing programs violated the free speech rights of dissenters. (Compare *United States v. Frame* (3d Cir. 1989) 885 F.2d 1119 [federal beef promotion program does not violate First Amendment] with *Wileman Bros. & Elliott, Inc. v. Espy* (9th Cir. 1995) 58 F.3d 1367, revd. *sub nom. Glickman v. Wileman Bros. & Elliott, Inc.* (1997) 521 U.S. 457 [federal tree fruit promotion programs violate First Amendment].) In June of 1997, the United States Supreme Court addressed this issue in *Glickman v. Wileman*

---

4. Although the Secretary was a named defendant in this action, he was never made a party to this action, and was not a party to the stipulated judgment. (CT 186-192.)

Brothers & Elliott, Inc. (1997) 521 U.S. 457 (*Glickman*). In *Glickman*, the United States Supreme Court considered the constitutionality of federal tree fruit promotion programs, and found that these programs were a form of economic regulation that did not violate the First Amendment.[5/] (*Id.* at pp.

---

5. The law regarding the constitutionality of these programs is still evolving. The United States Supreme Court revisited the *Glickman* decision in *United States v. United Foods, Inc.* (2001) 533 U.S. 405. In that decision, the Supreme Court considered whether the rule articulated in *Glickman* applied to an advertising-only, mushroom promotion program. The *United Foods* Court found that *Glickman* was not controlling in the context of an unregulated industry, and that the mushroom program violated the First Amendment. (*United Foods, supra,* at pp. 415-417.)

Since *United Foods*, courts have been struggling with the application of the *Central Hudson* test, applicable to regulation of commercial speech, and the government speech doctrine, in the context of generic promotional programs. (See, e.g., *Livestock Marketing Association v. United States Department of Agriculture* (8th Cir. 2003) 335 F.3d 711, 717-720, 722-724, cert. granted May 24, 2004, __ U.S. __ [124 S.Ct. 2389], *Cochran v. Veneman* (3d Cir. 2004) 359 F.3d 263, 273-274, 277-279.) The United States Supreme Court recently granted certiorari in a case that raises both of these issues. (*Veneman v. Livestock Marketing Association* (2004) __ U.S. __, 124 S.Ct. 2389 (mem.).) It is anticipated that the Supreme Court's decision in the pending case will resolve the question of the standards applicable to these programs under federal law.

California law has also been in a state of flux. In 2000, the California Supreme Court considered the constitutionality of a plum marketing program and found that in, the context of generic promotional programs, the California liberty of speech clause provided greater protections than the First Amendment of the United States Constitution. (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 517 (*Gerawan I*).) It was not until June of 2004, that the California Supreme Court articulated the appropriate test to be applied to generic promotion programs. In *Gerawan Farming, Inc. v. Kawamura* (2004) 33 Cal.4th 1 (*Gerawan II*), the California Supreme Court concluded that, under the California Constitution, "compelled funding of generic advertising . . . should be tested by the intermediate scrutiny standard articulated by the United States Supreme Court in *Central Hudson Gas &*

476-477.) Following the issuance of *Glickman*, Country Eggs suffered a series of setbacks in its claims against the Commission.

First, the Commission prevailed on a motion for judgment on the pleadings. (CT 363-364.) In ruling on that motion, the federal district court found that *Glickman* controlled Country Eggs' First Amendment claim and dismissed this claim, with leave to amend. The district court also dismissed Country Eggs' equal protection claim, with leave to amend. But the court denied the Commission's motion to dismiss Country Eggs' Commerce Clause claims. (CT 363-364.) On November 5, 1997, Country Eggs filed its Second Amended Complaint, alleging that the Commission's program violates the First Amendment, Equal Protection Clause, and Commerce Clause of the United States Constitution, and adding a claim under the free speech and free association clauses of the California Constitution. (CT 343-354.)

The Commission, in turn, pursued its own remedies against Country Eggs by filing a counterclaim in *Country Eggs I*. (CT 153-165.) The Commission subsequently moved for an order requiring Country Eggs to pay its past-due assessments, as well as a preliminary injunction requiring

---

Elec. v. Public Serv. Comm'n (1980) 447 U.S. 557. . ." (*Gerawan II*, *supra*, 33 Cal.4th at 17.) The Court also indicated that generic marketing programs could be justified under the government speech doctrine if the facts demonstrated that program's "message is decided upon by the Secretary or other government official pursuant to statutorily derived regulatory authority." (*Id.* at p. 35.)

Country Eggs to make timely payment of its assessments in the future. On November 2, 1998, the district court granted the preliminary injunction. (CT 183.) However, the Court made no final ruling on the merits of any of Country Eggs' claims. (CT 177, 179, 181.)

Shortly after the federal court granted the preliminary injunction, Country Eggs and the Commission settled *Country Eggs I*. At this point, Country Eggs believed that the case law was going against it. (CT 060-061, 73; see also AOB at p. 21.) Facing what was perceived to be "a lost cause" (AOB at p. 23) and to "stop having to pay more attorneys' fees to the Commission," Country Eggs entered into a stipulated judgment dismissing its claims against the Commission, with prejudice (the Stipulated Judgment). (CT 060:25-61:10, 073, 186-192.) Country Eggs entered into this Stipulated Judgment "voluntarily and intentionally," and with advise of counsel. (CT 189:19-20.) Although Country Eggs reserved its right to bring future challenges against the Commission, Country Eggs also agreed to a "voluntary stipulated injunction that [Country Eggs] was to continue paying its assessments" to the Commission, and to the applicable penalties should it fail to make those payments. (CT 659; see also CT 186-191.)

