COMMENTS

The Effect of *Glickman v. Wileman Brothers & Elliott, Inc.* on Nongeneric Commodities: A Narrow Focus on a Broad Rule

INTRODUCTION

For more than fifty years, California has been recognized as the nation's leading agricultural state. In 1997, California agriculture generated $26.8 billion, nearly $11 billion more than second ranked Texas.[1] California produces over 250 agricultural commodities.[2] It is the largest fluid milk producing state in the nation.[3] Cotton raised in the Central Valley is responsible for California's recognition as the second

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[1] California Dep't of Food and Agric., *California Agriculture Facts* (visited Jan. 29, 1999) <http://www.cdfa.ca.gov/statistics/california.html> [hereinafter *California Agricultural Facts*].

[2] California Dep't of Food and Agric., *CDFA Historical Perspective/Overview* (visited Jan. 29, 1999) <http://www.cdfa.ca.gov/aboutcdfa/history.html> [hereinafter *Historical Perspective/Overview*].

[3] California Dep't of Food and Agric., *Milk and Cream* (visited Jan. 24, 1999) <http://www.cdfa.ca.gov/kids/commodities/milk.html>.

largest cotton producing state.[4] California agriculture produced fifty-five percent of all vegetables in the United States and forty-two percent of all fruit and nuts.[5] Many commodities are trending toward more growth, including fruit and nut crops; vegetable crops; field crops; livestock and poultry; and nursery and greenhouse products.[6]

California's number one rank in milk production has contributed to the state's national rank in cheese production. The state ranks second, behind Wisconsin, in the percentage of milk production going to cheese makers.[7] Forty percent[8] of the state's 1997 milk production was used for making 1.17 billion pounds of cheese.[9] Preliminary projections for 1998 indicate a six and one-half percent increase over 1997 in production going to cheese.[10] Milk production continues to increase in California, and interest in the dairy industry continues to grow. In response to Southern California urban concerns, the industry has directed its growth largely in the Central Valley.[11] Indicative of this growth is the announcement by the J.G. Boswell Company, the world leader in cotton production, of plans to build five mega-dairies in the Central Valley's Kings County. The new dairies could raise the county's herd by another twenty-five percent.[12]

Overseeing the state's rich and diverse agricultural industry is the California Department of Food and Agriculture (CDFA). The CDFA has the dual role of both protecting[13] and, pursuant to the California Marketing Act of 1937,[14] promoting California's agriculture industry. The CDFA also has the role of interfacing with the United States Department of Agriculture (USDA) and the Secretary of Agriculture. The Secretary, pursuant to the Agricultural Marketing Agreement Act of

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[4] *California Agriculture Facts, supra* note 1.

[5] California Dep't of Food and Agric., *California Agricultural Production and Farm-Gate Values* (visited Jan. 29, 1999) <http://www.cdfa.ca.gov/statistics/production.html>.

[6] *Id.*

[7] Telephone Interview with Nancy Fletcher, Director of Communications, California Milk Advisory Board (Jan. 29, 1999) (on file with author).

[8] *Id.*

[9] *Spotlight on Cheese*, FRESNO BEE, Jan. 25, 1999, at C1.

[10] Telephone Interview with Nancy Fletcher, *supra* note 7.

[11] Leslie A. Maxwell, *Cotton King Plans Move into Dairy Biz*, FRESNO BEE, Dec. 27, 1998, at B2.

[12] *Id.* The largest of the proposed dairies would have 10,000 cows. California's average dairy has 200 to 300 cows. The national average is 62. *Id.*

[13] *Historical Perspective/Overview, supra* note 2.

[14] CAL. FOOD & AGRIC. CODE § 58601 (Deering 1999).

1937 (AMAA),[15] is authorized by Congress to effectuate its policies regarding agricultural commodities in interstate commerce.[16] Therefore, California agriculture is not only regulated by the CDFA, but also by the USDA.

It was this combination of rich agricultural production and government regulation in the form of marketing orders—and a claim of First Amendment protected speech—that, in 1997, brought a small group of California tree fruit growers, handlers, and processors (hereinafter handlers) together in a vehement clash with the Secretary of Agriculture. In a five-to-four ruling, the Supreme Court of the United States ruled in *Glickman v. Wileman Bros. & Elliott, Inc.* that compelled funding of generic advertising for programs implemented under the AMAA did not violate the complaining handlers' rights of free speech under the First Amendment.[17]

Controversy created by marketing orders and the overly-broad decision of *Wileman* continues in *Gallo Cattle Company v. Veneman.*[18] Plaintiff Gallo is a California producer[19] of dairy products,[20] specifically milk[21] and cheese. The issue in *Gallo* is the producer's objection to "compulsory assessments" for research,[22] marketing,[23] advertising, and promotion,[24] regulated by the CDFA.[25] The CDFA's assessments of

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[15] Act of June 3, 1937, ch. 296, 50 Stat. 246 (codified as amended in scattered sections of 7 U.S.C.).

[16] 7 U.S.C. § 602(1) (1998).

[17] Glickman v. Wileman Bros. & Elliott, 521 U.S. 457, 138 L. Ed. 2d 585, 600 (1997).

[18] Gallo Cattle Co. v. Veneman, No. 97-17182, 1999 U.S. App. LEXIS 1939 (9th Cir. Feb. 11, 1999).

[19] A producer is defined in 7 U.S.C. § 4502(h) (1998) as "any person engaged in the production of milk for commercial use."

[20] Dairy products is defined in 7 U.S.C. § 4502(e) (1998) as "products manufactured for human consumption which are derived from the processing of milk, and includes fluid milk products."

[21] Milk is defined in 7 U.S.C. § 4502(d) (1998) as "any class of cow's milk produced in the United States."

[22] Research is defined in 7 U.S.C. § 4502(j) (1999) as "studies testing the effectiveness of market development and promotion efforts, studies relating to the nutritional value of milk and dairy products, and other related efforts to expand demand for milk and dairy products."

[23] Marketing is defined in 7 C.F.R. § 1150.118 (1998) as "the sale or other disposition in commerce of dairy products."

