UNITED STATES OF AMERICA

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DEPARTMENT OF AGRICULTURE

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PUBLIC HEARING

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IN THE MATTER OF:

:

NATIONAL LEAFY GREEN : Docket No.

VEGETABLES HANDLED IN : AO-FE-09-0138 THE UNITED STATES; : AMS-FV-09-0029

HEARING ON PROPOSED
MARKETING AGREEMENT

NO. 970

__**:**

Tuesday, September 22, 2009

Hyatt Regency Hotel Monterey Grand Ballroom 1 Old Golf Course Road Monterey, California

The above-entitled matter came on for

hearing, pursuant to notice, at 8:30 a.m. BEFORE:

Marc R. Hillson, Chief Administrative Judge

APPEARANCES:

ON BEHALF OF THE USDA:

SHARLENE DESKINS, Esq., Office of General

Counsel, Marketing Division
ANTOINETTE M. CARTER, Technical Assistant to
the Chief, AMS

MELISSA SCHMAEDICK, Senior Marketing Specialist, AMS

KATHLEEN A. STALEY, Food Safety Officer, AMS, Fruit & Vegetable Programs

ANTHONY J. SOUZA, Federal Program Manager, AMS SUZANNE DASH, Agricultural Economist, AMS MICHAEL DURANDO, Chief, AMS RAYNE PEGG, Administrator, AMS

ON BEHALF OF THE PROPONENTS:

JASON RESNICK, Western Growers ROBERT WILKINSON, Western Growers

SCOTT HORSFALL, California Leafy Green Handler

Marketing Agreement

HENRY GICLAS, Western Growers

ON BEHALF OF THE NATIONAL ORGANIC COALITION:

CHARLES ENGLISH, National Organic Coalition

T-A-B-L-E O-F C-O-N-T-E-N-T-S

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E-X-I-B-I-T-S

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1.	Program Announcement for Hearing on Leafy Green Vegetables 9/11/09	10	11
2.	Certificate of Mailing		
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3.	Certificate of Mailing to Governors and Secretary of Agriculture 9/10/09	11	11
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13.	Sammy Duda Testimony	330	337
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- 1 P-R-O-C-E-E-D-I-N-G-S
- 2 8:32 a.m.
- JUDGE HILLSON: Good morning
- 4 everybody. It's September 22, 2009. And
- 5 we're in Monterey, California for the Leafy
- 6 Green Vegetables Handled in the United States
- 7 hearing. It's Docket No. AO-FE-09-0138, AMS-
- 8 FV-09-0029 AND FV-09-970-1.
- 9 My name is Marc Hillson. I'm the
- 10 Chief Administrative Law Judge at the
- 11 Department of Agriculture. My job is to
- 12 preside over and conduct this hearing. But I
- 13 have no role in making any decisions on this
- 14 subject.
- 15 I'm basically here to make sure
- 16 the evidence comes in in an orderly fashion
- 17 and a complete fashion to make sure the
- 18 hearing is just conducted properly. And that
- 19 will be my role here.
- 20 This hearing is going to take
- 21 place in seven locations over the next five
- 22 weeks. And just as a note, this first week of

- 1 hearing was scheduled to take place Tuesday
- 2 through Thursday but AMS has requested for me
- 3 to continue the hearing through Friday, if
- 4 necessary, and is in the process of publishing
- 5 some notice to that effect. And I said that
- 6 I could do that. So if we don't finish up by
- 7 Thursday with the business that we want to
- 8 have conducted in Monterey, we'll continue to
- 9 Friday.
- 10 I'm also willing -- and this is
- 11 something that we can sort of play by ear
- 12 later on, is to start earlier and go later if
- 13 everyone is up to it, including me, including
- 14 the reporter, including everyone else. So I'd
- 15 be willing to start at eight or even at seven-
- 16 thirty and go until six or six-thirty.
- I don't think we want to really
- 18 kill ourselves but I'd be willing to extend
- 19 the day if it will mean we'll get everything
- 20 that we want to have done in Monterey get it
- 21 all done.
- Now I'm going to just have

- 1 probably two regular old coffee breaks, two
- 2 10- or 15-minute breaks, one in the morning,
- 3 one in the afternoon, and about an hour for
- 4 lunch. I understand we're pretty much captive
- 5 here in terms of where we're going to -- we
- 6 pretty much need to eat here so an hour for
- 7 lunch should take care of things.
- 8 Just a couple general things about
- 9 the hearing. One is I just want to remind
- 10 people that when they come up to make a
- 11 statement or when they ask questions or cross
- 12 examine later on to please identify
- 13 themselves.
- 14 There are a lot of different
- 15 people who are going to be talking here and we
- 16 want the record to be as accurate as possible.
- 17 I'll be reminding people all week long
- 18 probably to identify themselves for the
- 19 record.
- In there rulemaking hearings, any
- 21 interested person can testify. And each
- 22 person that testifies will be sworn in and

- 1 testify under oath. And also each person who
- 2 testifies will be subject to cross
- 3 examination.
- 4 Now I do have the authority to
- 5 take measures to avoid the undue prolongation
- 6 of the hearing, as I think the regs say, which
- 7 basically if the same people are going to read
- 8 -- if ten people in the room are going to read
- 9 the exact same statement, I'm going to
- 10 probably just say -- have them just say look,
- 11 I endorse the statement, not have them read it
- 12 again. I think we'd probably all appreciate
- 13 that in the long run.
- 14 The important thing is to let
- 15 everyone testify. I've asked people out in
- 16 the lobby to let me know if there are people
- 17 who can only testify today and we'll do the
- 18 same thing tomorrow. And my goal -- one of
- 19 the goals is I'm supposed to allow, within
- 20 reason, everyone who wants to testify to
- 21 testify.
- 22 So if someone comes in and they

- 1 can only testify today, make sure you let them
- 2 know and we'll find a way to squeeze you in
- 3 even though it might break up, to some extent,
- 4 the flow of the case that is being presented.
- 5 I understand the proponent -- I
- 6 have listed 31 witnesses that the proponent is
- 7 going to be presenting and I know the
- 8 opposition has a lot of witnesses as well.
- 9 And while a nice smooth presentation would be
- 10 great, we have to accommodate reality here
- 11 which is that some people need to be here at
- 12 certain times and we're going to try and take
- 13 care of that.
- One other thing today that is a
- 15 little bit different is that this hearing, at
- 16 least the Monterey part of the hearing, is
- 17 going to be videotaped. And is going to be
- 18 made available on the AMS website, I believe.
- 19 Is that correct? And so that's more incentive
- 20 to be on your best behavior, I guess, as well.
- 21 Let me -- I'm going to do a few
- 22 preliminary things before the witness is

- 1 called. One is that are a few standard
- 2 preliminary exhibits. I'll ask Ms. Deskins to
- 3 describe them for me and we'll get them
- 4 admitted into evidence.
- 5 MS. DESKINS: Judge Hillson, I
- 6 have three exhibits I'd like to put into
- 7 evidence.
- 8 This first is -- it is a press
- 9 release certificate. And I'd like to have
- 10 that marked -- it's already marked as Exhibit
- 11 1.
- 12 (Whereupon, the above-referred to
- 13 document was marked as USDA
- 14 Exhibit No. 1 for identification.)
- MS. DESKINS: The second is a
- 16 certificate of mailing to interested persons.
- 17 And it's been marked as Exhibit 2. And it
- 18 includes the Notice of Hearing as well as a
- 19 copy of the proposed order.
- 20 (Whereupon, the above-referred to
- 21 document was marked as USDA
- 22 Exhibit No. 2 for identification.)

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1 MS. DESKINS: And then Exhibit 3
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- 2 is a certificate of mailing to the Governors.
- 3 (Whereupon, the above-referred to
- 4 document was marked as USDA
- 5 Exhibit No. 3 for identification.)
- 6 JUDGE HILLSON: Thank you. And
- 7 these exhibits are already marked and nobody
- 8 could possibly an objection to these three
- 9 documents so I will receive Exhibits 1, 2, and
- 10 3 into evidence.
- 11 (Whereupon, the above-referred to
- 12 documents were received into the
- record as USDA Exhibit Nos. 1, 2,
- 14 and 3.)
- MS. DESKINS: Thank you, Judge
- 16 Hillson.
- JUDGE HILLSON: Thank you, Ms.
- 18 Deskins.
- 19 And what I'm going to do now is,
- just for the record, one time I'm going to ask
- 21 the people who are here in a representational
- 22 capacity to just identify themselves. State

- 1 their name and who they are representing. And
- 2 I'm going to start with the governing table to
- 3 my left.
- 4 MS. DESKINS: Judge Hillson, my
- 5 name is Sharlene Deskins. I'm with the Office
- 6 of General Counsel, United States Department
- 7 of Agriculture. My office is 1400
- 8 Independence Avenue, S.W., Washington, D.C.
- 9 20250.
- 10 MS. CARTER: Good morning. My
- 11 name is Antoinette Carter. I'm with the
- 12 Marketing Order Administration Branch of the
- 13 USDA Agricultural Marketing Service, Food and
- 14 Vegetable Programs.
- 15 MS. SCHMAEDICK: Good morning. My
- 16 name is Melissa Schmaedick. I'm a Senior
- 17 Marketing Specialist also with the Marketing
- 18 Order Administration Branch, Fruit and
- 19 Vegetable Programs, USDA.
- MS. STALEY: Good morning. I'm
- 21 Kathleen Staley with AMS Fruit and Vegetable
- 22 Programs.

- 1 MR. SOUZA: Good morning. My name
- 2 is Anthony Souza. I'm with Fresh Products
- 3 Branch, Western Territory.
- 4 MS. DASH: Suzanne Dash, Fruit and
- 5 Vegetable Programs, AMS.
- 6 JUDGE HILLSON: I know you don't
- 7 have a microphone. Are you going to be asking
- 8 -- I hope you're not. Okay. Let me turn to
- 9 the table to my right.
- 10 MR. RESNICK: Good morning, Your
- 11 Honor. I'm Jason Resnick, Assistant General
- 12 Counsel at Western Growers Association.
- MR. HORSFALL: My name is Scott
- 14 Horsfall. I'm the CEO of the California Leafy
- 15 Greens Marketing Agreement and part of the
- 16 proponent group.
- 17 MR. GICLAS: Good morning. My
- 18 name is Hank Giclas. I'm Vice President for
- 19 Strategic Planning Science and Technology for
- 20 Western Growers and part of the proponent
- 21 group.
- JUDGE HILLSON: Okay. I'm going

- 1 to ask if you people in the room -- I see a
- 2 lot of people have identified -- those that
- 3 are here in a representational capacity, if
- 4 you could just -- the mics won't quite get
- 5 you, I guess, but if you could just stand up
- 6 and identify yourself and we'll just start off
- 7 with this table here.
- 8 MR. ROLPH: I'm Josh Rolph from
- 9 the California Farm Bureau Federation.
- JUDGE HILLSON: Thank you.
- 11 Sir?
- MR. BOGART: Jim Bogart, Growers
- 13 and Shippers Association of Central
- 14 California.
- JUDGE HILLSON: Ma'am?
- 16 PARTICIPANT: (Speaking from
- 17 unmiked location.) Diane --
- 18 PARTICIPANT: (Speaking from
- 19 unmiked location.) Dave --
- 20 MS. BAUMGARTNER: (Speaking from
- 21 unmiked location.) Joann Baumgartner.
- 22 PARTICIPANT: (Speaking from

- 1 unmiked location.) Steve --
- 2 MS. LOVERA: (Speaking from
- 3 unmiked location.) Patty Lovera --
- 4 MR. ENGLISH: (Speaking from
- 5 unmiked location.) Charles English, Council
- 6 for National Organic Coalition.
- JUDGE HILLSON: Thank you, Mr.
- 8 English.
- 9 MR. PAUL: (Speaking from unmiked
- 10 location.) Garth Paul, Oregon Certified
- 11 Organic.
- 12 JUDGE HILLSON: Okay. Anyone else
- 13 here in a representational capacity? Sir?
- MR. GONZALEZ: I'm Johnny Gonzalez
- 15 with the California Environmental Protection
- 16 Agency, State Water Resources Control Board.
- 17 JUDGE HILLSON: Thank you.
- 18 Anyone else here in a
- 19 representational capacity?
- Mr. English, you have a motion you
- 21 said?
- MR. ENGLISH: Good morning, Your