Pursuant to the federal court Stipulated Judgment, on June 1, 1999, Country Eggs began paying its assessments. (CT 060-061, 073.) Country Eggs fell behind in its payments and, in early 2000, the Commission applied

to the federal district court for enforcement of the Stipulated Judgment. (CT 073-074, 195.) On March 24, 2003, the district court issued its order denying the requested relief. The court found that because the Commission had adequate state law remedies, the permanent injunction was unnecessary. The district court therefore dissolved the injunction and dismissed the action. (CT 195-199.) Upon the dissolution of the injunction, Country Eggs ceased paying its assessments. All of the assessments sought in the present refund action were paid pursuant to the stipulated injunction. (CT 061:11-24, 074, 515:3-8; see also AOB at p. 24.)

Country Eggs II Case–Country Eggs Prevails in the State Trial Court, and Obtains a Monetary Judgment Against the Commission.

On March 16, 2000, Country Eggs filed *Country Eggs II* in Sacramento County Superior Court. (CT 093.) In *Country Eggs II*, Country Eggs alleged that the Commission program violated its freedom of speech and free association rights under the California Constitution and its due process rights under the United States and California Constitutions. (CT 093-101.) Country Eggs brought this action against the Secretary, as well as the Commission. (CT 093-094.)

Country Eggs II proceeded quickly, and the parties' cross-motions for summary judgment were decided on October 13, 2000. (CT 056.) The *Country Eggs II* court ruled in favor of Country Eggs, finding that the Commission's mandatory assessments violate Country Eggs' free speech and

free association rights under the California Constitution. Additionally, the Court found that the assessments collected by the Commission violate Country Eggs' due process rights under the California and United States Constitutions. (CT 111-114; see also CT 103-105.)

On May 1, 2001, the court issued a judgment in Country Eggs' favor. (CT 111-114.) The judgment specified that Country Eggs was entitled to a refund of assessments from the Egg Commission, but did not specify the amount of that refund. (CT 380-382.) The trial court subsequently amended the judgment to include a monetary judgment in the amount of $166,408.95, against the Commission only. (CT 387.) Relying on section 75070, subdivision (a), which provides that "[p]ayments of all claims arising by reason of the administration of this chapter or acts of the [egg] commission are limited to the funds collected by the commission," the judgment specified that the "monetary judgment is only directed against the California Egg Commission and is not directed against the Secretary of Food and Agriculture or against the State of California." (CT 387:12-14.) The Commission and the Secretary appealed the trial court's judgment. (CT 473.)

After the notices of appeal had been filed, Country Eggs filed a motion with the trial court, seeking an order requiring that the Commission either pay the judgment or escrow funds for payment of the judgment. The

court denied the motion for escrow. (CT 057, 071, 410-411.) Country Eggs then filed a motion with the Court of Appeal, seeking an order that the Commission post a bond or escrow funds in the amount of the judgment, pending resolution of the appeal. Although the Secretary did not oppose this motion, the Court of Appeal denied this request. (CT 426-427, 431.)

The Commission Suspends Its Operations and the Appeals of *Country Eggs II* Are Dismissed.

The statutes authorizing the existence of the Commission provided that, upon an industry vote to suspend the Commission's activities, the Commission's activities must be suspended. (§ 75173.) On December 31, 2001, the Commission voted to recommend to the Department that it suspend the Commission's operations. As required by statute, the Department conducted a referendum of egg handlers to determine whether the Commission's activities should be suspended. In that referendum, a supermajority of egg handlers voted in favor of suspending the Commission's activities. The Department certified these results on February 14, 2002. (CT 282:25-283:5, 285-286.)

Even before these results were certified, the Commission filed a request to dismiss its appeal. The Commission's appeal was dismissed on February 13, 2002. (CT 474-475.) Although Country Eggs was free to execute on its judgment once the Commission had dismissed its appeal, it did not do so until late March. On March 25, 2002, Country Eggs obtained a

Writ of Execution against the Commission and levied on the Commission's bank accounts on April 4, 2002. By that time, almost all of the Commission's funds had been expended. Country Eggs collected the $22,160.61 remaining in the Commission's account. (CT 072, 084.) The Defendants did not cause the Commission's failure to pay its judgment or hinder Country Eggs' ability to execute on its judgment. (CT 621-622, 662.)

In this present action, Country Eggs seeks an order requiring the State and the Secretary to pay the remainder of its unpaid judgment for *Country Eggs II*.

Country Eggs Brings the Present Action to Compel the State and the Department to Pay the Portion of the Judgment that it Did Not Collect from the Egg Commission.

On July 21, 2002, Country Eggs filed the present action against the Secretary, the Department, and the State. (CT 002.) Country Eggs' complaint contains three causes of action. In its first cause of action for violation of the Due Process Clause of the United States Constitution, and its third cause of action for violation of the Due Process Clause of the California Constitution, Country Eggs seeks injunctive relief in the form of a refund of the unpaid portion of its assessments, as well as a declaration that Food and Agricultural Code section 75070 is unconstitutional. (CT 005-

008.) Country Eggs' second cause of action seeks damages against Secretary Lyons under 42 U.S.C. § 1983. (CT 007.)

