

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH DAKOTA  
NORTHERN DIVISION

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LIVESTOCK MARKETING ASSOCIATION, an )  
association of livestock markets, )  
7509 Tiffany Springs Parkway )  
Kansas City, Missouri 64153-2315 )  
)  
WESTERN ORGANIZATION OF RESOURCE )  
COUNCILS, an association of grassroots of )  
organizations that seek to protect natural resources, )  
family farms, and rural communities, )  
2401 Montana Avenue, #301 )  
Billings, Montana 59101 )  
)  
and ) Civil  
Action No. 00-1032  
)  
ROBERT M. THULLNER )  
10589 US Hwy 83 )  
Herried, South Dakota 57632 )  
)  
JOHN L. SMITH )  
Box 336 )  
Fort Pierre, South Dakota 57532 )  
)  
ERNIE J. MERTZ )  
32028 132 Street )  
Bowdle, South Dakota 57428 )  
)  
JOHN WILLIS )  
P.O. Box 354 )  
Lake City, Florida 32056-0354 )  
)  
PAT GOGGINS )  
P.O. Box 1781 )  
Billings, Montana 59103 )  
)  
HERMAN SCHUMACHER )  
P.O. Box 67 )  
Herreid, South Dakota 57632-0067 )  
)  
JERRY GOEBEL )

RR 1, Box 46A	)
Lebanon, SD; and	)
	)
LEO ZENTNER	)
9602 Alexandria Road	)
Shepherd, MT 59079	)
	)
on behalf of themselves and others similarly situated,	)
	)
Plaintiffs,	)
	)
v.	)
	)
UNITED STATES DEPARTMENT OF	)
AGRICULTURE; ANN VENEMAN,	)
Secretary of Agriculture, and the	)
CATTLEMEN’S BEEF PROMOTION AND	)
RESEARCH BOARD, an	)
organization of cattle producers and importers	)
charged with implementing the Beef Research	)
and Promotion Order,	)
	)
Defendants.	)

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**PLAINTIFFS’ SECOND AMENDED COMPLAINT  
FOR DECLARATORY AND INJUNCTIVE RELIEF**

**NATURE OF THE CASE**

1. This is an action for declaratory and injunctive relief arising from the failure of the U.S. Department of Agriculture (“USDA”) and the Secretary of Agriculture (“the Secretary”) to provide diligent oversight and implementation of the referendum provisions of the Beef Research and Promotion Act. 7 U.S.C. § 2906. Plaintiff Livestock Marketing Association (“LMA”) submitted to USDA petitions signed by the individual plaintiffs in this action and by more than 140,000 other cattlemen seeking a referendum on the termination of the Beef Research and Information Order. The failure of USDA and the Secretary to act upon the petitions violates statutory and constitutional

requirements. In addition, this action challenges the constitutionality of the Beef Research and Promotion Act of 1985, 7 U.S.C. §§ 2901-11 in light of the Supreme Court's recent decision in *United States v. United Foods, Inc.*, 121 S.Ct. 2334 (2001).

### **JURISDICTION AND VENUE**

2. Jurisdiction is conferred upon this Court by 28 U.S.C. §§ 1331, 1361, 2201, and 2202, and by the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706.

3. Venue in this Court is proper pursuant to 28 U.S.C. §1391(e).

### **THE PARTIES**

4. Plaintiff Robert M. Thullner, 10589 US Hwy 83, Herried, South Dakota 57632, is an individual who raises cattle, signed a petition seeking a referendum on the termination of the Beef Research and Promotion Order, and resides in this judicial district.

5. Plaintiff John L. Smith, Box 336, Fort Pierre, South Dakota 57532, is an individual who raises cattle, signed a petition seeking a referendum on the termination of the Beef Research and Promotion Order, and resides in this judicial district.

6. Plaintiff Ernie J. Mertz, 32028 132 Street, Bowdle, South Dakota 57428, is an individual who raises cattle, signed a petition seeking a referendum on the termination of the Beef Research and Promotion Order, and resides in this judicial district.

