APPENDIX

APPENDIX A

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

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C086205
(Super. Ct. Nos. 02AS01618 & 03AS05313)

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LION RAISINS, INC., *et al.*,

Plaintiffs and Appellants,

v.

KAREN ROSS, as Secretary, etc.,

Defendant and Respondent.

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C086206
(Super. Ct. Nos. 34-2010-00067624-CU-MC-GDS
& 34-2011-00106058-CU-MC-GDS)

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THE PEOPLE *ex rel.* KAREN ROSS, as Secretary, etc.,

Plaintiff, Cross-defendant and Respondent,

v.

RAISIN VALLEY FARMS, LLC, *et al.*,

Defendants, Cross-complainants and Appellants.

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* Pursuant to California Rules of Court, rules 8.1105 and 8.1110, this opinion is certified for publication with the exception of parts I, II, V, VI and VII.

APPEALS from judgments of the Superior Court of Sacramento County, Raymond M. Cadei, Judge. Case No. C086205 dismissed. Case No. C086206 affirmed as modified.

Bertram T. Kaufmann; Law Offices of Brian C. Leighton and Brian C. Leighton for Plaintiffs and Appellants in Case No. C086205.

Law Offices of Brian C. Leighton and Brian C. Leighton for Defendants and Appellants in case No. C086206.

Xavier Becerra, Attorney General, Robert W. Byrne, Assistant Attorney General, Randy L. Barrow, Ali A. Karaouni, and Linda Gandara, Deputy Attorneys General for Defendant and Respondent in case No. C086205 and Plaintiff and Respondent in case No. C086206.

This appeal concerns a California Raisin Marketing Order (the Marketing Order) first issued in 1998 by the California Department of Food and Agriculture (the Department) under the California Marketing Act of 1937 (Food & Agr. Code, § 58601 et seq.) (the CMA).[1] The Marketing Order establishes a "California Raisin Marketing Board" (the Board) and authorizes the Board to engage in research and promotional activities to aid producers in reducing the costs of production and increasing demand for California raisins. In accordance with the CMA, the Marketing Order is administered by the Department and funded by mandatory assessments imposed on California raisin producers.

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[1] Undesignated statutory references are to the Food and Agricultural Code.

The present appeal arises from two cases consolidated for purposes of trial. The first case, *Lion Raisins, Inc., et al. v. Ross*, case No. C086205, involves a complaint for declaratory and injunctive relief filed by Lion Raisins, Inc., et al. (collectively, Lion). The Lion complaint, which challenges the validity of the Marketing Order on a wide range of issues, seeks a declaration that the Marketing Order is unconstitutional and invalid, an injunction against future assessments, and a refund of all assessments paid since the 1999-2000 crop year.

The second case, *People ex rel. Ross v. Raisin Valley Farms, LLC, et al*., case No. C086206, involves a complaint filed by the Department against Raisin Valley Farms, LLC, et al. (collectively, Raisin Valley), to recover unpaid assessments, and a related cross-complaint against the Department for declaratory, injunctive, and compensatory relief.[2] Similar to the Lion complaint, the Raisin Valley cross-complaint challenges the validity of the Marketing Order on multiple grounds.

The trial court initially entered judgment against the Department on the consolidated cases, concluding the Marketing Order was invalid because there was insufficient evidence that the Marketing Order was necessary to address severe economic conditions in the raisin industry. (*People ex rel. Ross v. Raisin Valley Farms LLC* (2015) 240 Cal.App.4th 1254, 1259 (*Ross*).) The Department appealed and we reversed, concluding the trial court's interpretation of the CMA was too

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[2] The Raisin Valley action, originally filed in Fresno County, was later transferred to Sacramento County, where it was consolidated with another enforcement action filed by the Department against successor entities to the original Raisin Valley parties.

narrow. (*Ross, supra*, at p. 1267.) We remanded the matter to the trial court for further proceedings consistent with our opinion. (*Ibid*.)

On remand, after additional briefing, the trial court entered judgments in favor of the Department, denying the challenges to the Marketing Order. Lion and Raisin Valley appeal from those judgments, asserting numerous errors. First, appellants contend the court erred in rejecting their claim that the Board's promotional activities violated the "varietal benefit" and "non-disparagement" provisions of the Marketing Order. Second, appellants contend the court erred in concluding that the Raisin Bargaining Association (the RBA) was lawfully allowed to bloc vote as a cooperative marketing association in referendums to approve the Marketing Order. Third, they contend the court erred in concluding that the bloc-voting provisions of the CMA are constitutional. Fourth, they contend that the court erred in allowing the Department to abandon its "cornerstone" finding for the Marketing Order which, they argue, was not supported by the evidence. Fifth, they contend the court erred in concluding the Department had no duty to consider reasonable alternatives before adopting the Marketing Order. And finally, they contend the court erred in rejecting their claim that the Marketing Order violates their constitutional rights to free speech and free association.

With regard to the appeal in the Lion case, we shall modify the judgment to dismiss the "varietal benefit" and "non-disparagement" claims due to appellants' failure to exhaust administrative remedies, and affirm the judgment as modified. We dismiss the appeal in the Raisin Valley case as premature under the one final judgment rule.

BACKGROUND LAW

The CMA and its federal counterpart, the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. § 601 et seq) (the AMAA), were legislative responses to severe problems encountered by the agricultural industry during the Great Depression. (*Ross, supra*, 240 Cal.App.4th at p. 1257; see also *Lion Raisins, Inc. v. United States* (Fed. Cir. 2005) 416 F.3d 1356, 1358.) The programs were rooted in the legislative judgment that governmental intervention was necessary to preserve the agricultural industry. (*Ross*, at p. 1257.)

In enacting the CMA, the Legislature found that there was "'unreasonable and unnecessary economic waste'" of California's agricultural wealth due to, among other things, disorderly marketing of commodities, unfair competition in the marketing of commodities, and the inability of producers to maintain present markets or develop new or larger markets for California-grown commodities. (*Voss v. Superior Court* (1996) 46 Cal.App.4th 900, 907 (*Voss*); § 58651.) According to the Legislature, such conditions "jeopardize the future continued production of adequate supplies of food . . . and prevent producers from obtaining a fair return from their labor . . . ." (§ 58651.) Thus, in enacting the CMA, the Legislature declared its intent to aid producers in preventing economic waste, developing more efficient and equitable methods of marketing commodities, and restoring and maintaining their purchasing power at a more adequate, equitable, and reasonable level. (§ 58652.)

To effectuate its purposes, the CMA authorizes the Secretary of the Department (formerly the Director of Agriculture of the State of California) to enter into "'marketing agreements'" and issue "'marketing

orders.'"[3] (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 478-479.) A "marketing agreement" is a contract-like arrangement binding only upon the signatories to the agreement, which governs the marketing and handling of such commodity. (*Id*. at p. 478; § 58745.) A "marketing order," in contrast, regulates all persons engaged in the marketing, processing, distributing, or handling of the commodity. (*Gerawan Farming, supra*, at pp. 478-479; §§ 58615, 58712, 58741, 58743, 58881.)

The CMA authorizes marketing orders that control, among other things, the quantity or quality of any commodity produced for market. (*Ross, supra*, 240 Cal.App.4th at p. 1257; §§ 58881-58888; 7 U.S.C. § 608c(6).) The CMA also separately authorizes marketing orders that establish "plans for advertising and sales promotion to maintain present markets or to create new or larger markets for any commodity . . . ." (§ 58889, subd. (a); *Ross*, at p. 1257.)

The CMA provides that any advertising or promotional plan must be generic and "directed toward increasing the sale of the commodity without reference to any private brand or trade name that is used by any handler with respect to the commodity regulated by the marketing order . . . ." (§ 58889, subd. (b).) The CMA prohibits advertising or sales promotion programs that make "false or unwarranted claims in behalf of any product, or disparages the quality, value, sale, or use of any other commodity." (§ 58889, subd. (d).)

Funding of a marketing order comes from the producers or handlers directly affected by it. (*Ross, supra*, 240 Cal.App.4th at pp. 1257-1258.) The CMA

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[3] For simplicity, we hereafter refer to both the Department and its Secretary collectively as "the Department."

gives the Department the power to levy and collect from each affected producer or handler an assessment calculated to defray the costs of the order. (§§ 58921, 58925, 58926, 58929.)

The CMA describes the procedure for adopting a marketing order. It provides that whenever the Department has reason to believe that a marketing order (or amendments to a marketing order) will promote the policy of the CMA with respect to any commodity, the Department shall give notice and hold a hearing. (§§ 58771, 58782; see also §§ 58773-58781, 58783-58788.) The notice must include the date and place of the hearing, the commodity and area covered by the proposed marketing order, and a statement that the Department will receive, at the hearing, evidence about the subjects for which the Department is required to make findings as a precondition to the issuance of an order. (§ 58774.)

The hearing on a proposed marketing order must be public, and all testimony must be received under oath. (§ 58782; see also § 58786.) The CMA requires the Department to consider all relevant matter presented at the hearing and to preserve a complete record of the proceedings for judicial review. (§§ 58782, 58783, 58787; *Voss, supra*, 46 Cal.App.4th at p. 924.) Upon conclusion of the hearing, but prior to issuing a marketing order, the Department must make specific findings appropriate for the type of order proposed. (§§ 58811-58813; *Ross, supra*, 240 Cal.App.4th at p. 1258.)

To adopt a marketing order with provisions for advertising, sales promotion, or research, the Department must find that: (1) the proposed marketing order will "tend to effectuate" the declared purposes and policies of the CMA; (2) the proposed marketing order

is reasonably calculated to attain the objectives sought in the order; and (3) the powers under the CMA are being exercised only to the extent necessary to attain such objectives. (§ 58813, subds. (a)-(c).) These findings must be based on the facts, testimony, and evidence received at the hearing, "together with any other relevant facts which are available to [the Department] from official publications or institutions of recognized standing." (§ 58813.)

Even if the Department makes the required findings, a marketing order will not become effective unless it is approved by the prescribed percentage of persons affected by the order. (§§ 58991-58993.) The Department may elect whether such approval shall be determined by written assent or by referendum. (§§ 58786, 58787, 58991-58998.)[4]

For a referendum to be valid, at least 40 percent of eligible affected producers must vote. (§ 58993, subd. (c).) For the referendum to pass, it must be approved by either (1) at least 65 percent of the voters, representing not less than 51 percent of the total quantity of the commodity produced for market, or (2) at least 51 percent of the voters, representing not less than 65 percent of the total quantity of the commodity produced for market. (§ 58993, subd. (c).) The CMA permits "any nonprofit agricultural cooperative marketing association, which is authorized by its members so to assent," to bloc vote on behalf of that association's members. (§ 58999.)

Approved marketing orders are administered and enforced by the Department. (§ 58711.) But the CMA

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[4] The CMA sets out the standards for approval by written assent for producers (§ 58993), processors (§ 58992) and handlers (§ 58991). (*Voss, supra*, 46 Cal.App.4th at p. 918, fn. 9.)

requires that marketing orders establish an advisory board to assist the Department in the administration of the order. (§§ 58841, 58842.) The advisory board's duties include recommending rules and regulations, receiving and reporting complaints of violations of the marketing order, and assisting in preparing budgets and collecting funds to cover expenses. (§§ 58846, 58923.)

Members of an advisory board may be nominated by the affected producers and handlers, but are appointed by, and serve at the pleasure of, the Department. (§ 58841.) While the members of an advisory board generally must represent the agricultural industry covered by the marketing order, the Department may appoint one person to represent the public. (§§ 58842-58843.) For any marketing order affecting raisin producers, the Department also must appoint one advisory board member to represent "cooperative bargaining associations." (§ 58842.5; see also § 54401 [defining "cooperative bargaining association"].)

A marketing order has no fixed lifespan. (*Voss, supra*, 46 Cal.App.4th at p. 921.) It can be terminated at any time and must, at minimum, be reapproved every five years. (§§ 59081, 59082, 59086.)

BACKGROUND FACTS AND PROCEDURE

The challenged Marketing Order

For decades, until the early 1990's, there was a state marketing order for raisins administered by the California Raisin Advisory Board, best known for creating the "Dancing Raisins" promotional campaign. However, due to disagreements between the producers (growers) and independent packers, the prior marketing order was terminated in 1994.

At the time the prior marketing order was terminated, California's raisin industry was experiencing persistent oversupplies of raisins. Although the federal government had implemented programs to reduce the oversupply, the programs had the effect of reducing producer profits. Thus, many participants in the raisin industry, including the RBA and Sun-Maid Growers of California (Sun-Maid), a large cooperative marketing association, were supportive of a new state marketing order.

In March of 1998, the RBA and Sun-Maid, collectively representing a majority of the producers in the raisin industry, proposed a new Marketing Order designed to increase demand for raisins. The proposed Marketing Order declared that the "inability to maintain or expand present markets, or to develop new or larger markets results in an unreasonable and unnecessary waste of the [state's] agricultural wealth," and that it is "therefore in the public interest for the producers of California raisins to establish a [marketing board] to conduct market development activities to improve the demand for all categories of raisin usage . . . ." To further this goal, the proposed Marketing Order would authorize a research and promotional program administered by the Department and funded by an assessment on raisin producers.[5]

To help the Department administer the program, the proposed Marketing Order established a Board consisting of 15 members, 13 of whom must be producers or persons authorized to represent the

[5] The Board's research and promotional activities are funded by a uniform assessment on producers of approximately 2 percent of the field price on each ton of "free tonnage" raisins delivered to packers (i.e., raisins not subject to the reserve pool).

producers (the producer members), with one member representing the general public, and one member representing the largest cooperative bargaining association (here, the RBA). The Marketing Order specifies that nominations and appointments of the producer members must be made from three groups—cooperative marketing associations, cooperative bargaining associations, and other (i.e., independent) producers—based on each group's proportional share of raisin production.[6] The Marketing Order provides that the Board may take action by majority vote of the quorum, except on fiscal matters, which requires a vote of eight members. The Marketing Order states that all activities of the Board shall be equally available to all producers of California raisins, and that the Board shall plan its activities to benefit each variety of raisin in proportion to the assessments paid by the producers of that variety.

In accordance with the CMA, the Department held a public hearing on the proposed Marketing Order, receiving testimony from 16 witnesses. Following the hearing, and receipt of additional written comments, the Department adopted "economic findings" in support of the proposed Marketing Order.

In its findings, the Department listed the policies and purposes of the CMA, as described in sections 58652 and 58654, and then found that the Marketing Order would tend to effectuate those policies and purposes by funding research regarding the potential health benefits of raisins, educating the public about

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[6] In practice, this has resulted in Sun-Maid members holding three to four seats, the RBA members holding four to five seats, the RBA itself holding one seat, and independent producers holding five to six seats of the fourteen nonpublic member seats on the Board.

the versatility and healthful properties of raisins, and fostering efficient marketing and promotion of raisins, so as to increase the demand for raisins, better correlate raisin supply with demand, decrease economic waste, and increase the purchasing power of raisin producers. Based on its findings, the Department issued the proposed Marketing Order subject to the approval by referendum of the affected raisin producers.

Between June and July of 1998, the Department held the required referendum. For purposes of voting on the referendum, the Department took the position that Sun-Maid and the RBA could elect to bloc vote on behalf of their membership as "cooperative marketing associations" under section 58999. Both Sun-Maid and the RBA elected to bloc vote, although both also allowed their members to "opt out" and vote separately if they wished. Based on the voting results of the referendum, the Marketing Order was approved.

In 2001, the Department held the first "continuation" (reapproval) referendum on the Marketing Order. For the 2001 referendum, neither Sun-Maid nor the RBA elected to bloc vote. Nevertheless, producers overwhelmingly voted to continue the Marketing Order.

At the next continuation referendum, in 2006, the Marketing Order again was approved. For the 2006 referendum, both Sun-Maid and the RBA elected to bloc vote.

The Board's advertising program

Since its inception, the Board's advertising and promotion has been a generic program focusing on the virtues of California raisins generally, without reference to particular brands or sellers. The Board's

first major campaign, entitled "Look Who's Cooking with California Raisins," focused on using celebrity chefs to promote new uses for raisins. Subsequent campaigns included the "Wise Choice" campaign, which was designed to show how raisins could be used by people looking for "healthy, nutritious foods on the go," and the "Solar Powered Goodness" campaign, which emphasized the benefits of eating natural, sun-dried fruit.

The Board also maintains a Web site and produces brochures. Prior to 2010, some of the Web pages and brochures referred to Thompson seedless raisins and mentioned the "tray-drying" method. In addition, the phrase "Thompson Seedless Grapes make the best California raisins" was used in a promotional blurb in a brochure and posted in a few places on the Board's approximately 1,260-page Web site. The materials containing these references constituted a small part of the Board's promotional materials. The Board has since updated the materials to remove the phrase that "Thompson Seedless Grapes make the best California raisins," to replace references to "Thompson Seedless" grapes with "Natural Seedless" grapes, and to include "dried-on-the-vine" methods of drying raisins.

Trial and first appeal

When the Lion complaint originally was filed in 2002, it challenged the Marketing Order only on free speech/free association grounds. That case was then stayed for several years pending the outcome of certain appellate cases.[7] By 2011, when the stay was lifted, the legal landscape for free speech claims had

[7] During the pendency of the stay, the parties agreed to escrow the entire amount of Lion's assessments due under the Marketing Order.

shifted. This was due, in part, to the United States Supreme Court's decision in *Johanns v. Livestock Marketing Assn.* (2005) 544 U.S. 550 [161 L.Ed.2d 896] (*Johanns*), holding that the government's own speech is not susceptible to a First Amendment-compelled subsidy challenge. (*Id*. at p. 559; see also *Gallo Cattle Co. v. Kawamura* (2008) 159 Cal.App.4th 948, 951-952 (*Gallo Cattle*) [following *Johanns*].) Thus, in 2011, Lion was granted leave to amend its complaint to include additional challenges to the Marketing Order.