On September 25, 2003, the trial court issued its ruling granting Defendants' motion for summary judgment and denying Country Eggs' motion for summary judgment. (CT 642-647.) As to Country Eggs first cause of action for violation of the Due Process Clause of the United States Constitution, the trial court found that, unlike the *McKesson* line of cases upon which Country Eggs relied, Country Eggs was seeking a "refund" from a party that did not collect the assessments. (CT 644, citing *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco* (1990) 496 U.S. 18 (*McKesson*).) Because the assessments were not paid to the Defendants, the Defendants "cannot return the 'precise property wrongfully taken.'" (CT 644.) Instead, any award against the Defendants would be akin to a damages award, which is barred by the State's sovereign immunity. (*Id.*, see also *Will v. Michigan Dept. of State Police* (1989) 491 U.S. 58, 64, 71.) Nor is the State vicariously liable for the acts of the Commission. (CT 645, citing *Ting v. United States* (9th Cir. 1991) 927 F.2d 1504.) Therefore, the trial court found that section 75070, subdivision (a), "which provides that the state shall not be liable for the acts of the commission . . . , as applied in this action, does not violate the due process clause" (CT 645), and granted

summary judgment on Country Eggs' first cause of action in favor of Defendants. (CT 644-645.)

The trial court also granted summary judgment as to Country Eggs' civil rights claims, brought against the Secretary under 42 U.S.C. § 1983. The court found that Country Eggs failed to establish that Secretary Lyons owed Country Eggs a duty to prevent the Commission from making legal expenditures, even though these expenditures prevented Country Eggs from collecting the full amount of its judgment. The trial court also found that "[p]laintiff has not shown that the failure of the Secretary to intervene was the cause of plaintiff's inability to collect its judgment. Twice the courts refused to create an escrow account for plaintiff." (CT 645.) Moreover, the trial court found that the Secretary was entitled to the defense of qualified immunity for the § 1983 claims, because "the law at the time of the Secretary's actions was not clearly established, therefore the Secretary could not fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." (*Id.*) Country Eggs has not appealed the trial court's grant of summary judgment on this claim. (AOB at p. 16.)

Finally, the trial court granted Defendants' summary judgment motion on Country Eggs' third cause of action for violation of the Due Process Clause of the California Constitution, on the ground that the California Constitution does not provide a constitutional tort action for

violation of due process. (CT 646, citing *Katzberg v. Regents of the University of California* (2002) 29 Cal.4th 300, 329.) Country Eggs has not raised this issue in its opening brief. Therefore, this issue has been waived. (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894, fn. 10.)

The trial court entered judgment in favor of Defendants on December 5, 2003, and notice of entry of judgment was mailed on December 15, 2003. (CT 650-667.) Country Eggs filed its notice of appeal of this judgment on February 11, 2004. (CT 668-669.)

ARGUMENT

Standard of Review

A trial court's ruling on a motion for summary judgment is reviewed de novo. (*Lunardi v. Great-West Life Assurance Co.* (1995) 37 Cal.App.4th 807, 819.) Defendants are entitled to summary judgment where the record establishes as a matter of law that none of the plaintiff's asserted causes of action can prevail. (*Zelda, Inc. v. Northland Ins. Co.* (1997) 56 Cal.App.4th 1252, 1258-1259.) Although the review of a summary judgment is de novo, on appeal, the court's review is limited to issues which have been adequately raised and supported in the plaintiff's brief. (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6.) Because the record here establishes that

Defendants are entitled to summary judgment as to the claim raised on appeal,[6] the trial court's grant of summary judgment should be affirmed.

I. The State Defendants Are Not Responsible for Refunds of Assessments That Were Paid to the Egg Commission.

Invoking the *McKesson* line of cases, Country Eggs asks this Court to find that the State or the Department are responsible to refund assessments that Country Eggs paid to the Commission. In *McKesson*, the United States Supreme Court held that, where a public entity requires payment of a tax without providing adequate predeprivation procedures, and due process requires that entity to provide a "clear and certain remedy," normally in the form of refund, in the event that the tax is later found to be invalid. (*McKesson*, *supra*, 496 U.S. at p. 51.)

A key distinction separates *McKesson* and its progeny from the present case. In *McKesson*, the taxpayer was seeking a refund from the entity that had collected the tax. In contrast, here, Country Eggs paid its assessments to the Commission, but seeks a refund from the Department and

---

6. The sole claim raised on appeal is the trial court's grant of summary judgment as to Country Eggs' first cause of action for injunctive and declaratory relief. Country Eggs has not appealed the trial court's grant of summary judgment as to Country Eggs' second cause of action for violation of civil rights. (AOB at p. 16.) Country Eggs has failed to argue that the trial court erred when it granted summary judgment on Country Eggs' third cause of action for violation of the Due Process Clause of the California Constitution; therefore it has waived this issue. (*Tierman v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4.)

the State, even though it is undisputed that these defendants never had access to the assessments collected by the Commission. Thus, Country Eggs seeks its refund remedy against the wrong parties. Because *McKesson* does not require the State to refund assessments paid to other entities, the State and the Department cannot be held liable for a refund of the assessments collected by the Commission, and the trial court's entry of summary judgment in favor of Defendants must be affirmed.[7]

A. *McKesson* Does Not Require the State or the Secretary to Refund Assessments That Were Paid to Other Public Entities.

Country Eggs relies upon *McKesson* for the proposition that the State and the Department are liable for a refund of the assessments that it paid to the Commission. But it has failed to present any authority for the

---

7. If this Court finds that there is a basis for a refund claims against Defendants, factual issues remain regarding the propriety of a refund in this case. Restitution is available "only if the circumstances of its receipt or retention [of the benefit] are such that, as between the two persons, it is unjust for him to retain it." (*Ghirardo v. Antonioli* (1996) 14 Cal.4th 39, 51 [quoting Restatement of Restitution, § 1, com. c].)