[24] Promotion is defined in 7 U.S.C. § 4502(i) (1998) as "actions such as paid advertising, sales promotion, and publicity to advance the image and sales of and demand for dairy products."

[25] Brief for Appellant at 4, Gallo Cattle Co. v. Veneman, 1999 U.S. App. LEXIS

milk producers are a result of the issuance of the Dairy Promotion Program (the Dairy Order)[26] by the USDA.

Like the handlers in *Wileman*, Gallo claims that the assessments violate First Amendment rights.[27] In particular, Gallo complains that the assessments are used with other funds that promote competitors' cheese and pay for advertising "products which Gallo does not produce."[28] As in *Wileman*, the district court permitted Gallo to place its assessments into a trust account pending the outcome of the case.[29] During *Gallo's* district court proceeding, the *Wileman* decision was announced. The district court found *Wileman* to be controlling and granted the motion for summary judgment. Gallo appealed.[30]

This comment addresses the need for the broad finding in *Wileman* to be restricted to a narrow focus. The ruling should exclude particular commodities which are not generic and which are not regulated to the same extent as the commodities involved in *Wileman*. Part I presents a historical perspective of the origins of agricultural regulations in the United States and the policy of the AMAA. Part II reviews the Supreme Court's ruling in *Wileman* and the bases for its decision. Part III defines those programs which regulate and promote the dairy industry. Both the Dairy Promotion Program[31] (the Dairy Order) and the California Milk Promotion Marketing Order (Marketing Order)[32] are mandated marketing orders which regulate milk and milk products production. The California Milk Advisory Board's (CMAB)[33] cheese promotion program is also presented. Part IV discusses the issue in *Gallo* and distinguishes the producer's claim from those of *Wileman*, demonstrating the need for a narrow interpretation of the *Wileman* decision.

1939 (9th Cir. 1999) (No. 97-17182).

[26] Dairy Promotion Program, 7 C.F.R. § 1150.101 (1998).

[27] *Gallo*, 1999 U.S. App. LEXIS 1939, at *1.

[28] Brief for Appellant at 2, Gallo Cattle Co. v. Veneman, 1999 U.S. App. LEXIS 1939 (9th Cir. 1999) (No. 97-17182).

[29] *Id.* at 3.

[30] *Id.*

[31] 7 C.F.R. § 1150.101 (1998).

[32] CALIFORNIA DEP'T FOOD & AGRIC., MARKETING ORDER FOR RESEARCH, EDUCATION AND PROMOTION OF MARKET MILK AND DAIRY PRODUCTS IN CALIFORNIA (1969) (on file with Cal. Dep't Food & Agric. Mktg. Branch, Sacramento, Cal.) [hereinafter CALIFORNIA MARKETING ORDER].

[33] CAL. FOOD & AGRIC. CODE § 58841 (Deering 1999) (providing for establishment of an advisory board to assist in administering marketing orders).

I. The History and Policy of the AMAA

In response to the economic crisis experienced by the agricultural industry during the Depression Era, Congress enacted the AMAA as a declaration of a national interest in "the orderly exchange of [agricultural] commodities in interstate commerce."[34] The policy of Congress in establishing the AMAA is:

> (1) [T]o establish and maintain . . . orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices . . . . (2) To protect the interest of the consumer . . . . (3) [T]o establish and maintain . . . production research, marketing research, and development projects . . . . (4) [T]o establish and maintain . . . orderly marketing conditions for any agricultural commodity . . . as will provide . . . an orderly flow of the supply thereof to market . . . .[35]

Congress' intent for "parity prices" was to create a regulatory system by which farmers would receive the benefit of price adjustments to ensure "that gross income from agriculture . . . will provide the farm operator and his family with a standard of living equivalent to those afforded persons dependent upon other gainful occupation."[36] "Parity" is achieved by the use of a computation incorporating the base period of 1910 to 1914.[37] Congress also authorized the assessment of funds to pay for expenses incurred for production and marketing research undertaken for the purpose of promoting "the marketing, distribution, and consumption" of agricultural commodities.[38] The AMAA contains a specific list of commodities and products to which marketing orders are applicable. Among other things, the list includes milk, fruits, tobacco, and vegetables.[39] For the commodities of California-grown peaches, pears, plums, and nectarines, as well as a limited list of others, Congress authorized "any form of marketing promotion including paid advertising . . . ."[40]

The AMAA gives the Secretary of Agriculture the power to create marketing orders. The Secretary is authorized "to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or prod-

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[34] 7 U.S.C. § 601 (1998).
[35] 7 U.S.C. § 602 (1998).
[36] 7 U.S.C. § 1301(a)(1)(G)(2) (1998).
[37] 7 U.S.C. § 1301(a)(1)(A), (B) (1998).
[38] 7 U.S.C. § 608c(6)(I) (1998).
[39] 7 U.S.C. § 608c(2) (1998).
[40] 7 U.S.C. § 608c(6)(I) (1998).

uct thereof . . . ."[41] As a form of economic regulation, agricultural marketing orders are intended to remove competitive market forces.[42] This is achieved by providing producers within the same or particular market "a uniform price," limiting marketable commodities to predetermined qualities and quantities, specifying the commodities' "grade and size," and managing surplus disposition in order to avoid depression of market prices.[43] Marketing orders are held not "to be in violation of any of the antitrust laws of the United States."[44]

II. THE FINDINGS OF *WILEMAN*

The Supreme Court's decision in *Wileman* was a bitter loss to the sixteen handlers involved. After receiving a favorable decision on their claim from the Court of Appeals for the Ninth Circuit,[45] they faced a reversal of fortune requiring contributions of $3.1 million.[46] This amount reflected assessments which had been withheld by some of the handlers since 1987.[47] The contributions had been held in a trust fund account, in accordance with a district court order, pending outcome of the litigation.[48] As the Court of Appeals' ruling on the First Amendment issue conflicted with a decision of the Third Circuit,[49] the Supreme Court granted certiorari.[50]

At issue in *Wileman* were regulations contained in Marketing Order 916[51] pertaining to California grown nectarines and Marketing Order 917[52] pertaining to California grown peaches, pears, and plums.[53]

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[41] 7 U.S.C. § 608b(a) (1998).