As amended, the Lion complaint alleged five causes of action. The first two causes of action alleged the Marketing Order violates the free speech and free association clauses of the California Constitution. The third cause of action alleged a violation of liberty interests protected by the federal and state due process clause. The fourth cause of action alleged a violation of the Marketing Order based on the "varietal benefit" provisions in section 58749. The fifth cause of action alleged that allowing the RBA to bloc vote was unlawful and an invalid exercise of the police power.

The Department's complaint against Raisin Valley alleged that the defendants had improperly failed and refused to remit assessments due under the Marketing Order. The Department sought an injunction enjoining Raisin Valley from committing further violations of the Marketing Order and compelling Raisin Valley to pay overdue assessments (plus costs and penalties).

Raisin Valley's amended cross-complaint alleged nine causes of action against the Department. The first cause of action alleged the Marketing Order violates the police power because the Board's membership was inconsistent with section 58842.5. The second cause of action alleged the Marketing Order violates the police power because its reapproval pro-

visions were inconsistent with sections 58993 and 59086. The third cause of action alleged the Marketing Order is invalid because the Department allowed the RBA to bloc vote, in violation of section 58999 (and/or due process). The fourth, fifth, sixth, and seventh causes of action alleged the CMA's bloc-voting provisions violate the state and federal equal protection clauses, federal free association rights, and federal due process. The eighth and ninth causes of action alleged that the Marketing Order violates the state constitutional rights of free speech and free association, and state and federal due process, by compelling appellants to subsidize the speech of, and associate with, the Board.

In 2013, following a 19-day bench trial, and post-trial briefing, the court granted judgment for the appellants. Although numerous issues were presented by the parties, the trial court's judgment rested on a single issue—a finding that the record lacked sufficient evidence to support the finding that the Marketing Order would "'tend to effectuate the declared purposes and policies'" of the CMA. (*Ross, supra*, 240 Cal.App.4th at p. 1256.)

Relying on the legislative findings of the CMA, the bulk of which were adopted during the Great Depression, the trial court concluded that the Department cannot adopt a marketing order under the CMA unless the order is necessary to address adverse economic conditions so severe as to threaten the continued viability of the industry. (*Ross, supra*, 240 Cal.App.4th at pp. 1264-1265.) The trial court found no evidence in the record before it that the raisin industry was suffering from a severe economic crisis. (*Id*. at p. 1259.) Thus, the trial court found the Department's Marketing Order was invalid and that the Department improperly

exercised its police power in adopting the order. (*Id*. at p. 1256.)

In *Ross, supra*, 240 Cal.App.4th at pages 1256-1257, we reversed the trial court's judgment. We held the trial court erred in construing section 58813, subdivision (b) to be met only if a marketing order was necessary to address a severe economic crisis. (*Ross*, at p. 1267.) We noted that subsequent to its adoption, the CMA was amended to divide marketing orders into "two camps: those that restrict the supply of a commodity (i.e., restrict quantity), and those that do not." (*Ross*, at p. 1265.) As a result of that amendment, only marketing orders that restrict the supply of a commodity "require economic findings concerning the correlation of supply and demand and a particular level of producer purchasing power, as well as the consideration of particular economic factors . . . ." (*Id*. at p. 1258; §§ 58811 & 58812.)

We held that marketing orders that do not restrict supply—including orders for advertising, sales promotion, or research—do not require economic findings concerning the correlation of supply and demand and a particular level of purchasing power, or the consideration of particular economic factors. (*Ross, supra*, 240 Cal.App.4th at pp. 1258, 1265-1266.) Instead, such orders are valid as long as they are supported by "generalized findings" that the order will "'tend to effectuate'" the purposes and policies of the CMA.[8] (*Ross*, at pp. 1265-1266; § 58813.) Thus, we reversed and remanded for further proceedings consistent with our opinion. (*Ross*, at p. 1267.)

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[8] We also noted that a marketing order need not effectuate *all* the purposes and policies of the CMA, "something that would not be practicable." (*Ross, supra*, 240 Cal.App.4th at p. 1264, fn. 7.)

The court's decision after remand

On remand, the trial court reconsidered whether there was sufficient evidence to support the Department's finding that the Marketing Order would tend to effectuate the purposes and policies of the CMA. Applying a broader interpretation of section 58813, the court concluded that there was substantial evidence to support that finding.

The trial court then addressed the "remaining challenges" to the Marketing Order, which it identified as (1) whether the Department violated section 58999 by allowing the RBA to bloc vote; (2) whether section 58999 is unconstitutional; (3) whether the Marketing Order violated appellants' free speech or free association rights; (4) whether the Board's advertising program violated the Marketing Order by failing to equally promote and/or disparaging dried-on-the-vine raisins; and (5) whether the Marketing Order is invalid because the Department failed to consider reasonable alternatives to the Marketing Order before adopting it. After further briefing, the court issued its final statement of decision, finding for the Department on all remaining issues. Both Lion and Raisin Valley timely appealed the court's judgment in each of their respective cases.

DISCUSSION

I

The Raisin Valley Appeal

As a threshold matter, we must consider whether we have jurisdiction over the Raisin Valley appeal in view of the fact that the judgment in the Raisin Valley case fails to dispose of the Department's claims against Raisin Valley.

"An appealable judgment is a jurisdictional prerequisite to an appeal. [Citation.]" (*Martis Camp Community Assn. v. County of Placer* (2020) 53 Cal.App.5th 569, 587.) "Under the 'one final judgment' rule, an order or judgment that fails to dispose of all claims between the litigants is not appealable. [Citations.]" (*Ibid*.)

At our request, the parties briefed the question whether the judgments at issue here are appealable. In a joint supplemental brief, the parties all agree that the Raisin Valley judgment is not final and the appeal should be dismissed. They contend, however, that the Lion appeal, which was consolidated only for purposes of trial, involves a final judgment and should not be dismissed. We agree. We therefore dismiss the appeal in the Raisin Valley case and limit our discussion to the claims in the Lion case.

II

Failure to Exhaust Administrative Remedies

Before turning to the merits of the Lion appellants' claims, we first address the Department's argument that several claims are barred because appellants failed to exhaust available administrative remedies under section 59240 of the CMA and the Marketing Order. In particular, the Department argues that the Lion appellants (hereafter referred to as appellants) failed to exhaust their claims that (1) the Board's marketing activities disparaged and failed to promote appellants' dried-on-the-vine raisins, and (2) the Department unlawfully permitted bloc voting.

The rule of exhaustion is well established in California. "In brief, the rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act." (*Abelleira v.*

District Court of Appeal (1941) 17 Cal.2d 280, 292; accord, *City of Sacramento v. State Water Resources Control Bd.* (1992) 2 Cal.App.4th 960, 969; see also *Dunham v. City of Westminster* (1962) 202 Cal.App.2d 245, 249-250 [rule of exhaustion applies to declaratory relief claims].) This is not a matter of judicial discretion, but a jurisdictional prerequisite to resort to the courts. (*City of Sacramento, supra*, at p. 969; *California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1151.)

The primary purpose of the rule is to lighten the burden of overworked courts and provide administrative agencies with the opportunity to decide matters within their area of expertise prior to judicial review. (*California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 616; *Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 501.) Even where the administrative remedy may not provide complete relief, the doctrine is still "viewed with favor 'because it facilitates the development of a complete record that draws on administrative expertise and promotes judicial efficiency.'" (*Sierra Club, supra*, at p. 501.)

Appellants bear the burden of demonstrating that the issues raised in the judicial proceeding were first raised at the administrative level. (*Monterey Coastkeeper v. State Water Resources Control Bd.* (2018) 28 Cal.App.5th 342, 359; *Westinghouse Elec. Corp. v. County of Los Angeles* (1974) 42 Cal.App.3d 32, 37.) We exercise our independent judgment on the legal question of whether the doctrine applies in a given case. (*Monterey Coastkeeper, supra*, at p. 359.)

Here, we conclude that appellants have failed to exhaust their available administrative remedies as to their product disparagement/failure to promote claim.

Under section 59240 of the CMA, any interested party may file an administrative complaint alleging "any violation" of the CMA or a marketing order, rule, or regulation issued by the Department. When such a complaint is filed, the Secretary either must refer the matter to the Attorney General or a district attorney for the institution of legal proceedings, or hold an evidentiary hearing to consider the claim. (§§ 59240, 59242, 59244, 59245.)

The Marketing Order also contains its own appeal procedure under which "[a]ny producer . . . who believes that any act or determination by or on behalf of the Board, its committees or staff has been or will be detrimental or adverse to the producer's interests . . . may petition the Department to . . . correct the detrimental or adverse impact." If the Department finds that "the Board has acted in a fashion inconsistent with [the CMA], or this Marketing Order or that the Board has implemented the Marketing Order in an unreasonably discriminatory, unfair or inequitable manner," the Department shall declare the challenged act or determination to be without force and effect, and may order the Board to take steps to correct any harm suffered by the petitioner. (See *Brock v. Superior Court* (1952) 109 Cal.App.2d 594, 610 [finding failure to exhaust based on appeal procedure in marketing order]; *People for Ethical Treatment of Animals, Inc. v. California Milk Producers Advisory Bd.* (2005) 125 Cal.App.4th 871, 882, fn. 10 [noting requirement to exhaust under section 59240].)

Appellants failed to meet their burden of proving that they exhausted either of these administrative remedies with respect to their disparagement claim. Appellants have not cited, and we have not found, any

evidence that they filed an administrative petition or complaint with the Department objecting to the Board's marketing activities or the bloc-voting provisions.[9] Accordingly, appellants failed to exhaust their administrative remedies.

Appellants argue they should be excused from pursuing their administrative remedies because exhaustion would have been futile. We are unpersuaded. Futility is a narrow exception which applies only when the party invoking the exception "can positively state that the administrative agency has declared what its ruling will be in a particular case." (*Steinhart v. County of Los Angeles* (2010) 47 Cal.4th 1298, 1313.) That was not the case here. If the Board was not fulfilling the Marketing Order's "promise" for proportionate promotion of dried-on-the-vine raisins, as appellants argue, it was incumbent on them to bring that charge to the Department to take steps to correct the purported violation.[10] Because they failed to do so, we conclude appellants failed to exhaust their administrative remedies with respect to the "varietal benefit" and "non-disparagement" claims, depriving the Department of the opportunity to develop a factual

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[9] We acknowledge that Bruce Lion and others submitted a letter to the Department in May 1998 seeking assurances that there would be proportional funding of dehydrated raisins, but the letter was directed to the terms of the *proposed* Marketing Order, and was not complaining about the Board's implementation of the approved Marketing Order. Thus, the letter is not relevant to the claim in appellants' complaint alleging violations *of* the Marketing Order.

[10] Indeed, if the Board's promotional activities are violating the terms of the Marketing Order, the appropriate remedy seemingly would be to change the promotional activities rather than suspend or terminate the Marketing Order.

record and apply its expertise to the issues raised.[11] Thus, the claim is not properly before this court and should be dismissed.[12]

We reach a different conclusion regarding the bloc-voting claims. We conclude appellants' failure to exhaust those claims must be excused because the available administrative remedies were inadequate to address them. (*California Water Impact Network v. Newhall County Water Dist.* (2008) 161 Cal.App.4th 1464, 1490 [exhaustion is not required when the available administrative remedy is inadequate].) The Marketing Order's appeal procedure was inadequate because, by its terms, the appeal procedure applies only to acts or determinations "by or on behalf of the Board," whereas the bloc-voting claims were concerned with actions taken by the Department, not the Board.

For similar reasons, we conclude the administrative hearing procedure in section 59240 was inadequate. Under that procedure, when an administrative hearing is held, the hearing must be conducted by, and findings issued by, the Department's Secretary. (§§ 59244, 59245.) But such a procedure is inappropriate where, as here, the Department itself is claimed to have engaged in wrongdoing. Under such circumstances, the Department essentially would be asked to

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[11] It matters not that the trial court did not rule on this issue, because exhaustion presents a pure question of law. (*Evans v. City of San Jose* (2005) 128 Cal.App.4th 1123, 1136.)

[12] As an alternative ground, we also conclude that appellants forfeited any challenge to the sufficiency of the evidence regarding their promotion/disparagement claim by failing to set forth in their brief all of the material evidence relating to that issue, including much of the evidence on which the trial court relied in its statement of decision.

judge the correctness of its own decisions, which would be contrary to due process. (See, e.g., *Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 223; *Brown v. City of Los Angeles* (2002) 102 Cal.App.4th 155, 177.) Accordingly, we construe section 59240 more narrowly, giving the Department authority to enforce violations against private parties, but not allowing the Department's Secretary to resolve complaints against the Department itself.[13] Applying this construction to this case, we agree with appellants that they were not required to exhaust their claims against the Department related to the bloc-voting provisions of the CMA.

III

Violation of Section 58999

Under section 58999, only a "nonprofit agricultural cooperative marketing association" is entitled to bloc vote on behalf of its members. (§ 58999.) That term, however, is not defined. Before the Department promulgated the Marketing Order, Department staff considered whether the RBA was a cooperative marketing association for purposes of section 58999, and determined that it was.[14] After hearing the evidence at

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[13] We find further support for this interpretation in the language of former section 1300.19, the predecessor to section 59240, which prescribed criminal and civil penalties when a "'person'" violated a marketing order issued "'by the director.'" (*People v. Harter Packing Co*. (1958) 160 Cal.App.2d 464, 467.)

[14] Prior to the initial referendum on the proposed Marketing Order, the RBA enlisted Dr. Leon Garoyan, Ph.D., the Director of the University of California Center for Cooperatives, to investigate the RBA's authority to bloc vote. Dr. Garoyan concluded that the RBA was authorized to bloc vote, and prepared a memorandum explaining the bases for his conclusion, which relied on the RBA's articles of incorporation, bylaws, membership

trial, the court below reached the same conclusion. On appeal, appellants argue the trial court erred because the RBA was a bargaining association, not a marketing association, and therefore the RBA should not have been permitted to bloc vote in the referendums. The Department, in turn, argues the RBA was *both* a bargaining association *and* a marketing association, and therefore entitled to bloc vote.

To resolve this claim, we must answer the following two questions: (1) whether a cooperative bargaining association may qualify as a cooperative marketing association within the meaning of section 58999 and, if so, (2) whether the RBA qualified as a marketing association because it was involved in marketing.

"'In construing a statute, our fundamental task is to ascertain the Legislature's intent so as to effectuate the purpose of the statute. [Citation.] We begin with the language of the statute, giving the words their usual and ordinary meaning. [Citation.] The language must be construed "in the context of the statute as a whole and the overall statutory scheme, and we give 'significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose.'" [Citation.] In other words, "'we do not construe statutes in isolation, but rather read every statute "with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness." [Citation.]'" [Citation.] If the statutory terms are ambiguous, we may examine extrinsic sources, including the ostensible objects to be

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agreement, and master contract with processors/packers. The RBA then presented Dr. Garoyan's memorandum to the Department. Thus, there was evidence before the Department to support its determination that the RBA was authorized to bloc vote.

achieved and the legislative history. [Citation.] In such circumstances, we choose the construction that comports most closely with the Legislature's apparent intent, endeavoring to promote rather than defeat the statute's general purpose, and avoiding a construction that would lead to absurd consequences. [Citation.]' [Citation.]" (*Estate of Kelly* (2009) 172 Cal.App.4th 1367, 1373.)

Our focus here is on section 58999's use of the term "nonprofit agricultural cooperative marketing association," which we logically may conclude is a nonprofit agricultural cooperative association involved in "marketing." (§§ 54002, 54033, 54036, 54037.) The relevant question, then, is how to define "marketing."

As noted, neither the CMA nor California's cooperative association laws directly define "marketing" or a "marketing association," but the CMA's general definitions do provide helpful guidance. Among other terms, the CMA broadly defines "producer marketing" to mean "any or all operations which are performed by any producer in preparing [a commodity] for market. It includes selling, delivering, or disposing of for commercial purposes, to any handler any commodity which the producer has produced." (§ 58621; accord, § 58614; see also § 66537.) Likewise, under section 58620, a "producer" is defined to mean any person engaged in the business of producing a commodity "for market" (§ 58620), and is distinguished from "handlers" or "processors," which may engage in their own marketing. (§§ 58611, 58619, 58712, 58741, 58881; see also §§ 54039, 54261 [referring to agreements between cooperative associations and their members as a "marketing contracts"].) These definitions show, contrary to what appellants argue, that "marketing" is not limited to sales of "processed"

raisins. Rather, producers may engage in "marketing" merely by selling or delivering the commodity to a handler for commercial purposes.

We find further support for this conclusion in the language of section 58993, under which no marketing order which directly affects producers is effective until approved by the specified percentage of producers affected by the order. The statute provides that for a referendum to pass, it must be approved by producers which "marketed" not less than 51 percent (or, in some cases, not less than 65 percent) of the total quantity of the commodity in the relevant season. (§ 58993, subd. (c).) Again, we find the CMA's use of the term "marketing" inconsistent with appellants' argument that a marketing association must process raisins or sell processed raisins.