- 1 Honor, my name is Charles English, appearing
- 2 for the National Organic Coalition.
- 4 preliminary objection. But yes, Your Honor,
- 5 I do make it under 7 CFR 900.7 and 900.8
- 6 (b)(2). While the Secretary in his Notice of
- 7 Hearing, which is Exhibit 2, has indicated
- 8 that he has determined that this proceeding is
- 9 an appropriate matter under the Agricultural
- 10 Market Agreements Act, we respectfully
- 11 disagree that this effectively food safety
- 12 matter is a proper subject for a marketing
- 13 agreement.
- 14 As a matter of courtesy, I
- 15 indicated last week to the Office of General
- 16 Counsel and to an attorney representing one of
- 17 the entities that its proponents, I believe,
- 18 has communicated that, that we had this
- 19 objection. Therefore, I'm not making the
- 20 objection to delay rather to get it on the
- 21 record.
- Your Honor, the Agricultural

- 1 Marketing Service, under the AMAA, is not a
- 2 food safety agency. USDA has repeatedly told
- 3 both Congress in testimony and most recently
- 4 in a report issued by GAO, the oversight of
- 5 food safety activities, that it lacks quote
- 6 food safety statutory authority.
- 7 This proceeding, while guised as
- 8 quality, is not quality as we have understood
- 9 it and as the Secretary has understood it in
- 10 the past. For instance, the Secretary's own
- 11 website defines quality as a measurable
- 12 attribute. The definition of quality in the
- 13 dictionary is an attribute, not a process.
- 14 What is being proposed goes beyond
- 15 the mechanisms for which we believe the
- 16 Secretary has present statutory authority. I
- 17 would point out that there is presently
- 18 litigation -- I am not involved in that
- 19 litigation -- but there is litigation
- 20 involving the almond industry in which AMS has
- 21 sought effectively authority under marketing
- 22 orders to acquire pasteurization of almonds

- 1 that are handled in the United States.
- 2 That matter is pending in Federal
- 3 Court. I think, from my perspective, it may
- 4 have a procedural hurdle and exhaustion of
- 5 remedies but I'm not counsel for that, but
- 6 nonetheless, the substantive issue is out
- 7 there.
- 8 The Secretary obviously has
- 9 effectively made a determination that he has
- 10 the authority. I'm here, not so much to make
- 11 a motion to adjourn proceedings because a lot
- 12 of people have made a financial investment and
- 13 everybody is here. I also know how you would
- 14 rule on that.
- 15 But I'm more here to make an
- 16 objection to proceeding, to make it clear for
- 17 the record that we have that objection.
- 18 Again, that was part of why I signal it in
- 19 advance.
- 20 One of my concerns, Your Honor, is
- 21 what happens down the road if a marketing
- 22 agreement is entered into. And if some

- 1 litigation in the future is brought that
- 2 determines that the Secretary lacked the
- 3 statutory authority or the almond case comes
- 4 out in that way.
- 5 Under a proposed marketing
- 6 agreement under the Agricultural Marketing
- 7 Agreements Act, the principle benefit to those
- 8 who participate in a marketing agreement is
- 9 protection from the federal antitrust laws.
- 10 And my clients, who are frankly opposed to the
- 11 marketing agreement but recognizing that an
- 12 agreement might happen, are also prepared to
- 13 make various suggestions, if necessary, for
- 14 how it could be modified.
- 15 It would be an awkward position
- 16 down the road if a marketing agreement is
- 17 entered into, they wish to serve on the board,
- 18 but no one is going to give them legal advice.
- 19 A conservative attorney may fail to give them
- 20 legal advice that they are exempt from the
- 21 antitrust laws.
- There is a significant risk here.

- 1 And the problem is is that if the Secretary
- 2 acts ultra vires, we submit that any marketing
- 3 agreement would be void ab initio. And as
- 4 such, any entity entering into a marketing
- 5 agreement would be at risk under the federal
- 6 antitrust laws.
- 7 Now having said all of that, there
- 8 is nothing that can be said at this hearing,
- 9 other than legal argument, that can change --
- 10 nothing can change whether the Secretary has
- 11 the legal authority or not. The Secretary
- 12 either has the legal authority or he does not.
- 13 Until the statute is changed, he either does
- 14 or does not have the authority.
- 15 And so we rise in an objection to
- 16 the proceeding. We're going to participate.
- 17 But we want people to understand we have that
- 18 concern. I'm here for the hearing. I've
- 19 already mentioned to one counsel about it and
- 20 we can discuss it informally off the record.
- But that reason, Your Honor, we
- 22 object to the proceeding. We do not believe

- 1 that this proceeding can properly be
- 2 maintained under the declared policy of the
- 3 act under 7 USC Section 602.
- JUDGE HILLSON: Thanks, Mr.
- 5 English.
- 6 Ms. Deskins, did you want to say
- 7 anything before I rule?
- 8 MS. DESKINS: Judge Hillson, the
- 9 purpose of this of this hearing is to see
- 10 whether there is sufficient evidence to have
- 11 an agreement under Section 608(b) of the
- 12 Agricultural Marketing Act of 1937. That's
- 13 the authority under which the Secretary's
- 14 operating here today.
- These arguments about food safety,
- 16 there have always been quality standards
- 17 since, you know, the 1946 act. They include
- 18 standards on things such as aflatoxin in
- 19 peanuts, sulphur in raisins. They may have
- 20 food safety implications but the Secretary is
- 21 acting in order to enhance marketing.
- 22 And the food safety arguments,

- 1 people may use the regulations for what they
- 2 want but we're acting here today under the
- 3 authority -- or under the AMAA for the
- 4 Secretary to enter into marketing agreements.
- 5 JUDGE HILLSON: Well, Mr. English,
- 6 while your objection is noted for the record,
- 7 it will be of no great surprise to you that I
- 8 will rule against you and we will proceed with
- 9 the hearing.
- 10 And, Ms. Deskins, was the
- 11 Government going to call a witness before the
- 12 proponents?
- MS. DESKINS: Yes, yes. We have a
- 14 --
- JUDGE HILLSON: We're ready for
- 16 that. Unless there were any other
- 17 preliminary?
- MS. DESKINS: Not from me, Your
- 19 Honor.
- JUDGE HILLSON: Okay. Okay.
- 21 MS. DESKINS: Our first witness is
- 22 going to be Suzanne Dash.

- 1 JUDGE HILLSON: Okay. Here's the
- 2 official witness chair. I guess you have a
- 3 microphone over there but why don't we just
- 4 let everyone testify from over here.
- I need a copy of that. The
- 6 reporter probably wants a copy, too. And I
- 7 don't know how many you want to give out to
- 8 the -- I just want one.
- 9 So we're getting two documents.
- 10 One is your testimony and one is just
- 11 statistical information. Okay. Have a seat.
- 12 Please raise your right hand.
- 13 WHEREUPON,
- 14 SUZANNE DASH
- 15 was called as a witness by Counsel for the
- 16 Agency, having been first duly sworn, assumed
- 17 the witness stand, was examined and testified
- 18 as follows:
- 19 DIRECT TESTIMONY
- JUDGE HILLSON: Okay. Could you
- 21 please state your name and spell it for the
- 22 record?

- 1 THE WITNESS: Suzanne Dash, S-U-Z-
- 2 A-N-N-E, my last name is D-A-S-H.
- JUDGE HILLSON: Okay. And are you
- 4 going to read a statement for the record
- 5 first?
- THE WITNESS: Yes.
- 7 JUDGE HILLSON: I'm going to --
- 8 you handed me two documents. I'm going to
- 9 mark your statement as Exhibit 4.
- 10 (Whereupon, the above-referred to
- 11 document was marked as USDA
- 12 Exhibit No. 4 for identification.)
- JUDGE HILLSON: And I'm going to
- 14 mark your document of statistical information
- 15 as Exhibit No. 5 just so we can follow on when
- 16 the time comes.
- 17 You may read your statement.
- 18 THE WITNESS: Okay. There's
- 19 copies of my written statement in the back.
- 20 And there's also copies of the statistical
- 21 information that I'm presenting in the back if
- 22 anybody would like that.

- 1 My name is Suzanne Dash. I am an
- 2 agricultural economist with the Economic
- 3 Analysis and Program Planning Branch of the
- 4 Fruit and Vegetable Programs of the
- 5 Agricultural Marketing Service of the U.S.
- 6 Department of Agriculture (USDA).
- 7 I received a Bachelor's degree in
- 8 agricultural economics from the University of
- 9 Illinois in 1978 and a Masters degree in
- 10 agricultural economics from the University of
- 11 Wisconsin in 1982. I have worked for USDA
- 12 since 1982.
- 13 My duties include providing
- 14 economic analyses of the impact of changes in
- 15 marketing order and agreement programs for
- 16 fruits, vegetables, nuts and specialty
- 17 products. I also conduct analyses of the
- 18 marketing situation for fruits and vegetables
- 19 that are purchased for domestic feeding
- 20 programs.
- 21 For the National Leafy Greens
- 22 Marketing Agreement Hearing, I have prepared

- 1 a report titled "Leafy Greens Statistical
- 2 Information." The sources for the data used
- 3 in this report are the National Agricultural
- 4 Statistics Service (NASS) and the Economic
- 5 Research Service (ERS), of USDA and the U.S.
- 6 Census Bureau of the Department of Commerce
- 7 (Commerce).
- 8 Concerning the proposed marketing
- 9 agreement, USDA takes a neutral position. The
- 10 purpose of this testimony is to introduce
- 11 relevant NASS, ERS, and Commerce data and
- 12 other information into the hearing record.
- 13 The testimony, data, and charts are intended
- 14 for use by participants in the Hearings and by
- 15 USDA in discussing and analyzing the merits of
- 16 the proposed marketing agreement.
- 17 The types of leafy green
- 18 vegetables proposed to be included in the
- 19 national marketing agreement include: the
- 20 fresh mature and immature leafy portions of
- 21 any of the following: arugula, cabbage (red,
- 22 green, and savoy), chard, cilantro, endive,

- 1 escarole, kale, lettuce (iceberg, leaf,
- butter, head, and romaine), parsley,
- 3 radicchio, spinach, and spring mix. Under the
- 4 proposal, the addition or removal of specific
- 5 leafy green vegetables is authorized if
- 6 recommended by the Marketing Agreement
- 7 Committee and approved by the Secretary of
- 8 Agriculture.
- 9 This testimony and the "Leafy
- 10 Green Vegetables Statistical Information"
- 11 present the supply, utilization, grower
- 12 prices, and trade in leafy green vegetables.
- 13 Data for the United States (U.S.) and
- 14 individual states is included. In its annual
- 15 publications, NASS reports leafy green
- 16 vegetable data only for the major producing
- 17 states.
- 18 More detailed information is
- 19 available every five years from USDA's Census
- 20 of Agriculture (Census). According to the
- 21 latest Census, 9,274 farms harvested leafy
- 22 green vegetables from 433,023 acres for the

- 1 fresh market in 2007. The commodities in this
- 2 total include head, leaf, and romaine lettuce,
- 3 head cabbage, spinach, Chinese cabbage, kale,
- 4 escarole, and endive, mustard cabbage,
- 5 collards, mustard greens, and turnip greens.
- 6 The supply, utilization, and price
- 7 for head lettuce, leaf, and romaine lettuce,
- 8 fresh spinach, and fresh cabbage, annual per
- 9 capita lettuce consumption was 21 pounds in
- 10 the 1960s, 24 pounds in the 1970s and 25
- 11 pounds in the first half of the 1980s. Since
- 12 the late 1980s, consumption has averaged about
- 13 30 pounds per person, an increase of 40
- 14 percent compared to the 1960s.
- The type of lettuce consumed has
- 16 changed over this time period also. Until
- 17 1985, USDA reported annual data on head
- 18 lettuce only (also known as iceberg). By
- 19 2008, head lettuce accounted for only 56
- 20 percent of lettuce production reported by
- 21 USDA, with romaine and leaf accounting for the
- 22 other 44 percent.