7. Plaintiff John Willis, P.O. Box 354, Lake City, Florida, 32056-0354, is an individual who has a small cow-calf operation and pays the mandatory assessments imposed by the Beef Research and Production Act. He is the President of the Livestock Marketing Association and the owner of the Columbia Livestock Market of Lake City, Inc. in Lake City, Florida.

8. Plaintiff Pat Goggins, P.O. Box 1781, Billings, Montana, 59103, is an Angus breeder, cow/calf operator, and cattle feeder. He estimates that he pays

approximately \$30,000 annually in beef checkoff assessments. He is the Vice-President of the Livestock Marketing Association and owner of Public Auction Yards in Billings, Montana.

9. Plaintiff Herman Schumacher, P.O. Box 67, Herreid, South Dakota 57632-0067, owns a feedyard in South Dakota and pays the mandatory beef checkoff assessments. He also owns Herried Livestock Market, Inc. in Herreid, South Dakota.

10. Plaintiff Jerry Goebel, RR1, Box 46A, Lebanon, SD, is a cattle producer as defined by the Act. He is a resident of South Dakota. Mr. Goebel did not receive the PwC mail survey, but did receive a telephone call from a PwC representative on or about January 11 or 12, 2001. He responded to their request for financial information on January 23, 2001.

11. Plaintiff Leo Zentner, 9602 Alexander road, Shepherd, Montana, 59079, is a cattle producer as defined by the Act. He is a resident of Montana. Mr. Zentner received a telephone call from PwC on January 4th or 5th, 2001. He then received a PwC mail survey on approximately January 12, 2001. He sent the requested financial information on January 16, 2001.

12. Plaintiff Livestock Marketing Association, 7509 Tiffany Springs Parkway, Kansas City, MO 64153-2315, is a trade association representing livestock marketing businesses, which was established in 1947 as the National Livestock Auction Association. It is incorporated as a not-for-profit organization in the State of Missouri, and its members are persons engaged in operating livestock markets, who regularly engage in the purchase of cattle. The Livestock Marketing Association currently represents more than 800 livestock marketing businesses in the United States, including auction markets, commission firms, dealers, and order buyers. Approximately 90 percent of LMA members are market operator and dealers who also have cattle production

operations and therefore are subject to and pay as well as collect the mandatory beef checkoff assessments.

13. Plaintiff Western Organization of Resource Councils (“WORC”), 2401 Montana Avenue, #301, Billings, Montana 59101, is an association of grassroots organizations which, in turn, are composed of affiliated citizens' groups based in 42 communities throughout the region. Members of WORC include the Dakota Resource Council (North Dakota), Dakota Rural Action (South Dakota), the Idaho Rural Council (Idaho), the Northern Plains Resource Council (Montana), the Powder River Basin Resource Council (Wyoming) and the Western Colorado Congress (Colorado). The members of these groups are farmers, ranchers, small business and working people who seek to protect natural resources, family farms, and rural communities, including cattle producers who are subject to and pay the mandatory beef checkoff assessments.

14. The United States Department of Agriculture, Defendant, is an agency of the United States government.

15. Defendant Ann Veneman is the Secretary of Agriculture (the Secretary), and is sued in her official capacity. The Secretary is charged with administering the Beef Promotion and Research Act (the “Act” or the “Beef Promotion Act”), 7 U.S.C. §§ 2901-11, which establishes beef promotion program, funded through per-head assessments on cattle producers and which gives cattle producers who are subject to the Act the right to request that the Secretary hold a referendum in order to determine whether the program should be continued.

16. Defendant Cattlemen’s Beef Promotion and Research Board (herein, and popularly, referred to as the “Cattlemen’s Beef Board”) is an organization authorized pursuant to the Beef Promotion and Research Act, 7 U.S.C. § 2904(1), and created pursuant to the Beef Research and Promotion Order. It is composed of cattle producers

and importers, who are appointed by the Secretary and charged with administering the Beef Research and Promotion Order at the federal level.

