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FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JUN 07 2004

JAMES R. LARSEN, CLERK  
DEPUTY  
RICHLAND, WASHINGTON

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**IN RE WASHINGTON STATE APPLE  
ADVERTISING COMMISSION**

NO. CS-01-0278-EFS

**ORDER ACCEPTING SETTLEMENT  
AGREEMENTS, MODIFYING PREVIOUS  
ORDER, AND RULING ON MOTIONS**

A hearing was held in the above-captioned matter on July 23, 2003. Before the Court were the Settlement Agreement with Intervening Defendants, Amendment to Partial Settlement Agreement, and related motions. Appearing on behalf of the Apple Commission were Mr. James Danielson and Mr. Peter Spadoni and Larry Olsen. Mr. Brendon Monahan appeared on behalf of the Intervening Defendants. Mr. Brian Leighton appeared on behalf of the Organic Growers. At that hearing, the Court permitted oral statements by interested members of the Class. Of those seeking to address the proposed class settlement, only one individual spoke against it while several others, including those speaking on behalf of various organizations spoke in favor of the class settlement. The Court also listened to the arguments of counsel and reviewed the pleadings filed in connection with these various motions. The Court then orally granted the Motion for Approval of Partial Settlement Agreement, Motion for Approval of Settlement, and the Commission's Motion for

1 Reconsideration of Limited Issues concerning a portion of the language  
2 of the Court's Order Granting Defendant's Motion for Summary Judgment and  
3 Denying Plaintiff's Motion for Summary Judgment, which precluded  
4 consideration of these Settlement Agreements. In order to monitor the  
5 implementation of the Settlement Agreements, the Court set a status  
6 hearing for June of 2004.

7 On June 1, 2004, that telephonic status hearing took place. Mr.  
8 Peter Spadoni along with several members of the Commission appeared on  
9 behalf of the Commission. Mr. Brendon Monahan appeared for the  
10 Intervening Defendants, and Mr. Brian Leighton appeared for several  
11 Organic Growers. The Court was advised by the parties that Governor  
12 Locke had signed legislation recreating the Apple Commission as a state  
13 agency effective June 10, 2004. There was no assertion that the  
14 Commission had failed to carry out the terms of the settlement  
15 agreements, although there were concerns expressed about the relationship  
16 of these settlement agreements and this legislation.

17 This Order memorializes and supplements those oral decisions  
18 announced during that July, 2003 hearing and briefly addresses the status  
19 of these matters. In the Court's Order Granting Defendant's Motion for  
20 Summary Judgment and Denying Plaintiff's Motion for Summary Judgment, the  
21 Court stated:

22 Because the Commission's principal purpose is speech, and its  
23 assessments are unconstitutional, the Court declines the  
24 invitation of the Commission to reform the Commission in a  
25 constitutional fashion. That task is left to the Washington  
26 State legislature, where all stakeholders can engage in robust  
public debate, with the final decision left to those elected  
by the citizens of the State of Washington.

1 The Commission asked the Court to reconsider this finding. The Commission  
2 as well as the Defendants representing the Class and the Intervening  
3 Defendants correctly understood that unless the Court changed this view,  
4 there was no possibility of the continuation of the Commission, which was  
5 the essential point of the proposed settlements.

6 Reconsideration of that position necessarily involved two primary  
7 issues: (1) whether the non-speech functions of the Commission could  
8 still be funded through assessments even though the Court found that the  
9 principal purpose of the Apple Commission was speech and thus funding  
10 such functions through mandatory assessments was unconstitutional and (2)  
11 whether the process used by parties to settle the claims, which involved  
12 sending a notice of settlement containing the terms and conditions of the  
13 settlement agreement to the approximately 3,700 stakeholders, together  
14 with the two court hearings, satisfied the Court's concern that the  
15 recreation of the Apple Commission could only be properly accomplished  
16 by a robust debate of the stakeholders, best done as part of the  
17 legislative process.

18 In order to grant the Apple Commission's reconsideration request,  
19 the Court would in effect sever the unconstitutional portion of the  
20 Washington Apple Commission Act and allow the remaining statute to  
21 remain. The United States Supreme Court has stated, "a court should  
22 refrain from invalidating more of the statute than is necessary . .  
23 .'[W]henEVER an act of Congress contains unobjectionable provisions  
24 separable from those found to be unconstitutional, it is the duty of this  
25 court to so declare, and to maintain the act in so far as it is valid."  
26 *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1987), quoting *El Paso & NE R.*

1 Co. v. Gutierrez, 215 U.S. 87, 96 (1909). Here, the Washington Apple  
2 Commission Act did not contain a severability clause. However, just  
3 because a severability clause is absent does not raise a presumption  
4 against severability. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686  
5 (1987); *Gubiensio-Ortiz v. Kanahele*, 857 F.2d 1245, 1267 (199<sup>th</sup> Cir.  
6 1988), *vacated in part* by 488 U.S. 1036 (1989), *aff'd in part & rev'd in*  
7 *part, on other grounds*, 871 F.2d 104 (9<sup>th</sup> Cir. 1989). The Notes to each  
8 section of the Washington Apple Commission Act do cite to a severability  
9 clause. Accordingly, the Court finds that a presumption exists that the  
10 Washington legislature intended the unconstitutional provisions to be  
11 severed. Further, the Court finds that if the unconstitutional  
12 application of the Act to fund speech-related activities is enjoined, the  
13 Act will still be able to stand on its own and be coherent.