In the court below, in opposition to Plaintiff's motion for summary judgment, Defendants presented evidence showing that the equities weigh heavily in favor of denying Country Eggs' claims for restitution. Defendants have receive no direct benefits from the assessments. (CT 661.) In contrast, Defendants have presented evidence that Country Eggs received benefits from the Commission's program. (CT 282, 293-315, 589-590.) Additionally, Defendants have presented evidence showing that Country Eggs has not borne the costs of paying the assessments, but instead passed these costs directly to its customers. (CT 262-263, 591.) Therefore, in the event that this Court does not affirm the trial court's judgment, this case should be remanded so that the trial court may determine the propriety of a refund in light of the equities in this case.

proposition that it is entitled to a refund from entities that neither collected the assessments, nor had access to the assessments. Nor is there any basis in *McKesson* or its progeny for this novel proposition.

It is well-established that the State can create separate public entities that have their own taxing and spending power, and not be responsible for their debts. States are neither directly nor vicariously liable for the constitutional violations of many forms of public entities ranging from traditional local governmental entities, such as cities and counties, to port authorities. (See, e.g., *Sullivan v. County of Los Angeles* (1974) 12 Cal.3d 710, 717 [counties]; *Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820, 860 (conc. & diss. opn. of Werdegar, J.) [counties]; *Hess v. Port Authority Trans-Hudson Corporation* (1994) 513 U.S. 30, 46 [port authority] (*Hess*).) The fact that these entities "exist solely at the whim and behest of their State" (*Hess*, *supra*, 513 U.S. at p. 47), does not make the states legally liable for their debts. (*Id.* at p. 46.)

This rule of nonliability has been a key factor in the line of cases in which courts have found that, although a public entity was created by the state to further state ends, it is not an arm of the state and is not entitled to Eleventh Amendment immunity from suit. (See, e.g., *Hess*, *supra*, 513 U.S. at p. 52 [Port authority not arm of the state, in part because the state is not liable for its debts]; *ITSI T.V. Productions, Inc. v. Agricultural Associations*

(9th Cir. 1993) 3 F.3d 1289, 1293 [finding that Cal Expo is not an entitled to Eleventh Amendment immunity because "[t]here appears to be no obligation on the part of the state to pay debts of a special fund agency."]; see also *Kirchman v. Lake Elsinore Unified School District* (2000) 83 Cal.App.4th 1098, 1109-1111.)

Given this long established rule, parties seeking refunds or other equitable relief from state-created public entities, such as cities and counties, have looked to those entities, not the state, for refunds. (See, e.g., *General Motors Corporation v. City and County of San Francisco* (1999) 69 Cal.App.4th 448; *Ward v. Board of County Com'rs of Love County, Okl.* (1920) 253 U.S. 17.) Thus, it is not surprising that Country Eggs has not pointed to, nor have Defendants found, a case where an individual obtained a refund from an entity other than the specific entity that collected the tax or fees.

Defendants have found only one case in which a plaintiff sought a refund of taxes or assessments from an entity that had not collected those monies–the Ninth Circuit case of *Cal-Almond v. United States Department of Agriculture* (9th Cir. 1995) 67 F.3d 874 (*Cal-Almond II*), judgment vacated and cause remanded for further consideration in light of *Glickman, supra*, 521 U.S. at p. 457, in *United States Department of Agriculture v. Cal-Almond, Inc.* (1997) 521 U.S. 1113; see also *United States v. Cal-Almond,*

Inc. (9th Cir. 1996) 102 F.3d 999, 1002-1003. In *Cal-Almond II*, the Ninth Circuit found that an entity must provide a refund of invalid assessments that were paid to that entity, but that entity is not required to refund assessments paid to other entities.

Cal-Almond II arose out of a challenge to a federal almond promotion program. In a prior decision, the Ninth Circuit had found that the federal almond marketing program violated dissenters' First Amendment rights. (*Cal-Almond v. Department of Agriculture* (9th Cir. 1993) 14 F.3d 429, 440 (*Cal-Almond I*), judgment vacated and cause remanded for further consideration in light of *Glickman*, *supra*, 521 U.S. at p. 457, in *United States Department of Agriculture v. Cal-Almond, Inc.* (1997) 521 U.S. 1113.) The *Cal-Almond I* court found that an appropriate remedy was "a refund of any assessments found not to have been due." (*Cal-Almond I*, *supra*, 14 F.3d at p. 448.) But the court also explained that *McKesson* does not require any award of compensatory damages, but only held "that a refund of unlawful taxes was one possible way for the State [of Florida] to satisfy the requirements of the Due Process Clause." (*Cal-Almond I*, *supra*, 14 F.3d at p. 448, fn. 19.)