## **BACKGROUND**

### **Statutory and Regulatory Scheme**

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17. The Beef Promotion and Research Act, 7 U.S.C. §§ 2901-11, originally enacted in 1976, is intended to strengthen the beef industry's position in the marketplace through a coordinated program of promotion and research. 7 U.S.C. §§ 2901(b).

18. The Beef Promotion and Research Program is funded by mandatory producer contributions. Currently, there are a number of other producer funded promotion and research programs for agricultural commodities, identical in many of their functional respects to the Beef Promotion Act.

19. The Beef Promotion Act directs the Secretary of Agriculture to promulgate a Beef Promotion and Research Order to be financed through one dollar per head assessments and which must be paid by all cattle producers and importers. 7 U.S.C. § 2904(8)(C). Each person receiving a payment from a producer is designated a “collecting person” 7 C.F.R. § 1260.311(a), and is required to remit the assessments either to a qualified State beef council or directly to the Cattlemen’s Beef Board. 7 U.S.C. § 2904(8)(A); 7 C.F.R. §§ 1260.172(a)(5), 1260.311(a), 1260.312(c).

20. The Beef Promotion and Research Act provides for the formation of a Cattlemen’s Beef Board (CBB), which is a large committee (115) of competitors of the individual plaintiffs. Members of the CBB are nominated by state cattle associations.

21. The principal contractor for the CBB is the National Cattlemen’s Beef Association (NCBA), a private trade association. The operations of the CBB are implemented by the Beef Operating Committee (BOC), which is comprised of 20

members, 10 of whom are drawn from the CBB itself and 10 of whom are appointed by the “checkoff division” of the NCBA.

22. Funds for the promotion and advertising programs developed by the CBB, BOC, and NCBA are generated by levying a mandatory, one dollar per head assessment on every sale of cattle in the United States. 7 U.S.C. § 2904(8)(C).

23. Under the terms of the Act, the first twenty-two months after an Order is, in effect, a “trial period.” Within that 22-month period, the Secretary is required to conduct a referendum among persons who were producers and importers during the trial period to determine whether the persons subject to the Order felt that it should continue in effect. 7 U.S.C. § 2906(a).

24. The Secretary issued an Order on July 18, 1986, 51 Fed. Reg. 26132; the required referendum was conducted on May 10, 1988; the Order was approved and assessments subsequently became mandatory.

25. The only way that the Order may now be suspended or terminated by a new referendum “on the request of a representative group comprising ten per centum or more” of the cattle producers subject to the order. 7 U.S.C. § 2906(b).

26. Amendments to the Act in 1985 deleted the Secretary’s previously existing unilateral powers either to terminate the Order or to call a referendum on his or her own initiative.

27. The Beef Promotion and Research Act deals only with the advertising, promotion, and research of beef. The Act does not regulate the beef industry, nor does it purport to regulate the beef industry. The Act does not regulate price, size, pack, maturity, production levels, quotas, reserves, or any other matters designed to restrict competition and/or stabilize markets or prices. Rather, the Beef Promotion and Research Act exists only for the purpose of compelling producers who sell cattle to fund the advertising and promotional activities of the CBB for generic beef.

28. The cattle production industry is a free market industry governed by supply and demand.

29. Most monies raised by the assessments under the Beef Promotion and Research Act are spent for generic advertising to promote beef sales.

### **Factual Background**

30. Cattle are produced throughout the United States. USDA has estimated that approximately 1.07 million of the 1.9 million Americans engaged in the agricultural industry produce cattle. The cattle industry is the single largest sector of the agricultural industry, generating approximately \$30 billion annually for the United States economy.

31. United States beef cattle are generally raised and grazed on ranches and finished to market weight on mixed grain rations in feed lots.