- 1 Per capita consumption of fresh
- 2 spinach and fresh cabbage is about two and
- 3 eight pounds per year, respectively.
- 4 Head (iceberg) lettuce, table 1
- 5 and charts 1 and 2 show the supply,
- 6 utilization and farm price for head lettuce.
- 7 Production in 2009 is forecast to total 5.3
- 8 billion pounds, making head lettuce the most
- 9 popular type of lettuce grown in the U.S.
- 10 However, head lettuce's average share of U.S.
- 11 lettuce production has declined from an
- 12 average of 77 percent during 1996-1998 to 56
- percent in 2006-2008 while the popularity of
- 14 leaf and romaine lettuce has surged.
- 15 Head lettuce is harvested year-
- 16 round in California. Of the other states with
- 17 large production of head lettuce, Arizona
- 18 harvests in the winter, New Jersey harvests in
- 19 the spring and fall, and Colorado harvests in
- 20 the summer. While head lettuce production was
- 21 quite variable in the 1990s, production has
- 22 generally declined since then to an estimated

- 1 5.3 billion pounds in 2009.
- 2 Table 2 shows the number of farms
- 3 and acres harvested, by state, for head
- 4 lettuce in 2007. According to the 2007
- 5 Census, 1,158 farms harvested head lettuce
- from nearly 167,000 acres.
- 7 Although the farms harvesting head
- 8 lettuce were spread over 48 states, only three
- 9 states reported harvesting more than 1,000
- 10 acres of head lettuce: California (118,676
- 11 acres), Arizona (39,187 acres), and Colorado
- 12 (2,268 acres).
- 13 Leaf and romaine, table 3 and
- 14 charts 3 and 4 show the supply, utilization
- 15 and farm price for leaf and romaine lettuce.
- 16 Because of increased demand for lettuce, and
- 17 changes in the types of lettuce consumers
- 18 prefer, leaf and romaine production from major
- 19 states increased 125 percent between 1990 and
- 20 1999 and an additional 42 percent between 2000
- 21 and 2009, for a total of almost 3.9 billion
- 22 pounds forecast to be produced in 2009.

- 1 Leaf and romaine lettuce are
- 2 harvested year round in California. The other
- 3 state with large production of leaf and
- 4 romaine lettuce is Arizona, which harvests in
- 5 the winter.
- 6 Tables 4 and 5 show the number of
- 7 farms and acres harvested, by state, for leaf
- 8 lettuce and romaine in 2007. According to the
- 9 2007 Census, 2,891 farms in all 50 states
- 10 harvested leaf lettuce from approximately
- 11 59,000 acres. For romaine lettuce, the
- 12 figures are 1,057 farms in 49 states from
- 13 87,000 acres.
- Note, if a farm harvested more
- 15 than one type of leafy green vegetable in
- 16 2007, which is common, the farm would be
- 17 included in the Census count of farms for each
- 18 leafy green crop. It is not valid to add up
- 19 the number of farms harvesting head lettuce
- 20 with the number of farms harvesting romaine
- 21 lettuce because there would be significant
- 22 double counting of farms.

- 1 Spinach, table 6 and charts 5 and
- 2 6 show the supply, utilization and farm price
- 3 for fresh spinach. The demand for fresh
- 4 spinach spurred average production increases
- 5 of over six percent per year since 1990 with
- 6 production from major states forecast to total
- 7 513 million pounds in 2009. Fresh market use
- 8 now dominates consumption.
- 9 Table 7 shows the number of farms
- 10 and acres harvested, by state, for fresh
- 11 spinach in 2007. According to the 2007
- 12 Census, 1,121 farms in all 50 states harvested
- 13 spinach for the fresh market from almost
- 14 30,000 acres.
- In 2007, the top five producers of
- 16 spinach for the fresh market were California
- 17 (harvesting 18,000 acres), Arizona (3,600
- 18 acres), Texas (2,200 acres), Colorado (1,900
- 19 acres), and New Jersey (1,500 acres). These
- 20 states accounted for 94 percent of the fresh
- 21 spinach acreage.
- 22 Of the states with large

- 1 production of fresh spinach, California
- 2 harvests year round, Arizona and Texas harvest
- 3 in the winter, Colorado harvests in the
- 4 summer, and New Jersey harvests in the spring
- 5 and fall.
- 6 Cabbage, table 8 and charts 7 and
- 7 8 show the supply, utilization and farm price
- 8 for fresh cabbage. Production increases for
- 9 fresh cabbage have been significantly less
- 10 than for lettuce and spinach over the past 20
- 11 years, reflecting more steady demand for fresh
- 12 cabbage.
- 13 Production averaged 2.3 billion
- 14 pounds in the 1990s, 11 percent higher than
- 15 the average for the 1980s. For the 10-year
- 16 period between 2000 and 2009, fresh cabbage
- 17 production in major states averaged 2.4
- 18 billion pounds, four percent higher than the
- 19 1990s average. Most cabbage is grown for the
- 20 fresh market.
- 21 Table 9 shows the number of farms
- 22 and acres harvested, by state, for fresh

- 1 cabbage in 2007. In 2007, 88 percent of
- 2 harvested cabbage acreage was for fresh use.
- 3 In 2007, the top five producers of cabbage for
- 4 the fresh market were California (harvesting
- 5 14,000 acres), New York (10,300 acres),
- 6 Florida (9,800 acres), Texas (6,800 acres),
- 7 and Georgia (6,600 acres).
- 8 Fresh cabbage production is less
- 9 concentrated geographically than lettuce and
- 10 spinach. The top five states accounted for 67
- 11 percent of the fresh cabbage acreage. Other
- 12 states that produce large quantities of fresh
- 13 cabbage include North Carolina, Wisconsin, and
- 14 Arizona.
- 15 According to the 2007 Census,
- 16 3,986 farms in all 50 states harvested cabbage
- 17 for the fresh market from close to 71,000
- 18 acres. Of the states with large production of
- 19 fresh cabbage, Florida, Georgia, and Texas
- 20 harvest in the winter and spring, California
- 21 harvests year round, and New York harvests in
- 22 the summer.

- 1 Charts 9 and 10 compare the
- 2 production and grower prices for the major
- 3 leafy green vegetables.
- 4 Minor crops, the 2007 Census
- 5 included data on six additional leafy green
- 6 vegetables: Chinese cabbage, collards,
- 7 escarole and endive (combined), kale, mustard
- 8 greens, and turnip greens. Table 10 shows the
- 9 number of farms that harvested each crop in
- 10 2007 and the number of harvested acres.
- 11 Imports and exports, some leafy
- 12 green vegetables, like lettuce, are hardy cool
- 13 season vegetables and can be grown in the
- 14 desert southwest of California and Arizona and
- in the Rio Grande Valley of Texas. Thus,
- 16 imports during the winter and spring tend to
- 17 be lower than that of other vegetables.
- 18 The import share of consumption of
- 19 leafy green vegetables has increased over the
- 20 past two decades, but remains small.
- 21 Tables 11 through 14 show imports
- 22 of leafy green vegetables by country. Most

- 1 lettuce consumed in the United States is
- 2 produced domestically.
- 3 Over the past ten years, less than
- 4 two percent of the U.S. lettuce supply was
- 5 imported. For fresh spinach and fresh
- 6 cabbage, the percentages imported were 3.3
- 7 percent and 4.1 percent, respectively.
- 8 Tables 15 through 17 show exports
- 9 of leafy green vegetables by country. Export
- 10 figures are larger than imports. Head lettuce
- 11 exports since 2000 have averaged 6.9 percent
- 12 of production.
- 13 Leaf and romaine lettuce exports
- 14 have averaged 14.4 percent of production over
- 15 the same time period. For fresh spinach and
- 16 fresh cabbage, the percentages exported were
- 17 ten percent and 3.3 percent, respectively.
- 18 Most exports go to Canada.
- 19 This concludes my remarks
- 20 concerning the statistical exhibits I have
- 21 presented at this hearing.
- 22 MS. DESKINS: I have no further

- 1 questions for this witness.
- JUDGE HILLSON: Okay. Would you
- 3 like me to have these two exhibits introduced
- 4 into evidence?
- 5 MS. DESKINS: Yes, I would move
- 6 for the admission of Exhibits 4 and 5.
- 7 JUDGE HILLSON: Any objections?
- 8 (No response.)
- 9 JUDGE HILLSON: Exhibits 4 and 5
- 10 are introduced into evidence.
- 11 (Whereupon, the above-referred to
- 12 documents were received into the
- record as Agency Exhibit Nos. 4
- and 5.)
- JUDGE HILLSON: Does anyone else -
- 16 does anyone have questions have Ms. Dash?
- 17 Mr. English, step up to the podium
- 18 if you would.
- 19 CROSS EXAMINATION
- 20 MR. ENGLISH: Charles English for
- 21 the National Organic Coalition.
- Ms. Dash, thank you for providing

- 1 this information. I have some questions about
- 2 data derivation and some other issues just to
- 3 try to understand the data better.
- 4 On Exhibit 5, in a number of the
- 5 charts, and I'm looking at table 1 now but I
- 6 think this carries through, for domestic
- 7 utilization, you have the source as derived by
- 8 the Economic Research Service. I simply took
- 9 the total that's in the column, the fourth
- 10 column, subtracted the exports that come from
- 11 the Department of Commerce and came up with
- 12 the domestic usage.
- Do you know if that's --
- 14 THE WITNESS: Yes, it's a
- 15 residual.
- MR. ENGLISH: Okay, so all ERS
- 17 data is due to residual, is that right? Do
- 18 you think?
- 19 THE WITNESS: Yes.
- 20 MR. ENGLISH: To your knowledge?
- THE WITNESS: Yes.
- MR. ENGLISH: Okay. Turning to

- 1 table 2, and the same questions would hold
- 2 true to other things, for table 2, is this
- 3 data also derived from the National
- 4 Agricultural Statistic Service?
- 5 THE WITNESS: It's from the 2007
- 6 Census of agriculture.
- 7 MR. ENGLISH: Oh, the Census of
- 8 Agriculture? Okay.
- 9 Traditionally, at least in other
- 10 AMS programs, when there is confidential data,
- 11 it is under the theory that if you have two or
- 12 fewer entities, such as farms, if you reveal
- 13 the data for two, that, you know, the other
- 14 ones can figure out, correct?
- 15 THE WITNESS: Yes.
- 16 MR. ENGLISH: Do you know why it
- is for the Census of data that for New Jersey,
- 18 for instance, you can have 34 farms but the
- 19 number of acres is restricted?
- 20 THE WITNESS: I don't know. We
- 21 got counts of farms which we were told by NASS
- 22 was not subject to the confidentiality policy.