[42] Glickman v. Wileman Bros. & Elliott, 521 U.S. 457, 138 L. Ed. 2d 585, 594-95 (1997).

[43] *Id.* at 595.

[44] 7 U.S.C. § 608b(a) (1998).

[45] Wileman Bros. & Elliott v. Espy, 58 F.3d 1367 (9th Cir. 1995), *rev'd sub nom* Glickman v. Wileman Bros. & Elliott, 521 U.S. 457 (1997).

[46] Glickman v. Wileman Bros. & Elliott, 521 U.S. 457, 138 L. Ed. 2d 585, 596 (1997).

[47] Wileman Bros. & Elliott v. Espy, 58 F.3d 1367, 1373 (9th Cir. 1995), *rev'd sub nom* Glickman v. Wileman Bros. & Elliott, 521 U.S. 457 (1997).

[48] *Id.* at 1373 n.2.

[49] United States v. Frame, 885 F.2d 1119 (3d Cir. 1989) (holding that a cattle rancher's compelled assessments from the sale of cattle as permitted under the Beef Promotion and Research Act of 1985 did not violate his First Amendment rights of free speech).

[50] Glickman v. Wileman Bros. & Elliott, 521 U.S. 457, 138 L. Ed. 2d 585, 598 (1997).

[51] 7 C.F.R. pt. 916 (1998).

[52] 7 C.F.R. pt. 917 (1998).

These orders, as well as others like them, serve as economic regulations which promulgate the policy of the AMAA.[54] The contention of the handlers arose from disagreements involving standards set by the orders that related to maturity and minimum size.[55] Additionally, the handlers challenged portions of the orders relating to generic advertising, claiming a violation of their First Amendment rights of free speech.[56]

The First Amendment claim was based on the handlers' "disagreement with the content of some of the generic advertising."[57] The Court defined generic advertising as that "intended to stimulate consumer demand for an agricultural product in a regulated market."[58] The generic advertising at issue was the message " 'California Summer Fruits' are wholesome, delicious, and attractive to discerning shoppers."[59] The Court noted that the marketing orders themselves provided for reducing the possibility of any adverse effect generic advertising might create for individual producers. In making this observation, the Court was referring to termination or suspension provisions for marketing orders which do not " 'effectuate the declared policy' of the AMAA."[60] The Court went on to state it was not passing judgment on whether individual producer advertising might have greater effect than generic advertising which had received the statutorily required two-thirds approval by handlers.[61]

A. An Issue of Generic Advertising and Free Speech

The Court identified three aspects of the AMAA's economic regulations that were distinguishable from other regulations which the Court had determined to be violative of the First Amendment's protection of speech.[62] First, the Court found that the handlers were not prevented from communicating "any message to any audience."[63] This finding

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[53] *Wileman*, 138 L. Ed. 2d at 596.

[54] *Id.* at 594-95.

[55] *Id.* at 596.

[56] Glickman v. Wileman Bros. & Elliott, 521 U.S. 457, 138 L. Ed. 2d 585, 596 (1997).

[57] *Id.* at 598.

[58] *Id.* at 604.

[59] *Id.* at 595.

[60] *Id.* at 595 n.3 (citing 7 U.S.C. § 608c(16)(A)(i) (1998)).

[61] *Id.*

[62] Glickman v. Wileman Bros. & Elliott, 521 U.S. 457, 138 L. Ed. 2d 585, 599-600 (1997).

[63] *Id.* at 600.

distinguished the *Wileman* free speech issue from that in *Central Hudson Gas & Electric Corp. v. Public Service Commission.*[64] In effect, the distinction created an exception to the *Central Hudson* test for determining whether commercial speech restrictions are protected as free speech rights.

At issue in *Central Hudson* was a public utility's objection to a ban on advertising that "[promotes] the use of electricity."[65] The Commission had implemented the ban to preserve insufficient energy supplies.[66] The *Central Hudson* three-part inquiry included: (1) whether the speech at issue concerns "lawful activity" that is not "misleading;" (2) whether the "asserted governmental interest is substantial;" and (3) whether the "regulation directly advances the governmental interest asserted" without being more extensive than necessary.[67] The Court of Appeals for the Ninth Circuit, in ruling on the handlers' free speech claim, relied upon the *Central Hudson* test; the Supreme Court found that reliance to contradict "the very nature and purpose" of the marketing orders.[68]

B. Distinguishing Generic Advertising from "Actual Speech"

The Court next distinguished the *Wileman* free speech issue by finding the marketing orders did not result in compelled "actual or symbolic speech."[69] Unlike the Court's previous decision in *West Virginia Board of Education v. Barnette,*[70] the Court distinguished the free speech claim in *Wileman* by finding "the use of assessments to pay for advertising does not require respondents to repeat an objectionable message out of their own mouths."[71] In *West Virginia Board of Education,* the Board had adopted a resolution requiring all students and teachers to salute the United States flag.

The Supreme Court defined the Board of Education's resolution as "a compulsion of students to declare a belief,"[72] and that "the flag sa-

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[64] Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

[65] *Id.* at 558.

[66] *Id.* at 559.

[67] *Id.* at 566.

[68] Glickman v. Wileman Bros. & Elliott, 521 U.S. 457, 138 L. Ed. 2d 585, 603 (1997).

[69] *Id.* at 600.

[70] West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[71] *Wileman,* 138 L. Ed. 2d at 600.