32. Cattle which have been feed mixed rations and feed grains represent the largest sector of cattle production and slaughter in the United States. Ranchers raising grain-fed cattle typically sell their feeder calves to feed lots through auction markets and their mature cows and bulls to slaughter plants through auction markets. Grain-fed cattle is typically sold as fresh subprimals, such as rounds, chucks, and loins to retailers, where it is sold to consumers as roasts and steaks very often with grades of USDA prime, USDA choice, and USDA select.

33. Cattle for slaughter are also produced as a “byproduct” by dairy farmers. Dairy producers will typically “cull” their herds of these cattle, both to reduce production when milk prices are low and to remove older cows from milk production. In addition, many of the offspring of milk cows are sold. These “cull cows” are typically marketed through auctions to cow slaughter plants. Non-grain-fed cattle, such as cattle produced as byproducts of dairy production, is generally less tender, and therefore better suited for making ground beef and further processed beef products.

34. A significant amount of beef sold in the United States is imported, rather than originating from fed cattle raised, sold, and processed in the United States. Much of this imported beef comes from cattle which are grass-fed and not grain-fed, and comes from herds and breeds which produce a substantially lesser quality of beef than United States cattle.

35. The individual plaintiffs, the large majority of members of LMA, and the large majority of members of the member organizations of WORC are United States ranchers and cattle producers, primarily with cow-calf operations, who raise calves to a weight where they are sold through auction markets to either stockers or feeders. They produce United States, grain-fed cattle, to be sold as United States beef.

36. The individual plaintiffs, the large majority of members of LMA, and the large majority of members of the member organizations of WORC are cattle producers who are subject to the mandatory assessments of the Beef Promotion and Research Act and who have paid the mandatory one-dollar per head beef checkoff assessment for all of the cattle that they have sold since the inception of the Act. The members of LMA also collect these assessments at their livestock auctions, at which cattle producers sell their cattle.

37. In the 15 years since the enactment of the 1985 amendments to the Beef Promotion and Research Act, more than \$1 billion has been expended from assessments on cattle producers, but beef demand has decreased overall.

38. In the 15 years since the enactment of the 1985 amendments to the Beef Promotion and Research Act, the gap between cattle prices received by cattle producers and retail beef prices has widened at an accelerated rate. The cattle producer's share of the beef retail dollar has fallen from approximately 70 percent in the 1970s to below 50 percent in 1996. In the first six months of 2001 alone, fed cattle prices have dropped \$62 per head from the monthly average.

39. Beef packers, beef processors, beef distributors, beef marketers, beef wholesalers, and beef retailers are not subject to the mandatory assessments of the Beef Promotion and Research Act, even though they are in the best position to directly profit or gain advantage from any alleged benefits of the promotion, advertising, and other activities funded by the mandatory assessments on cattle producers.

40. Most, if not all, of the promotional programs supported by the mandatory beef checkoff assessments are “generic,” in the sense that they do not recognize the distinguishing characteristics and qualitative differences between United States beef and imported beef, or grain-fed and non-grain-fed beef.

41. The generic promotion and advertising programs of the Beef Promotion and Research Order have had no discernable effect on the consumption of beef in the United States.

42. During 1997 and 1998, livestock markets found themselves deducting assessments from prices which were already not sufficient to cover producer costs. Producers expressed extraordinary frustration regarding these assessments at livestock markets.

43. As a service to their customer-cattlemen, LMA and its members decided to initiate a petition drive to obtain a referendum on continuation of the program. LMA undertook this action to provide producers throughout the United States with an opportunity to have input into the decision as to whether the program should be continued, terminated or revised.

44. Beginning in 1997, LMA members directed the association to explore the appropriate procedures for submitting petitions seeking a referendum. In 1997 and early 1998, LMA made inquiries to the Secretary concerning the petition process for a beef referendum. In March, 1998, USDA provided LMA with a list of current requirements and sample language for the petition, which LMA adopted in its entirety. USDA further

stated that the petition must contain a signature, the date of each signature, the printed name of the signer, the signer's company name ( if applicable), the signer's full address, and the signer's telephone number.