Our construction also is consistent with the ordinary definition of the word "marketing." In its broadest sense, the dictionary defines marketing as the "aggregate of functions involved in moving goods from producer to consumer." (Merriam-Webster's Online Dictionary <https://www.merriam-webster.com/dictionary/marketing> [as of May 21, 2021], archived at <https://perma.cc/SZ9D-PQ6Q>; see *Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1121-1122 ["When attempting to ascertain the ordinary, usual meaning of a word, courts appropriately refer to the dictionary definition of that word"].)

We are not aware of any cases construing the meaning of the term "marketing" for purposes of the CMA, but courts have construed that term for purposes of the Capper-Volstead Act (7 U.S.C. §§ 291, 292), which provides limited antitrust immunity for cooperatives that market their members' products. In *Treasure Valley Potato Bargaining Assn. v. Ore-Ida*

Foods, Inc. (9th Cir. 1974) 497 F.2d 203, the Ninth Circuit held that two bargaining associations, the principal function of which was to bargain collectively for prices, terms, and conditions of preseason potato contracts, were entitled to antitrust immunity even though they did not process, handle, buy, or sell any potatoes. The court reasoned that the associations were entitled to immunity because they performed marketing functions "in bargaining for the sales to be made by their individual members," which "necessarily requires supplying market information and performing other acts that are part of the aggregate of functions involved in the transferring of title to the potatoes." (*Id*. at p. 215; accord, *Northern California Supermarkets, Inc. v. Central California Lettuce Producers Cooperative* (N.D.Cal. 1976) 413 F.Supp. 984, 991-992.)

This brings us back to the language of section 58999, which provides: "In finding whether [a] marketing order . . . is . . . approved or favored by producers . . . , the [Secretary] shall consider the approval of any nonprofit agricultural cooperative marketing association, which is authorized by its members so to assent, as being the assent, approval, or favor of the producers that are members of, or stockholders in, that nonprofit agricultural cooperative marketing association." (§ 58999.) Because the purpose of the statute is limited to the approval of marketing orders by affected producers, which themselves must have "marketed" the commodity, it is logical to construe the term "marketing" to include "producer marketing" as defined in section 58621. It follows that for purposes of section 58999, a cooperative marketing association includes an association involved in selling or delivering commodities to handlers for commercial purposes. On its face, this may include a cooperative bargaining

association, which is an association organized and functioning "for the purpose of group bargaining between its producer members and the first handler or processor, with respect to the sale of any agricultural commodity . . . ."[15] (§ 54401.)

Appellants argue that federal law and the state Marketing Order distinguish between marketing and bargaining associations for purposes of selecting members for the advisory board/committee. Appellants are correct (see, e.g., §§ 58841-58842.5), but they do not explain why this should control the interpretation of a statute which uses different language and has nothing to do with allocating seats on the advisory board.[16]

Appellants also suggest that an organization cannot be both a bargaining association and a marketing association. But appellants have not cited any authority to support their claim that a bargaining association cannot also be a marketing association for purposes of the bloc-voting provisions in section 58999. Accordingly, we conclude, as did the trial court, that a cooperative bargaining association may qualify as a cooperative marketing association within the meaning of section 58999 if it is involved in marketing.

Having so concluded, we next consider whether the trial court correctly concluded that the RBA was

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[15] In reaching this conclusion, we have not considered appellants' arguments based on the "literature on bargaining and marketing cooperatives," which were raised for the first time in their reply brief.

[16] Under federal law and the raisin Marketing Order, only members of a cooperative marketing association engaged in the processing/handling of raisins are eligible for a representative seat on the advisory board/committee. (7 C.F.R. §§ 989.17, 989.26, subd. (a); cf. 7 C.F.R. § 989.12a.)

a marketing association because it was involved in marketing. As appellants acknowledge, the facts relating to the RBA's organization and operations are not in dispute. The interpretation and application of a statute to an undisputed set of facts is a question of law, subject to de novo review. (*Stanford Vina Ranch Irrigation Co. v. State of California* (2020) 50 Cal.App.5th 976, 998.)

The evidence in the record shows that the RBA was formed as a nonprofit agricultural cooperative association authorized to render "selling" and "marketing" services to its members. The RBA's bylaws specifically authorize it to "assent in writing or otherwise, on behalf of the members of [the RBA] and all producers of products marketed or to be marketed by [the RBA], to any marketing order or amendment thereto . . . ." The RBA membership agreement, which sets forth the terms of membership, provides that the purpose of the association is to allow growers throughout the state to "more efficiently and economically market" their products by joining together in a cooperative association. To further this purpose, the membership agreement provides that the producer members shall sell and deliver their product to the RBA, which shall take delivery of the product and then sell it to processors or packers at prices determined by the RBA.[17]

Although deliveries to processors are made in the name of the producer, and most of the purchase price is paid directly to the producer, the actual sale is between the RBA and the processor/packer. Title and

[17] The RBA permits individual producers to market their product directly, but any such individual agreements must be consistent with the terms and conditions of the membership agreement and the master contract between the RBA and the signatory processors/packers.

the right to possession of the product passes from the producer to the RBA, and then from the RBA to the processor/packer. Members can express preferences respecting the processor/packer to which they wish to deliver their product, but the RBA has the ultimate authority to decide where the product is delivered. And the RBA has the "sole discretion" to determine the price at which the product is sold.

Based on these facts, we conclude the trial court correctly determined that the RBA was a marketing association. Thus, we uphold the trial court's conclusion that the RBA was authorized to bloc vote under section 58999.

IV

Constitutional Challenge to Section 58999

In addition to arguing that the Department violated section 58999 by permitting the RBA to bloc vote as a nonprofit agricultural cooperative marketing association, appellants challenge the constitutionality of the bloc-voting statute itself. Appellants contend section 58999 violates the equal protection clause because it gives cooperative marketing associations, such as Sun-Maid, disproportional voting power.[18] We are unpersuaded.

The critical first step when determining whether state legislation violates the equal protection clause is to determine the appropriate level of judicial scrutiny

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[18] Although the Lion complaint alleged an improper exercise of the police power, and did not use the term "equal protection," we liberally construe the complaint to include a claim that the statute is an invalid exercise of the police power because it violates the right to equal protection under the law. (*Aden v. Younger* (1976) 57 Cal.App.3d 662, 673 [equal protection clause is a limitation on the police power].)

to be applied.[19] (*Southern Cal. Rapid Transit Dist. v. Bolen* (1992) 1 Cal.4th 654, 664 (*Bolen*).) "'The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. [Citations.]'" (*Sacramentans for Fair Planning v. City of Sacramento* (2019) 37 Cal.App.5th 698, 710, italics omitted.)

In the typical equal protection case involving social welfare or economic legislation, the classification need only bear a rational relationship to a conceivable legitimate state purpose. (*Hernandez v. City of Hanford* (2007) 41 Cal.4th 279, 298-299; *Board of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 913 (*Board of Supervisors*).) On the other hand, statutes which create suspect classifications or impinge on fundamental rights are subjected to strict scrutiny. (*Hernandez, supra*, 41 Cal.4th at p. 299.) "Under this very severe standard, a discriminatory law will not be given effect unless its classification bears a close relation to the promoting of a compelling state interest, the classification is necessary to achieve the government's goal, and the classification is narrowly drawn to achieve the goal by the least restrictive means possible. [Citations.]" (*Board of Supervisors, supra*, 3 Cal.4th at p. 913.)

The right to vote is a fundamental right. (*Board of Supervisors, supra*, 3 Cal.4th at p. 913.) But not every law that "touches on the right to vote" requires strict scrutiny. (*Board of Supervisors*, at p. 914; accord,

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[19] The equal protection clauses in the federal and state Constitutions (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7, subd. (a)) guarantee substantially similar rights, and courts analyze them in a similar fashion. (*Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, 775.)

People v. Boulerice (1992) 5 Cal.App.4th 463, 473; see also *California Gillnetters Assn. v. Department of Fish & Game* (1995) 39 Cal.App.4th 1145, 1161 [even statutes which severely restrict the pursuit of an occupation are tested under the rational basis test].) The question presented here is whether section 58999 impinges on the right to vote in a manner that requires the application of strict scrutiny.

Appellants contend section 58999 should be subjected to strict scrutiny because it offends the "one person, one vote" principle articulated in *Reynolds v. Sims* (1964) 377 U.S. 533 [12 L.Ed.2d 506], under which each person's vote must be approximately equal in weight to that of any other person in a representative election. (*Id*. at pp. 568, 579; accord, *Gray v. Sanders* (1963) 372 U.S. 368, 379 [9 L.Ed.2d 821, 829-830] ["Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote"].) Appellants contend section 58999 is inconsistent with the "one person, one vote" principle because it essentially allows cooperative marketing associations to stuff the ballot box, thereby "diluting" the votes of independent producers and "disenfranchising" the dissenting members of the cooperative associations.

However, as appellants acknowledge, there is a recognized exception to the "one person, one vote" requirement when the election relates to a governmental body performing a specialized governmental function that has a disproportionate effect on a definable segment of the community. (*Bolen, supra*, 1 Cal.4th at p. 665.) When these conditions are met, "the strict demands of *Reynolds* [*v. Sims*]*, supra*, 377 U.S. 533, do not apply and voting power 'may be apportioned in ways which give greater influence to the citizens most

affected by the organization's functions' [citation] without violating the guarantee of equal protection . . . ." (*Bolen, supra*, at p. 665.)

The United States Supreme Court applied this exception in two leading cases: *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.* (1973) 410 U.S. 719 [35 L.Ed.2d 659] (*Salyer*) and *Ball v. James* (1981) 451 U.S. 355 [68 L.Ed.2d 150] (*Ball*). *Salyer* involved a challenge to the election of the board of directors of a small California water storage district. (*Salyer, supra*, 410 U.S. at pp. 721, 724-725.) The statutory scheme at issue in *Salyer* limited voting to owners of land within the district, and apportioned voting power according to the assessed value of each owner's land. (*Id*. at pp. 724-725.) The voting scheme was challenged on equal protection grounds by, among others, residents of the district who were not allowed to vote because they did not own land within the district. (*Id*. at p. 724.) In upholding the property-based voting scheme, the court concluded that the "one person, one vote" requirement did not apply because the district's purposes were specialized and narrow and its activities disproportionately affected the voters responsible for paying its costs. (*Id*. at pp. 727-730.)

Ball, supra, 451 U.S. 355 similarly involved a challenge to the procedures used to elect a water storage district board. (*Id*. at p. 357.) Similar to *Salyer*, the statute limited voting to those owning land within the district, with voting power weighted in proportion to acreage owned. (*Ball*, at p. 357.) Although the district at issue in *Ball* was significantly larger and performed more functions than the district in *Salyer*, including selling power to almost half the state's population, the court again concluded that the district fell within the exception to the one person, one vote

principle. (*Ball*, at pp. 365-366, 371.) The court reasoned that, despite its more diverse activities, the district's functions were still limited, and it did not exercise the sort of general government powers that triggers the "one person, one vote" requirement, such as imposing taxes, maintaining streets, operating schools, or providing health or welfare services. (*Id*. at p. 366.) Further, coordinate with its specialized purpose and functions, the district's activities fell disproportionately on the specific class of persons who were allowed to vote in the district elections. (*Id*. at pp. 370-371.)

Our Supreme Court applied the same two-pronged test in *Bolen, supra*, 1 Cal.4th 654. *Bolen* involved a validation proceeding filed by a transit district to validate special benefit assessment districts created to help defray the costs of a mass transit system through assessments on owners of commercial property. (*Id*. at pp. 659-660, 662-663, 673.) Although the transit district could establish the assessment districts without voter approval, its actions were subject to referendum if requested by the owners of at least 25 percent of the assessed value of real property within the district. (*Id*. at p. 660.) By statute, voting at such a referendum was limited to the owners of the real property who were subject to the assessments, and the voting power was apportioned based on the assessed value of the property. (*Ibid*.) Interveners in the validation proceeding challenged the validity of the assessment districts, contending the statute's property-based voting scheme violated the equal protection clause. (*Id*. at p. 663.)

In lockstep with the reasoning in *Salyer* and *Ball*, the court in *Bolen* concluded that the challenged voting scheme fell within an exception to the "one person, one vote" requirement because (1) the benefit

districts were special-purpose government units lacking "'general governmental powers,'" and (2) the class of eligible voters were disproportionately affected by the election issue in that they were responsible for paying the assessments.[20] (*Bolen, supra*, 1 Cal.4th at pp. 665-666, 669-675.)

Applying these authorities, we agree with the trial court that the CMA's voting scheme does not require application of strict scrutiny. Voting in referendums on marketing orders does not involve the election of officials who will exercise general governmental powers, like voting in an election for national, state, or local representatives. (*Cecelia Parking Corp. v. United States Dept. of Agriculture/Agricultural Mktg. Serv.* (9th Cir. 1993) 10 F.3d 616, 624 (*Cecelia Packing*).) Rather, it involves the establishment of an advisory board, which has limited authority and performs specialized administrative functions generally related to the marketing, processing, distributing, or handling of agricultural commodities. (§§ 58712, 58841, 58846, 58881.) And the functions of the Board at issue in this case are even more limited, relating only to the research and promotion of raisins. (§§ 58889, 58892.) Under the circumstances, we conclude that the raisin Board is the sort of "special-purpose" governmental unit that is not subject to the strict requirements of *Reynolds v. Sims, supra*, 377 U.S. 533.[21]

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[20] As to the latter finding, the court noted that the "issue-specific nature of referenda in general and of the assessment district elections in particular reduces somewhat the prominence equal protection values would assume if representational interests were at stake in the challenged election." (*Bolen, supra*, 1 Cal.4th at p. 671.)

[21] As *Bolen* makes clear, the fact that a marketing order authorizes assessments does not demand a different result. (*Bolen,*

We draw additional support for our conclusion from the Ninth Circuit's decision in *Cecelia Packing*, which rejected an equal protection challenge to the cooperative bloc-voting provisions under the federal AMAA. (*Cecelia Packing, supra*, 10 F.3d at pp. 617-618.) The court concluded that because the federal marketing order involves "'relatively limited authority,'" and is "not 'what might be thought as "normal governmental" authority,'" the legislation should be reviewed under the rational relationship test. (*Id*. at pp. 624-625.) We reach the same conclusion here.

Turning to the second prong of the *Bolen* test, which looks to the impact of the election outcome on voters and nonvoters, we find that there are genuine differences in the interests of those enfranchised and those disenfranchised under the legislation.[22] The persons "primarily affected" by the Marketing Order and its mandatory assessments—raisin producers—are enfranchised by the voting scheme. Those excluded from voting by the statutory scheme, such as raisin handlers and other commodity producers, are substantially less affected.[23]

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supra, 1 Cal.4th at pp. 660-661, 669-670; accord, *Ball, supra*, 451 U.S. at p. 366, fn. 11.)

[22] As the Department notes, appellants failed to discuss the second prong of the *Bolen* test in their opening brief. However, because the Department fully addressed the issue in a supplemental brief, we will not treat this issue as forfeited. In contrast, we conclude that appellants forfeited their arguments that (1) the statutory bloc-voting provision violates appellants' free association rights, and (2) requiring members to opt out of bloc voting is unconstitutional. (See *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764-765 and *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52.)

[23] We reject appellants' suggestion that the bloc-voting provisions "disenfranchise" members of cooperative marketing asso-

Appellants complain that the bloc-voting provisions of section 58999 triggers strict scrutiny because it gives cooperative marketing associations disproportional voting power. However, when the strict demands of the "one person, one vote" principle do not apply, the apportionment of voting power among the enfranchised is subject to rational basis review. (*Bolen, supra*, 1 Cal.4th at p. 677; *Salyer, supra*, 410 U.S. at pp. 733-734; *Ball, supra*, 451 U.S. at p. 371.) Voting power may be apportioned in ways that give greater influence to some voters as long as the apportionment of power is not "'wholly irrelevant'" to the objectives of the statute. (*Bolen, supra*, at p. 678.)

Under the rational relationship test, we conclude that section 58999's bloc-voting provisions are rationally related to the legitimate governmental purposes of encouraging producers to join cooperative marketing associations, promoting orderly and efficient marketing of commodities, and preventing or reducing economic waste. (§§ 58652, 58654; see also Corp. Code, §§ 14550, 14551.) As the Ninth Circuit summarized in *Cecelia Packing, supra*, 10 F.3d 616: By allowing the cooperative marketing associations to bloc vote, the government furthers its goal of encouraging producers

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ciations. Appellants are conflating the impact of a member's decision to join a cooperative marketing association with the impact of the statutory voting scheme. The second prong of the *Bolen* test focuses solely on the "contested statutory voting classification," and the extent to which there is a "'genuine difference in the relevant interests' of those enfranchised and those excluded" by that statutory classification. (*Bolen, supra*, 1 Cal.4th at pp. 666, 670.) The class of eligible voters under the statutory voting scheme are the producers directly affected by the proposed marketing order. (§ 58993.) Bloc voting has not deprived cooperative members of their right to vote; they simply have authorized the cooperative to vote on their behalf.

to "'join together . . . to increase their collective economic strength and advantage,'" thereby contributing to more stable and efficient markets. (*Id*. at p. 625, fn. 8.)

For these reasons, we reject appellants' constitutional challenge to the bloc-voting provisions of section 58999.

V

Post Hoc Rationalization

Appellants also contend the trial court erred in allowing the Department to abandon its original rationale for the Marketing Order. Appellants contend that the Department found that restoring and maintaining "producer purchaser power" was the "cornerstone" justification for the Marketing Order. Because the trial court previously found "no evidence" that producer purchasing power was inadequate, appellants contend the trial court was required to remand this matter to the Department for new findings.[24] We disagree.