[72] *West Virginia Bd. of Educ.*, 319 U.S. at 631.

lute is a form of utterance" when affiliated with the pledge.[73] The Court declared: "One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[74] In his concurring opinion, Justice Murphy posited that the constitutional protection of the right of freedom of thought "against state action includes both the right to speak freely and the right to refrain from speaking at all."[75] The Justice noted the only exception would be government operations which are necessary for maintaining societal order.[76]

In finding no compelled "actual or symbolic speech,"[77] the *Wileman* Court also distinguished the handlers' complaint from one "requir[ing] them to use their own property to convey an antagonistic ideological message,"[78] as in *Wooley v. Maynard.*[79] In *Wooley*, Maynard was criminally convicted for defacing his auto's license plates, a violation of state law. The license plates were inscribed with the New Hampshire state motto, "Live Free or Die."[80] The Court held it unconstitutional for a state to "require an individual to participate in the dissemination of an ideological message by displaying it on his private property" in order to gain public notice.[81] Citing *West Virginia Board of Education,* the *Wooley* Court affirmed that one's right to speak and right to forbear from speaking are matching elements of the expanded idea of "individual freedom of mind."[82]

Additionally, the Court found the generic message in *Wileman* did not "require [the handlers] to be publicly identified or associated with another's message"[83] as in *PruneYard Shopping Center v. Robins.*[84] In *PruneYard Shopping Center*, the shopping center's property owner objected to students publicly expressing their opposition to a United Nations resolution on the shopping center property.[85] The owner claimed

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[73] *Id.* at 632.
[74] *Id.* at 638.
[75] *Id.* at 645 (Murphy, J., concurring).
[76] *Id.*
[77] *Wileman*, 138 L. Ed. 2d at 600.
[78] *Id.* at 600-01.
[79] Wooley v. Maynard, 430 U.S. 705, 715 (1977).
[80] *Id.* at 707.
[81] *Id.* at 713.
[82] *Id.* at 714.
[83] *Wileman*, 138 L. Ed. 2d at 601.
[84] PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980).
[85] *Id.* at 77.

a violation of his First Amendment free speech rights.[86] The Court reasoned that as the shopping center is a public place, messages communicated by the public "will not likely be identified with those of the owner."[87] The Court went on to state that the owner "could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages" by placing signs adjacent to the speakers.[88]

In distinguishing the free speech claims of *Wileman* from those of *West Virginia Board of Education, Wooley,* and *PruneYard Shopping Center,* the Court explained that the handlers were not made to speak; rather, they were "merely required to make contributions for advertising."[89] "[N]one of the generic advertising conveys any message with which [the handlers] disagree. Furthermore, the advertising is attributed not to them, but to the California Tree Fruit Agreement or 'California Summer Fruits'."[90]

C. Organizational Messages and a Defining of "Germane"

The third distinction made in *Wileman* was the Court's finding that there was no compelled endorsement or financing of "political or ideological views" as in the previous decisions of *Abood v. Detroit Board of Education*[91] and *Keller v. State Bar of California.*[92] At issue in *Abood* was the constitutional challenge to a state government system[93] requiring compelled payments by teachers to a teachers union in order to maintain employment.[94] Membership in the union was not required. Additionally, state law did not restrict the compelled nonunion members' fees to the cause of collective bargaining.[95] Teachers claimed a violation of the First Amendment's protection of freedom of association.[96] The contention was that the union was engaged in "economic, political, professional, scientific and religious" areas with which the

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[86] *Id.* at 76-77.

[87] *Id.* at 87.

[88] *Id.*

[89] Glickman v. Wileman Bros. & Elliott, 521 U.S. 457, 138 L. Ed. 2d 585, 601 (1997).

[90] *Id.*

[91] Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

[92] Keller v. State Bar of Cal., 496 U.S. 1 (1990).

[93] *Abood,* 431 U.S. at 211.

[94] *Id.* at 212.

[95] *Id.* at 232.

[96] *Id.* at 213.

teachers did not agree.[97]

The *Abood* Court reiterated that First Amendment protection includes the right of individuals to join together in order to promote shared opinions and ideals.[98] The Court also proclaimed that lying "at the heart of the First Amendment" is the conviction of one's ability to freely choose one's beliefs.[99] Free choice arises when the "mind and [the] conscience," rather than state persuasion, develop those beliefs.[100] The Court went on to find that compelled payments for purposes "germane" to the union's collective bargaining activities were constitutionally permitted; however, when the compelled payments were for "ideological activities unrelated to collective bargaining," and to which the employee objected, they were in violation of the First Amendment.[101] In addressing the finding of *Abood*, the Court in *Wileman* reasoned the assessments compelled by the marketing orders do not create "any crises of conscience. None of the advertising in this record promotes any particular message other than encouraging consumers to buy California tree fruit."[102]

In *Keller*, the Court considered whether compelled membership dues to the State Bar of California, used to fund "ideological or political activities to which [the members] were opposed,"[103] constituted a First Amendment violation of freedom of speech and association.[104] The *Keller* Court analogized a state bar and its members to an employee union and its members. The Court reasoned that both organizations provide benefits that nonmembers would receive, if not required to financially contribute, at the expense of paying members.[105] Drawing on *Abood*, the Court found financial support to programs germane to the association's purpose was constitutional; however, funding programs ideological in nature and beyond the purposes justifying the association was not.[106] The test for deciding whether use of compelled funds was within the association's purpose was whether the funds are "necessarily or reasonably incurred for the purpose of regulating [or en-

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[97] *Id.*

[98] *Id.* at 233.

[99] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234-35 (1977).

[100] *Id.*

[101] *Id.* at 235-36.

[102] Glickman v. Wileman Bros. & Elliott, 521 U.S. 457, 138 L. Ed. 2d 585, 601 (1997).

[103] Keller v. State Bar of Cal., 496 U.S. 1, 4 (1990).

[104] *Id.* at 6.

[105] *Id.* at 12.

[106] *Id.* at 14.

hancing] the legal profession . . . ."[107] In *Wileman*, the Court found this test to be met in that "the generic advertising of California peaches and nectarines is unquestionably germane to the purposes of the marketing orders and, . . . in any event, the assessments are not used to fund ideological activities."[108]

Having made these three distinctions, the Court in *Wileman* went on to find that the promotional portion of the marketing orders did not deserve the heightened scrutiny of First Amendment jurisprudence. Rather, the same rational basis standard which applies to the other anticompetitive portions of the orders was found to be the appropriate standard for the orders' promotional regulations.[109]

The *Wileman* decision has suggested more questions than answers regarding the marketing rights of agricultural entrepreneurs. The decision has given rise to an unexpected charge of attorney malpractice by at least one of the handlers.[110] It remains to be seen whether or not *Wileman* necessarily translates into a review standard lower than that of the First Amendment's heightened standard for other rules subject to economic regulation.[111] It is not known how lower courts will interpret the "three previously unseen distinctions" found in *Wileman*.[112] Additionally, agriculturalists are left questioning to what extent the Court tethered modern agriculture to an archaic system "which has generated increasing controversy,"[113] has "been controversial since day

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[107] *Id.*

[108] Glickman v. Wileman Bros. & Elliott, 521 U.S. 457, 138 L. Ed. 2d 585, 602 (1997).