45. In April 1998, USDA further advised LMA that initiation of a referendum would require: (1) the verification of 116,791 valid signatures; (2) the determination that the persons who signed the petition are "a representative group of cattle producers," and (3) a decision by the Secretary to conduct the requested referendum.

46. LMA began collecting petition signatures in July, 1998. LMA and its members were supported in this effort by other organizations including the National Farmers Union and the Western Organization of Resource Councils. The petition drive lasted until September 31, 1999, and LMA collected, in total, 145,045 signatures, all of which were submitted to the Secretary on November 12, 1999. Because USDA specified that the necessary number of signatures would have to be collected within a single continuous 12-month period, LMA designated the 125,788 signatures collected in the period between September 1, 1998 and August 31, 1999 as being from the qualifying twelve-month period.

47. By the time LMA submitted the petitions, the total number of cattlemen in the country had declined by approximately eight percent so that ultimately only 107,883 signatures were required, to meet the qualifying 10 percent requirement.

48. Support for the referendum was particularly strong in South Dakota. Of the 18,700 beef and dairy producers in the state, 8,545, or more than 45 percent, signed petitions seeking a referendum.

49. Beginning in mid-1998, the Cattlemen's Beef Board and its principal contractor, the National Cattlemen's Beef Association, initiated a vastly expanded program of "producer communications." These communications were clearly designed to

persuade producers against signing petitions and to promote a “no” vote on any referendum.

50. Both LMA and WORC wrote to USDA in April, 1999, protesting “producer communications” expenditures, which had increased from \$850,000 in Fiscal Year 1996 and \$653, 591 in Fiscal Year 1997 to \$3,748,604 in Fiscal Year 1998, \$1,135,000 in Fiscal Year 1999 and \$3,295,073 in Fiscal Year 2000. Including the budget of \$1,870,000 for FY 2001, which is just beginning, the Cattlemen’s Beef Board has thus allocated a total of \$10,048,677 for producer communications since 1998.

51. These “producer communications” funds have been directed to promoting the program back to the producers who pay the mandatory \$1 per head checkoff.

52. The petitions submitted by LMA were already in a Microsoft database format when they were provided to USDA on November 12, 1999. USDA did not proceed to review the database until April, 2000, and it was not completed until September, 2000. Thus, almost ten months elapsed before the agency completed even its first step in verifying signatures and producer status.

53. Although cattle producers have been making mandatory check-off contributions since 1986, USDA apparently does not have any way of identifying the cattlemen who have contributed to the program. USDA contracted with a private accounting firm, PricewaterhouseCoopers, to contact a statistical sample of beef petition signers by mail to confirm individual signatures and obtain sales documents, with a contract completion date of mid-January, 2001. PricewaterhouseCoopers has sent survey forms to referendum petitioners, asking for this information. The forms sent did not bear a control number assigned by the Office of Management and Budget.

54. On information and belief, an individual petitioner’s failure to respond to the letter from PricewaterhouseCoopers will apparently cause the petitioner to be classified as ineligible, despite the fact that, in 1997 and 1998, when LMA representatives

met and exchanged correspondence with USDA officials about the information that would be provided by each petitioner, they were never told that individual petitioners would need to provide personal sales documents, then or later.

55. On January 15, 2001, PricewaterhouseCoopers issued a report concluding that there were not sufficient valid signatures to trigger a referendum, upon which the USDA has relied in denying a referendum.

56. The Plaintiffs have suffered past injury and harm, and face the threat of ongoing and future injury and harm as the result of the actions of the Defendants.

### **Legal and Procedural Background**

57. Plaintiffs initially filed their complaint seeking declaratory and injunctive relief.

58. Plaintiffs previously sought and obtained a preliminary injunction against certain producer communications funded by mandatory assessments under the Beef Promotion and Research Order.

59. The United States Supreme Court subsequently released its decision in *United States v. United Foods, Inc.*, 121 S.Ct. 2334 (2001) which held that the assessments under the Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. § 6101 *et seq.* violated the First Amendment to the United States Constitution.