As we explained in *Ross*, the trial court erroneously interpreted section 58813, subdivision (b) to mean that the Department cannot adopt a marketing order for industry advertising or research unless the order is necessary to address adverse economic conditions so severe as to threaten the continued viability of the industry. (*Ross, supra*, 240 Cal.App.4th at p. 1264.) As a consequence, the trial court erroneously concluded

[24] To the extent appellants argue the trial court failed to comply with our directions in *Ross, supra*, 240 Cal.App.4th 1254, or that there is insufficient "economic evidence" in the record to support the Marketing Order under any standard, we deem the arguments insufficiently developed to merit review.

the Department must show both that the purchasing power of raisin producers was so "low" as to threaten the economic viability of the industry, and that the Marketing Order was necessary to "restore" their purchasing power. Applying this narrow standard, the trial court found insufficient evidence of the existence of a crisis and of the necessity for the Marketing Order to meet that crisis.

In *Ross*, we rejected the trial court's interpretation as too narrow. (*Ross, supra*, 240 Cal.App.4th at pp. 1264-1265.) We held in *Ross* that if the marketing order does not restrict commodity supply, the Department is not required to find the order is "'necessary'" to effect a reasonable correlation of supply and demand, or to find that the order would "reestablish or maintain a defined level of producer purchasing power." (*Id*. at p. 1265.) Nor is the Department required to find that a proposed marketing order will effectuate every purpose and policy of the CMA. (*Ross*, at p. 1264, fn. 7.) Instead, the Department merely has to make "generalized findings" that the proposed marketing order will "'tend to effectuate the declared purposes and policies'" of the CMA. (*Ross*, at pp. 1265-1266.) *Ross* disposes of appellants' argument that the Marketing Order is invalid because there is insufficient evidence that the producers' purchasing power was too low.

We likewise reject appellants' argument that the Department improperly "abandoned" its original rationale for the Marketing Order. Although the Department described producer purchasing power as a "cornerstone" of the Order, the "main objective" of the Order always was "to improve the demand for [raisins]." The Department found that the Marketing Order, by increasing demand for raisins, would

increase returns for raisin producers, and thereby improve producer purchasing power. For this reason and others, the Department found that the Marketing Order would "tend to effectuate the declared purposes and policies of the [CMA]," which is the same finding the Department sought to defend on remand. We find no merit to appellants' contention that the Department abandoned its original justification for the Order and instead sought to uphold it based on the post hoc rationalizations of counsel.

VI

Alternatives to Marketing Order

The trial court rejected appellants' contention that the Marketing Order was invalid because the Department failed to consider reasonable alternatives before adopting it. On appeal, appellants argue the trial court's "conclusion is a clear misstatement of both statutory text and case law." Appellants contend that the plain language of section 58813 and governing case law required the Department to consider any reasonable alternatives to the Marketing Order and to state the basis on which they were rejected. Appellants contend that the Department failed to comply with this requirement even though several reasonable alternatives were proposed.

Appellants' claim lacks merit. Section 58813 does not require the Department to consider alternatives, or even mention alternatives. It provides, in relevant part: "If the marketing order or amendments to it contain provisions only for . . . advertising or sales promotion, or for research, the director may issue such marketing order or amendments to it if [he or she finds]: [¶] (a) That such marketing order or amendments to it are reasonably calculated to attain the

objectives which are sought in such marketing order[;] [¶] (b) That such marketing order or amendments to it are in conformity with the provisions of this chapter and within the applicable limitations and restrictions which are set forth in this chapter and will tend to effectuate the declared purposes and policies of this chapter[;] [and] [¶] (c) That the interests of consumers of such commodity are protected in that the powers of this chapter are being exercised only to the extent which is necessary to attain such objectives." (§ 58813.)

Highlighting the term "amendments," appellants argue that section 58813 requires the Department to consider and make findings about any amendment offered as an alternative to the proposed marketing order. We disagree. As the Department argues, "[s]ection 58813's references to amendments simply reflects that the Department is required to follow the same procedures when [amending] a marketing order as when it proposes a new marketing order." (Citing § 59021.) Nothing in section 58813 requires the Department to analyze reasonable alternatives to a marketing order and describe the Department's reasons for rejecting them before promulgating the Marketing Order.[25] (Cf. Gov. Code, § 11346.2, subd. (b)(4)(A).)

The cases cited by appellants are similarly unavailing. Two of the cases, *Western States Petroleum Assn. v. Board of Equalization* (2013) 57 Cal.4th 401, and *Sims v. Department of Corrections & Rehabilitation* (2013) 216 Cal.App.4th 1059, involved regulations issued under the Administrative Procedure Act (Gov.

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[25] Moreover, even if the Department was required to consider *amendments* to the Marketing Order and explain its reasons for rejecting them, the record shows that it did so.

Code, § 11346 et seq.), which, unlike the CMA, requires agencies to include a description of reasonable alternatives to the proposed regulation and the agency's reasons for rejecting them. (Gov. Code, § 11346.2, subd. (b)(4)(A).) But marketing orders are expressly exempt from the requirements of the Administrative Procedure Act. (*Voss, supra*, 46 Cal.App.4th at pp. 904, 911.) Thus, the cases cited by appellants have no application here.

The other case cited by appellants, *California Hotel & Motel Assn. v. Industrial Welfare Com.* (1979) 25 Cal.3d 200, involved wage and hour orders issued under the Labor Code, which requires "a statement as to the basis upon which an adopted or amended order is predicated." (Lab. Code, § 1177.) In defining a "statement of basis" to support a wage and hour order, our Supreme Court explained that a statement must describe "how and why the commission did what it did." (*California Hotel, supra*, at p. 213.) Where a wage and hour order turns on factual issues, the statement must demonstrate support in the record, and where the order turns on policy choices, the statement must discuss the risks, alternatives, economic and social consequences, where appropriate, and show how the commission resolved the conflicts in adopting the orders. (*Id*. at p. 214.) The CMA imposes no similar requirement here. (*Voss, supra*, 46 Cal.App.4th at p. 917 [the CMA does not "compel [the Department] to disclose the reasoning underlying [its] findings . . . or to explain why the particular order was selected over some other suggested version, if any"]; § 58813.)

The action of the Department in issuing a marketing order under the CMA is quasi-legislative in nature. (*Brock v. Superior Court, supra*, 109 Cal.App.2d at p. 597.) Courts exercise limited review of such acts out

of deference to the separation of powers between the Legislature and the judiciary and to the presumed expertise of the agency within the scope of its authority. (*Western Oil & Gas Assn. v. Air Resources Board* (1984) 37 Cal.3d 502, 509.) Under the CMA, the Department was not required to consider reasonable alternatives to the Marketing Order and make findings as to why they were rejected. Accordingly, the trial court properly rejected appellants' argument that the Marketing Order was invalid due to the Department's failure to consider alternatives.[26]

VII

Free Speech and Free Association

In their complaint, appellants alleged that the Marketing Order violated their free speech and free association rights by compelling them to associate with the Board and subsidize the Board's commodity advertising activities. Relying on the United States Supreme Court's decision in *Johanns, supra*, 544 U.S. 550, and this court's decision in *Gallo Cattle, supra*, 159 Cal.App.4th 948, the trial court rejected appellants' free speech/association claims, concluding that the Board's commodity advertising is government speech, and therefore appellants could be compelled to subsidize the speech without violating the First Amendment.

After the trial court's ruling, our Supreme Court decided *Delano Farms Co. v. California Table Grape Com.* (2018) 4 Cal.5th 1204 (*Delano Farms*), which followed *Johanns* in concluding that mandatory assess-

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[26] This claim also is properly denied on procedural grounds since it was not alleged in appellants' complaint. (*Centex Homes v. Superior Court* (2013) 214 Cal.App.4th 1090, 1102.)

ments by the California Table Grape Commission to fund generic advertising of table grapes did not violate the free speech rights of growers and shippers because the Commission's promotional messages qualified as government speech. (*Id*. at pp. 1209-1211, 1236-1244.) Appellants concede that *Delano Farms* controls resolution of their claims, but they nevertheless raise the argument to "preserve their rights . . . in the event that the U.S. Supreme Court reverses the [*Delano Farms*] opinion."

In November 2018, shortly after appellants filed their opening brief, the United States Supreme Court denied review of *Delano Farms*. (*Delano Farms Co. v. Cal. Table Grape Com.* (2018) ___U.S.___ [202 L.Ed.2d 403].) Thus, the California Supreme Court's decision in *Delano Farms* is final and binding. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

We accept appellants' concession that *Delano Farms* is controlling and dispositive of their free speech/ association claims. Although there are differences between the marketing program at issue in *Delano Farms* and the program at issue here, we are persuaded that the similarities considerably outweigh the differences. As in *Delano Farms*, the Board was created by the Legislature to implement public policy by aiding the producers of an agricultural commodity. (§§ 58651-58654, 58852.) As in *Delano Farms*, the Legislature authorized the Board to promote the sale of the commodity through generic advertising funded by compelled assessments on the producers. (§§ 58889, 58921, 58925, 58926, 58929.) Further, as in *Delano Farms*, the Legislature has specified, in general terms, the basic message for such promotional campaigns, while leaving the details to be fleshed out by the Board, subject to Department oversight. (§§ 58652,

58813.) Finally, as in *Delano Farms*, the Legislature has ensured that the Department retains sufficient responsibility and control over the content of the Board's messaging for it to qualify as government speech, even if the Department staff did not review "every word" of the promotional materials. (§§ 58711, 58841, 58846, 58923, 59081, 59082, 59201, 59240; *Delano Farms, supra*, 4 Cal.5th at p. 1242.) Accordingly, we follow *Delano Farms* in concluding that the Board's advertising program is government speech and therefore did not violate appellants' free speech or free association rights. (*Delano Farms, supra*, 4 Cal.5th at pp. 1211, 1236-1244; see also *Gallo Cattle, supra*, 159 Cal.App.4th at p. 952; *Delano Farms Co. v. Cal. Table Grape Com.* (9th Cir. 2009) 586 F.3d 1219, 1220.)

DISPOSITION

We modify the judgment in the Lion case (C086205) to dismiss the Lion appellants' "varietal benefit" and "non-disparagement" claims due to their failure to exhaust administrative remedies. As modified, we affirm the judgment. The appeal in the Raisin Valley case (C086206) is dismissed. The Department shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

/s/ Krause, J.
Krause, J.

We concur:

/s/ Blease
Blease, Acting P. J.

/s/ Hull, J.
Hull, J.

APPENDIX B

IN THE SUPREME COURT OF CALIFORNIA
En Banc

[Filed: September 1, 2021]

S269714

LION RAISINS, INC., *et al.*,
Plaintiffs and Appellants,
v.
KAREN ROSS, as Secretary, etc.,
Defendant and Respondent.

THE PEOPLE *ex rel.* KAREN ROSS, as Secretary, etc.,
Plaintiff, Cross-defendant and Respondent,
v.
RAISIN VALLEY FARMS, LLC, *et al.*,
Defendants, Cross-complainants and Appellants.

Court of Appeal, Third Appellate District -
No. C086205, C086206

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice

APPENDIX C

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO

GORDON D SCHABER COURTHOUSE

MINUTE ORDER

DATE:	TIME:	DEPT:
09/26/2017	09:32:00 AM	54

JUDICIAL OFFICER PRESIDING: Raymond Cadei

CLERK: D. Ahee

REPORTER/ERM:

BAILIFF/COURT ATTENDANT:

CASE NO: 03AS05313 CASE INIT.DATE: 04/13/2007

CASE TITLE: BOGHOSIAN RAISIN PACKING CO INC ET AL VS WILLIAM LYONS JR

CASE CATEGORY: Civil – Unlimited

APPEARANCES

NATURE OF PROCEEDINGS: OBJECTIONS TO PROPOSED STATEMENT OF DECISION AFTER REMAND

The Court, having reviewed Plaintiffs, Defendants, and Cross-Complainants' (Raisin Producers/Packers) Objections to Proposed Statement of Decision After Remand, now issues its Proposed Statement of Decision After Remand as its Final Statement of Decision.

Counsel for Defendant, Plaintiff, and Cross-Defendant Karen Ross, in her official capacity as Secretary of the California Department of Food and Agriculture, is hereby ordered to take custody of the exhibits and make arrangements with the Court for their pick-up.

APPENDIX D

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO

GORDON D SCHABER COURTHOUSE

MINUTE ORDER

DATE:	TIME:	DEPT:
08/31/2017	10:41:00 AM	54

JUDICIAL OFFICER PRESIDING: Raymond Cadei

CLERK: D. Ahee

REPORTER/ERM:

BAILIFF/COURT ATTENDANT:

CASE NO: 03AS05313 CASE INIT.DATE: 04/13/2007

CASE TITLE: BOGHOSIAN RAISIN PACKING CO INC ET AL VS WILLIAM LYONS JR

CASE CATEGORY: Civil – Unlimited

APPEARANCES

NATURE OF PROCEEDINGS: TENTATIVE AND PROPOSED STATEMENT OF DECISION AFTER REMAND

Introduction

The following constitutes the Court's Tentative and Proposed Statement of Decision After Remand pursuant to California Rule of Court 3.1590(c)(1). The Court elects to prepare the Final Statement of Decision and notifies the parties that the following will become the Final Statement of Decision After Remand unless, within 10 days after service plus 5 days for mailing, any party specifies additional principal controverted issues or objections based on the evidence

the party requests the Court address, pursuant to California Rule of Court 3.1590(c)(4), (g). The Court reserves the right to order a hearing on any of the proposals or objections to its Tentative and Proposed Statement of Decision After Remand, or to consider the submissions without further court hearing.

On December 9, 2015, the Court of Appeal in *Ross v. Raisin Valley Farms LLC* (2015) 240 Cal. App. 4th 1254 reversed this Court's judgment in this matter and remanded it for further proceedings.

The Court of Appeal found this Court erred in interpreting the provision of the California Marketing Act, Food and Agriculture Code § 58601 *et seq*. (the "CMA"), which requires that a marketing order for industry or advertising or research "tend to effectuate the declared purposes and policies of [the CMA]." The Court of Appeal concluded this Court erred in finding this requirement could be met *only if* "the [o]rder was necessary to address adverse economic conditions in the raisin-growing industry that were so severe as to threaten the continued viability of the industry." The Court of Appeal found a marketing order is valid if it *generally* tends to effectuate *some of* the purposes and policies of the CMA. (See *Ross, supra*, at 1265-1266.)

The Court of Appeal remanded the matter for this Court to "consider the other challenges to the marketing order that the raisin companies raise[,]" *(Ross, supra*, at 1258) which include contentions that:

> (1) the marketing order was adopted through improper bloc voting by the Raising Bargaining Association the "RBA") and Sun-Maid;
>
> (2) the California Raisin Marketing Board's ("CRMB") activities are not legitimate government speech;

> (3) the CRMB's speech activities are not being conducted in conformity with the terms of the marketing order with regard to issues such as varietal benefit and non-disparagement of particular varietals;
>
> (4) the Department should have considered reasonable alternatives to the marketing order as adopted;
>
> (5) and the California Department of Food and Agriculture (the "Department") has not engaged in proper oversight of the CRMB activities.[1] (Final Statement of Decision After Court Trial at 59:23-60:6)

In its June 24, 2013, Final Statement of Decision After Court Trial the Court set forth in detail the factual and statutory background relevant to this matter. The Court need not repeat that information here.

As for the applicable standard of review, the standard is not uniform as to each of Plaintiffs' remaining contentions. Therefore, the Court will address the applicable standard of review in discussing each of the remaining challenges.

There was substantial evidence to support that the Raisin Bargaining Association("RBA") was entitled to bloc vote as a marketing association.

Defendants and Cross-Complainants Lion Raisins, Inc., et al., and Raisin Valley Farms, LLC, et al. ("Plaintiffs") contend the Department violated section 58999 of the CMA by allowing the RBA to bloc vote. The Department argues it correctly decided the RBA is entitled to bloc vote because, while the RBA is a bargaining association, it is also a cooperative

marketing association and therefore entitled to bloc vote. The question of whether the RBA was eligible to bloc vote was referred to the Department's legal office and John Dyer, an attorney with the Department's legal office, determined the RBA is a marketing association and entitled to bloc vote. (Tr. 539:16-27 [Yost]; Tr. 1879:25-1880:12 [Koligian].)

Section 58999 of the CMA provides:

> "In finding whether the marketing order or major amendment to it is assented to in writing or approved or favored by producers pursuant to the provisions of this chapter, the director shall consider the approval of any nonprofit agricultural cooperative marketing association, which is authorized by its members so to assent, as being the assent, approval, or favor of the producers that are members of, or stockholders in, that nonprofit agricultural cooperative marketing association." (emphasis added.)

Plaintiffs argue that under statutory rules of construction, the expression of one thing necessarily excludes the other. Accordingly, as section 58999 expressly instructs the director to consider the approval of only cooperative marketing associations, it necessarily does not apply to approval given by bargaining associations. The Department does not contest this reading and the Court agrees. In construing a statute under the first step, the court's function is simply to ascertain and declare what is in terms or in substance contained in the statute, not to insert what has been omitted, or to omit what has been inserted. (Code Civ. Proc. § 1858.) The courts may not alter the words of a statute or insert qualifying provisions to accomplish a purpose or assumed intention that does

not appear either on the statute's face, or from its language, or from its legislative history. *(In re Hoddinott* (1996) 12 Cal. 4th 992, 1002; *City of Sacramento v. Public Employees' Retirement System* (1994) 22 Cal. App. 4th 786, 793.) "'While every word of a statute must be presumed to have been used for a purpose, it is also the case that every word excluded from a statute must be presumed to have been excluded for a purpose.'" *(Arden Carmichael, Inc. v. County of Sacramento* (2001) 93 Cal. App. 4th 507, 516.) Here, section 58999 on its face clearly includes marketing associations without any mention of bargaining associations and the Court must presume, from a plain reading, that section 58999 thus does not apply to approval given by bargaining associations.