[109] *Id.* at 600.

[110] *See, e.g.*, Tony Mauro, *Calling A Bad Day In Court Malpractice?*, LEGAL TIMES, July 20, 1998, at 7. After the *Wileman* decision, one of the petitioners in the case, Daniel Gerawan of Reedley, California, filed a legal malpractice claim against Thomas Campagne. Campagne had won a coin toss and, consequently, the right to argue the case before the Justices. Campagne had been involved in the litigation from its beginnings as counsel for the growers. Gerawan claimed, among other things, that Campagne's oral argument before the Supreme Court was the direct cause of the growers being given an adverse ruling. *Id.*

[111] *See generally*, Dave Smith, *Constitutional Law — Forced Advertising: Free Speech or Not Even?* Glickman v. Wileman Bros. & Elliott, Inc., 117 S. Ct. 2130 (1997), 33 LAND & WATER L. REV. 779, 794 (1998): "Glickman seems to set the stage for just this argument."

[112] *The Supreme Court, 1996 Term: Leading Cases*, 111 HARV. L. REV. 319, 320 (1997): "Although which, if any, of these three doctrinal distinctions takes hold will depend on lower court interpretations of the Glickman decision . . . ."

[113] Daniel Bensing, *The Promulgation And Implementation of Federal Marketing Orders Regulating Fruit And Vegetable Crops Under The Agricultural Marketing Agreement Act of 1937*, 5 S.J. AGRIC. L. REV. 3, 41 (1995).

one,"[114] and which deserves sweeping reevaluation.

III. Government Programs Regulating the Production of Milk and Milk Products

A. The AMAA's Milk Marketing Orders

Under the AMAA, the Secretary of Agriculture is authorized to issue orders affecting milk and milk products.[115] Such orders are to establish uniform minimum prices[116] to be paid by all milk "handlers."[117] The orders also prohibit marketing agreements or orders which would "prohibit or in any manner limit" the marketing of milk or milk products.[118]

Programs for "research and development projects, and advertising [and] sales promotion" of milk and milk products that are intended to increase or promote sale and consumption are approved.[119] "Brand advertising" is particularly excluded under this section.[120] The amount producers will be assessed for funding these programs is determined by the particular order. When state law requires a "mandatory checkoff for advertising or marketing research," orders may exclude, adjust, or credit milk assessments.[121] In the event provision of this kind is made, payments are made to "an agency organized by milk producers and producers' cooperative associations."[122] These assessments, however, are restricted to applications of "research and development projects . . . advertising . . . sales promotion, and education[] . . . ."[123]

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[114] Michael Doyle, *Court to Rule on Ag Orders*, Sacramento Bee, Dec. 1, 1996, at FI.

[115] 7 U.S.C. § 608c(5) (1998).

[116] 7 U.S.C. § 608c(5)(A) (1998).

[117] Handler is defined in 7 U.S.C. §608c(1) (1998) as "processors, associations of producers, and others engaged in the handling of [the] agricultural commodity or product thereof . . . ."

[118] 7 U.S.C. § 608c(5)(G) (1998).

[119] 7 U.S.C. § 608c(5)(I) (1998).

[120] 7 U.S.C. § 608c(5)(I) (1998).

[121] 7 U.S.C. § 608c(5)(I) (1998).

[122] 7 U.S.C. § 608c(5)(I) (1998).

[123] 7 U.S.C. § 608c(5)(I) (1998).

B. The Dairy Promotion Program

In 1983, Congress enacted the Dairy and Tobacco Adjustment Act (Dairy Act).[124] Congress' intent was to establish policy recognizing the dietary value of dairy products and the significant contributions to the national economy made by milk producers and dairy product consumers.[125] Additionally, the policy was to address the need for spontaneous and efficient supply and the need to sustain and expand markets to protect the interests of milk producers.[126] The Dairy Act authorizes funding of promotional programs for milk and milk products, strengthening the industry's marketplace position, and maintaining and increasing markets and uses both domestically and internationally. Noteworthy is Congress' express prohibition of interpreting the Dairy Act as meaning to control or restrict milk production rights of individual producers.[127]

Under the Dairy Act, the Secretary of Agriculture is given authorization to "issue a dairy products promotion and research order."[128] The issuance of the Dairy Promotion Program[129] (the Dairy Order), in 1984, became the promotion and research mechanism by which the USDA effectuates the Dairy Act.[130]

As issued under the Dairy Act, administration of the Dairy Order is the responsibility of the National Dairy Promotion and Research Board (National Dairy Board).[131] The National Dairy Board is the largest of the nation's promotional boards. It collects approximately $228 million annually from producers.[132] Funding for the program's administration is generated by assessments prescribed at "15 cents per hundredweight of milk for commercial use or the equivalent thereof."[133] However, "up to 10 cents per hundredweight of milk marketed" may be credited towards a milk producer's assessment when they take part in a "qualified State or regional dairy product promotion . . . program" designed to promote greater use of milk and dairy products.[134] The Secretary will certify a program based on the requirement that it must:

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[124] 7 U.S.C. § 4501 (1998).
[125] 7 U.S.C. § 4501(a)(1), (2) (1998).
[126] 7 U.S.C. § 4501(a)(3), (4) (1998).
[127] 7 U.S.C. § 4501(b) (1998).
[128] 7 U.S.C. § 4503(b) (1998).
[129] 7 C.F.R. § 1150 (1998).
[130] 7 C.F.R. § 1150.101 (1998).
[131] 7 U.S.C. § 4504(f) (1998).
[132] Doyle, *supra* note 114.
[133] 7 U.S.C. § 4504(g) (1998).
[134] 7 U.S.C. § 4504(g) (1998).