60. The Court then invited the parties to address the impact of the *United Foods* decision on the present case.

61. The parties responded to the Court in a joint statement informing the Court that “The parties are in agreement that the issue regarding the constitutionality of the beef checkoff program called into question by the Supreme Court’s recent decision in *United Foods* needs to be resolved prior to proceeding with Plaintiffs’ claims related to the LMA’s petition drive and the validation process conducted by USDA and PwC.”

62. The Plaintiffs were then granted permission to file this amended complaint.

63. The present case is governed by the *United Foods* decision.

64. The mandated assessments under the Beef Promotion and Research Act are not ancillary to a more comprehensive program restricting marketing autonomy. To the contrary, the advertising of beef, far from being ancillary, is the principal object of the regulatory scheme.

65. Unlike California tree fruits, the beef industry is identical to the mushroom industry in that beef is not marketed under detailed marketing orders that have displaced competition to such an extent that they had an antitrust exemption.

66. The market for beef and beef industry are characterized by a free market and the aggregate consequences of independent competitive choices of cattle producers, and are not characterized by collective action in any sense.

67. Cattle producers are not bound together and required by statute to market their products according to cooperative rules. Their freedom to act independently is not constrained by any regulatory scheme and they are not part of any broader collective enterprise.

68. Almost all of the funds collected under the Beef Promotion and Research Order are used for generic advertising.

69. Beyond the collection and disbursement of advertising funds, there are no marketing orders regulating beef production and sales, no exemption from antitrust laws, and nothing preventing individual producers from making their own marketing decisions.

70. Cattle producers are not forced to associate as a group that makes cooperative decisions.

71. Cattle production is unregulated, except for the enforcement of mandatory assessments used for beef promotion and research.

72. The cattle production industry has not been collectivized, exempted from antitrust laws, subjected to a uniform price, or otherwise subsidized through price supports or restrictions on supply.

73. The Beef Promotion and Research Act does not require group action among cattle producers, save to generate the very speech to which the plaintiffs object through advertising and promotion funded by the mandatory assessments.

#### **FIRST CAUSE OF ACTION**

74. The Plaintiffs reiterate and incorporate by reference paragraphs 1-73 hereof.

75. The USDA Defendants' delays in handling Plaintiffs' petitions constitute unreasonable delay, in violation of sections 555 and 706(2) of the Administrative Procedure Act.

#### **SECOND CAUSE OF ACTION**

76. The plaintiffs reiterate and incorporate by reference paragraphs 1-75 hereof.

77. The Secretary's "validation" program is seriously flawed and denies Plaintiffs their rights to due process and equal protection of the law.

#### **THIRD CAUSE OF ACTION**

78. The plaintiffs reiterate and incorporate by reference paragraphs 1-77 hereof. 79. The Cattlemen's Beef Board's producer communications activities violate both the Beef Promotion and Research Act and the First Amendment by using checkoff funds to disseminate public relations messages, including anti-referendum messages.

#### **FOURTH CAUSE OF ACTION**

80. The plaintiffs reiterate and incorporate by reference paragraphs 1-79 hereof.

81. The deletion of extensive portions of the Beef Promotion, when it was amended in 1985, eliminated the Secretary's ability to terminate the Order on his own initiative or to call a referendum on his own initiative, and eliminated the presumption that the Secretary would call a referendum in response to a petition from ten percent of the producers. The result of these changes was to cause an unconstitutional delegation of legislative authority to the Cattlemen's Beef Board.

#### **FIFTH CAUSE OF ACTION**

82. The plaintiffs reiterate and incorporate by reference paragraphs 1-81 hereof.

83. The termination and referendum provisions of the Beef Promotion Act provide far less protection against the continuation of an abusive and/or ineffective program than are provided with respect to similar promotional programs, and therefore violate the rights of cattle producers to equal protection under the Fifth Amendment to the United States Constitution.