Accordingly, the query is whether the Department abused its discretion in finding that the RBA was both a cooperative bargaining association and a cooperative marketing association.

A writ will issue if the Court finds a prejudicial abuse of discretion, which is established if the Department "has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (Code of Civ. Pro. § 1094.5(b).) In most cases, the Court shall find abuse of discretion if "the findings are not supported by substantial evidence in light of the whole record." (Code of Civ. Pro. § 1094.5(c).) Substantial evidence is not synonymous with "any" evidence (*Newman v. State Personnel Bd.* (1992) 10 Cal. App. 4th 41, 47), but has been defined as relevant evidence that a reasonable mind might accept as adequate to support a conclusion (*California Youth Auth. v. State Personnel Bd*. (2002) 104 Cal. App. 4th 575).

Section 54401 defines "cooperative bargaining association" as "a farmer association which is organized and functioning pursuant to Chapter 1 (commencing with Section 54001) of this division, for the purpose of group bargaining between its producer members and the first handler or processor, with respect to the sale of any agricultural commodity except milk, cotton, or cottonseed." There is no dispute that the RBA is a bargaining association.

The term "cooperative marketing association" is not defined, however, in the Food and Agriculture Code, nor is the term "marketing" defined in the context of nonprofit cooperative associations. Accordingly, the Court looks elsewhere in the law for guidance.

In the context of foreign marketing, "marketing" means "the advertising, sale, and distribution of agricultural commodities, including private brands and trade names, in foreign markets." (Food and Agr. Code § 58557.) In various other places throughout the Food and Agriculture Code related to marketing advisory and promotional councils and commissions, "marketing" is defined as "to sell." (See, e.g., Food and Agr. Code §§ 66537, 71028, 73067, 75031, 75518, 77227, 77417.5, 77729, 77915, 78216, 79220, 79426, 79819.) A common definition of "marketing" is "the process or technique of promoting, selling, and distributing a product or service or an aggregate of functions involved in moving goods from producer to consumer." ("Marketing." *Merriam-Webster.com.* Merriam-Webster, n.d. Web. 31 July 2017.)

Case law has interpreted the term "marketing" to be broader than the word sell, albeit in the context of federal antitrust law. In *Treasure Val. Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.* (9th Cir. 1974) 497 F.2d 203, the Ninth Circuit concluded bargaining is a

form of marketing and therefore found a potato bargaining cooperative is also a marketing cooperative. Thereafter, in *Northern California Supermarkets, Inc. v. Central California Lettuce Producers Cooperative* (1976) 413 F. Supp. 984, 991-992, the U.S. District Court for the Northern District of California followed the reasoning of *Treasure Valley* and found an association was engaged in collective marketing through its price fixing and therefore was exempt from federal antitrust laws.

Based on the foregoing, the Court is persuaded that if an association is "marketing," they would be either directly selling or distributing a product, or somehow involved in that process. As discussed below, there is substantial evidence that the RBA was formed, in part, to engage in marketing and actually sells its grower member grapes to processors/packers, thereby engaging in "marketing."

The RBA was formed in 1966 pursuant to California nonprofit association laws. (Ex. 1045 [Articles of Incorporation of Raisin Bargaining Association].) The RBA's Articles of Incorporation provide it was formed to "engage in any activity in connection with the marketing, selling, preserving, harvesting, drying, processing, manufacturing, canning, packing, grading, storing, handling or utilization of any products produced or delivered by its members with particular reference to grapes or raisins . . . ." (Ex. 1045, p. 2, Art. II.) The RBA amended its Articles of Incorporation in 2003, but the Articles still provided the RBA was formed, in part, to engage in marketing. (Ex. 1046, p. 1, Art. II.)

The RBA's bylaws authorize the RBA "[t]o assent in writing or otherwise, on behalf of the members of Association . . . to any marketing order or amendment

thereto, pertaining to and regulating, directly or indirectly, the marketing of products marketed by the Association . . . ." (Ex. 1046, p, 21, Art. IX, § 9.15.)

The RBA Membership Agreement sets forth the terms of membership. (Ex. 1048.) Three sections of that agreement are relevant to the inquiry here. First, section three provides "(t]he Association hereby purchases from Grower, and Grower hereby sells to the Association, all of the grapes produced for the purpose of being made into raisins (hereinafter called "products") by or for the account of Grower during the period of this Agreement . . . ." (Ex. 1048, ¶ 3 (emphasis added).) Section 10 also states "[t]his instrument is intended by the parties to pass to and vest in the Association title to all of the products covered hereunder and to give the Association the right to the possession of said products as soon as they are ready to be picked, or any time thereafter, ..." (Ex. 1048, ¶ 10 (emphasis added).) Lastly, section six provides "[e]ach year's delivery of products shall be sold by the Association at such prices as may be determined by the Board of Directors, in its sole discretion, to be fair and equitable." (Ex. 1048, ¶ 6 (emphasis added))

Kalem Barserian, General Manager of the RBA from 1969-1987, testified that when the RBA was formed, its sole function was to bargain annually for a field price for their growers' raisins. (Tr. 45:27-46:9 [Barserian].) He testified the RBA would negotiate the field price and enter into contracts with those processors/packers willing to do business with the RBA. (Tr. 46:17-48:16 [Barserian]; Ex. 3145 [form of contract of sale between the RBA and purchasing packer].) RBA grower members were then notified of the processors/packers that had entered into a contract with the RBA. According to Mr. Barserian, RBA

grower members could then select those processors/ packers to which they wanted to sell and enter into individual contracts. (Tr. 48:12-22 [Barserian].)

Although Mr. Barserian describes RBA grower members as being able to designate which packers off the list to which they want to sell, the form of contract of sale for the 2001-2002 season between the RBA and a purchasing packer indicates a grower member may simply indicate a preference as to which packer it wanted to deliver its products, but that "the Association agrees to sell to Packer . . . ." (Ex. 3145, ¶ 1(b) ("members' preferences respecting the packer to which they wish to deliver").) The form contract also addresses how a packer can indicate its preferences as to which grower members it receives product from, but makes no reference as to the packer actually purchasing from grower members. (Ex. 3145, ¶ 1(b).) Further, the individual contract between a grower member and packer is identified as one only "with respect to delivery of raisins," not with respect to the terms of sale of said raisins. (Ex. 3145, ¶ 3 (emphasis added))

In 1989, Vaughn Koligian took over as General Manager of the RBA until April of 2002. (Tr. 1831:4-10 [Koligian],) As such, he was the General Manager during the relevant 1997-98 season when the marketing order was approved. Mr. Koligian testified that in setting the field price and negotiating with packers, the RBA takes title to all of its members' raisins and that it is his understanding the RBA then sells those raisins to packers through a Master Agreement entered into between the RBA and the processors/packers. (Tr. 1832:4-1834:2 [Koligian].) Glen Gott), the CEO of the RBA from May of 2002 until at least the time of trial, also testified to his opinion that the RBA, in taking

title to members' raisins, sells those raisins to the processors/packers. (Tr. 2298:16-24 [Gato].)

There was evidence that the RBA also has the ultimate authority over to whom its grower members can deliver raisins to and that the RBA has diverted those raisins when it had concerns over the financial integrity of a processor/packer that had received RBA raisins. (Tr. 1834:23-1835:19, 1943:21-1944:19 [Koligian].) For those raisins that had been delivered to the at issue processor/packer, the RBA raised the matter in court and received a ruling for the sheriff of Fresno County to remove the raisins from the processor's/packer's property. (Tr. 1834:25-1835:19 [Koligian].)

While Plaintiffs argue the RBA is not a marketing association because it did not sell processed raisins during the relevant 1997-98 season, Plaintiffs provide no authority that a marketing association must engage in processing. Plaintiffs also argue the RBA cannot be both a bargaining association and a marketing association, but they have failed to set forth authority indicating a cooperative cannot operate as both. Plaintiffs further argue the RBA is not a marketing association because it holds seats as a bargaining association under the state and federal marketing orders. However, these orders only permit the RBA to represent itself in its capacity as a bargaining association because they limit marketing association seats to those associations that engage in the processing of raisins.

While there was evidence that around 1983-1984, the RBA board may have viewed itself as a bargaining, rather than a marketing association, as it directed Mr. Barserian to cease his efforts to establish and sell an RBA brand of raisins (the Valley Pride label) to

grocery stores (Tr. 54:1-7 [Barserian]; 1834:13-16, 1943:21-1944:19 [Koligian]), this is over ten years prior to the relevant season and, in light of the foregoing evidence, the Court is not persuaded this is significant.

Accordingly, the Court finds there was substantial evidence to support the Department's determination that the RBA was entitled to bloc vote as a marketing association and the Department, therefore, did not abuse its discretion. Based on the foregoing, the Court need not address the Department's argument regarding Plaintiffs purported failure to exhaust administrative remedies.

Plaintiffs' argument in the alternative That section 58999 is unconstitutional is not persuasive.

Plaintiffs then argue that even if the RBA was a marketing association, the vote was unlawful because section 58999 is facially unconstitutional as it results in unequal treatment between growers who choose to associate with the RBA and those who do not. Plaintiffs contend those who are associated with the RBA are given the right to a proxy vote while those who are not associated do not have the same right. Plaintiffs argue this implicates the fundamental right to vote and freedom of association. Accordingly, Plaintiffs argue review of section 58999 is subject to strict scrutiny and that the State has no interest in preferring the vote of one raising grower over another based on their association or lack thereof with the RBA.

The Department contends the standard is rational basis review, not strict scrutiny. In support, the Department argues both the United States Supreme Court and the Ninth Circuit Court of Appeals have

held that analogous bloc voting provisions in the federal marketing order context are subject to rational basis review and constitutional (see, e.g., *United States v. Rock Royal Co-op* (1939) 307 U.S. 553; *Cecelia Packing Corporation v. United States Department of Agriculture* (1993) 10 F.3d 616) and there is no reason for the Court to depart from these rulings.

In *Cecelia Packing*, a group of orange growers argued the bloc voting provision of the federal marketing order for Navel and Valencia oranges was unconstitutional. (*Cecelia Packing, supra*, at 618.) The plaintiffs challenged the provision permitting Sunkist Growers, Inc., a large agricultural cooperative, to bloc vote, and claimed the provision violated their equal protection rights. (*Id.* at 620.) The Ninth Circuit Court of Appeals stated:

> "Generally, 'legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.' (citation omitted.) We apply this deferential standard of review to social and economic legislation, because 'the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.' (citation omitted.) 'The general rule gives way, however, when a statute classifies by race, alienage, or national origin . . . . These laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.' (citation omitted.)" (*Cecilia Packing, supra*, at 624.)

The Ninth Circuit then explained the challenge at issue was subject to rational basis review, not strict

scrutiny, because "[w]here the elected officials do not exercise general governmental powers such as administering 'such normal functions of government as the maintenance of streets, the operation of schools, or sanitation, health, or welfare services,' (citation omitted) limitations on the election are not reviewed under strict scrutiny." (*Id.* at 624.) Rather, "voting in a referendum concerning a marketing order is not 'a bedrock of our political system' like voting in an election for national, state or local legislative representatives." (*Ibid*.) In applying the rational relationship test, the Ninth Circuit found the bloc voting provision was rationally related to a legitimate governmental purpose — that of promoting and stabilizing agricultural production by encouraging farmers to join cooperatives in order to market their products effectively. (*Cecelia Packing, supra*, at 625.)

The Court finds *Cecelia Packing* persuasive and is not persuaded by Plaintiffs that their fundamental right to vote is implicated. The vote does not involve the election of officials who will exercise general governmental power over the entire geographic area to be served to which the strict scrutiny standard would apply. (*Cecelia Packing, supra*, at 624.) Rather, the marketing order here, just as the federal marketing order in *Cecilia Packing*, has limited authority. The cases cited by Plaintiffs are distinguishable in that they involve disparate treatment in the voting context based on a protected class status (i.e., racial gerrymandering) or involve elections for positions that do in fact exercise general governmental functions (i.e., county commissioners or local primary elections). Further, the fact that the CMA states the "provisions of this chapter are enacted in the exercise of the police powers of this state for the purpose of protecting the health, peace, safety, and general welfare of the people

of this State" (Food and Agr. Code § 58653) does not transform raisin marketing into a general governmental power. The Court is also not persuaded that Plaintiffs' fundamental right of association is implicated. Section 58999 does not require Plaintiffs to associate with any particular group or limit their ability to express their views. Accordingly, the Court finds section 58999 should be subject to rational basis review. Under this standard, section 58999 is constitutional so long as it bears a rational relationship to a legitimate government interest.

In passing California's Cooperative Marketing Act, Food and Agriculture Code section 54001 *et seq*., the Legislature recognized that:

> "(a) Agriculture is characterized by individual production in contrast to the group or factory system that characterizes other forms of individual production.
>
> (b) The ordinary form of corporate organization permits industrial groups to combine for the purpose of group production and the ensuing group marketing, and the public has an interest in permitting farmers to bring their industry to the high degree of efficiency and merchandising skill evidence in the manufacturing industries.
>
> (c) The public interest urgently needs to prevent the migration from the farm to the city in order to keep up farm production and to preserve the agricultural supply of the nation.
>
> (d) The public interest demands that the farmer be encouraged to attain a superior and more direct system of marketing in the

> substitution of merchandising for the blind, unscientific, and speculative selling of crops."

(Food and Agr. Code § 54032.)

The foregoing illustrates the California Legislature, in passing the Cooperative Marketing Act, wanted to permit farmers to associate in order to increase agricultural efficiency and marketing, prevent migration from the farm to the city, and preserve the agricultural supply of the nation. Such purposes constitute legitimate government interests.

Section 58999, in turn, permits those farmers who have joined together to authorize their marketing cooperative to determine, on their behalf, whether a marketing order would benefit the industry. This encourages growers to join cooperatives, thereby furthering the legitimate government interest of increasing agricultural efficiency and marketing. Accordingly, section 58999 is rationally related to a legitimate government interest.

The marketing order does not violate Plaintiffs' free speech rights as the speech constitutes government speech.

Plaintiffs contend the California Raisin Marketing Board ("CRMB") program violates its right to free speech and does not qualify as government speech.

The validity of this type of commodity advertising, under the California and federal Constitutions, has been addressed by both the California Supreme Court and United States Supreme Court.

First, in *Gerawan Farming v. Kawamura* (2004) 33 Cal.4th 1 (*Gerawan II*), the California Supreme Court stated:

> "Because we conclude that this case must be remanded for further factfinding, the government will have an opportunity to prove that the speech at issue was in fact government speech . . . . In the present case, the marketing board is comprised of and funded by plum producers, and is in that respect similar to the State Bar. But, as United Foods suggests, the speech may nonetheless be considered government speech if in fact the message is decided upon by the Secretary or other government official pursuant to statutorily derived regulatory authority. Because there are factual questions that may be determinative of the outcome-for example, whether the Secretary's approval of the marketing board's message is in fact pro forma, whether the marketing board is in de facto control of the generic advertising program, and whether the speech is attributed to the government-this issue cannot be resolved on the pleadings and requires further factfinding." *(Gerawan II*, 33 Cal.4th at 28.)

Thereafter, the validity of commodity advertising under the federal Constitution came before the United States Supreme Court in *Johanns v. Livestock Marketing Assn.* (2005) 544 U.S. 550. In *Johanns*, the United States Supreme Court held that where commodity advertising is authorized and the basic message is prescribed by statute and where its content is overseen and subject to the control of a politically accountable official, it is government speech, and whether the funds for such promotions are raised by general taxes or through a targeted assessment, citizens have no free speech right not to fund such government speech. (*Johanns*, 544 U.S. at 562-63.)

The reasoning in *Johanns* has been recently followed by the Third District Court of Appeal in *Gallo Cattle Company v. Kawamura* (2008) 159 Cal. App. 4th 948, which concerned issues very similar to those presented here. *Gallo* concerned the constitutionality, under the California Constitution's right to freedom of speech, of use of milk producer assessments, authorized by statute, for generic advertisement to stimulate sales of milk. In *Gallo*, the Court of Appeal reiterated the holding in *Johanns* that speech is government speech if (1) the speech is authorized and the basic message is prescribed by statute; and (2) the program's content is subject to the control of a politically accountable official. (*Gallo, supra*, at 952.)

The Court will follow the reasoning of *Johanns* and *Gallo* in applying the California Constitution's freedom of speech clause to the raising marketing order, Thus, to be valid government speech, the message must be prescribed by statute and the content overseen and controlled by a politically accountable government official, in this case, the Department. The Court rejects Plaintiffs' argument that there is an additional requirement that to be government speech it must be attributed to the government. *Johanns* rejected this requirement as did *Gallo.*

The Court also reviewed the parties' discussion regarding the recent United States Supreme Court decision in *Metal v. Tam* (2017) __ U.S. __, 137 S. Ct. 1744 and finds it inapposite. *Metal* addressed whether an anti-disparagement provision the federal trademark registration laws violated the free speech provision of the federal Constitution. *Matal* concluded registration did not transform a trademark into government speech. In reaching this conclusion, *Matal* cited to, but distinguished *Johanns.* The United States

Supreme Court stated "[t]he Government's involvement in the creation of these beef ads bears no resemblance to anything that occurs when a trademark is registered." (*Metal, supra*, at 1759.) The Supreme Court continued "the federal registration of trademarks is vastly different from the beef ads in *Johanns,* . . ." (*Id.* at 1760.) The Court finds nothing in *Matal* that changes the precedent of *Johanns* or *Gerawan II*.