On remand from *Cal-Almond I*, the district court awarded a refund of all of the assessments that the dissenters had paid, regardless of who had received those payments. In *Cal-Almond II*, the Ninth Circuit Court of

Appeals considered the propriety of that refund. This analysis was complicated by the fact that not all of the assessments mandated by the almond promotion program were paid to the program. The almond program provided two means through which almond handlers could satisfy their obligation to pay assessments. First, an almond handler could pay its assessments directly to the program. Second, an almond handler could deduct the amounts it spent on its own promotional activities from the amount of the assessment due (this amount is referred to as "creditable advertising"). (*Cal-Almond I, supra,* 14 F.3d at p. 433; see also *Cal-Almond II, supra,* 67 F.3d at p. 877.) This distinction raised the question of whether reimbursement of the money paid for creditable advertising was a refund of assessments, or instead was a damages claims that was barred by sovereign inmunity. (*Cal-Almond II, supra,* 67 F.3d at p. 878.)

After carefully considering the nature of the remedy of a refund, the *Cal-Almond II* court found that the money paid as "creditable advertising" was not recoverable as a refund. The court explained that the distinction between money damages and a refund is that "[d]amages are given to the plaintiff to *substitute* for a suffered loss . . . specific remedies 'are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he is entitled.'" (*Cal-Almond II, supra,* 67 F.3d at p. 878, quoting *Maryland Dept. of Human Resources v. Department of Health and Human*

Services (D.C. Cir. 1985) 763 F.2d 1441, 1446.) Because the assessments used for creditable advertising were never paid to the almond program, but instead were paid to others such as advertising agencies, "[r]equiring the USDA to reimburse the handlers for money they expended on creditable advertising would oblige the USDA to 'substitute' money from its coffers for money the handlers had to pay to third parties." (*Cal-Almond II, supra,* 67 F.3d at p. 878.) The *Cal-Almond II* court found the claim for assessments paid for creditable advertising was a damages claim, not a claim for refund. These damages claims were barred by the doctrine of sovereign immunity. Accordingly, although the plaintiffs had paid assessments for creditable advertising under duress, there was no remedy available. (*Id.* at pp. 879-880.)

For the reasons outlined in section 3.B.2.of this brief, to require any of the Defendants to pay the judgment here would require them to 'substitute' money from their coffers for the money the handlers paid to third party. This remedy would be a damages award, not the equitable remedy of a refund. The trial court correctly found that Country Eggs' damages claims fail. (CT 661-662.) As the trial court found, the State, the Department and the Secretary, in his official capacity, cannot be held vicariously liable for the acts of the Commission and, in any event, have sovereign immunity. (*Id.*)

Accordingly, the sole remedy available to Country Eggs is a refund. But the only entity liable for the refund is the entity that received the assessments. As discussed below, the Commission was a separate entity, and assessments paid to the Commission were not available to the State or the Department. The State and the Department cannot refund assessments paid to the Commission.

B. The Commission Is an Independent Entity; Therefore the State Is Not Liable for a Refund of the Assessments Paid to the Commission.

As discussed above, states may create separate public entities and not be responsible for paying the debts of these entities. Therefore, the remaining question is whether the Commission was a separate entity, such that requiring Defendants to "refund" assessments paid to the Commission would require Defendants to substitute money from the state treasury for money paid to the Commission. The Commission's authorizing statutes created the Commission as a separate entity, which was separately funded and managed. (See, e.g. §§ 75064, 75069, 75095, 75131, 75175, subd. (a).) Because the Defendants had no access to the assessments paid to the Commission, they cannot refund those assessments.

The statutory scheme authorizing the Commission establishes that the Legislature intended that it be a separate public entity, and that the State would not be liable for its debts. (§ 75070, subd. (a).) While it was in

operation, the Commission had a separate legal existence from either the State or the Department. The Commission was a public corporation, granted all of the powers of a corporation, and was authorized to adopt a corporate seal. (§75064, subds. (a), (b); CT 511, 585:6-10; 661.) It was composed of 8 egg industry representatives, who were elected by members of the egg industry, and one public member, who was nominated by the Commission and appointed by the Secretary. (§§ 75051, 75052; CT 511, 586:4-19.) The Commission could hire its own counsel, sue and be sued, and prosecute violations of its authorizing statute. (§§ 75064, subd. (b), 75085, subd. (a), 75098; CT 511, 585:6-10.) The Commission could even bring actions against the Secretary and the Department. (§§ 75056, 75064, subd. (b), 75085, subd. (a); CT 511, 585:6-10.)

The Commission was also a separate financial entity. The Commission was not publicly funded, but instead was funded through assessments, set by the Commission,[8/] and paid by egg distributers. (§§ 75095, 75131, subd. (a); CT 511:6-7; 661.) The State had no access to any of the assessments collected by the Commission. These assessments were kept in a separate account and could be disbursed only on the order of the Commission. (§ 75069; CT 511:9-12; 661.) Even upon dissolution, the Commission's funds were not available to the State. In the event that the

---

8. The Legislature capped the assessment rate at $0.01 per dozen for shell eggs, with an equivalent cap for egg products. (§ 75131, subd. (a).)

Commission dissolved, any remaining funds would be returned to the persons from whom they were collected, on a pro rata basis. (§ 75175, subd. (a); CT 511:13-15; 661.) Additionally, the Legislature expressly provided that the Commission was a separate financial entity, and responsible for its own debts, declaring:

> The state shall not be liable for the acts of the commission or its contracts. Payments of all claims arising by reason of the administration of this chapter or acts of the commission are limited to the funds collected by the commission.

(§ 75070, subd. (a).)