- 1 MR. ENGLISH: Okay.
- 2 THE WITNESS: So for the first
- 3 column, you know, we were able to get, you
- 4 know, the exact number for each state. On the
- 5 acreage numbers, I know that they go through
- 6 several iterations and they have a number of
- 7 considerations for declaring something
- 8 unreportable. But I don't understand it well
- 9 enough to explain it.
- 10 MR. ENGLISH: Okay. Thank you for
- 11 that. I don't know is a perfectly good answer
- 12 and I appreciate it.
- I similarly wonder, and maybe
- 14 you're answering the question the same way,
- 15 that, for instance, for the states of Iowa and
- 16 Kansas where there are six farms listed, at
- 17 first I was thinking these might be in
- 18 thousands or something but I see one acre
- 19 total for six farms in Iowa, do you know how
- 20 that was derived by NASS?
- 21 THE WITNESS: No, I don't.
- 22 MR. ENGLISH: And that answer

- 1 would hold true for the other charts for the
- 2 other commodities, correct?
- THE WITNESS: Yes.
- 4 MR. ENGLISH: Okay.
- 5 THE WITNESS: And on the tables
- 6 that were taken from the Census of
- 7 agriculture, it is data that I took, you know,
- 8 from their published information. It's public
- 9 information.
- 10 MR. ENGLISH: Is there anywhere in
- 11 this information -- I may have just missed it,
- 12 I only saw it for the first time this morning,
- 13 starting with the question is there any
- 14 information in this data that is Exhibit 5
- 15 that would divulge the number of farms and/or
- 16 acreage used for growing for the fresh market
- 17 versus the fresh cut and ready-to-eat market?
- 18 THE WITNESS: No. I don't believe
- 19 that USDA reports that data. I think that
- 20 only USDA has published some research, I
- 21 think, that they did a survey. And that's the
- 22 only information that USDA has on fresh versus

- 1 -- total fresh versus any kind of fresh cut or
- 2 further processing.
- MR. ENGLISH: Okay. But you
- 4 haven't provided that information for this
- 5 record?
- THE WITNESS: No.
- 7 MR. ENGLISH: Would it be possible
- 8 by the end of this proceeding, and I don't
- 9 mean here in Monterey, but I believe this
- 10 proceeding is continuing on, to see if we can
- 11 get that information for this record?
- 12 Obviously you can consult and, you know, you
- don't have to answer my question without
- 14 consulting with your colleagues, including
- 15 counsel.
- JUDGE HILLSON: You're requesting
- 17 that they --
- 18 MR. ENGLISH: I'm requesting that
- 19 the Department make that information available
- 20 if it already exists.
- 21 THE WITNESS: Okay. I know that
- 22 there is a paper of published research that

- 1 would be available.
- 2 MR. ENGLISH: By which agency
- 3 within the Department?
- 4 THE WITNESS: The Economic
- 5 Research Service.
- 6 MR. ENGLISH: We would request
- 7 that if it could be made available before the
- 8 conclusion of the proceeding. And obviously,
- 9 again, don't answer -- go consult with --
- JUDGE HILLSON: Okay, that's fine.
- 11 MR. ENGLISH: -- with your
- 12 colleagues.
- I have no further questions.
- 14 Thank you very much, ma'am, for your time.
- JUDGE HILLSON: Does anyone else
- 16 have any questions for Ms. Dash?
- 17 (No response.)
- JUDGE HILLSON: If not, you may
- 19 step down, Ms. Dash. Thank you for
- 20 testifying.
- 21 Ms. Deskins, does the Government
- 22 have any more witnesses that they are going to

- 1 be calling?
- MS. DESKINS: No, we have no more
- 3 witnesses.
- 4 JUDGE HILLSON: Okay. So I guess
- 5 we turn to you, Mr. Resnick. Are you sort of
- 6 head-manning the proponents case?
- 7 MR. RESNICK: Yes, Your Honor.
- 8 JUDGE HILLSON: Okay. And do you
- 9 have a witness you'd like to call to get
- 10 things started?
- 11 MR. RESNICK: Yes, the proponent
- 12 group would call Joe Pezzini.
- JUDGE HILLSON: If you're going to
- 14 have a written statement, you might want to
- 15 just give a copy to me if you're going to put
- 16 it into evidence and as many copies for the
- 17 panel.
- 18 MR. PEZZINI: Yes, I do have a
- 19 written statement.
- 20 MR. RESNICK: Is that also
- 21 available to the proponent group?
- JUDGE HILLSON: Excuse me?

- 1 MR. RESNICK: Is that group also
- 2 available to the proponent group or --
- JUDGE HILLSON: If it's a
- 4 statement, it should be available -- any
- 5 statement should be made available to anybody.
- 6 MR. RESNICK: Right. I want to
- 7 make sure there's enough for everybody.
- JUDGE HILLSON: That I couldn't
- 9 tell you. I just took one and passed them
- 10 along.
- MR. RESNICK: Okay.
- 12 WHEREUPON,
- 13 JOE PEZZINI
- 14 was called as a witness by Counsel for the
- 15 Proponents, having been first duly sworn,
- 16 assumed the witness stand, was examined and
- 17 testified as follows:
- 18 DIRECT TESTIMONY
- 19 JUDGE HILLSON: Could you please
- 20 state your name and then spell it for the
- 21 record, sir?
- 22 THE WITNESS: My name is Joe

- 1 Pezzini. That's spelled P-E-Z-Z-I-N-I.
- JUDGE HILLSON: Okay, sir, and you
- 3 want to read a statement for starters I take
- 4 it?
- 5 THE WITNESS: Yes, I would like
- 6 to.
- 7 JUDGE HILLSON: Okay. I'm going
- 8 to mark your statement even before you start
- 9 reading it as Exhibit 6.
- 10 (Whereupon, the above-referred to
- 11 document was marked as USDA
- 12 Exhibit No. 6 for identification.)
- JUDGE HILLSON: And you may
- 14 proceed.
- 15 THE WITNESS: My name is Joe
- 16 Pezzini. I am the Chief Operating Officer of
- 17 Ocean Mist Farms. Ocean Mist Farms is an 85-
- 18 year-old family-owned grower-packer-shipper of
- 19 vegetables in California and in Arizona. My
- 20 company farms approximately 10,000 acres of
- 21 lettuce and leafy greens.
- We have been members of the

- 1 California Leafy Greens Marketing Agreement
- 2 since its inception three years ago and
- 3 members of the Arizona Leafy Greens Marketing
- 4 Agreement since its inception two years ago.
- 5 I am also the current Chairman of
- 6 the Advisory Board of the California Leafy
- 7 Greens Marketing Agreement. My testimony is
- 8 in support of the National Leafy Greens
- 9 Marketing Agreement.
- 10 Three years ago last week, the
- 11 U.S. Food and Drug Administration issued an
- 12 unprecedented "do not eat" advisory related to
- 13 spinach. The FDA had been tracking a national
- 14 outbreak of E. coli 0157:H7, an outbreak that
- 15 eventually sickened over 200 people and caused
- 16 three deaths. In the wake of the FDA
- 17 advisory, sales of spinach plummeted, and the
- 18 entire leafy greens industry across the
- 19 country was dramatically and negatively
- 20 affected.
- 21 As the spinach crisis unfolded,
- 22 the leafy green industry in California

- 1 realized that we had to do something to raise
- 2 the bar for food safety. The result was the
- 3 creation of the California Leafy Green
- 4 Products Handler Marketing Agreement, an
- 5 organization operating with oversight from the
- 6 California Department of Food and Agriculture.
- 7 Almost all handlers of spinach, lettuce, and
- 8 other leafy green products have been members
- 9 of the California Leafy Greens Marketing
- 10 Agreement for the past three years. And the
- 11 organization has helped the industry make sure
- 12 that there has been no repeat of the 2006
- 13 outbreak.
- 14 A similar program in Arizona
- 15 quickly followed the creation of the
- 16 California LGMA. Now a group of agriculture
- 17 groups from across the country has
- 18 collectively approached the United States
- 19 Department of Agriculture to propose the
- 20 creation of a National Leafy Greens Marketing
- 21 Agreement.
- The purposes of the marketing

- 1 agreement are:
- 2 To provide a mechanism to enable
- 3 fresh leafy green handlers to organize;
- 4 To enhance the quality of fresh
- 5 leafy green vegetable products available in
- 6 the marketplace through the application of
- 7 good agricultural production and handling
- 8 practices;
- 9 To implement a uniform, auditable,
- 10 science-based food quality enhancement
- 11 program;
- 12 To provide for USDA validation and
- 13 verification of program compliance;
- 14 To foster greater collaboration
- 15 with local, state and federal regulators;
- 16 To improve consumer confidence in
- 17 fresh leafy greens; and most importantly
- To protect public health.
- 19 The proposed production area for
- 20 the national marketing agreement includes the
- 21 entire United States since leafy greens are
- 22 grown in all 50 of the United States. While

- 1 a particular type of leafy green may only be
- 2 grown in a subset of states, the openness and
- 3 diversity of the U.S. agricultural market
- 4 ensures that handlers, processors, retailers,
- 5 and ultimately consumers will purchase fresh
- 6 leafy greens from a multiple of growers, and
- 7 handlers, and processing facilities from many
- 8 states.
- 9 Because of the diversity in open
- 10 market, fresh leafy greens may be produced in
- 11 one state, processed in another state, and
- 12 ultimately shipped to many states for
- 13 consumption.
- 14 Members of the National Leafy
- 15 Greens Marketing Agreement will be companies
- 16 that handle leafy greens that commit
- 17 themselves to sell only those fresh leafy
- 18 greens products that are grown in compliance
- 19 with the good agricultural, handling, and
- 20 manufacturing practices defined in the
- 21 agreement.
- It is important to note that these

- 1 best practices will be determined by the
- 2 administrative committee whose members will be
- 3 appointed by the USDA's Secretary if the
- 4 National Leafy Greens Marketing Agreement is
- 5 implemented. Members will subject themselves
- 6 to, and pay for, mandatory audits and
- 7 verification processes, ensuring every
- 8 possible preventative step has been taken to
- 9 make certain that leafy greens put into
- 10 commerce and ultimately consumed worldwide
- 11 have been grown and handled according to the
- 12 best available scientific data.
- 13 The industry believes that a
- 14 national marketing agreement promulgated by
- 15 the USDA is the best available instrument for
- 16 protecting the quality and hence, the
- 17 marketability of fresh leafy greens vegetables
- 18 by promoting the use of scientifically-based
- 19 good agricultural practices, good handling
- 20 practices, and good manufacturing practices in
- 21 a standardized manner to reduce physical,
- 22 chemical, and microbial contamination events.

- 1 The fresh leafy green industry
- 2 believes that the USDA is the most appropriate
- 3 federal agency to oversee a national food
- 4 quality enhancement program because it has
- 5 significant expertise and experience in the
- 6 design and delivery of programs that involve
- 7 inspections for product quality and
- 8 verification of production practices.
- 9 At industry's request, USDA has
- 10 incorporated food safety-related elements into
- 11 several of its programs and has established
- 12 programs such as the Quality Through
- 13 Verification and the GAP&GHP Audit
- 14 Verification Programs to provide independent
- 15 verification that growers and handlers are
- 16 following Food and Drug Administration's
- 17 guidance and commodity specific best
- 18 practices. Both the leafy greens industry and
- 19 the USDA have a good working relationship with
- 20 the FDA on food quality programs that include
- 21 food safety issues.
- 22 The Agricultural Marketing Service

- 1 of the USDA offers the "Fresh Produce Audit
- 2 Verification Program, a voluntary, audit-
- 3 based program for the fresh produce industry
- 4 based on the Guidance to Minimize Microbial
- 5 Food Safety Hazards for fresh Fruits and
- 6 Vegetables and the California and Arizona
- 7 Leafy Greens Marketing Agreements. Another
- 8 example of interagency cooperation in ensuring
- 9 safety of our national food supply is the co-
- 10 sponsorship of the National Advisory Committee
- 11 on Microbiological Criteria for Foods by the
- 12 Food Safety and Inspection Services of the
- 13 USDA and the FDA, along with our federal
- 14 agencies such as the Centers for Disease
- 15 Control and Prevention.
- 16 The FDA has been supportive of the
- 17 utilization of marketing agreements and orders
- 18 to address food safety issues and has worked
- 19 with the fruit and vegetable industry and the
- 20 USDA in developing and implementing best
- 21 practices included in marketing agreements and
- 22 orders.