Applying the foregoing principles, the Court disagrees with Plaintiffs' claim that the "basic message" is not prescribed by statute. The raisin marketing order was issued pursuant to the same statute as the milk marketing order in Gallo. The Third District Court of Appeal in *Gallo* found this authorization was sufficient and the Court sees no reason to distinguish the marketing order at issue here. Accordingly, the raisin marketing order was "prescribed by statute."

The issue then is whether the Department exercised sufficient oversight and control over the message for it to qualify as government speech.

Plaintiffs contend the requisite control is not present because the CRMB message was established by the raisin industry, not the State, and the Department did little more than attend the meetings to observe the operation of the CRMB, reserving at most an arbitrary power of veto. Accordingly, Plaintiffs contend the speech is truly that of a private industry group, not government speech. The Court is not persuaded.

The representatives of the Department regularly attend CRMB meetings at which CRMB's advertising and promotional campaigns are presented. (Tr. 2343:23-2346:11 [Robert Maxie, Chief of the market-

ing branch at the Department]; Tr. 2160:25-2161:6 [Kriebel]; Tr. 389:4-7 [Yost].) While the Department may not have approved the actual language of all of the CRMB's brochures and advertisements, the Department did approve the advertising concepts. (Tr. 455:11-19, 481:20-485:2, 550:2-12 [Yost].) Further, actual ad copy was at times presented at the CRMB meetings, and copies of those presentations were attached to the minutes. (Tr. 2343:23-25, 2345:11-2346:3 [Maxie]; Ex. 1185, Attachment A.) The Department requires the campaign to be truthful, in good taste, not disparaging, and consistent with the CMA. (Ex. 1038, p. M-2.)

The Department also exercises final approval of the program. (Tr. 2343:23-2346:11 [Maxie]; Tr. 550:17-551:11 [Yost]; Ex. 2001, p. 16, Art. VII, § A (marketing order provides that all powers granted to the CRMB are subject to the Department's approval).) If the Department does not approve a program, the CRMB must cease that program. For example, the "Let's Keep it Real" campaign was disapproved by the Department because it did not comply with departmental policy and the program could not continue, (Exs. 2039, 2040, 2041.)

In addition, the Department had general control over the CRMB. For example, the Department appoints the members of the CRMB pursuant to section 58841, can remove board members, and has exercised this power. (TR. 2339:26-2240:2, 2341:3-12 [Maxie]; Ex. 1047.) The Department controls the CRMB's budget and assessment rates and requires annual financial audits. (Tr. 582:28-583:6, 2347:7-20 [Maxie]; Exs. 1064-1069, 3165, 3168-3174.) The Department oversees the CRMB's compliance with the Bagley-Keene Open Meetings Act (Tr. 2350:21-2351:27 [Maxie]) and

also has the authority to determine grievances and complaints raised against the CRMB. (Ex. 2001, Art. VII, p. 16 (marketing order); Ex. 1039, pp. 11, 21 (CRMB 1999 Policy Manual); Ex. 1038, pp. A-9 to A-10.)

Based on the foregoing, the Department had sufficient oversight and control over the CRMB and its advertising messages for the speech to qualify as government speech. The Department oversees the program, appoints and dismisses key personnel, and retains absolute veto power over the advertisements' content. As a result of this determination, the Court finds it unnecessary to address Plaintiffs' argument that the private speech is also unconstitutional because it does not pass intermediate scrutiny under the *Central Hudson* test.

Further, Plaintiffs' argument that the marketing order violates its free association rights is rejected. Plaintiffs cite to *United States v. United Foods, Inc.* (2001) 533 U.S. 405, in support, but *United Foods* is inapposite as the decision was made based on the assumption that the advertising was private speech, not government speech. (*Johanns, supra*, at 558.) Here, the Court has found the advertising to be government speech.

Plaintiffs' administrative complaints that the Department failed to equally promote and not disparage dried on the vine ("DOV") raisins fails because the CRMB advertisements generically promoted all California raisins.

Plaintiffs contend the Department failed to equally promote and disparaged its dried on the vine ("DOV") raisins in violation of Article Ill, Section F, Varietal Benefits, of the marketing order.

Article III, Section F of the marketing order provides: "To the extent practicable, the Board shall plan its activities to provide to each variety in proportion to the assessments paid by producers of the variety."

Plaintiffs argue the CRMB marketed "California Raisins" as coming only from sun-dried Thompson and being dried on the ground ("DOG") and that all of the pictorial references in CRMB materials emphasized the DOG method. They contend the phrase "Thompson Seedless Grapes make the best California raisins" was a unifying theme of CRMB materials. In turn, Plaintiffs argue that because many customers did not want to buy raisins that were not "California Raisins," the implication was that Plaintiffs' DOV raisins were inferior and that, as a result, Plaintiffs began to lose customers and revenue and had to expend extra efforts to market its products. Plaintiffs argue that pitting DOG and DOV against one another is inimical to what a generic advertising program is supposed to be doing.

The evidence does not support Plaintiffs' contentions. While the phrase "Thompson Seedless Grapes make the best California raisins" was used in a promotional blurb in a brochure and posted in a few places on the Board's approximately 1,260-page website (1349:1-1350:20 [Blagg]), there was substantial evidence that the advertising program as a whole is a generic program that focuses on the benefits and uses of all California raisins, without any references to particular brands or sellers. For example, Professor Sexton reviewed the CRMB advertising program and found the materials generically promoted the virtues of California raisins. (Tr. 2464:16-2466:18 [Professor Sexton].) Professor Sexton also testified that reference to Thompson seedless grapes did not prevent the

program from being generic given the context in the industry that Thompson seedless grapes are about 90 percent of the industry's production and Fiesta has become more prevalent only recently. (Tr. 2521:23-2522:16 [Professor Sexton].) Professor Kaiser also testified that the program increased demand for California raisins, not any particular type or variety. (Tr. 2592:16-26 [Professor Kaiser].) John Keys, General Manager of the advertising agency MeringCarson who oversaw the agency's account with the CRMB, testified that the advertising focus was to reposition raisins as a more vibrant, newer product and the advertising materials focused generally on California raisins. (Tr. 2414:4-2416:26, 2419:16-2420:12 [Keys]; Ex. 3161; Ex. 3146 ("Love Your Raisins" ads).)

Further, while some of the CRMB's web pages and brochures refer to Thompson seedless raisins and mention tray drying without also mentioning DOV, the materials containing these references were a very small part of the materials and have since been updated to change the term "Natural Thompson Seedless" to the more current term, "Natural Seedless," and to include DOV methods of drying together with tray drying. (Tr. 692:8-21 [Maxie]; 1349:1-1350:20 [Larry Blagg, Senior VP of Marketing for the Raisin Administrative Committee].) These modified references include DOV raisins as the USDA considers all DOV raisins to be within the Natural Seedless varietal type for marketing purposes. (7 C.F.R. § 989.110 [defining Natural (sun-dried) Seedless raisins as "all sun-dried seedless raisins possessing similar identifiable characteristics as raisins produced from Thompson Seedless grapes or similar grape varieties, whether dried on trays or on the vine . . . "].)

Of additional relevance here is also what the term "variety" was intended to mean under the marketing order. There is evidence that the reference to "variety" in Article Ill, Section F of the marketing order was intended to relate to the varietal types specifically defined in the order, and the order does not specifically enumerate DOV as a variety. (Tr. 1989:10-1991:19 [Koligian]; 2083:19-2085:11 [Kriebel).}.

Accordingly, the Court is not persuaded that the Department failed to equally promote and/or disparaged Plaintiffs' DOV raisins.

The Department is not required to consider reasonable alternatives to the marketing order.

Plaintiffs finally contend the Department failed to consider reasonable alternatives to the marketing order. The Court rejects this argument as Plaintiffs have failed to cite to any legal authority mandating the Department to consider reasonable alternatives before Issuing a marketing order.

While Plaintiffs cite to section 58813, this section does not mandate the consideration of reasonable alternatives before issuing a marketing order. Section 58813 provides: "If the marketing order or amendments to it contain provisions only for the purpose of regulating the flow of the commodity, or any grade, size, or condition of the commodity, to market without directly restricting the total quantity which may be marketed during the marketing season, . . . , the director may issue such marketing order or amendments to it if he makes all of the following findings:

> (a) That such marketing order or amendments to it are reasonably calculated to attain the objectives which are sought in such marketing order.

> (b) That such marketing order or amendments to it are in conformity with the provisions of this chapter and within the applicable limitations and restrictions which are set forth in this chapter and will tend to effectuate the declared purposes and policies of this chapter.
>
> (c) That the interests of consumers of such commodity are protected in that the powers of this chapter are being xercised only to the extent which is necessary to attain such objectives." (Food & Agr. Code § 58813.)

Second, the cases cited by Plaintiffs in support do not arise under the CMA and are inapposite. Accordingly, the Court is not persuaded and rejects this argument.

Conclusion

The Court has considered the evidence and claims as set forth above and made its determinations. Based on those decisions, IT IS HEREBY ORDERED:

1. That Plaintiffs taking nothing by way of their complaint; and
2. The Department is entitled to judgment entered in its favor on all causes of action alleged against it.

The Department is directed to prepare an appropriate judgment in this matter, provide it to Plaintiffs' counsel for review pursuant to California Rules of Court, Rule 3.1312, and then submit it to the Court for signature.

IT IS SO ORDERED.

August 31, 2017

/s/ Raymond M Cadei
Hon. Raymond M. Cadei
Judge of the Superior Court

/n

[1] Neither party has submitted supplemental briefing post-remand on the issue of the Department not engaging in proper oversight of the CRMB activities. Therefore, this issue no longer appears to be in dispute or before the Court.

APPENDIX E

STATE OF CALIFORNIA
DEPARTMENT OF FOOD AND AGRICULTURE
MARKETING BRANCH

MARKETING ORDER
FOR CALIFORNIA RAISINS

Effective July 28, 1998

MARKETING ORDER FOR CALIFORNIA RAISINS

Contents

MARKETING ORDER FOR CALIFORNIA RAISINS

PREAMBLE

California raisins are one of the major specialty crops produced in the state. The production and marketing of raisins affects the welfare, standard of living and health of a large number of citizens residing in the state. In addition, a large portion of this crop is exported which positively affects the California economy and the U.S. balance of trade. The inability to maintain or expand present markets, or to develop new or larger markets results in an unreasonable and unnecessary waste of the agricultural wealth of this state. It is therefore in the public interest for the producers of California raisins to establish a California Raisin Marketing Board to conduct market development activities to improve the demand for all categories of raisin usage, including, ingredient usage and for retail packages, both branded and private label.

ARTICLE I - DEFINITIONS

Section A. DEFINITION OF TERMS.

As used in this Marketing Order the following terms shall have the following meanings:

1. Act" means the California Marketing Act of 1937, Chapter 1 (commencing with § 58601) of Part 2, of Division 21 of the California Food and Agricultural Code.
2. "Acquire" means to purchase or otherwise obtain legal title to raisins from a producer or from a person or agency, governmental or private, that represents a producer or producers, or receives raisins from a producer for processing or custom packing.

3. "Books and Records" means any books, records, contracts, documents, memoranda, papers, correspondence, or other written or magnetically stored data of any person, and pertaining to matters relating to this Marketing Order.

4. "California Raisin Marketing Board" or "Board" are synonymous and mean the California Raisin Marketing Board created pursuant to Article II of this Marketing Order.

5. "Cooperative Bargaining Association" means a nonprofit cooperative association of raisin growers engaged in this state in bargaining with packers as to price and otherwise arranging for the sale of raisins of its members.

6. "Cooperative Marketing Association" means a membership association of growers which markets more than fifty percent (50%) of its raisins on a cooperative basis for its grower members.

7. "Department" means the California Department of Food and Agriculture.

8 "Dipped Seedless Raisins" includes all raisins produced by artificial dehydration of seedless grapes that possess the characteristics similar to Thompson Seedless grapes which, in order to expedite drying, have been dipped or sprayed with water only after the grapes have been removed from the vine.

9. "Golden Seedless Raisins" includes all seedless raisins whose color generally varies from golden yellow to dark amber.

10. "Marketing Order for California Raisins" and "Marketing Order" are synonymous and mean, this Marketing Order which is issued by the

Department pursuant to the Act, and shall be applicable throughout the state of California.

11. "Marketing Season" and "Fiscal Year" are synonymous and mean the period beginning on August 1 of any year and extending through July 31 of the following year.

12. "Member" means any person appointed by the Department to serve on the Board established pursuant to Article II.

13. "Monuka" includes all raisins produced from Monuka grapes.

14. "Muscats" (including other raisins with seeds)" include all raisins which usually contain seeds and possess characteristics similar to Muscat raisins.

15. "Natural Condition Raisins" means raisins, the production of which includes sun-drying or artificial dehydration, but which have not been further processed to a point where they meet any of the conditions for processed raisins, as defined in this Article.

16. "Natural (sun-dried) Seedless Raisins" includes all sun-dried seedless raisins that possess characteristics similar to Natural Thompson Seedless raisins which, for the purpose of expediting drying, have not been dipped in or sprayed with water, with or without soda, oil or other chemicals prior to or during the drying process.

17. "Oleate and Related Seedless" includes all raisins produced by sun drying or artificial dehydration of seedless grapes which, in order to expedite drying, are dipped in or sprayed

with water with soda, oil, Ethyl Oleate, Methyl Oleate or any other chemicals either while the grapes are on the vine or after they have been removed from the vine.

18. "Other Seedless" includes all raisins produced from Ruby Seedless, Kings Ruby Seedless, Flame Seedless and other seedless grapes not included in any of the varietal categories for seedless raisins defined elsewhere in this Article.

19. "Other Varieties" includes any variety identified by the Board and not otherwise defined elsewhere in this Article.

20. "Person" means any individual, firm, corporation, company, association or any other business unit.

21. "Processed Raisins" means raisins which have been stemmed, graded, sorted, cleaned, or seeded, ready for placing in any container used by processors in the marketing and distribution of raisins.

22. "Producer" means any person engaged within the state in the business of producing or causing to be produced for market natural conditional raisins as defined in this Article.

23. "Processor" or "Packer" means any person engaged within the state in the processing operations of receiving, stemming, grading, sorting, cleaning, seeding, packing, or otherwise preparing raisins for marketing in any form. It does not include a person who only packages for market (with or without additional preparation) raisins which in the hands of a previous holder,

have been inspected and certified as meeting the applicable minimum grade standards for processed raisins.

24. "Raisins" means grapes of any variety, grown in this state, from which a significant part of the natural moisture has been removed by sun drying or artificial dehydration, either prior to or after the grapes have been removed from the vine.

25. "Sultana" includes all raisins produced from Sultana grapes.

26. "Zante Currant" includes all raisins that possess characteristics similar to those produced from Black Corinth or White Corinth grapes.

ARTICLE II – CALIFORNIA RAISIN MARKETING BOARD

Section A. ESTABLISHMENT AND MEMBERSHIP.

1. The California Raisin Marketing Board ("Board"), shall consist of fifteen (15) members to assist the Department in the administration of this Marketing Order. Thirteen (13) members shall be producers or persons authorized by producers to represent the producers' interests, one (1) member shall represent the largest cooperative bargaining association; and one (1) member having no financial interest in the production, processing or marketing of raisins shall be appointed to represent the general public.

2. There shall be an alternate member for each member of the Board, whose qualifications are subject to Paragraph 1 of this Section.

3. The members and alternate members shall be appointed by the Department from nominations

received from those directly affected by the terms of this Marketing Order for that purpose.

4. Term of Office.

   a. The regular term of office of members and alternate members shall be two (2) years and shall begin on June 1 and end on May 31. Members and alternate members shall continue to serve until their successors have been selected, appointed and qualified.

   b. Notwithstanding any other provision of this Marketing Order, the initial term of office of members and alternate members shall be from the date of appointment after the effective date of this Marketing Order through May 31, 1999, or until successors are selected, appointed and qualified.

   c. Prior to the nomination, selection, appointment and qualification of the initial Board, the Department shall act as the Board in a caretaker capacity, receiving, holding, and depositing any assessment collected. Any funds in the Department's possession under this subparagraph shall be turned over to the initial Board once it is duly appointed.

5. Members and alternate members of the Board shall be appointed from nominations received as follows:

   a. Cooperative Marketing Associations. Members and alternate members shall be appointed to represent the producer members of any cooperative marketing association organized and operating under the applicable laws of the State of California, engaged

in the processing of raisins, and which received for processing or processed not less than ten percent (10%) of the total quantity of raisins received from producers for processing or processed by all packers, during the last completed marketing season. The number of members and alternate members each association which received for processing or processed not less than ten percent (10%) may nominate shall be determined by multiplying the thirteen producer members by the percentage of all raisins received by the association from its member producers for processing or processed of all raisins received for processing or processed by all packers during the last completed marketing season, rounded to the nearest whole number.

b. Cooperative Bargaining Associations. Members and alternate members shall be appointed to represent the producer members of any cooperative bargaining association organized and operating under the applicable laws of the State of California and whose members delivered not less than ten percent (10%) of the total quantity of raisins delivered to packers for processing. The number of members and alternate members each association may nominate shall be determined by multiplying the thirteen (13) producer members by the percentage of raisins delivered to packers for processing by the cooperative bargaining association members of all raisins delivered to packers for processing by the packers for processing by all producers during the last completed

marketing season, rounded to the nearest whole number.

c. Other Producers. The remaining producer members and alternate members shall be appointed from nominations received from producers who have no affiliation with any entity submitting producer nominations pursuant to Subparagraph (a) or Subparagraph (b).