Finally, the Commission operated independently. The State retained virtually no control over the Commission or its activities. The State did not select the Commission members. With the exception of the Commission's one public member, the Commission's members were chosen by vote of egg handlers, giving no appointment or veto power to the Secretary. (§ 75051, 75052, 75059; CT 511:23-26.) Although the Secretary was an "ex officio" member of the Commission, he did not have the power to vote on issues before the Commission. (CT 282, 512:1-5.) Defendants had virtually no control over the day-to-day activities of the Commission. The Secretary's sole means of exerting authority over the Commission was through his cease and desist authority. (§ 75054, subd. (a); CT 661.) But this authority could only be exercised after the Secretary made a determination that the Commission was engaging in an activity that was not in the public interest,

or was in violation of the Commission's authorizing statute. (§ 75054, subd. (a).) The Commission thus acted in an independent, not an advisory role, when administering its program.[9/]

Nonetheless, Country Eggs argues that the trial court erred when it found that, because the State and the Secretary cannot refund assessments they never received, any remedy would be more akin to an award of damages. (AOB, at p. 31.) In so doing, Country Eggs concedes that the remedy it seeks under *McKesson* is a refund, and not damages,[10/] but argues

---

9. The Commission's separateness and independence is particularly striking when compared to the Almond Board, the entity administering the almond program on behalf of the U.S. Department of Agriculture (USDA). (*Cal-Almond II, supra*, 67 F.3d at p. 877.) In contrast to the Commission, the Almond Board was not separate legally or financially. The Almond Board is not a separate public corporation. Instead, it was an agency of the Secretary that was merely advisory to the Secretary. (7 U.S.C. § 608c(7)(C).) Unlike the Commission, the Almond Board did not set the assessments; instead the assessment rate was set by the Secretary of the USDA. Furthermore, the Secretary of the USDA controlled the distribution of the Board's funds upon termination. (7 C.F.R. § 981.81(d).) Unlike the Commission, the Almond Board was not elected by the industry, but was instead composed of industry members appointed by the Secretary of the USDA. (*Glickman v. Wileman Bros. & Elliott, Inc.* (1997) 521 U.S. 457, 462; 7 C.F.R. § 981.33.)

Additionally, unlike the Commission, which managed its own program, the Board's role in managing the almond program was only advisory. The Secretary alone was responsible with administering and enforcing the almond marketing order. (*Massachusetts Farmers Defense Committee v. United States* (1939), 26 F.Supp. 941, 942; see also 7 C.F.R. § 981.38(a)-(c).)

10. Alternatively, Country Eggs describes its claims as claims for recoupment. (AOB at pp. 36-37.) However, "recoupment" is not an independent claim. Instead it a defense or counterclaim that is raised to

that the State must be required to refund the assessments because it created the Commission and receives an indirect benefit from the Commission (an expansion of the egg market). (AOB at pp. 31-35.)

The fact that the Legislature created the Commission does not make the State or the Department liable for a refund of assessments paid to the Commission. States create a myriad of public entities, in a "profusion of distinct forms," including "many kinds of municipal corporations, political subdivisions, and special districts of all sorts . . ." (*City of St. Louis v. Praprotnik* (1988) 485 U.S. 112, 124.) All of these entities are created through and are dependent upon the state's police powers, and "exist at the whim and behest of their State." (*Hess, supra*, 513 U.S. 30, 47.) Any power that these entities have to impose and enforce taxes is delegated to them by the Legislature. (*Marin County v. Superior Court of Marin County* (1960) 53 Cal.2d 633, 638-639.) But this grant of power does not make the state responsible to refund invalid fees and taxes paid to these entities. Instead, the state can only refund taxes and fees that it actually receives.

Nor is it relevant that the Commission provided an indirect benefit to the state by carrying out a legislatively approved policy of maintaining and

---

reduce the amount of a demand by deductions arising out of the same transaction. (4 Witkin, Cal. Procedure (4th ed., 1996) Pleading, § 1080, p. 530.) In the present action, Defendants have made no demand against which a claim for recoupment can be raised.

expanding the market for eggs. (AOB at p. 32-33.) The fact that the Commission was created to benefit the State's egg industry, and the public as a whole, is not the type of direct benefit that creates liability for a refund. Every political subdivision of the State was created to aid the state in carrying out the State policies and to assist in achieving the public good. (See, e.g. *Marin County v. Superior Court of Marin County*, *supra*, 53 Cal.2d at pp. 638-639 ["The county is merely a political subdivision of state government, exercising only the powers of the state, granted by the state, created for the purposes of advancing the policy of the state at large . . ."].) But the State is not liable for the debts of each of these entities.

Finally, Country Eggs' reliance on the boilerplate statement in section 75051 that "[t]here is in state government the California Egg Commission" is misplaced. (AOB at pp. 34-35.) There is no basis for finding that this phrase was intended as a waiver of the State's sovereign immunity. Instead, the Legislature expressly provided that the State was not liable for the Commission's debts. (§ 75070, subd. (a).)[11/] This general, introductory language does not even indicate that the Legislature intended that the Commission be a state agency.[12/] As acknowledged by Country Eggs (AOB

---

11. Where, as here, "a general statute conflicts with a specific statute, the specific statute controls the general one." (*Craddock v. Kmart Corp.* (2001) 89 Cal.App.4th 1300, 1310.)