- In his testimony before the U.S.
- 2 House of Representatives' Subcommittees on
- 3 Domestic Policy, Oversight and Government
- 4 Reform on July 29, 2009, Michael Taylor,
- 5 senior advisor to the Commissioner of the FDA
- 6 said the following about the FDA's view of
- 7 marketing agreements and orders to enhance
- 8 produce safety.
- 9 "Although FDA has not had a direct
- 10 role in creating such agreements, we do work
- 11 collaboratively with our colleagues at AMS,
- 12 which is the federal agency responsible for
- 13 marketing agreements and orders. When AMS has
- 14 incorporated food safety standards into its
- 15 marketing orders, FDA has provided technical
- 16 assistance to AMS on the appropriate safety
- 17 practices and would provide such assistance
- 18 for marketing agreements as well. It is our
- 19 shared goal that any AMS safety standards
- 20 would incorporate the applicable FDA
- 21 regulations or guidance documents."
- 22 In addition, the USDA is currently

- 1 administering marketing orders for almonds and
- 2 pistachios that involve food safety-related
- 3 requirements. Best practices that address the
- 4 safety of growing and handling of fresh leafy
- 5 greens are intrinsically linked to the quality
- 6 and marketability of leafy greens.
- Good agricultural, handling, and
- 8 manufacturing practices that provide assurance
- 9 of safety also improve quality.
- 10 Implementing best practices is
- 11 intrinsically linked to competitiveness and
- 12 market share. Proof of use of best practices
- is essential to the marketability of fresh
- 14 produce. Growers that demonstrate the use of
- 15 good agricultural practices, good handling
- 16 practices, and good manufacturing practices
- 17 will undoubtedly have better marketing
- 18 opportunities than those that cannot
- 19 demonstrate that they have a food safety and
- 20 quality management program in place.
- 21 A national marketing agreement is
- 22 critical to the industry for the following

- 1 reasons:
- 2 Number one, the marketing
- 3 agreement is collective action for the good of
- 4 the public. Contamination of food endangers
- 5 the health of consumers. At worst,
- 6 contaminated food can cause illness and even
- 7 death.
- 8 Of lesser significance, but with
- 9 consequence to public health nevertheless,
- 10 food contamination damages consumer trust in
- 11 the affected food product. When the affected
- 12 food product is leafy green produce, reduced
- 13 consumption means that consumers are losing
- out on the benefits of this healthy,
- 15 nutritious food in their diet.
- Number two, the marketing
- 17 agreement is a collective action for the good
- 18 of the industry. Every contamination problem,
- 19 whether real or perceived, has a detrimental
- 20 financial impact on the growers and handlers
- 21 of the affected food product. Rarely is the
- 22 public's response to a contamination event

- 1 brand specific.
- 2 Consumer's reactions to a food
- 3 safety alert is swift and decisive even before
- 4 the scope and origin of the problem may be
- 5 known. Consumers immediately adjust their
- 6 buying patterns to reduce any potential
- 7 exposure to an affected product. The economic
- 8 impact of the E. coli outbreak in spinach on
- 9 the entire leafy greens industry is a recent
- 10 example of this phenomenon.
- 11 The ability to trace a product
- 12 during all stages of production, processing,
- 13 and distribution is a key factor in reducing
- 14 the economic impact of a contamination event.
- 15 Traceability allows for more effective, cost
- 16 effective recalls of a contamination event it
- 17 if it were to occur. The National Leafy
- 18 Greens Marketing Agreement will require
- 19 signatory handlers of the agreement to have in
- 20 place systems and procedures that will allow
- 21 them to track their products from supplier to
- 22 customer. Decreasing contamination events

- 1 will lead to a consistency in consumer demand
- 2 for leafy green products.
- Number three, buyers, especially
- 4 large buyers, are developing their own food
- 5 safety requirements for producers and
- 6 handlers. These requirements may differ from
- 7 buyer to buyer and implementation of these
- 8 varied requirements is costly to the producer
- 9 and handler and often redundant.
- 10 A national agreement adopted by
- 11 the majority of the industry would greatly
- 12 increase efficiencies and significantly reduce
- 13 costs related to multiple buyer-specific
- 14 requirements.
- Number four, state level marketing
- 16 agreements can only regulate the handlers in
- 17 that particular state and so are limited in
- 18 their effectiveness for the industry as a
- 19 whole. For example, the California Leafy
- 20 Greens Marketing Agreement cannot regulate
- 21 lettuce or leafy greens grown in any other
- 22 state outside of California. It does not have

- 1 the authority to send inspectors to audit
- 2 growers in another state.
- 3 And number five, it is critical
- 4 and timely for the industry to demonstrate the
- 5 ability to apply standardized best practices
- 6 and preventative controls to improve and
- 7 ensure the safety of their products in light
- 8 of the current regulatory climate as
- 9 illustrated in the following statement by,
- 10 again, Michael Taylor, senior advisor to the
- 11 Commissioner of the FDA in his testimony
- 12 before the U.S. House of Representatives'
- 13 Subcommittee on Domestic Policy and Oversight
- 14 and Government Reform on July 29,2009:
- "In the short term, FDA's approach
- 16 is to issue commodity-specific guidance for
- industry on the measures they can implement to
- 18 prevent or minimize microbial hazards of fresh
- 19 produce. To improve compliance with such
- 20 measures, the FDA also plans to work with
- 21 USDA's Agricultural Marketing Service to
- 22 include these recommended standards in their

- 1 marketing agreements and orders when
- 2 appropriate."
- 3 The National Leafy Greens
- 4 Marketing Agreement proponent group includes
- 5 industry trade associations such as the
- 6 Arizona Farm Bureau Federation, California
- 7 Farm Bureau Federation, the California Leafy
- 8 Greens Marketing Agreement, the Georgia Farm
- 9 Bureau Federation, Georgia Fruit and Vegetable
- 10 Growers Association, Grower Shipper
- 11 Association of Central California, Imperial
- 12 Valley Vegetable Growers Association, the
- 13 Leafy Greens Council, Produce Marketing
- 14 Association, Texas Vegetable Association,
- 15 United Fresh Produce Association, and Western
- 16 Growers.
- 17 In order to ensure the quality of
- 18 fresh leafy gr3eens by protecting them from
- 19 potential contamination, the provisions of the
- 20 National Leafy Greens Marketing Agreement will
- 21 include the scientifically-based best
- 22 practices for production and handling. A

- 1 national marketing agreement will allow for
- 2 the verification of the use of best practices
- 3 by government audits.
- 4 And most importantly, it will
- 5 protect public health by verifying the use of
- 6 best practices, every bite, every time.
- 7 Thank you. And I would be happy
- 8 to answer any questions about my testimony.
- 9 JUDGE HILLSON: Mr. Resnick, do
- 10 you have any questions you want to ask your
- 11 witness on direct?
- MR. RESNICK: You mentioned there
- 13 are shipper-mandated practices that are being
- 14 imposed on handlers. Can you talk a little
- 15 bit about what those are and how they are
- 16 costly to handlers?
- 17 THE WITNESS: It is commonplace in
- 18 the industry to have buyers have their own set
- 19 of audits and standards. And most handlers
- 20 and their growers are subject to multiple
- 21 audits throughout the year.
- 22 And, in fact, those audits, most

- 1 of the time, are very redundant. And they are
- 2 time consuming and expensive. And it is
- 3 costly to the industry.
- 4 We need to get, in my opinion, to
- 5 a standardization. And this is -- the
- 6 National Leafy Greens Marketing Agreement with
- 7 standardized best practices would lead to a
- 8 standardized audit, I believe.
- 9 MR. RESNICK: And are these
- 10 shipper -- excuse me, I keep saying shipper --
- I mean buyer mandates, are they necessarily
- 12 science based in your opinion?
- 13 THE WITNESS: In my opinion, they
- 14 are not science based. They are different
- 15 than the science-based standards that the
- 16 California Leafy Greens Marketing Agreement
- 17 uses. In most cases, they are referred to as
- 18 above and beyond or super metrics. There's
- 19 really no written standard for them other than
- 20 the fact that if a little is good, a lot must
- 21 be better. And that doesn't necessarily lend
- 22 to ensuring food safety.

- 1 An example of that would be either
- 2 sterilized buffer zones or these huge mile
- 3 buffer zones. There's no science that says
- 4 that that increases food safety or ensures
- 5 food safety. And that's just an example of
- 6 those types of standards which are
- 7 incorporated in these audits.
- 8 MR. RESNICK: I have no further
- 9 questions.
- JUDGE HILLSON: Okay, I'm
- 11 presuming that you would like Exhibit 6, the
- 12 written testimony of Mr. Pezzini to be
- 13 received into evidence?
- MR. RESNICK: Yes, Your Honor.
- JUDGE HILLSON: Okay, I'll receive
- 16 that into evidence.
- 17 (Whereupon, the above-referred to
- document was received into the
- record as USDA Exhibit No. 6.)
- 20 JUDGE HILLSON: And I'm going to
- 21 ask that the Government Panel if they have any
- 22 questions of Mr. Pezzini.

- 1 CROSS EXAMINATION
- 2 MS. SCHMAEDICK: This is Melissa
- 3 Schmaedick. Good morning.
- 4 Mr. Pezzini, I have a couple of
- 5 questions that I just wanted to clarify some
- 6 language that you used in your testimony. You
- 7 said that -- first of all that GAPs, GHPs, and
- 8 GMPs defined in the agreement, is there a
- 9 difference between GAPs, GHPs, and GMPs? And
- 10 the other references that you make to best
- 11 practices? And can you describe their
- 12 relationship?
- 13 THE WITNESS: There is some
- 14 overlap within these different practices. But
- 15 generally speaking, good agricultural
- 16 practices are defined to the production and
- 17 the growing of a crop. Good handling
- 18 practices may overlap slightly at the harvest
- 19 time but it really deals with harvesting and
- 20 handling the product at harvest time and post
- 21 harvest.
- 22 And good manufacturing practices,

- 1 largely deal with then further processing
- 2 beyond the farm after it has been harvested.
- 3 Now there is a little bit of overlap with
- 4 those standards. But generally, they are
- 5 applicable to different areas of the process
- 6 of produce.
- 7 When I refer to best practices,
- 8 that's getting at that are the best practices
- 9 that would decrease, minimize the potential
- 10 for contamination. And so good agricultural
- 11 practices, good handling practices, and good
- 12 manufacturing practices really are the best
- 13 practices within those areas of practice.
- MS. SCHMAEDICK: So to clarify,
- 15 are the GAP, GHP, and GMPs bodies of general
- 16 guidelines? And then best practices are more
- 17 specific ways of applying practices -- or
- 18 applying activities at either the farm or
- 19 handler level to meet the goals of the
- 20 quidelines?
- 21 THE WITNESS: I would say that's
- 22 correct. The good agricultural practices, and

- 1 manufacturing practices, and handling
- 2 practices, particularly the good agricultural
- 3 practices that came out in 1998 by the FDA
- 4 were considered guidelines. And there's been
- 5 updates to those, commodity-specific
- 6 quidelines.
- 7 But what we've found to create the
- 8 best practices, they have to be specific and
- 9 measurable so that they can be verified. So
- 10 I would say, indeed, that the best practices
- 11 need to very much be specific. And often
- 12 times the guidelines that are presented to
- industry in growing a crop and harvesting a
- 14 crop and processing a crop may not be specific
- 15 enough because they are meant to be general
- 16 quidelines.
- I learned at a meeting with the
- 18 FDA a couple of weeks ago that their
- 19 expectation was that industry would take those
- 20 quidelines and create more specific
- 21 measurements. So, indeed, best practices that
- 22 are specific.

- 1 MS. SCHMAEDICK: Based on your
- 2 knowledge of the proposal are there any
- 3 specific best practices defined in the
- 4 proposed agreement? Or is the agreement
- 5 simply pointing towards GAP, GHP, and GMP
- 6 guidelines at this point?
- 7 THE WITNESS: From my
- 8 understanding of the agreement, this hearing
- 9 is about creating of a vehicle. There is
- 10 actually a technical committee that would then
- 11 be appointed and there is specific language to
- 12 that. And that that technical committee would
- 13 recommend to the board specific practices.
- 14 And my belief is that they would
- 15 look at those guidelines, good agricultural
- 16 practices, good handling practices, and even
- 17 good manufacturing practices to create the
- 18 specific best practices that would be part of
- 19 the program and thus be audited.
- 20 MS. SCHMAEDICK: Okay. So at this
- 21 point, there are no best practices that are
- 22 described in your proposal, is that correct?