Section B. NOMINATION FOR BOARD MEMBERSHIP.

1. Producer Members.

   a. Nominations made pursuant to Subparagraphs 5 (a) and 5 (b) of Section 1 of this Article shall be submitted to the Department prior to May 1 of each odd-numbered year.

   b. The Department shall call a meeting prior to May 1 of each year, to receive nominations made pursuant to Subparagraph 5 (c) of Section 1 of this Article.

2. Bargaining Association Member. The cooperative bargaining association entitled to a seat on the Board pursuant to Subsection 1 of this Section shall submit its nominations for member and alternate member to the Department prior to May 1 of each odd-numbered year.

3. Public Member. The Board shall submit nominations for the public member and alternate member to the Department prior to June 15 of each odd-numbered year.

Section C. APPOINTMENT OF MEMBERS OF THE BOARD.

1. From the nominations submitted pursuant to Subsection B (1) of this Article, the Department shall select and appoint thirteen producer members and their respective alternates.
2. From the nominations submitted pursuant to Subsection B (2) of this Article, the Department shall select and appoint a member and alternate member.
3. From the nominations submitted pursuant to Subsection B (3) of this Article, the Department shall select and appoint a member and alternate member.

Section D. FAILURE TO NOMINATE. In the event nominations are not made as set forth in this Article, the Department is authorized to select and appoint members and alternate members without regard to nominations, provided, that the persons so selected shall represent the classifications prescribed in Section A of this Article.

Section E. QUALIFICATION AFTER APPOINTMENT. Any person selected and appointed by the Department as a member or alternate member shall qualify by filing with the Department a written acceptance and other documents as may be required.

Section F. ALTERNATE MEMBERS OF THE BOARD. An Alternate member of the Board shall, in the absence of the member for whom they are an alternate, sit in the place and stead of the member and shall have all the rights, privileges, powers, and duties of the member. In the event of the death, removal, resignation, or disqualification of a member, the

alternate member shall act in the place and stead of the member until a successor is appointed and has qualified.

Section G. VACANCIES. To fill any vacancy on the Board, a successor for the unexpired term may be appointed from nominations made as set forth in Section B of this Article.

Section H. ORGANIZATION AND PROCEDURES OF THE BOARD.

1. The Board shall select a Chair, Vice-Chair, Secretary and other officers deemed reasonably necessary from its membership, and may adopt rules for the conduct of its meetings and functions as may be deemed desirable and necessary.
2. A quorum of the Board shall be fifty-one percent (51%) of the number of members appointed, including alternate members acting in the place and stead of members. The Board may continue to transact business at a meeting at which a quorum is initially present, notwithstanding the withdrawal of members, provided any action taken is valid only upon a vote consistent with the requirements of Paragraph 3 of this Section.
3. No action of the Board shall be valid except by a majority vote of the required quorum provided, however, that on fiscal matters, eight (8) members shall be required to validate an action of the Board.
4. No meeting of the Board, its committees or subcommittees shall be held except upon notice given pursuant to the requirements of the

Bagley-Keene Open Meeting Act (Government Code Section 11120, et seq.)

Section I. COMMITTEES. The chair shall be authorized to appoint committees as may be deemed necessary to assist the Board and the Department in performing duties authorized pursuant to this Marketing Order.

Section J. EXPENSES. The members and alternate members shall be reimbursed for necessary expenses incurred, and approved by the Board, in the performance of their duties and in the exercise of their powers hereunder.

Section K. DUTIES AND POWERS OF THE BOARD. Subject to the Department's approval, the Board is authorized to:

1. Administer the provisions of this Marketing Order.
2. Recommend and report to the Department administrative rules and regulations relating to this Marketing Order.
3. Receive and report to the Department complaints of violations of this Marketing Order.
4. Recommend to the Department amendments to this Marketing Order.
5. Assist the Department in the assessment of members of the industry and in the collection of assessments to cover expenses incurred by the Board and the Department in the administration of this Marketing Order.
6. Assist the Department in the collection of necessary information and data as the Board or

the Department deem necessary for the proper administration of this Marketing Order and the Act.

7. Keep minutes, books, and records which clearly reflect all of its meetings, acts, and transactions. Copies of all meeting minutes shall be provided to the Department and the minutes, books, and records shall at all times be subject to the examination of the Department or duly authorized representative.

8. Employ necessary personnel to serve at the pleasure of the Board, and to fix their compensation and terms of employment.

9. Incur expenses, to be paid from assessments collected pursuant to Article V of this Marketing Order, as necessary and proper to enable the Board to perform its duties.

10. Receive, invest and disburse funds.

11. Establish offices, incur expenses, enter into contracts and agreements, and create liabilities and borrow funds in advance of receipt of assessments.

12. Utilize state, federal funds or other public funds, including the utilization through the use of matching funds, that may be available to conduct the activities authorized by this Marketing Order.

13. Administer, if requested by an advisory board, a board of directors or other authorized agent of a governmental program, any governmental program directly affecting California raisins; which program shall then be subject to the

terms and conditions set forth in this Marketing Order.

14. Present facts and information to, and negotiate with local, state, federal and foreign agencies on matters which affect the California raisin industry.

Section L. LIMITATION OF LIABILITIES OF BOARD MEMBERS, COMMITTEE MEMBERS AND EMPLOYEES. The members, alternate members, employees of the Marketing Board and members of any committees duly appointed pursuant to this Marketing Order shall not be held responsible individually in any way whatsoever for error in judgment, mistakes, or other acts, either of commission or omission, as principal, agent, person, or employee, except for their own individual acts of dishonesty or crime. No member, alternate member, employee of the Board or committee member shall be held responsible individually for any act or omission of any other member, alternate member, employee of the Board, or committee member. The members, alternate members, or employees of the Board and members of any committees duly appointed pursuant to this Marketing Order are not responsible individually in any way whatsoever to any person for liability on any contract or agreement of the Board.

Section M. CONFLICT OF INTEREST. The members and alternate members of the Board and members of any committees appointed pursuant to this marketing order are intended to represent and further the interest of the California raisin industry, which is intended to serve the public interest. Accordingly, the Legislature finds that, with respect to members, alternate members and members of any committee appointed pursuant to this Marketing Order, the

California raisin industry is tantamount to, and constitutes, the public generally within the meaning of Section 87103 of the Government Code.

ARTICLE III – ACTIVITIES

Section A. RESEARCH. The Board may conduct and contract with others to conduct research, including, but not limited to, the study, analysis, dissemination and accumulation of information as follows:

1. Producer Production Research may include, but is not limited to, research activities directed toward reducing the costs of production, and increasing raisin quality, research regarding water, soils, pests, chemical usage, integrated pest management, organic growing methods, soil and water conservation, harvesting technology, compliance with governmental regulations, and any other production related research.

2. Post-Harvest Research may include, but is not limited to, research activities directed toward improving the handling, storing, packaging, and shipping of raisins, research regarding measurements of raisin quality, raisin reconditioning, fumigation, use of controlled atmospheres, additives, residues, pest control, inspection, compliance with governmental regulations, and any other post-harvest handling, processing, storage or shipping activities.

3. Nutrition Research may include, but is not limited to, research activities directed toward improving human nutrition through discovering or improving the dietetic value of raisins and products containing raisins, research directed toward understanding and changing nutritional behavior as regards raisins and

products containing raisins and any other diet or nutrition activities.

4. Food Processing Research may include, but is not limited to, research activities directed toward increasing the use and consumer acceptance of raisins, raisin paste and raisin juice concentrate in manufactured foods.

5. Market Research may include, but is not limited to, research activities directed toward improving knowledge about new and existing markets for raisins, and raisin products, sales, distribution, purchase, consumption and usage of raisins, products containing raisins or related products, studies of attitudes and beliefs which may affect the sales, usage or consumption of raisins, research measuring the effectiveness of specific marketing or communications activities of the Board and any other market activities.

Section B. COMMUNICATIONS. The Board may conduct and contract with others to conduct communications activities designed to inform, educate and instruct the public regarding the production, availability, uses, healthful properties or other information regarding raisins as follows:

1. Consumer Education:

   a. In North American markets (the United States and Canada), communications plans and activities designed to inform the general public about the production, availability, uses, healthful properties, or other information regarding raisins and products containing raisins, through means generally known as publicity, public relations, events marketing, and advertising without re-

striction as to media type. The Board may develop and prepare in-store point of sale materials. The in-store point of sale materials may be used in either of the following methods: (1) The Board, directly or indirectly may inform retailers of the existence of the in-store point of sale materials and request the retailers to contact their packers for details regarding the use and availability of the materials: or (2) Packers may directly or indirectly, inform retailers of the availability of in-store point of sale materials and make arrangements for their use. In-store point of sale materials may be shipped to retailers by packers, or by the Board, directly or indirectly, upon the request of a packer.

b. In all other markets, communications plans and activities designed to inform the general public about the production, availability, uses, healthful properties, or other information regarding raisins and products containing raisins, through means generally known as publicity, public relations, events marketing, and advertising without restriction as to media type. In addition the Board may directly or indirectly contact retailers and put on display at the retailer level, point of sale materials, made available to the industry as a whole, provided that no monies are paid directly or indirectly to retailers or wholesalers in accordance with the provisions of Section A of Article IV.

2. Trade Communications, including, but not limited to, Communications plans and activities

of any type directed toward North American and export non-consumer buyers of raisins and raisin products, including, but not limited to, manufacturers, resellers, retailers, brokers, distributors, wholesalers and food service market segments. Trade advertising using purchased media and commissioned advertising time may be employed.

3. Market Development Activities including, but not limited to, activities not specified in Paragraphs 1 and 2 of this Section, travel and meetings for the purpose of expanding existing markets or developing new markets.

4. Industry Relations:

   a. Activities involving related industry trade groups and associations, or directed toward members and other participants in these groups, including, but not limited to conventions, seminars and trade shows.

   b. Publication and distribution of bulletins, newsletters or other communications for disseminating information relating to the raisin industry and its activities to raisin producers, packers and other individuals.

Section C. PRODUCT IDENTITY. The Board may create, or contract with others to create, distinctive logos, slogans, music, lyrics, audio, video-graphic or other communications devices for the purposes of communicating about and identifying California raisins and products containing California raisins. These devises may be used by the Board as trade or service marks, or to create a distinctive sound or look, and may be protected by the Board by registration or copyright. All communication devices are the property

of the Board. The Board may choose to restrict the use, and to license these devices, as it determines to be in the best interest of the California raisin industry, subject to the provisions of Article IV. It is intended that the devises be used for identification or endorsement.

Section D. DISSEMINATION OF INFORMATION. Upon a request from any person directly affected by this Marketing Order, the Board shall provide a copy of any research report or other work product resulting from the activities undertaken pursuant to this Article. No proprietary information, including, but not limited to names and addresses of producers, or packers, individual quantities produced or packed, prices paid, and commercial and trade secrets, shall be disclosed to any person pursuant to this Section.

Section E. PARTICIPATION IN BOARD PROGRAMS. All activities of the Board pursuant to this Marketing Order shall be equally available to all producers and packers of California raisins and no producer or packer shall be charged for, nor subjected to any minimum requirement in order to participate in any program or event undertaken pursuant to this Article.

Section F. VARIETAL BENEFITS. To the extent practicable, the Board shall plan its activities to provide benefit to each variety in proportion to the assessments paid by producers of the variety.

ARTICLE IV – PROHIBITIONS AND RESTRICTIONS

The activities undertaken by the Board shall comply with the following:

Section A. There shall be no credit backs, reimbursements, or payment or partial payment for the activ-

ities of any producer or packer, or any of their customers, distributors, wholesalers, retailers, or any other person acting in concert with the producer or packer, including, but not limited to, advertising, promotion, marketing, communications, media or public relations, whether undertaken directly or through agents, employees or representatives. Except as expressly provided for in Subsection B (1) of Article III, assessments collected pursuant to this Marketing Order shall not be used in any way to compensate, directly or indirectly, any retailer, wholesaler, or other person for trade merchandising of any kind, including, but not limited to, in-store displays, feature advertisements, listing fees, temporary price reductions, or store mailers. Assessments shall not be used to reimburse or otherwise compensate packers or their agents, representatives of employees for trade show expenditures.

Section B. The Board shall not engage, directly or through its employees, agents or representatives, in the sales or direct selling of raisins or raisin products, including, but not limited to, selling, taking or receiving orders, invoicing or otherwise arranging for the distribution of raisins or raisin products, whether for the Board or any other person. Nothing in this section shall be construed as a limitation on the ability of members representing individual processors from utilizing their employees, agents, representatives or brokers to present raisin industry marketing programs to the retail trade or to sell raisins or raisin products. This section shall not prevent the Board from giving raisins to any person free of charge.

Section C. The Board shall have the sole authority over the use of any and all intellectual property owned or controlled by the Board, including, but not limited

to, the California Dancing Raisins characters and the California Raisins logo or seal. The Board shall control the use pursuant to a written license agreement in accordance with the terms of this Marketing Order.

1. No exclusive rights to use such trademarks, service marks or copyrights shall be given, sold or otherwise transferred to any person for use on or in conjunction with raisins or raisin products.
2. Any and all use shall be available upon the same terms and conditions to:
    a. All packers of raisins
    b. All manufacturers of food products which use raisins or raisin products.
3. Any character, logo or seal shall always be less prominent than the proprietary brand used by the packer or manufacturer on the package, printed material or advertising of the packer or manufacturer. The placement or use of the character, logo or seal shall be separate and distinct from the brand used by the packer or manufacturer.
4. No character, logo or seal may be used in a way that would imply that the character, logo or seal is a packer's or a manufacturer's brand name or logo.
5. All licenses shall be in writing and shall require the licensee to abide by the terms of Articles III and IV of this marketing order.
6. Any license agreement entered into pursuant to this Article shall permit the use of the intellectual property owned or controlled by the Board in conjunction with the licensee's own

brand or trade mark and other brand or trade marks on food products containing California raisins, provided, the use is consistent with the restrictions set forth in this Article.

Section D. In addition to the restrictions set forth in Section C of this Article, the Board's authority to license the use of the California Dancing Raisins characters or California Raisins logo or seal on packages of California raisins, California raisin products and food products which contain California raisins or California raisin products shall be limited as follows:

1. Placement shall be on no more than two locations on the package.
2. Placement shall be only once on any panel.
3. The size of the character, logo or seal shall be no greater than three quarters of one inch (3/4') in height and no more than three quarters of one inch (3/4") in width, except that where the principal display panel (or front of the package) is greater than four inches (4") in height and width, the character, logo or seal may be up to twenty percent (20%) of the height and width of the principal display panel (or front).
4. Placement of the character, logo or seal on the principal display panel shall be in only one of the four (4) corners. A "corner" shall be defined as within the area from any side or end of the principal display panel which is no more than twenty-five percent (25%) of the height and twenty-five percent (25%) of the width of the principal display panel.

Section E. To encourage advance planning and the solicitation of input, the Board shall cause a descrip-

tion of all planned advertising and promotional activities to be distributed to those producers and packers of California raisins who have indicated an interest in receiving the information, at least six (6) months prior to the scheduled date of execution of the planned activities for the North American market, and four (4) months for planned activities for other markets. The Board may however, implement, without providing the prior notice otherwise required by this Section, activities in response to unanticipated or unforeseen circumstances, including, but not limited to, issues involving food safety, and international trade.

Section F. Annually, and prior to the adoption of any plan for activities to be undertaken pursuant to Article III, the Board shall prepare or cause to be prepared, a report containing a review of all advertising and promotion plans implemented during the immediately preceding marketing season. The report shall include, but not be limited to, the following information:

1. An overview of all activities undertaken during the period covered by the report.
2. A summary of each plan element accompanied by the stated objective for the element.
3. A summary of all efforts implemented to measure the degree to which the stated objectives have been achieved.
4. An analysis of actions that can be taken to improve future performance.
5. An overview of activities initiated in response to previous years' recommendations, including an analysis of the extent to which these activities have produced the desired results.

6. An outline of anticipated activities for the coming year.
7. A list of research projects conducted.

ARTICLE V – ASSESSMENTS

Section A. RECOMMENDATION OF BUDGETS AND RATES OF ASSESSMENT BY THE BOARD.

1. Prior to the beginning of each marketing season and as may be necessary thereafter, the Board shall recommend to the Department a budget of estimated expenses of the Board, its committees and the Department. The budget shall be itemized and funded from assessments collected as authorized by this Marketing Order. Additionally, the budget may propose funding from unexpended funds carried from prior years, funds received as the result of efforts to enforce this Marketing Order or any other source.
2. In order to provide funds to carry out the budget or budgets of estimated expenditures for promotional and research activities and administrative expenses of this Marketing Order, the Board shall recommend an annual rate of assessment to be levied upon raisin producers upon a uniform basis. The recommended annual rate of assessment shall not exceed two percent (2%) of the prior marketing season's established free tonnage field price to be paid on all free tonnage, all reserve tonnage sold for free use and all reserve tonnage sold to packers as replacement tonnage for export programs.