12. Even if this language indicated that there was some type of agency relationship between the State and the Commission, this relationship

at p. 34), this identical language is used in 73 different California statutes for a wide variety of public entities, including entities that are expressly defined as political subdivisions, rather than State agencies. (See California Pollution Control Financing Authority, Health & Saf. Code, §§ 44515; California Passenger Rail Financing Commission, Gov. Code, §§ 92100.)

When the Legislature passed the Commission law, it specifically expressed its intention that the Commission be an independent, self-funded entity, and that the State would not be liable for the Commission's debts. (See, e.g., §§ 75064, 75070, 75069, 75095.) Thus, the Commission is a separate entity, and requiring the State or the Department to refund assessments paid to the Commission would require these entities to substitute their own funds for the funds of the Commission. As found by the trial court, such an award does not fall within the equitable remedy of a refund, but is instead damages. Because there is no basis for an award of damages against any of the Defendants in the present case (CT 661-662; AOB at p. 16 [waiving damages claims]), Country Eggs' claims fail, and the trial court's judgment in favor of Defendants should be affirmed.

---

does not create a liability for a refund. Public entities may be considered agencies of the state for some purposes, but that does not necessarily mean that the State is liable for the debts of that entity. (See *Lynch v. San Francisco Housing Authority* (1997) 55 Cal.App.4th 527, 539-540.)

II. Country Eggs' Claims Under *McKesson* Fail Because Country Eggs Seeks a Refund of Assessments That Were Paid Pursuant to a Stipulated Injunction Entered into Voluntarily.

As explained above, the trial court correctly found that the State and the Secretary cannot be held liable for a refund of the assessments that Country Eggs paid to the Commission. However, even if this ruling was in error, the trial court's judgment should be upheld because the trial court's result is supported by a separate ground. (*Whyte v. Schlange Lock Co.* (2002) 101 Cal.App.4th 1443, 1451.)

The assessments that Country Eggs seeks were paid pursuant to "a voluntary stipulated injunction" under which Country Eggs agreed to "continue paying its assessments." (CT 659; see also CT 186-192.) Thus, Country Eggs' claims are additionally barred for two reasons. First, because Country Eggs agreed to pay the assessments, and any related charges, these payments do not violate Country Eggs' due process rights. Second, to award Country Eggs a refund of assessments that it paid pursuant to a federal court judgment would conflict with the principle of comity and with the respect accorded to final federal court judgments.

There is no due process violation, and no basis for a refund under *McKesson*, where the payment of a fee or tax was voluntary. (*McKesson*, *supra*, 496 U.S. at p. 36; *United States v. Mississippi Tax Comm'n* (1973) 412 U.S. 363, 368, fn. 11.) Under *McKesson*, voluntariness normally turns

upon whether the taxpayer has an adequate predeprivation remedy. However, this case present a unique circumstance, because Country Eggs seeks a refund of assessments that were paid pursuant to a stipulated federal court injunction entered into "voluntarily and intentionally," and with advice of counsel. (CT 188-189.)

Country Eggs agreed to pay its assessments as part of its settlement of *Country Eggs I*. At that time, the case law was not favorable to its position, and Country Eggs believed it faced "a lost cause with respect to [its] free speech claims." (AOB at p. 23.) "[T]o stop having to pay more attorneys' fees to the Commission" (CT 073), Country Eggs entered into a stipulated judgment, dismissing its claims and agreeing to "a voluntary stipulated injunction that plaintiff was to continue paying its assessments." (CT 659; see also 188-190.)

Country Eggs' decision to agree to pay its assessments to avoid incurring potential penalties, as well as further legal costs and attorneys' fees, was not involuntary or under duress.[13] Nor were the payments made pursuant to the stipulated judgment under duress for purposes of *McKesson*. Instead, Country Eggs made the payments pursuant to an agreement that it

---

13. See, e.g. *Philippine Export and Foreign Loan Guarantee Corporation v. Chuidian* (1990) 218 Cal.App.3d 1058, 1079 (threats to prosecute a lawsuit in good faith not duress); cf. *People v. Bravo* (1987) 43 Cal.3d 600, 609 (a probationer's waiver of his Fourth Amendment rights is no less voluntary than the waiver of rights by a defendant who pleads guilty to gain the benefits of a plea bargain).

entered into based on Country Eggs' belief that it was unlikely to be successful in light of then-existing case law. Country Eggs may now "wish that it had not made this deal, but courts have not looked favorably on the entreaties of parties trying to escape the consequences of their own 'counseled and knowledgeable' decisions." (*Coltec Industries, Inc. v. Hobgood* (3d Cir. 2001) 280 F.3d 262, 274 [although subsequent case law revealed plaintiffs' claims were viable, plaintiffs not entitled to relief from stipulated dismissal of those claims].)

Furthermore, Country Eggs is asking this Court to find that payments made pursuant to a final federal court judgment were under duress within the meaning of *McKesson*, and to award it with a refund of monies paid pursuant to that judgment. But California courts must accord the *Country Eggs I* judgment the respect it would receive in federal court, where the judgment would be treated as a binding, final judgment. (*Martin v. Martin* (1970) 2 Cal.3d 752, 761 ["A federal court judgment has the same effect in the courts of this state as it would in a federal court"]; *Butcher v. Truck Insurance Exchange* (2000) 77 Cal.App.4th 1442, 1452-1453 [where prior federal judgment was on the basis of federal question jurisdiction, full faith and credit must be given to that judgment]. Under Federal Rules of Civil Procedure 60, a party may request the court to vacate a continuing injunctionto reflect changes in the law or may seek relief from a final

judgment.[14] Had Country Eggs objected to the federal court injunction, it should have raised the issue before the district court in *Country Eggs I.* It cannot now be permitted to turn to the state court to obtain relief from a federal court judgment.