- 1 THE WITNESS: I'm sorry?
- MS. SCHMAEDICK: At this point,
- 3 there are no best practices that are described
- 4 in this proposal? If I understood you
- 5 correctly, you said it was a vehicle to create
- 6 those?
- 7 THE WITNESS: That's correct.
- 8 MS. SCHMAEDICK: Okay.
- 9 THE WITNESS: But in my testimony,
- 10 my belief is that the FDA and their guidelines
- 11 would be used as the templates.
- MS. SCHMAEDICK: Okay. Thank you.
- 13 And you touched on my other
- 14 question, my last question is in your
- 15 statement you say that the best practices will
- 16 be determined by the administrative committee.
- 17 It's on page two of your testimony. Can you
- 18 explain the process by which best practices
- 19 would actually come into effect?
- 20 THE WITNESS: So based on the
- 21 federal registry and the proposal that is in
- 22 the federal registry, Item 970.45, technical

- 1 review board, this is the board that would
- 2 create their recommendations for the best
- 3 practices. And it is very specific on who
- 4 makes up that committee, if you will -- I
- 5 should say review board -- from the different
- 6 zones and the land grant universities,
- 7 including the FDA and others. So that is my
- 8 belief that the technical committee will
- 9 create the best practices.
- 10 MS. SCHMAEDICK: Would they be
- 11 subject to review and approval of the U.S.
- 12 Department of Agriculture prior to being
- 13 implemented?
- 14 THE WITNESS: My belief, since the
- 15 USDA is over -- would oversee, potentially
- 16 oversee this program, that yes, they would be
- 17 involved.
- 18 MS. SCHMAEDICK: Those are all the
- 19 questions I have. Thank you.
- MS. CARTER: Good morning,
- 21 Antoinette Carter with the USDA.
- Just a couple of follow-up

- 1 questions from the questions that were just
- 2 posed to you. With regard to the best
- 3 practices, the development, as you read the
- 4 proposal in terms of your understanding of it,
- 5 how would, in terms of developing the set of
- 6 best practices, what is the intent to address
- 7 or is there an intent to address regional
- 8 differences which would account for production
- 9 as well as handling practices within zones or
- 10 specific regions of the country?
- 11 THE WITNESS: My understanding is
- 12 that those standards, which would be developed
- 13 by the technical review board, would be
- 14 scalable. And it would take in geographic
- 15 uniqueness. An example would be the tomato
- 16 industry in Florida looked at the practices
- 17 that we had used in California. In California
- 18 we don't have some of the same amphibious life
- 19 that they have in Florida. So they would have
- 20 to take that into consideration.
- 21 And they also looked at different
- 22 water sources. You would have to take those

- 1 different geographic uniquenesses into
- 2 consideration. And that, I believe, is in the
- 3 registry about scalability and taking in those
- 4 geographic uniquenesses.
- 5 MS. CARTER: And just to follow
- 6 up, and that would include for handlers that
- 7 are sourcing from producers located within the
- 8 U.S. as well as -- since imports would be
- 9 covered under the proposal as well as
- 10 differences in production in the foreign areas
- 11 for signatory handlers that are sourcing from
- 12 out of the country?
- 13 THE WITNESS: I think that --
- 14 well, the intent is, I believe, that -- and it
- 15 says in the registry that imports would be
- 16 subject to be a part of this agreement, but
- 17 for an importer product to be a part of the
- 18 agreement, they would have to go through the
- 19 same rules and regulations that a domestic
- 20 producer would as well.
- 21 And then I think it would be up to
- 22 the USDA to look at how that is being applied

- 1 in regards to the standards that are
- 2 established within the program.
- MS. CARTER: Okay. You made
- 4 reference to the current state marketing
- 5 agreements on page five of your prepared
- 6 statement. You noted that on one of the
- 7 limitation is that the regulation only applies
- 8 to handlers within those states that are
- 9 operating within the states.
- 10 Are there any other fundamental
- 11 differences between what is being proposed and
- 12 the current state marketing agreements? And
- 13 if there are, could you specifically explain
- 14 what those are?
- THE WITNESS: Well, the process is
- 16 different. In California, for example, the --
- 17 it is basically in the development of what the
- 18 standards are. The national program has a
- 19 technical review board that would actually
- 20 create the standards.
- In the case of California, and I
- 22 believe in Arizona as well, based on state

- 1 laws that the development of those standards
- 2 are actually done in conjunction outside of
- 3 the agreement. So the 1938 Market Act creates
- 4 or allows for the government in California to
- 5 enforce standards as presented to them.
- 6 And in this case, in the
- 7 California Leafy Greens Marketing Agreement,
- 8 was development by academia, by the industry,
- 9 by input from the regulators. Not quite as
- 10 formal as what would be presented on a
- 11 national level. I think that's one difference
- 12 of note.
- MS. CARTER: Okay. Let's see. I
- 14 guess my last question is with regards to --
- is it envisioned that if this proposed program
- 16 were to go into effect, what would happen with
- 17 regards to the other state programs that are
- 18 currently in existence?
- 19 THE WITNESS: Well, I don't know
- 20 if I can answer that until we cross that
- 21 bridge.
- MS. CARTER: But what do you -- in

- 1 terms of what would you support as a proponent
- 2 of this proposal?
- 3 THE WITNESS: Well, I think if a
- 4 national program went forward then that
- 5 probably would make the state programs fall
- 6 within those -- the national program. And
- 7 that you probably wouldn't need the state
- 8 programs any more. That it would be done
- 9 through the national program.
- 10 But that would probably depend on
- 11 how the whole process -- and if it goes
- 12 forward, obviously.
- MS. CARTER: Thank you.
- 14 JUDGE HILLSON: Any further
- 15 questions from the government table?
- MS. DESKINS: I only have one
- 17 question.
- 18 JUDGE HILLSON: Ms. Deskins?
- 19 MS. DESKINS: I just want to
- 20 clarify the purpose of the agreement. Your
- 21 group is interested in these regulations in
- 22 order to enhance the marketing of leafy

- 1 greens? Is that the overall purpose?
- 2 THE WITNESS: Enhance the quality,
- 3 which would include food safety.
- 4 MS. DESKINS: Okay. But you are
- 5 in the business of selling leafy greens,
- 6 right?
- 7 THE WITNESS: Well, my company
- 8 grows, harvests, and sells leafy greens.
- 9 That's correct.
- 10 MS. DESKINS: No further
- 11 questions.
- MS. DASH: Suzanne Dash,
- 13 Agricultural Marketing Service. Could you
- 14 give some specific examples of buyer
- 15 requirements that are maybe redundant and also
- 16 the same as one or two requirements that are
- in the California agreement or the Arizona
- 18 agreement? And that you think are good and
- 19 might likely be in the national agreement?
- 20 THE WITNESS: Well, I think many
- 21 of the audits now are looking at the
- 22 California Leafy Greens Marketing Agreement

- 1 and taking those standards and putting it into
- 2 their audits. But we're still subject to
- 3 multiple audits.
- What we've tried to encourage them
- 5 is if we're in good standing with the
- 6 California Leafy Greens Program, that we can
- 7 give them that audit and that would suffice so
- 8 we wouldn't have to continually be doing these
- 9 redundant audits if that's to your question.
- 10 If you're talking about standards
- 11 that a buyer might bring forward that are
- 12 different than the California Leafy Greens
- 13 Marketing Agreement, an example would be
- 14 buffer zones, in the California Leafy Greens
- 15 Marketing Agreement there's a 400-foot buffer
- 16 zone between the production of a leafy greens
- 17 field and a concentrated feed lot operation
- 18 and some buyers want a mile buffer zone. So
- 19 that's a pretty clear difference. There's
- 20 those kinds of examples.
- 21 MS. DASH: Okay. Could you give
- 22 some examples of things that you think are

- 1 reasonable? Just an example of what kind of
- 2 requirements there might be in the national
- 3 agreement or just what is a requirement in one
- 4 of the state agreements, two or three examples
- 5 of requirements that are in the agreements
- 6 that are also similar to a buyer requirement.
- 7 THE WITNESS: Well, there's a
- 8 number of different areas. For example, doing
- 9 a pre-assessment, so these are risk-based food
- 10 safety practices, and before you plant a
- 11 field, for example, we'll have to go out and
- 12 do a risk assessment before that field is
- 13 planted. We'll have to do another risk
- 14 assessment to make sure that food safety
- issues haven't changed in a field before it is
- 16 harvested. Those are pretty common practices
- 17 that most audits now encapsulate.
- 18 Certainly water testing is another
- 19 one. In the case of the California Leafy
- 20 Greens Marketing Agreement, the specifics of
- 21 the water testing, they are very specific.
- 22 And most audits have adopted those same

- 1 standards.
- MS. DASH: And did you say that
- 3 the state agreement has been helpful to you in
- 4 certain instances that a buyer has said well,
- 5 if you are a member of this agreement, then
- 6 that's sufficient?
- 7 THE WITNESS: Little by little,
- 8 yes. We have been able to get a number of
- 9 buying groups to accept the California Leafy
- 10 Greens Marketing Agreement as the audit that
- 11 they would accept. And if you are in
- 12 compliance, then that is satisfactory to them.
- 13 And there are a number of
- 14 companies that have begun to make that
- 15 exception rather than have another of their
- 16 own audits. So it has been working. It has
- 17 taken some time. We've had to establish a
- 18 track record. But it is working.
- 19 MS. DASH: Do you consider
- 20 yourself a farmer and a handler?
- 21 THE WITNESS: I'm a third
- 22 generation former. I work for a company that

- 1 grows, harvests, packs, and ships its own
- 2 product and some product from other growers as
- 3 well. So we very much are farmers. That's
- 4 what we do first and foremost.
- 5 MS. DASH: USDA is required to
- 6 look at the impact of any, you know, new or
- 7 proposed program based on the impact on small
- 8 entities. So we're looking at small growers
- 9 and small handlers.
- 10 And for this purpose, we consider
- 11 a small farm a farm with gross receipts of
- 12 less than 750,000 dollars per year and for a
- 13 small handler the figure is gross receipts of
- 14 less than seven million dollars per year. So
- 15 I was wondering if you could clarify yourself
- 16 as a small or large?
- 17 THE WITNESS: We would be a large
- 18 handler.
- MS. DASH: And a large farmer?
- THE WITNESS: Yes.
- 21 MS. DASH: Thank you. That's all
- 22 I have.

- 1 JUDGE HILLSON: Anything else from
- 2 the USDA panel?
- 3 (No response.)
- 4 JUDGE HILLSON: Anything else --
- 5 any questions from the non-USDA people here?
- 6 Go ahead, Mr. English, step on up.
- 7 MR. ENGLISH: Charles English for
- 8 the National Organic Coalition. Good morning,
- 9 Mr. Pezzini. Let me start, I think, where we
- 10 might agree on some things.
- 11 There are still super metrics out
- 12 there with respect to leafy green vegetables
- 13 grown in California?
- 14 THE WITNESS: Yes.
- MR. ENGLISH: And one of the
- 16 problems with super metrics is that by its own
- 17 term, super metric, it is different from -- it
- 18 could be different from and exceed what the
- 19 California Leafy Green Vegetable Agreement has
- 20 put into place, correct?
- 21 THE WITNESS: They can be
- 22 different, that's correct.

- 1 MR. ENGLISH: And, in fact, they
- 2 are different?
- THE WITNESS: Yes.
- 4 MR. ENGLISH: And one of the
- 5 problems with being different is that you are
- 6 then trying to meet multiple standards,
- 7 correct? You might be asked to meet multiple
- 8 standards from different entities, correct?
- 9 THE WITNESS: Well there are
- 10 growers that might be supplying product to
- 11 multiple different handlers or buyers and the
- 12 buyers have different requirements. And it is
- 13 common practice then for the grower to meet,
- 14 you know, the greatest requirement because
- 15 then all the others would fall underneath
- 16 that.
- 17 MR. ENGLISH: Effectively the most
- 18 stringent requirement?
- 19 THE WITNESS: That's correct.
- 20 MR. ENGLISH: Okay. And today, in
- 21 September 2009, to your knowledge there still
- 22 are such buyer requirements notwithstanding

- 1 the California Leafy Green Vegetable
- 2 Agreement, correct?
- THE WITNESS: There's not as many
- 4 as there used to be but there still are some,
- 5 yes.
- 6 MR. ENGLISH: Even though there
- 7 are not as many as their used to be, there
- 8 still are those super metrics, correct?
- 9 THE WITNESS: Well, there's
- 10 probably -- and my understanding is that
- 11 there's no binder with super metrics in it
- 12 necessarily because many standards by
- 13 different buying groups are proprietary. But
- 14 nevertheless, they may be greater standards
- 15 than what are in the Leafy Greens Marketing
- 16 Agreement.
- 17 MR. ENGLISH: Indeed, they are
- 18 proprietary and, therefore, they are not going
- 19 to be made available for this record like it,
- 20 correct?
- 21 THE WITNESS: I don't know what
- 22 other testimony will be.