14 After considering the settlement agreements and listening to the  
15 positions expressed by the speakers at the hearing, including counsel for  
16 the parties, the Court is satisfied that its ruling that the principal  
17 purpose of the Commission was speech and therefor, mandatory assessments  
18 were unconstitutional, does not preclude a finding that the settlement  
19 agreements are proper. The essence of the Amendment to the Partial  
20 Settlement Agreement of class claims is that Commission will conduct only  
21 non-speech functions through a mandatory assessment reduced to three-and-  
22 a-half cents for a standard tray pack container of an assumed forty-six  
23 pound gross billing weight. Accordingly, the Court approves the  
24 settlement agreements and modifies its previous order declining to rule  
25 on whether assessments could be collected for non-speech activities,  
26

1 finding that the collection of the 3 ½ cents as proposed in the  
2 settlement agreements to fund non-speech activity is allowable.

3 In connection with the second issue before the Court, the Court  
4 concludes that a robust debate of stakeholders took place, albeit in a  
5 non-legislative manner. Notice of the terms and conditions of proposed  
6 class settlement was sent to approximately 3,700 growers. At the hearing  
7 on July 23, 2003, one individual organic grower objected to the proposed  
8 settlement agreements. That is the only objection the Court received,  
9 other than the objections of Mr. Leighton on behalf of several organic  
10 growers who had not been part of the group of organic growers who had  
11 intervened and earlier settled with the Commission. Seven individuals  
12 spoke in favor of the settlement, including Jim Hazen on behalf of the  
13 Washington State Horticultural Association, and Kirk Mayer, on behalf of  
14 the Washington Growers Clearinghouse Association, a non-profit  
15 association with approximately 275,000 Washington tree fruit growers,  
16 including three directors who are organic growers who voted in support  
17 of the settlement agreements. Thus, individual class members actually  
18 comprising the stakeholders in the Washington apple industry had the  
19 opportunity to participate in the decision to continue the Commission  
20 with only non-speech functions at a sharply reduced rate of three-and-a-  
21 half cents for a standard tray pack container of an assumed forty-six  
22 pound gross billing weight and to inform the Court as to their stance on  
23 the proposed settlement agreements.

24 The remarks of counsel at the June 1, 2004, status hearing revealed  
25 no dispute that the Commission carried out the terms and conditions of  
26 the settlement agreements. Further, after the July 2003 hearing, the

1 stakeholders in this matter had the opportunity to seek legislation, and  
2 they did so. The Governor signed into law Substitute House Bill 2367 on  
3 March 26, 2004, which will take effect on June 10, 2004. For the above  
4 reasons, the Court concludes that the stakeholders in the Washington  
5 apple industry had the opportunity to be heard and to shape the  
6 Commission to limit it to non-speech functions as part of the settlement.

7 The Court shall maintain jurisdiction over these settlement  
8 agreements. However, at the hearing, one party raised concerns about  
9 whether the settlement agreements restricted the scope of the enacted  
10 legislation, which recreated the Commission as a state agency. The Court  
11 expresses no opinion as to the relationship between the settlement  
12 agreements and the legislation; that issue is left for another day.

13 For the reasons given on the record, **IT IS HEREBY ORDERED:**

14 1. Plaintiff's Motion for FRCP 54(b) Finding, for Approval of  
15 Partial Settlement, for Order Permitting Interlocutory Appeal, for  
16 Reconsideration of Limited Issues, and for Stay Pending Appeal, (**Ct. Rec.**  
17 **283**), is:

- 18 a. **GRANTED** as to the Request for Approval of Partial  
19 Settlement Agreement,
- 20 b. **DENIED AS MOOT** as to the Request for Stay Pending Appeal,
- 21 c. **DENIED AS MOOT** as to the Request for Order Permitting  
22 Interlocutory Appeal,
- 23 d. **DENIED AS MOOT** as to the Request for Findings Under 28  
24 U.S.C. § 1292(b), and
- 25 e. **GRANTED** as to Request for Limited Consideration. The  
26 Court's Order Granting Defendant's Motion for Summary

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Judgment and Denying Plaintiff's Motion for Summary Judgment, (Ct. Rec. 272), is modified as set out above.

2. Borton & Sons Motion for Injunction Preventing Further Depletion of Assets, (Ct. Rec. 292), is **DENIED AS MOOT**.

3. Plaintiff's Motion for Approval of Settlement, (Ct. Rec. 306), is **GRANTED**.

**IT IS SO ORDERED.** The District Court Executive is directed to enter this order and to provide copies to all counsel.

**DATED** this 7<sup>th</sup> day of June, 2004.



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EDWARD F. SHEA  
United States District Judge

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