3. Notwithstanding the limitation on the annual assessment rate set forth in Subsection 2 of this Section, the Board may recommend and the Department may approve, at any time during the marketing season, an additional one percent (1%) for activities reasonably necessary to enable the Board to respond to unanticipated events impacting the sale, consumption or reputation of California raisins, including, but not limited to, food safety concerns, significant adverse publicity, and foreign trade restrictions.

4. The Department may also approve an additional one percent (1%) upon a determination that the free tonnage price or the free tonnage volume for the prior marketing season was so low that the projected income of an assessment within the limit set forth in this Section will not produce sufficient revenue to allow the Board to carry out its duties under this Marketing Order and the Act.

5. Any supplemental assessment levied pursuant to Subsections 3 or 4 of this Section shall be uniformly levied on producers.

6. In no event shall the assessment, including any supplemental assessment exceed four percent (4%) of the prior marketing season's free tonnage field price.

Section B. APPROVAL OF BUDGET AND FIXING OF RATE OR RATES OF ASSESSMENTS.

1. If the Department finds that the budget or budgets and rate or rates of assessments recommended by the Board are proper and equitable and within the limitations set forth in Section A of this Article and Article 10 (commencing with

Section 58921) of the Act and are calculated to provide amounts of money as may be necessary to carry out the provisions of this Marketing Order, the Department shall approve the budget or budgets and fix the rate or rates of assessment.

Section C. COLLECTION OF ASSESSMENTS.

1. Any assessment shall be levied upon the producer and is a personal debt of the person assessed. To facilitate collection, the packer shall deduct the producer's assessment from amounts paid to the producer, and shall be trustee of these assessments until they are remitted with assessment reports to the Board. Failure of the packer to deduct the producer's assessment shall not exempt the producer from liability. It is the intent of this provision that the person who pays the producer for the tonnage delivered shall deduct and remit assessments without the regard to the identity of the person to whom the tonnage is physically delivered.
2. Any raisins received by a packer for processing which they have produced as a producer shall be subject to all applicable assessments.
3. Packers shall file reports as may be required, and in the time and manner specified, by the Board.
4. Any assessment levied pursuant to this Marketing Order shall constitute a personal debt of every person so assessed, and shall be due and payable in the time and manner specified by the Board.

5. In the event of a failure of any person to pay any assessments payable hereunder pursuant to this Marketing Order, the Department may file a complaint against the person in a court of competent jurisdiction for the collection of the assessments and other remedies as provided in Article 21 (commencing with Section 59231) of the Act. In addition, the Department shall be entitled to collection costs and penalties as provided in Section 58930 of the Act.

Section D. DISPOSITION OF FUNDS.

1. Any monies collected by the Board pursuant to this Marketing Order shall be deposited in accordance with the provisions of the Act, and disbursed by the Board only for necessary expenses incurred or approved by the Department with respect to this Marketing Order. The disbursements or expenditures of money by the Board shall be made under the rules and regulations prescribed by the Department.
2. Upon the termination of this Marketing Order by the Department, either in total or in part pursuant to Section B of Article XIII, any and all monies remaining and not required to defray expenses incurred by the Board prior to termination, including reserves necessary to underwrite any employee termination expenses or pension pay-out, shall be returned by the Board or the Department in accordance with Section 58938 of the Act.
3. Upon termination of this Marketing Order by the Department, any intellectual property owned or controlled by the Board shall be held in trust by the Department for the benefit of all

of those within the industry directly affected by this Marketing Order.

ARTICLE VI – BOOKS AND RECORDS

Section A. BOOKS AND RECORDS. All persons subject to this Marketing Order, shall maintain books and records as required by the Act and shall make the books and records available for inspection by the Department or duly authorized representatives, including such information as may be requested by the Department.

Section B. CONFIDENTIAL INFORMATION.

1. Notwithstanding any other provision of law, all proprietary information, including, but not limited to, the names and addresses of producers, processors and handlers, individual quantities produced, processed or handled, prices paid, commercial and trade secrets, and the products of research obtained by a program or by the department for the benefit of a program, from any source is confidential.
2. Upon receipt of a request of a person that establishes cause for the request, the Department shall direct the Board to provide to the requesting person any record in its possession, except that any proprietary information shall be removed before disclosure.
3. This Section shall not apply to a request for information made pursuant to Section D of Article III by a person directly affected by this Marketing Order.

Section C. IMMUNITY. No person shall be excused from attending and testifying or from producing

documentary evidence before the Department in obedience to the subpoena of the Department on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of them, may tend to incriminate them or subject them to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which they may be so required to testify, or produce evidence documentary or otherwise, before the Department in obedience to a subpoena issued by the Department.

ARTICLE VII - APPEAL

Section A. APPEALS. Any producer directly affected by this Marketing Order who believes that any act or determination by or on behalf of the Board, its committees or staff has been or will be detrimental or adverse to the producer's interests or detrimental or adverse to the economic interests of the processor to whom the producer delivers its raisins may petition the Department to review the act or determination to correct the detrimental or adverse impact. Any petition must be filed in writing setting forth the facts upon which it is based.

Section B. EFFECT OF APPEAL. Pending the disposition of any appeal pursuant to this Article, the parties shall abide by the act or determination of the Board, unless the Board or the Department rule otherwise. The Department shall, upon a finding that the Board has acted in a fashion inconsistent with the Act, or this Marketing Order or that the Board has implemented this Marketing Order in an unreasonably discriminatory, unfair or inequitable manner, grant the petition and declare the act or determination to be without force and effect and may order the

Board to take any reasonable and necessary steps to correct any harm suffered by the appellant as a result of the disputed act or determination.

Section C. PROCEDURE FOR APPEAL. Within ninety (90) days after its initial meeting, the Board shall adopt procedures for the handling of any petition filed pursuant to this Article.

ARTICLE VIII – GENERAL PROVISIONS

Section A. DEPARTMENT'S APPROVAL OF ACTIONS OF THE BOARD. The exercise of any of the powers granted to the Board under this Marketing Order shall be subject to the approval of the Department.

Section B. AGENT OF THE DEPARTMENT. The Department may designate and authorize any person, including officers or employees of the State Department of Food and Agriculture, to act as the Department's agent with respect to any provision of this Marketing Order.

Section C. ADMINISTRATIVE RULES AND REGULATIONS. Upon the recommendation of the Board, the Department is authorized to issue and make effective such administrative rules, regulations and interpretations of terms as may be necessary to carry out the purposes and attain the objective of the Act and this Marketing Order.

Section D. MAJOR AMENDMENTS. Any proposed change, modification or deletion to the provisions of Articles III, IV, V or IX of this Marketing Order shall be considered as major amendments subject to the requirements of Article 13 (commencing with Section 59021) of the Act.

ARTICLE IX – UNFAIR TRADE PRACTICES

1. The use of any intellectual property of the Board in a manner inconsistent with the provisions of Section C of Article IV shall be an unfair trade practice in violation of this Marketing Order after written notice from the Board of the violation. Any person may provide written notice to the Board of the suspected violation. Upon receipt of the notice, the Board shall investigate and within thirty (30) days provide a notice of unfair trade practice as set forth in this Section, or provide notice to the complainant giving reasons why no action was taken.

2. The use of any intellectual property of the Board in a manner inconsistent with the provisions of Section D of Article IV shall be an unfair trade practice in violation of this Marketing Order.

3. Notwithstanding any provision of this Article, for shipment prior to June 30, 1999, packers may use existing packaging materials which utilize intellectual property of the Board in a manner inconsistent with the provisions of Sections C and D of Article IV.

ARTICLE X – ANTITRUST LAWS.

Section A. ANTITRUST LAWS. In any civil or criminal action or proceeding for violation of the Cartwright Act, the Unfair Practices Act, the Fair Trade Act (Sections 16700, et. seq. of the Business and Professions Code), or any rule of statutory or common law against monopolies or combinations in restraint of trade, proof that the act complained of was done in compliance with the provisions of this Marketing

Order and in furtherance of the purposes and provisions of the Act shall be a complete defense to the action or proceeding.

ARTICLE XI – SEPARABILITY

Section A. SEPARABILITY. If any section, sentence, clause or part of this Marketing Order, or the applicability thereof to any person, circumstance, or thing is held to be invalid such decision shall not affect the remaining portions of this Marketing Order.

ARTICLE XII – DEROGATION

Section A. DEROGATION. Nothing contained herein is or shall be construed to be in derogation or in modification of the rights of the Department or of the state to exercise any powers granted by the Act or otherwise, and in accordance with the powers to act in the premises whenever the action is deemed advisable.

ARTICLE XIII- EFFECTIVE TIME AND TERMINATION

Section A. EFFECTIVE TIME. This Marketing Order shall become effective on the date specified by the Department and shall continue in effect until suspended or terminated by the Department, or by operation of law, in accordance with the provisions of the Act.

Section B. TERMINATION.

1. This Marketing Order shall be subject to termination in accordance with the provisions of Article 15 (commencing with Section 59082) of the Act.
2. The Department shall conduct a vote of producers of record with the Department on or about

February 1, 2001 and on or about February 1 of every fifth year thereafter, to ascertain whether the producers favor the continuance of this Marketing Order. The Marketing Order shall continue upon a finding by the Department that the majority of the producers voting cast their votes in favor of continuation.

Section C. EFFECT OF TERMINATION. Unless otherwise expressly provided in the notice of amendment, suspension, or termination, no amendment, suspension or termination of this Marketing Order shall either (a) affect, waive, or terminate any right, duty, obligation or liability which shall have arisen or may thereafter arise in connection with any provisions not amended, suspended, or terminated; or (b) release, condone or dismiss any violation of this Marketing Order occurring prior to the effective time of the amendment, suspension or termination; or (c) affect or impair any rights or remedies of the Department or of any person with respect to the violation.

APPENDIX F

West's Annotated California Codes
Food and Agricultural Code
(Formerly Agricultural Code)
Division 21. Marketing
Part 2. General Marketing Laws
Chapter 1. California Marketing Act of 1937
Article 12. Assent to Marketing Orders

Cal. Food & Agric. Code § 58991

§ 58991. Handlers

A marketing order or major amendment to it, which directly affects handlers, that is issued pursuant to this chapter, shall not become effective unless and until the director finds one of the following has occurred:

(a) It has been assented to in writing by not less than 65 percent of the handlers that are engaged, within the area specified in the marketing order or amendment to it, in the handling of the commodity which is regulated by the marketing order.

(b) It has been assented to in writing by handlers that handle not less than 65 percent of the volume of the commodity which is regulated by the marketing order.

(c) It has been approved by handlers in a referendum among handlers that are directly affected. The director may make the finding pursuant to this subdivision if the valid votes cast in the referendum represent not less than 40 percent of the total number of handlers of the commodity of record with the department, and if the handlers that cast ballots in the referendum in favor of the marketing order or amend-

ment to it represent not less than 65 percent of the total number of handlers that cast ballots in the referendum and handled not less than 51 percent of the total quantity of the commodity which was marketed in the next preceding marketing season, or the current marketing season if the harvest and delivery of the commodity to handlers is complete, by all of the handlers that cast ballots in the referendum, or if the handlers that cast ballots in the referendum in favor of the marketing order or amendment represent not less than 51 percent of the total number of handlers that cast ballots in the referendum and handled not less than 65 percent of the total quantity of the commodity which was handled in the next preceding marketing season, or the current marketing season if the harvest and delivery of the commodity to handlers is complete, by all of the handlers who cast ballots in the referendum. The quantity of the commodity handled by the handler may be stated on the referendum ballot returned by each handler or may be obtained by requiring handlers to report that volume pursuant to Section 58775.

* * *

Cal. Food & Agric. Code § 58992

§ 58992. Processors

Any marketing order or major amendment to it which directly affects processors that are engaged in the operation of canning of fresh fruits or vegetables or canning or packing of dried fruits shall not be made effective by the director unless and until the director finds one of the following has occurred:

(a) The marketing order or amendment to it has been assented to in writing by the processors that are engaged in the marketing activity which is regulated

by the marketing order or amendment to it that processed not less than 65 percent of the volume of the commodity which is processed within the area defined in the marketing order or amendment to it and by 65 percent of the number of the processors that are engaged in the marketing activity which is regulated by the marketing order or amendment to it.

(b) It has been approved by processors in a referendum among processors that are directly affected. The director may make the finding pursuant to this subdivision if the valid votes cast in the referendum represent not less that[1] 40 percent of the total number of processors of the commodity of record with the department, and if the processors that cast ballots in the referendum in favor of the marketing order or amendment to it represent not less than 65 percent of the total number of processors that cast ballots in the referendum and processed not less than 51 percent of the total quantity of the commodity which was marketed in the next preceding marketing season, or the current marketing season if the harvest and delivery of the commodity to processors is complete, by all of the processors that cast ballots in the referendum, or if the processors that cast ballots in the referendum in favor of the marketing order or amendment represent not less than 51 percent of the total number of processors that cast ballots in the referendum and processed not less than 65 percent of the total quantity of the commodity which was marketed in the next preceding marketing season or the current marketing season if the harvest and delivery of the commodity to processors is complete, by all of the processors who cast ballots in the referendum. The quantity of the commodity processed by the processor may be stated on the referendum ballot returned by each processor

or may be obtained by requiring processors to report that volume pursuant to Section 58775.

* * *

Cal. Food & Agric. Code § 58993

§ 58993. Producers or producer marketing

No marketing order or major amendment to it, which directly affects producers or producer marketing, that is issued pursuant to this chapter, shall be made effective by the director unless and until the director finds one or more of the following has occurred:

(a) It has been assented to in writing by not less than 65 percent of the producers that are engaged, within the area specified in the marketing order or amendment to it, in the production for market, or engaged in the producer marketing, of not less than 51 percent of the commodity which is specified in the marketing order or the amendment to the marketing order in commercial quantities.

(b) It has been assented to in writing by producers that produce not less than 65 percent of the volume of the commodity and by 51 percent of the total number of producers that are so engaged.

(c) It has been approved by producers in a referendum among producers that are directly affected. The director may make the finding if the valid votes cast in the referendum represent not less than 40 percent of the total number of producers of the commodity of record with the department, and if the producers that cast ballots in the referendum in favor of the marketing order or amendment to it represent not less than 65 percent of the total number of producers that cast ballots in the referendum and marketed not less than 51 percent of the total quantity

of the commodity which was marketed in the next preceding marketing season, or the current marketing season if the harvest and delivery of the commodity to handlers is complete, by all of the producers that cast ballots in the referendum or if the producers that cast ballots in the referendum in favor of the marketing order or amendment represent not less than 51 percent of the total number of producers that cast ballots in the referendum and marketed not less than 65 percent of the total quantity of the commodity which was marketed in the next preceding marketing season, or the current marketing season if the harvest and delivery of the commodity to handlers is complete, by all of the producers who cast ballots in the referendum. The quantity of the commodity delivered by the producer may be stated on the referendum ballot returned by each producer or may be obtained by requiring handlers to report that volume pursuant to Section 58775.

* * *

Cal. Food & Agric. Code § 58993.1

§ **58993.1.** Repealed by Stats.1991, c. 385 (A.B.1959), § 4, operative Jan. 1, 1997

* * *

Cal. Food & Agric. Code § 58994

§ 58994. Use of written assents or referendum

If any marketing order or any major amendment to any marketing order is issued by the director for the approval of producers, handlers, or processors, the director shall determine whether the approval shall be by written assents or by referendum.

* * *

Cal. Food & Agric. Code § 58995

§ 58995. Referendum period; tabulation of ballots

If the director determines that it should be by referendum, the director shall establish a referendum period not to exceed 30 days. If the director determines that the referendum period so established does not provide sufficient time for the balloting, the director may extend the referendum period not more than 15 additional days. At the close of the referendum period, the director shall count and tabulate the ballots filed during the referendum period.

* * *

Cal. Food & Agric. Code § 58996

§ 58996. Referendum; sufficient vote; making order or amendment effective

If from the tabulation the director finds that the number of producers that voted in the referendum and that the number of producers that voted in favor of the marketing order or amendment to the marketing order are sufficient for him to make the finding that producers that are directly affected have approved the marketing order or amendment, the director may make the marketing order or amendment to the marketing order effective.

* * *

Cal. Food & Agric. Code § 58997

§ 58997. Referendum; insufficient vote

If the director finds from the tabulation of such referendum that the number of producers that voted in favor of such marketing order or amendment to the marketing order is not sufficient for him to make the finding that producers that are directly affected have approved the marketing order or amendment to it, he shall not make the marketing order or amendment effective.

* * *

Cal. Food & Agric. Code § 58998

§ 58998. Additional procedures

The director may prescribe such additional procedures as may be necessary to conduct the referendum.

* * *

Cal. Food & Agric. Code § 58999

§ 58999. Referendum; counting vote of nonprofit agricultural cooperative marketing association

In finding whether the marketing order or major amendment to it is assented to in writing or approved or favored by producers pursuant to the provisions of this chapter, the director shall consider the approval of any nonprofit agricultural cooperative marketing association, which is authorized by its members so to assent, as being the assent, approval, or favor of the producers that are members of, or stockholders in, that nonprofit agricultural cooperative marketing association.

* * *

Cal. Food & Agric. Code § 59000

§ 59000. Producer who sells growing crop

Any producer that sells a growing crop to be harvested and marketed by another person is entitled to assent to, or vote in a referendum, if both of the following requirements are complied with:

(a) At the time of sale of such growing crop the producer retains the exclusive right so to assent or to so vote.

(b) The quantity of such growing crop can be determined to the satisfaction of the director.

* * *