- 1 MR. ENGLISH: Let me be perfectly
- 2 clear though, of course confidential
- 3 information is precisely that. And this is
- 4 not like a trial. Are you subject to super
- 5 metrics that are different from the California
- 6 Leafy Green Vegetables today?
- 7 THE WITNESS: We've had customers
- 8 approach us, yes.
- 9 MR. ENGLISH: Okay. Are you
- 10 meeting such standards today that are super
- 11 metrics?
- 12 THE WITNESS: Our practice is to
- 13 push back on those types of standards. We'll
- 14 go and educate a buyer if we have standards
- 15 that are above and beyond the metrics that are
- 16 in the program in California. And normally
- 17 we're successful at convincing them that those
- 18 standards are sufficient to, you know, ensure
- 19 food safety.
- 20 MR. ENGLISH: Normally is not
- 21 necessarily all the time. Is it all the time
- 22 that you are able to succeed?

- 1 THE WITNESS: No.
- 2 MR. ENGLISH: Thank you. Do you
- 3 agree -- you quoted, somewhat extensively from
- 4 Mr. Taylor of the FDA, are you endorsing his
- 5 statements by quoting from him?
- 6 THE WITNESS: I believe -- my
- 7 purpose of putting that in the testimony is to
- 8 illustrate that the FDA sees marketing
- 9 agreements as a vehicle for enforcement of
- 10 standards and especially standards that they
- 11 feel meet their guidelines and their
- 12 expectations. That's the point of the
- 13 testimony.
- MR. ENGLISH: In answer to a
- 15 question from the Department, I think you said
- 16 that you viewed what FDA would do as being a
- 17 template for best practices for the proposed
- 18 marketing agreement. Is that correct?
- 19 THE WITNESS: The FDA has issued
- 20 guidance documents both commodity specific and
- 21 for good agricultural practices, good handling
- 22 practices, and good manufacturing practices.

- 1 And my understanding from recent conversations
- 2 that I've had with the FDA a couple of weeks
- 3 ago at a conference is that they take those
- 4 guidelines and look for industry and those in
- 5 and around an industry, effected parties to
- 6 create more specific standards that could be
- 7 measured and verifiable because a lot of the
- 8 guidance standards are not specific enough to
- 9 verify.
- 10 MR. ENGLISH: But nonetheless is
- 11 it your understanding that those -- that FDA
- 12 has signaled that those standards, however you
- 13 verify them, are likely to become the basis
- 14 for the regulation?
- THE WITNESS: Well, again, that
- 16 would be up to the technical review board. I
- 17 don't know what will be decided. But I would
- 18 think that they would look at those types of
- 19 guidance documents.
- 20 MR. ENGLISH: Thank you. You
- 21 answered a different question. So I was maybe
- 22 imprecise. Is it your understanding that

- 1 FDA's guidance is likely to become -- the FDA
- 2 has signaled that its guidance is likely to
- 3 become its regulation?
- 4 THE WITNESS: I believe that the
- 5 FDA is working towards specific regulation,
- 6 yes.
- 7 MR. ENGLISH: And that the
- 8 guidance is very likely to be very close to
- 9 the regulation? They have signaled that.
- 10 THE WITNESS: On the FDA's part?
- 11 Or on --
- MR. ENGLISH: On the FDA's part.
- 13 THE WITNESS: I believe that they
- 14 are looking and they have said that they are
- 15 looking for specific regulations for
- 16 commodities, yes.
- 17 MR. ENGLISH: So when Mr. Taylor
- 18 says that we believe that AMS, by
- 19 incorporating FDA's produce safety standards
- 20 in produce-related marketing agreements -- and
- 21 what I'm grappling with here is you used the
- 22 word template. Do you ultimately view the

- 1 marketing agreement as adopting the FDA
- 2 regulations leaving aside the issue of how
- 3 specific you test for it.
- 4 THE WITNESS: I don't know if
- 5 they'll adopt is, as you say it. I do think
- 6 that they would, as a technical review board
- 7 with FDA as part of that board, that they
- 8 certainly would look at those guidance
- 9 documents in creating best practices.
- 10 But this hasn't occurred yet. So
- 11 we don't know exactly what exactly would come
- 12 out of the technical review board.
- 13 MR. ENGLISH: Let me ask two
- 14 questions based upon that. The first is did
- 15 I hear you correctly that you would expect the
- 16 FDA to be serving on the technical review
- 17 board? That's your understanding?
- 18 THE WITNESS: Let's see.
- 19 According to the registry --
- MR. ENGLISH: Right.
- 21 THE WITNESS: -- it says that two
- 22 representatives from the FDA, designated by

- 1 the Commissioner, would sit on that technical
- 2 review board.
- 3 MR. ENGLISH: Do you know today in
- 4 ways in which you would expect the marketing
- 5 agreement to differ from FDA's guidance if it
- 6 was implemented as a regulation?
- 7 THE WITNESS: I don't know how
- 8 that would be today.
- 9 MR. ENGLISH: If it would be the
- 10 same, what is the point of having a regulation
- 11 by FDA and a marketing agreement from a
- 12 different agency?
- 13 THE WITNESS: Well, I think that
- 14 if regulation through legislation comes along,
- 15 then that could very well supercede an
- 16 agreement like this. But if legislation with
- 17 regulation, specific regulation, doesn't come
- 18 along, then this is a way to create quality,
- 19 including food safety standards for the
- 20 lettuce and leafy greens industry and have
- 21 those verified by government.
- 22 MR. ENGLISH: So in effect this is

- 1 a fallback, is that right? If legislation or
- 2 regulation doesn't come along, you are looking
- 3 at a fallback?
- 4 THE WITNESS: I don't have -- I
- 5 don't know if legislation would come along.
- 6 I don't have any control over that. I don't
- 7 know if anybody in this room would have that
- 8 kind of control or influence. But this is a
- 9 proposal made to the USDA on a program that
- 10 would create national standards.
- 11 MR. ENGLISH: Let's go back to the
- 12 super metrics for a moment. Buyers themselves
- 13 are not subject to the California Leafy Green
- 14 Vegetable Agreement, correct?
- 15 THE WITNESS: That's correct.
- 16 MR. ENGLISH: Their not handlers
- in the term of art that we in the agricultural
- 18 marketing service use the term handler,
- 19 correct?
- 20 THE WITNESS: That's correct.
- 21 MR. ENGLISH: So nothing actually
- 22 binds buyers to using the metrics adopted by

- 1 the California Leafy Greens Agreement,
- 2 correct?
- 3 THE WITNESS: No, a buyer is not
- 4 part of the agreement.
- 5 MR. ENGLISH: And similarly,
- 6 buyers will not be a part of this proposed
- 7 agreement under AMS, correct?
- 8 THE WITNESS: That's correct.
- 9 MR. ENGLISH: Early on in your
- 10 statement, you referenced that as a rough
- 11 result of both California and Arizona's
- 12 actions, roughly 90 percent of the leafy
- 13 greens grown in the country could be grown
- 14 under the auspices of such a program. I'm
- wondering if the word could was an intentional
- 16 and -- do you know whether it's close to 90
- 17 percent actually is governed by those two
- 18 agreements?
- 19 THE WITNESS: We don't know that.
- 20 And it would vary based on the commodity.
- 21 MR. ENGLISH: Do you believe it is
- 22 a significant percentage close to 90 percent?

- 1 Say 80 percent of any of the commodities?
- THE WITNESS: Well, I think in the
- 3 prior testimony, the USDA has facts and
- 4 figures that say that California and Arizona
- 5 do grow the majority of lettuce and leafy
- 6 greens although that does vary based on the
- 7 commodity. An example would be cabbage. Most
- 8 cabbage is grown in the southeast and other
- 9 states outside of California and Arizona so it
- 10 is specific by commodity.
- 11 And our belief, at least in
- 12 California, which is the position that I hold
- 13 within the advisory board is that 90 percent,
- 14 we believe, of the volume of lettuce and leafy
- 15 greens within the state of California is in
- 16 the program.
- 17 MR. ENGLISH: And if 90 percent of
- 18 California is in the program and California --
- 19 I'm sorry, strike all of that. Let me back
- 20 up.
- 21 Do you have any knowledge of what
- 22 percentage of Arizona is in the program?

- 1 THE WITNESS: I don't.
- 2 MR. ENGLISH: But based upon the
- 3 idea that California is as large as it is and
- 4 90 percent of California, in your view, is
- 5 covered, would you agree that once you add any
- 6 Arizona, a majority of most of these
- 7 commodities, maybe not some of the specific
- 8 ones but most of these commodities are already
- 9 covered by an agreement?
- 10 THE WITNESS: A majority of the
- 11 commodities are covered?
- MR. ENGLISH: Yes, a majority of
- 13 each -- of any -- say leafy head lettuce is
- 14 covered.
- 15 THE WITNESS: Sure but I think
- 16 what needs to be added to that is the fact
- 17 that and what I'd hope to produce in my
- 18 testimony was in a situation like the spinach
- 19 outbreak, it didn't matter where you were
- 20 producing the product, whether it was New
- 21 Jersey, or Colorado, or Texas, or California.
- 22 In those kinds of situations, it effects all

- 1 producers, regardless of what state they are
- 2 in, regardless of their size.
- 3 MR. ENGLISH: But was that,
- 4 perhaps, in that instance because the
- 5 distribution of the product -- well, let me
- 6 strike that first.
- 7 The distribution of the product
- 8 ultimately did come from California though,
- 9 correct?
- 10 THE WITNESS: Of the contaminated
- 11 product?
- MR. ENGLISH: Yes.
- 13 THE WITNESS: Yes.
- 14 MR. ENGLISH: And the distribution
- 15 was very significant in terms of the geography
- 16 that it covered in the United States correct?
- 17 For that particular product? It wasn't just
- 18 limited to California distribution, it was
- 19 well outside of California for distribution,
- 20 correct?
- 21 THE WITNESS: And production of
- 22 product throughout the country is spread out

- 1 through multiple states, true.
- 2 MR. ENGLISH: But the largest
- 3 percentage and the largest growers are in
- 4 California, correct?
- 5 THE WITNESS: I don't know if the
- 6 largest growers are in California. I don't
- 7 have statistics to that but the volume, the
- 8 production volume of many of the leafy greens
- 9 commodities, the majority is in California and
- 10 Arizona.
- 11 MR. ENGLISH: So if the majority
- 12 is already covered in California and Arizona,
- 13 wouldn't that suggest that as a practical
- 14 matter, the rest of the country is going to
- 15 have to follow suit regardless of whether
- 16 there is a national marketing agreement?
- 17 THE WITNESS: I don't know if they
- 18 will follow suit or not.
- 19 MR. ENGLISH: Does it also suggest
- 20 that size does matter in that if a grower is
- 21 relatively small and is, say, the northeast,
- 22 its distribution may be so narrow that it is

- 1 not going to have the same impact as what
- 2 occurred in 2006?
- 3 MR. RESNICK: Objection, vague.
- 4 JUDGE HILLSON: This is a
- 5 legislative hearing. I'm going to -- if he
- 6 understands the question, you can answer. If
- 7 not, I'll ask Mr. English to rephrase it for
- 8 you.
- 9 THE WITNESS: Could you repeat the
- 10 question?
- 11 MR. ENGLISH: You earlier said
- 12 that you didn't think size mattered when it
- 13 came to a recall -- the size of the entity
- 14 that produced the problem. And I'm just
- 15 testing that out in the form of as opposed to
- 16 what actually happened in 2006 with a larger
- 17 entity that had large distribution,
- 18 geographical distribution.
- 19 If you have a very small entity
- 20 with very small distribution, doesn't that
- 21 have a different impact?
- 22 THE WITNESS: Well, potentially it

- 1 depends on what of occurrence. If you're
- 2 talking about a food-borne illness occurrence,
- 3 I guess my point is that even a small impact
- 4 can have detrimental effect on the
- 5 marketplace.
- 6 Now the 2006 spinach illness
- 7 outbreak was definitely large and across
- 8 multiple states. And I think that's why that
- 9 was kind of a watershed moment for the
- 10 industry to look at those kinds of standards.
- 11 MR. ENGLISH: Precisely. Do you
- 12 have an example of a small entity in the mode
- of the Department's question about 750,000
- 14 dollars that it had an impact like that on the
- 15 industry?
- 16 THE WITNESS: I don't have an
- 17 example off the top of my head. I know that
- 18 there are statistics that show that there have
- 19 been other illness outbreaks of varying size
- 20 going back ten, 15 years.
- 21 MR. ENGLISH: You just happen to
- 22 be the first witness. So let me just -- you

- 1 did not, in your testimony, discuss the
- 2 portion of the proposal that addresses the
- 3 zones. Will there be another witness to
- 4 testify about the zones that it would be
- 5 better to ask those questions of? And if
- 6 counsel wants to answer, that's fine, too. I
- 7 mean I don't want to just ask questions if
- 8 he's not the right witness.
- 9 MR. RESNICK: There will be
- 10 witnesses, other witnesses to speak about
- 11 zones.
- MR. ENGLISH: All right. Fine.
- 13 If I may just consult, Your Honor,
- 14 with my clients?
- JUDGE HILLSON: You may.
- MR. ENGLISH: I have no further
- 17 questions. Thank you for your time, sir.
- 18 JUDGE HILLSON: Any other
- 19 questions from the non-governmental parties?
- 20 (No response.)
- JUDGE HILLSON: Or the non-USDA
- 22 parties I should say?