#### **SIXTH CAUSE OF ACTION**

84. The plaintiffs reiterate and incorporate by reference paragraphs 1-83 hereof.

85. In implementing the validation program the Secretary has failed to comply with the requirements of the Paperwork Reduction Act of 1995.

**SEVENTH CAUSE OF ACTION** 86. The plaintiffs reiterate and incorporate by reference paragraphs 1-85 thereof.

87. Under the First Amendment to the United States Constitution, the CBB may not underwrite and sponsor speech with a certain viewpoint using special subsidies exacted from a designated class of persons, some of whom object to the ideas being advanced.

88. The plaintiffs oppose the general content of the promotion, advertising, and other activities funded by the mandatory assessments which they are compelled to pay.

89. Plaintiffs want to convey the message that United States cattle and beef are superior to imported beef and object to being charged for a contrary message, one which promotes beef as a generic commodity.

90. Plaintiffs object to the use of mandatory assessments against them for the generic promotion and advertising of beef, as opposed to United States beef in particular, which they believe to be superior, more tender, tastier, healthier, and of a higher quality than imported beef, which primarily consists of beef from grass-fed rather than grain-fed cattle and is generally inferior and of lesser quality. Plaintiffs object to the promotion of beef as a generic commodity and the promotion of imported beef as indistinguishable from beef from United States fed cattle. Plaintiffs object to the association of beef from United States fed cattle with beef from imported cattle. Importers of foreign beef are subject to the same one dollar per head mandatory assessments under the Beef Promotion and Research Act and co-fund the beef checkoff and its advertising and promotion efforts along with United States fed cattle producers.

91. Plaintiffs believe that the generic advertising of beef, funded in part by importers of foreign beef and foreign cattle, may increase, if anything, the amount of beef imported from outside of the United States, which may supplant domestic production and act to reduce the market prices obtained by United States cattle producers. Plaintiffs object to the messages conveyed and object to financing advertising for the benefit of their competitors.

92. Plaintiffs object to the use of mandatory assessments against them for the generic promotion and advertising of beef, as opposed to fed beef or grain-fed beef,

which they believe to be superior. This is also a message that they wish to convey. They object to being charged for a contrary message.

93. Plaintiffs object to the use of mandatory assessments against them for the promotion, advertising, development, or support of generic, lower quality, brand-name and/or processed beef products which may directly benefit private corporations, beef packers, and beef retailers, rather than cattle producers. They object to being charged for a message which they do not support. They object to being compelled to pay assessments for speech with which they disagree, and which does not benefit them, but instead benefits those who are not subject to the assessments.

94. Certain of the plaintiffs object to the use of mandatory assessments against them for the promotion and advertising of generic beef, as opposed to specific breeds or brands of beef, such as Angus cattle, which they believe is a superior type of beef. They object to being charged for a contrary message.

95. Plaintiffs object to the advertising and promotional activities funded by the mandatory assessments against them because they are ineffectual. They object to being charged for a message which they do not support.

96. Plaintiffs object to the advertising and promotional activities funded by the mandatory assessments against them because the beef packers, beef processors, and beef retailers who are in the best position to recoup any alleged benefits of those activities are “free riders” who do not share in the cost. They object to being charged for a message which they do not support.

97. Plaintiffs object to various other specific messages that appear in advertisements promotional messages and other programs funded by the mandatory assessments against them, including, but not limited to, those messages against which a preliminary injunction has been entered by this Court. They object to being charged for messages with which they disagree or do not support.

98. The Beef Promotion and Research Act does not serve a legitimate government interest.

99. Plaintiffs object to being compelled to express certain views and to being compelled to pay subsidies for speech to which they object. Yet they are forced to do so by law under the Beef Research and Promotion Act. This is an obligation imposed by law making membership in the group forced to pay assessments and fund objectionable speech less than voluntary.

100. Essentially the only program or purpose that these mandatory assessments serve is the advertising and promotion scheme to which the plaintiffs object.

101. The expressions the plaintiffs are required to support are not germane to any purpose independent of the compelled speech itself.