Nor does the respect accorded a final federal court judgment change when constitutional issues are at stake. (*Blue Diamond Coal Co. v. Trustees of the UMWA Combined Benefit Fund* (6th Cir. 2001) 249 F.3d 519, 528 (*Blue Diamond Coal*).) For example, the Blue Diamond Coal Company had challenged the constitutionally of congressionally mandated payments under the Coal Act. Blue Diamond's challenge failed, resulting in a final judgment against it. (*Id.* at p. 522-523.) The United State Supreme Court subsequently reviewed a parallel challenge to the Coal Act, and found that the challenged payments violated due process. (*Id.* at p. 523, citing *Eastern Enterprises v. Apel* (1998) 524 U.S. 498 (*Eastern Enterprises*).) By mid-1998, when the *Eastern Enterprises* decision was entered, Blue Diamond had paid in excess of $14 million pursuant to the 1994 district court order. (*Blue Diamond Coal, supra*, 249 F.3d at p. 523.) In accordance with the Supreme Court's decision, the government offered refunds of all of the

---

14. Fed. R. Civ. P. 60(b) (a district court may relieve a party from their legal obligations where "it is no longer equitable that the judgment should have prospective application," or where there is "any other reason justifying relief from the operation of the judgment"); *Agostini v. Felton* (1997) 521 U.S. 203, 238-239.

payments under the invalid law, except those payments made pursuant to a final judgment or settlement entered before the issuance of the *Eastern Enterprises* decision. (*Ibid.*) The government declined to refund the $14 million that Blue Diamond had paid, because Blue Diamond's payments were pursuant to a final court order.

Blue Diamond sought relief under Federal Rules of Civil Procedure, Rule 60(b), based on the unfairness of the result. Although the district court granted relief, the *Blue Diamond* court reversed. (*Blue Diamond Coal, supra*, 249 F.3d at p. 529.) The *Blue Diamond* court explained that these facts did not constitute "extraordinary circumstances" meriting relief under Rule 60(b)(6), particularly when weighed against the interest in finality of the prior judgment. (*Id.* at p. 528.) Similarly, here, the relief that Country Eggs seeks is essentially relief from a final federal court order. Even if this court could grant relief from a federal court order, because of the interests of comity and the finality of the judgment in *Country Eggs I*, the relief Country Eggs seeks must be denied.

Country Eggs entered into a stipulated judgment, in which it dismissed its claims with prejudice and agreed to "a voluntary stipulated injunction that plaintiff was to continue paying its assessments." (CT 659; see also CT 073, 188-190.) It cannot now claim that these payments were made under duress for purposes of a refund under *McKesson*. Nor can it

obtain relief from this stipulated judgment in this action. Accordingly, the trial court did not err in granting summary judgment for the Defendants, and the trial court's order should be affirmed.

CONCLUSION.

Although the Commission is not a party to this action, Country Eggs seeks a refund of assessments that it paid to the Commission. The refund sought by Country Eggs is not available in this action, because the assessments were not paid to the Defendants, nor did the Defendants obtain a direct benefit from the payment of assessments. Furthermore, Country Eggs is not entitled to a refund because the assessments that it seeks were paid pursuant to a voluntary stipulated injunction, that was part of a final federal court judgment. Accordingly, Defendants respectfully request that the trial court's judgment be affirmed.

DATED: July 29, 2004.

Respectfully submitted,

BILL LOCKYER,
Attorney General

LINDA BERG
Deputy Attorney General
Attorneys for Defendants and
Respondents

10072001.wpd

CERTIFICATE OF BRIEF LENGTH
[California Rules of Court, rule 14(c)(1)]

Pursuant to California Rules of Court, rule 14(c)(1), that the foregoing brief contains 8,342 words, as shown by the word count function of the computer program used to prepare the brief.

Dated: July 29, 2004

LINDA L. BERG
Deputy Attorney General

DECLARATION OF SERVICE BY OVERNIGHT MAIL AND U.S. MAIL

Case Name: **COUNTRY EGGS, INC., a California corporation v. A.G. KAWAMURA, in his official capacity as the Secretary of the California Department of Food and Agriculture; CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE; and STATE OF CALIFORNIA**

No.: **02AS04521**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1300 I Street, P.O. Box 944255, Sacramento, California 94244-2550.

On August 3, 2004, I served the attached **Respondent's Brief** as follows:

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid with the California Overnight courier service addressed as follows:

Brian C. Leighton
The Law Office of Brian C. Leighton
701 Pollasky Avenue
Clovis, CA 93612
Attorney for Plaintiff/Appellant

5 Copies to:
California Supreme Court
San Francisco Office
303 2nd Street, So. Tower
San Francisco, CA 94107-1317

and

via U.S. mail by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney

General at 1300 I Street, P.O. Box 944255, Sacramento, California 94244-2550, addressed as follows:

The Honorable Loren E. McMaster
Sacramento Superior Court, Dept. 53
720 Ninth Street
Sacramento, CA 95814-1389

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 3, 2004, at Sacramento, California.

Kathleen Dobson
Declarant

Kathleen Dobson
Signature

l0073233.wpd