> Conduct activities [promotion, research, and nutrition education] that are intended to increase consumption of milk and dairy products generally; be financed primarily by producers, either individually or through cooperative associations; [and] not use a private brand or trade name in its advertising and promotion of dairy products unless the Board recommends and the Secretary concurs that such preclusion should not apply . . . .[135]

The National Dairy Board must have notice from both the producer and the state program that the producer is making assessment payments in order to receive credit.[136]

C. The California Milk Promotion Marketing Order

1. The Purpose and Structure of the State Regulation

The California Marketing Act of 1937 (Act)[137] was established to provide producers with better means to execute marketing efforts which would achieve greater balance between supply and demand of commodities. Producers "partner" with the state in this endeavor.[138] The Act also aims to provide "orderly marketing of commodities," create and maintain sufficient economic status of producers, and develop an informational and cooperational relationship with consumers as well as urban and rural segments of the state.[139]

The Act is the source of the marketing order[140] which qualifies as a state program for promotion of California dairy products as authorized by the Dairy Act. Under the Act, the California Milk Promotion Marketing Order (Marketing Order)[141] appropriately includes an advertising and promotion directive. The purpose of such advertising and promotion is to sustain and expand upon the commodity's[142] markets. In addition, the order has as its stated purpose "the prevention, modification, or removal of trade barriers that obstruct the free flow of any

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[135] 7 C.F.R. § 1150.153 (1998).

[136] 7 C.F.R. § 1150.152(e) (1998).

[137] CAL. FOOD & AGRIC. CODE § 58601 (Deering 1999).

[138] CAL. FOOD & AGRIC. CODE § 58654(a) (Deering 1999).

[139] CAL. FOOD & AGRIC. CODE § 58654(b), (g), (h) (Deering 1999).

[140] Marketing order is defined in division 21, section 58615 of the California Food and Agriculture Code as "an order which is issued by the director, pursuant to this chapter, which prescribes rules and regulations that govern the processing, distributing, or handling in any manner of any commodity within this state during any specified period." CAL. FOOD & AGRIC. CODE § 58615 (Deering 1999).

[141] CALIFORNIA MARKETING ORDER, *supra* note 32.

[142] Commodity is defined as "any agricultural . . . product which is produced in this state . . . . It includes . . . milk as defined in Section 32511." CAL. FOOD & AGRIC. CODE § 58605 (Deering 1999).

commodity to market."[143] Marketing orders for fluid milk are expressly given the option of providing funds for the advertising and sales promotion of cheese that is made from California milk.[144]

As provided for in the Act, the Marketing Order is administered by an advisory board, the California Milk Producers Advisory Board (CMAB).[145] The CMAB is the collection agency for the assessments paid into the qualifying state program by California milk producers. The CMAB is also responsible for recommending, reporting, and administering use of the assessments.[146] In 1997, the CMAB administered a budget of approximately $25.5 million, nearly all of which was designated for advertising and product promotion.[147]

2. The CMAB's Cheese Program

A distinctive black and gold seal touting "Real California Cheese" along with the slogan "It's the Cheese,"[148] are the focal points of a generic advertising program which the CMAB began in July 1995.[149] In order to participate in the cheese program and use the "Real California Cheese" seal, California cheese producers must apply to and be approved by the CMAB.[150] To receive approval, the cheese must be natural and made "without preservatives or artificial colors."[151] Processed cheese foods are excluded. To earn the right to carry the "Real California Cheese" seal, the state requires the cheese to meet standards higher than those of the USDA.[152] To be included in the CMAB's cheese program generic advertising, producers must place the "Real California Cheese" seal on its packaging.[153] As of July 8, 1998,

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[143] CAL. FOOD & AGRIC. CODE § 58889(a) (Deering 1999); CALIFORNIA MARKETING ORDER, *supra* note 32, Art. III, § C (1969); CAL. FOOD & AGRIC. CODE § 58841 (Deering 1999).

[144] CAL. FOOD & AGRIC. CODE § 58889(c)(1) (Deering 1999).

[145] CALIFORNIA MARKETING ORDER, *supra* note 32, Art. II, § A (1969).

[146] CAL. FOOD & AGRIC. CODE § 58846 (Deering 1999).

[147] Brief for Appellant at 9, Gallo Cattle Co. v. Veneman, 1999 U.S. App. LEXIS 1939 (9th Cir. 1999) (No. 97-17182).

[148] *Id.* at 14.

[149] Telephone Interview with Nancy Fletcher, *supra* note 7.

[150] California Milk Advisory Bd., *California Cheese Manufacturers List* (visited Jan. 24, 1999) <http://www.calif-dairy.com/cheese list.html> [hereinafter *Manufacturers List*].

[151] Linda Susan Dudley, *Cutting Into Cheese Market; State's Consumber* [sic] *Ripe for Hike in Production*, SAN DIEGO UNION–TRIB., May 23, 1984, at Food-1.

[152] *Id.*

[153] Brief for Appellant at 15, n.7, Gallo Cattle Co. v. Veneman, 1999 U.S. App. LEXIS 1939 (9th Cir. 1999) (No. 97-17182).

there were forty-eight approved producers included in the program.[154]

The CMAB's "admitted purpose of the generic . . . advertising program is to promote the private label programs of grocery chains which use California produced milk."[155] Since the program was introduced, a variety of media resources have been employed to expose California consumers to the CMAB's cheese program message.[156] The program's 1998 budget was $18.5 million, and included advertising, retail promotion, consumer promotion, and public relations.[157] The program's 1999 budget is expected to remain the same.[158] Until 1998, the California cheese program's advertising appeared only in California. However, based upon high retail sales of cheese per capita in the state of Colorado, the CMAB approved plans to invest $2 million to carry the "It's the Cheese" campaign into that state.[159]

Cheese is growing faster than any other California dairy product.[160] Consumption of cheese was at an all time high nationwide in 1997 at twenty-eight pounds per capita.[161] When the cheese program began, there were seventy varieties of cheese being made in the state.[162] Since that time, the industry has increased in both volume and variety. Currently, there are 130 varieties of California cheese.[163]

IV. *GALLO:* DISTINGUISHING THE ISSUE

A. The Beginning of Joseph Farms

The Gallo story began in 1979 when Joseph Gallo began milking his "springer" heifers and thereby founded the Joseph Gallo Dairy Farm with 4,000 cows.[164] This family-owned farm, located in the Central Valley community of Atwater, grew to be the nation's largest dairy farm.[165] In 1983, Gallo began making cheese and, one year later, was

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[154] *Manufacturers List, supra* note 150.