102. The assessments are not necessary to make any voluntary advertisements non-misleading for consumers.

103. The Beef Promotion and Research Act violates Plaintiffs' right to freedom of speech under the First Amendment to the United States Constitution in that the Beef Promotion and Research Order wrongfully compels Plaintiffs to fund the speech of the Cattlemen's Beef Board. This speech is objectionable to Plaintiffs. This speech is contrary to the interests of Plaintiffs. This speech neither serves nor is ancillary to any legitimate economic or governmental purpose.

#### **EIGHTH CAUSE OF ACTION**

104. The plaintiffs reiterate and incorporate by reference paragraphs 1-103 thereof.

105. The Plaintiffs object to association with the National Cattleman's Beef Association, a private trade organization which is the principal contractor for the CBB and which controls, administers, and oversees most if not all of the beef research projects

funded by the mandatory assessments collected under the Beef Promotion and Research Order.

106. The National Cattleman's Beef Association is a private trade association with only 40,000 individual members. The Plaintiffs object to many of the policies, positions, and programs advocated by this private trade association, including those designed to promote the generic consumption of beef as opposed to specifically beef from United States fed cattle. The Plaintiffs object to being compelled to fund that organization and the research projects selected by that organization. The Plaintiffs object to being compelled to associate with that organization through the research funded by the mandatory assessments collected under the Beef Promotion and Research Order.

107. The Beef Promotion and Research Act violates Plaintiffs' right to freedom of association under the First Amendment to the United States Constitution in that the Beef Promotion and Research Order wrongfully compels Plaintiffs to associate with the National Cattleman's Beef Association, the Cattleman's Beef Board, and entities which import beef which is not United States fed cattle beef.

#### **PRAYER FOR RELIEF**

For the aforementioned reasons, Plaintiffs respectfully request that the Court grant a Declaratory Judgment declaring (a) that the Beef Promotion and Research Act and Beef Promotion and Research Order violate the plaintiffs' constitutionally guaranteed rights to freedom of speech and freedom of association under the First Amendment to the United States Constitution and plaintiffs' constitutionally guaranteed right to equal protection under the Fifth Amendment to the United States Constitution; and (b) that the Secretary cannot constitutionally collect assessments pursuant to that Act, and further request that the Court grant Plaintiffs a preliminary and permanent injunction prohibiting the United States Department of Agriculture or the Cattlemen's Beef Board from enforcing or

collecting any assessments under Beef Promotion and Research Act or Beef Promotion and Research Order.

In the alternative, the Plaintiffs respectfully request that the Court enter a Preliminary and Permanent Injunction, ordering (a) the USDA Defendants to immediately proceed to scheduling a referendum on the termination of the Beef Research and Promotion Order, and (b) the Cattlemen's Beef Board to immediately cease its expenditures for "producer communications" and to advise the Court how it will make restitution to producers for the \$10,048,677 illegally expended on such communications since 1998, and how it will provide to the Plaintiffs funding for corrective communications to offset the anti-referendum messages previously funded by illegal producer communications expenditures.

Plaintiffs further pray for an award of attorney's fees and costs under the Equal Access to Justice Act, and for such other legal and equitable relief as the evidence may support or the Court may deem just and proper.

Dated: August \_\_\_\_, 2001    Respectfully submitted,

**JOHNSON, HEIDPRIEM, MINER,  
MARLOW & JANKLOW, L.L.P.**

**OLSSON, FRANK AND  
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*Attorneys for Plaintiffs*



**CERTIFICATE OF SERVICE**

I hereby certify that on the \_\_\_\_\_ day of May, 2001, I caused a copy of **Plaintiff's Second Amended Complaint for Declaratory and Injunctive Relief** to be served by U.S. Mail, postage prepaid, to the following:

Ori Lev, Esq.  
Carolyn McKee  
United States Department of Justice  
Civil Division  
P.O. Box 883  
Ben Franklin Station  
Washington, DC 20044

Mr. Jeffrey Cole  
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Beresford, SD 57004

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Ronald A. Parsons