[155] Brief for Appellant at 13-14, *Gallo* (No. 97-17182).

[156] *Id.* at 14.

[157] Telephone Interview with Nancy Fletcher, *supra* note 7.

[158] *Id.*

[159] *Spotlight on Cheese, supra* note 9.

[160] California Milk Advisory Bd., *Products* (visited Mar. 19, 1999) <http://www.calif-dairy.com/prod.html>.

[161] *Spotlight on Cheese, supra* note 9.

[162] Telephone Interview with Nancy Fletcher, *supra* note 7.

[163] *Id.*

[164] Dan Looker, *The Milk Meisters: Our Ranking of the Nation's Largest Dairy Farms,* SUCCESSFUL FARMING, Aug. 1995, at 42.

[165] *Id.*

producing cheese under its own label.[166] Gallo cheese is sold under the label "Joseph Farms."[167]

Joseph Farms cheese quickly gained a reputation for its premium quality. In 1996, Gallo's medium cheddar won first place in the *San Francisco Chronicle's* Taster's Choice blind tasting competition.[168] At the 1997 California State Fair, a gold medal was awarded to each of the six Joseph Farms cheeses entered.[169] Gallo received another kind of distinction in 1997 when it became the first to receive government approval to market its cheese as "Artificial Hormone Free."[170] In 1998, Gallo won the *San Francisco Chronicle's* competition for its Monterey Jack, with one judge declaring it, "A great cheese."[171] Today, Gallo is considered the largest producer of California-brand retail cheese,[172] producing fifty million pounds[173] and more than twenty varieties[174] of cheese per year. Gallo uses 100%[175] of its dairy's Grade A[176] milk to produce Joseph Farms cheese. Gallo sells no milk.[177]

B. Premium Product vs. Generic Commodity

Distinguishing *Gallo* from *Wileman* is the agricultural product itself. In *Wileman*, the Court ruled on marketing orders affecting tree fruit,[178] a "generic commodity."[179] The *Wileman* marketing orders regulated

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[166] *Id.*

[167] Brief for Appellant at 2, Gallo Cattle Co. v. Veneman, 1999 U.S. App. LEXIS 1939 (9th Cir. 1999) (No. 97-17182); Joseph Farms, *Welcome to Joseph Farms* (visited Jan. 29, 1999) <http://www.josephfarmscheese.com>.

[168] Karola Saekel, *Mixed Culinary Messages,* S.F. CHRON., Dec. 30, 1996, at Food-1.

[169] Joseph Farms, *Nutrition and Quality* (visited Jan. 29, 1999) <http://www.josephfarmscheese.com/quality.shtml>.

[170] *Hormone-Free Cheese*, SAN DIEGO UNION-TRIB., Sept. 10, 1997, at Food-8.

[171] Miriam Morgan, *Milking the Market for Monterey Jack*, S.F. CHRON., Jan. 21, 1998, at Food-2.

[172] Brief for Appellant at 13, *Gallo* (No. 97-17182).

[173] Interview with Brian C. Leighton, Attorney at Law, in Clovis, Cal. (Jul. 29, 1998) [hereinafter Leighton interview].

[174] Joseph Farms, *Our Products* (visited Jan. 29, 1999) <http://www.josephfarmscheese.com/product.shtml>.

[175] Damon Darlin, *Gallo's Whine*, FORBES, June 17, 1996, at 78.

[176] Brief for Appellant at 10, Gallo Cattle Co. v. Veneman, 1999 U.S. App. LEXIS 1939 (9th Cir. 1999) (No. 97-17182).

[177] Darlin, *supra* note 175.

[178] Glickman v. Wileman Bros. & Elliott, 521 U.S. 457, 138 L. Ed. 2d 585, 585 (1997).

[179] Reply Brief for Appellant at 6-7, Gallo Cattle Co. v. Veneman, 1999 U.S. App. LEXIS 1939 (9th Cir. 1999) (No. 97-17182).

the commodities' size, quality, maturity, and container.[180] As a result, handlers regulated by these orders are statutorily restricted from offering a product to the consumer that can be distinguished from a competitor's.[181] In its ruling, the Supreme Court repeatedly emphasized the message complained of involved only "generic advertising."[182] The Court reasoned that as the handlers shared a common interest[183] in the sale of the commodity, they could have no disagreement with the content of the message.[184]

In contrast, the *Gallo* claim involves a premium, private label cheese--not a generic commodity.[185] This difference arises from the way in which cheese is produced and marketed. Unlike generic commodities, one brand name is both distinguishable and recognizable from others.[186] Marketing orders for cheese do not place the same size, quality, maturity, and container restrictions on cheese producers as do the marketing orders in *Wileman*. Clearly, if the same logic regarding no consumer distinction in generic commodities--and therefore no reason to disagree with the generic advertising message—that applies in *Wileman* is extended to *Gallo*, it will not factually accord the recognition Gallo has earned from tasting competitions and consumers.

The message " 'California Summer Fruits' are wholesome, delicious, and attractive to discerning shoppers" reflects a market that by statutory regulation has been stripped of any competitive positioning between handlers. The message is as indistinctive as the commodities offered to consumers. The message minimizes consumer desire to distinguish between purchases of one type of summer fruit from another, creating a level playing field. As the Court in *Wileman* stated, "none of the generic advertising conveys any message with which respondents disagree."[187]

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[180] 7 U.S.C. § 602(3) (1998).

[181] Brief for Appellant at 35, Gallo Cattle Co. v. Veneman, 1999 U.S. App. LEXIS 1939 (9th Cir. 1999) (No. 97-17182).

[182] *Wileman*, 138 L.Ed. 2d at 594.

[183] *Id.* at 595.

[184] *Id.* at 601.

[185] Reply Brief for Appellant at 7, Gallo Cattle Co. v. Veneman, 1999 U.S. App. LEXIS 1939 (9th Cir. 1999) (No. 97-17182).

[186] *Id.*

[187] Glickman v. Wileman Bros. & Elliott, 521 U.S. 457, 138 L. Ed. 2d 585, 601 (1997).

C. Compelled Use of a False Message

Unlike the message in *Wileman*, the CMAB's "Real California Cheese" message takes products proven to be both distinguishable and superior and falsely portrays them as being the same. In order for Gallo to be included in the CMAB's cheese advertising, Gallo is required to carry the "Real California Cheese" seal on its product.[188] As Gallo is compelled to pay for the program, it did at one time include the seal on its packaging, but has since removed it.[189] The CMAB's purpose in its "Real California Cheese" message is to convince consumers that cheese made with California milk is superior to cheese which is not, and cheeses which carry the logo are equal in quality.[190] Gallo strongly objects to this message.[191] By including the seal on its packaging, Gallo is forced to promote itself as a cheese which is not superior to others bearing the same seal. Both consumer and taste competitions have proven Gallo produces a cheese that is distinguishable from other cheese. "Gallo's message is that its cheese is not the same as other California cheese, and that Gallo's cheese has qualities other cheese lacks."[192] Alternatively, by leaving the seal off of its packaging, Gallo exposes itself to the risk that the CMAB's "Real California Cheese" advertising suggests that Gallo cheese is inferior to those which do bear the seal.

In *Wileman*, the Supreme Court distinguished the handlers claim from that of *Wooley v. Maynard*.[193] Unlike *Wooley*, the handlers were not required to display the message at issue on their private property.[194] In *Gallo*, however, placement of the "Real California Cheese" seal on the Gallo packages presents the very problem found to be unconstitutional in *Wooley*. If Gallo includes the seal, which it must in order to receive the benefits of advertising for which it is compelled to pay, it is "require[d] . . . to participate in the dissemination of an ideological message by displaying it on [its] private property"[195] for public notice. Additionally, placement of the seal on Gallo packages will

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[188] Brief for Appellant at 15 n.7, Gallo Cattle Co. v. Veneman, 1999 U.S. App. LEXIS 1939 (9th Cir. 1999) (No. 97-17182).

[189] Leighton interview, *supra* note 173.

[190] Brief for Appellant at 14, *Gallo* (No. 97-17182).

[191] *Id.*

[192] *Id.* at 16.

[193] Glickman v. Wileman Bros. & Elliott, 521 U.S. 457, 138 L. Ed. 2d 585, 600-01 (1997).

[194] *Id.*

[195] Wooley v. Maynard, 430 U.S. 705, 713 (1977).

unavoidably attribute the CMAB cheese program advertising to Gallo. This message attribution is in direct contradiction to the finding of nonattribution in *Wileman*.[196]

As the Supreme Court in *West Virginia Board of Education* explained, the fundamental rights guaranteed by the United States Constitution—such as life, liberty, property, and free speech—do not depend on the results of elections; they cannot be put to a vote.[197] Reasoned analysis, then, would question why the vote of agricultural producers operating under a marketing order is a permissible exception to this principle. As such, if *Wileman* applies, those who disagree lose what is held to be the very foundation of our nation.

CONCLUSION

The purpose of the AMAA and marketing orders has served both agriculture and consumers well with regard to orderly supply to market. However, since the implementation of the federal regulations during the first half of the twentieth century, when small rural farms dominated the industry, agriculture has been transformed into an efficient, modern business. This transformation is due, in part, to industrial advances allowing agricultural interests to do more with less.[198] Both production and consumption are on the rise; yet, while antiquated policies continue to be upheld, progressive agricultural entrepreneurs remain hamstrung.

When the restriction placed on agriculture affects the entrepreneur's freedom of speech and compels participation in marketing programs that promote competitive products, the soundness of any regulatory policy begins to unravel. Furthermore, when the compelled participation uses an entrepreneur's funds to promote a product the entrepreneur does not sell, there is insult added to injury.

Placement of a compelled generic advertising message on one's nongeneric agricultural commodity packaging creates an undeniable connection between the commodity and the message. This connection detracts from any distinguishing factors the nongeneric commodity has and, arguably, creates consumer confusion. Additionally, when a message must be placed on the commodity, there is simply no way to "disavow any connection with the message"[199] without appearing non-

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[196] *Wileman*, 138 L. Ed. 2d at 601.

[197] West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

[198] Lamar Graham, *Where Have All the Small Towns Gone?*, PARADE MAG., Dec. 13, 1998, at 6.

[199] PruneYard Shopping Center v. Robins, 447 U.S. 74, 87 (1980).

sensical. Furthermore, when the compelled generic message is not coupled with a regulatory program that restricts quality, size, maturity, price, or packaging, any argument of a shared common interest in promotion of the commodity loses support altogether.

The holding of *Wileman* involving compelled generic advertising is both overly restrictive and too broad to be applied to nongeneric agricultural commodities. Producers and consumers will be better served by a finding that compelled funding of generic advertising programs arising from orders affecting a product such as cheese is a violation of the First Amendment's protection of free speech.

ADDENDUM

On February 11, 1999, the Ninth Circuit Court of Appeal ruled there were enough similarities between *Gallo* and *Wileman* to rule against the cheese maker.[200] Should Gallo decide to petition the U.S. Supreme Court, its success may lie in the hope that the Supreme Court Justices will find Joseph Farms cheese as distinguishable as consumers do.

DEBORAH K. BOYETT

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[200] Gallo Cattle Co. v. Veneman, No. 97-17182, 1999 U.S. App. LEXIS 1939, at *25 (9th Cir. Feb. 11, 1999).