- 1 (No response.)
- JUDGE HILLSON: Okay. I don't see
- 3 any questions.
- 4 MS. DESKINS: Judge Hillson, I --
- 5 Judge Hillson?
- JUDGE HILLSON: Oh.
- 7 MS. DESKINS: I have one question
- 8 I just wanted to clarify. The witness used
- 9 the term super metrics and I was wondering if
- 10 he could state for the record what his
- 11 understanding of what the term means?
- 12 THE WITNESS: It's certainly not a
- 13 technical term. It is a term that we would
- 14 refer to metrics or standards that go above
- 15 and beyond the existing practices or best
- 16 practices that are in the California Leafy
- 17 Greens Marketing Agreement now.
- 18 Those have been often called above
- 19 and beyond metrics or super metrics. There's
- 20 nothing super about them other than they are
- 21 different and usually different by exceeding
- 22 the standards that are already in the program

- 1 in California.
- 2 MS. DESKINS: Thank you.
- JUDGE HILLSON: I noticed Mr.
- 4 Gonzales had his hand up before but he has
- 5 just come back in the room. Did you have any
- 6 questions of this witness?
- 7 MR. GONZALES: No, it was
- 8 answered.
- 9 JUDGE HILLSON: Oh, okay. Thank
- 10 you.
- In that case, Mr. Pezzini, you may
- 12 step down. Thank you for testifying.
- MS. STALEY: Your Honor?
- JUDGE HILLSON: Oh, I'm sorry. I
- 15 didn't see you. I was premature on that one.
- 16 MS. STALEY: I'm sorry, Kathleen
- 17 Staley. Kathleen Staley.
- 18 Question, you were being asked
- 19 about the acceptance. Could you explain how
- 20 Canada and Mexico reacted with the California
- 21 Leafy Greens Marketing Agreement was put in
- 22 place?

- 1 THE WITNESS: Well, first Canada
- 2 and then eventually Mexico said that once the
- 3 program was put into place and they came down
- 4 to have a look at the program, that they
- 5 decided they would not let lettuce or leafy
- 6 greens from California into Canada without
- 7 being a part of the program that now exists in
- 8 California. And then Mexico eventually
- 9 followed suit as well.
- 10 So as a producer in California, I
- 11 can't ship lettuce or leafy greens into either
- 12 Canada or Mexico without being a part of the
- 13 program. And as I also mentioned, there are
- 14 a number of buyer groups that have also taken
- 15 the same stance.
- 16 JUDGE HILLSON: Anyone else?
- 17 (No response.)
- JUDGE HILLSON: You may step down.
- 19 Are you ready to call your next
- 20 witness, Mr. Resnick?
- 21 MR. RESNICK: Thank you, Your
- 22 Honor. Let me confer one moment.

- JUDGE HILLSON: If you'd prefer,
- 2 just if you would, why not take our morning
- 3 break now? I have no preference on that.
- 4 MR. RESNICK: This would be a
- 5 great time to take a break.
- 6 JUDGE HILLSON: All right. Let's
- 7 take -- it's five after on my watch. Let's
- 8 take ten and come back at 10:15.
- 9 MR. RESNICK: Thank you, Your
- 10 Honor.
- JUDGE HILLSON: Off the record.
- 12 (Whereupon, the foregoing matter
- went off the record at 10:05 a.m.
- 14 and went back on the record at
- 15 10:20 a.m.)
- 16 JUDGE HILLSON: Mr. Resnick, who
- 17 are you going to call?
- 18 MR. RESNICK: Proponent group will
- 19 call Diane Wetherington, Intertox.
- JUDGE HILLSON: Have a seat and
- 21 please raise your right hand.
- 22 WHEREUPON,

- 1 DIANE WETHERINGTON
- 2 was called as a witness by Counsel for the
- 3 Proponents, having been first duly sworn,
- 4 assumed the witness stand, was examined and
- 5 testified as follows:
- 6 DIRECT TESTIMONY
- 7 JUDGE HILLSON: Please state your
- 8 name and spell it for the record.
- 9 THE WITNESS: My name is Diane
- 10 Wetherington. It's W-E-T-H-E-R-I-N-G-T-O-N.
- 11 JUDGE HILLSON: Okay. And you've
- 12 handed me a document that I've marked as
- 13 Exhibit 7.
- 14 (Whereupon, the above-referred to
- document was marked as USDA
- 16 Exhibit No. 7 for identification.)
- 17 JUDGE HILLSON: And are you going
- 18 to read a written statement?
- 19 THE WITNESS: Yes, I am.
- JUDGE HILLSON: You may proceed
- 21 then.
- 22 THE WITNESS: My name is Diane

- 1 Wetherington and I am an Executive Vice
- 2 President with Intertox, which is a science-
- 3 based consulting firm in Seattle, Washington.
- 4 My role at Intertox is focused on analytical
- 5 services and analysis. I have a bachelor's
- 6 and a master's degree in Economics, both from
- 7 the University of Pennsylvania.
- 8 We prepared the marketing data and
- 9 cost overview for the proposed National
- 10 National Leafy Greens Marketing Agreement that
- 11 I will now cover. According to the USDA data,
- 12 the production value for fresh leafy green
- 13 crops was 2.5 billion dollars in 2008.
- 14 Lettuce is by far the largest
- 15 component of the fresh leafy green group in
- 16 terms of production value. And it represented
- 17 79 percent. Cabbage represents 15 percent of
- 18 the production crop value. And spinach, seven
- 19 percent.
- 20 Production data for major fresh
- 21 leafy green products is gathered by the USDA's
- 22 National Agricultural Statistics Services,

- 1 NASS. NASS publishes data on major fresh
- 2 leafy green crops and a vegetable report five
- 3 times a year plus an annual vegetable summary
- 4 and the Census of Agriculture for the U.S.,
- 5 which is completed every five years.
- 6 For the vegetable reports and
- 7 annual vegetable summary, NASS only gathers
- 8 data on the major producers of the major leafy
- 9 green crops. Therefore, its reports do not
- 10 include very small producers. None of NASS'
- 11 reports include data on minor leafy green
- 12 crops such as radicchio or cress.
- 13 In 2008, a total of 395,000 acres
- 14 were planted with the major leafy green crops
- including cabbage, head lettuce, leaf lettuce,
- 16 romaine, and spinach. This was a 4.4 decrease
- 17 from acres planted in 2007 and an 11.5 percent
- 18 decrease from 2006.
- In the U.S., head cabbage, leaf
- 20 lettuce, and spinach are grown in all 50
- 21 states. Kale is grown in 44 states. And head
- 22 lettuce is grown in 45 states.

- 1 Since 1997, the U.S. production of
- 2 total fresh market leafy greens has grown by
- 3 25 percent. Production is not, however,
- 4 growing for all leafy green crops. Head
- 5 lettuce declined from 7,230 million pounds in
- 6 1990 to 6,312 million pounds in 2007.
- 7 Spinach, leaf lettuce, and romaine
- 8 are the three fastest growing crops in terms
- 9 of production. Leaf lettuce and romaine
- 10 products grew at a rate of 144 percent while
- 11 spinach production grew by 95 percent. As
- 12 shown in Figure 2, between 1990 and 2008, the
- 13 trend in lettuce demand may be a shift from
- 14 head lettuce to leaf and romaine lettuce.
- In 1990, the average retail price
- 16 for iceberg lettuce was 53.8 cents per pound
- 17 and in 2007, it was 86.3 cents per pound. The
- 18 retail price of iceberg lettuce increased 37.7
- 19 percent in that 17-year time frame. From 1997
- 20 to 2007, the retail price increased 21.8 cents
- 21 per pound, a 25.3 percent increase. The
- 22 lowest retail price for that same time period

- 1 was 62.7 cents per pound in 1999.
- 2 Since 1990, the smallest and
- 3 largest portions of retail prices for iceberg
- 4 lettuce that went to retailers were 71.2
- 5 percent in 1997 and 80.7 percent in 2005
- 6 respectively. The average portion of retail
- 7 prices going to retailers during that 17 years
- 8 was 75.9 percent.
- 9 Shipping point prices increased
- 10 46.1 percent from 1990 to 2007 with the lowest
- 11 price, 11.4 cents a pound occurring in 1991
- 12 and the highest price 22.2 cents per pound in
- 13 2002. The portion of shipping price that went
- 14 to retailers ranged from 19.3 percent in 2005
- 15 to 28.8 percent in 1997.
- 16 2007 prices for other fresh leafy
- 17 greens such as cabbage, head lettuce, leaf
- 18 lettuce, and spinach ranged from a low of
- 19 13.72 per hundred weight for cabbage to 32
- 20 dollars and two cents per hundred weight for
- 21 spinach. While prices for cabbage and all
- 22 lettuces increased over the past eight year,

- 1 spinach remained relatively flat with a one
- 2 percent increase.
- Between 2000 and 2003, spinach
- 4 prices increased 17 percent; however, in 2004,
- 5 prices decreased 41 percent and only began to
- 6 increase in 2006 back to nearly the levels of
- 7 2000.
- 8 The U.S. consumes head lettuce
- 9 more than any other fresh leafy green
- 10 commodities. Cabbage consumption has remained
- 11 steady since 2000 with the lowest consumption
- in 2003 and the highest in 2007. Consumption
- of leaf and romaine lettuce has nearly doubled
- 14 from 2000 to 2007 as did consumption of
- 15 spinach. However, consumption of spinach
- 16 peaked in 2005 and has remained approximately
- 17 15 percent below peak consumption for the past
- 18 three years.
- 19 The USDA has kept records of U.S.
- 20 per capita use of iceberg lettuce since 1960
- 21 and use of leaf and romaine lettuce since
- 22 1985. Per capita use of iceberg lettuce has

- 1 declined since 1995 but use of romaine and
- 2 leaf lettuce has steadily increased over the
- 3 past ten years.
- 4 In terms of the worldwide
- 5 production, the U.S. is the second largest
- 6 producer of lettuce in the world with a 21.6
- 7 percent market share, a decrease from 1997
- 8 when the U.S. produced 27 percent of the
- 9 world's lettuce.
- 10 China's lettuce production grew
- 11 from 34.1 percent to a 49.3 percent market
- 12 share during the same time period. China has
- 13 become the world's largest leafy green
- 14 producer with a 51 percent share of the market
- 15 in 2008.
- 16 Since 1997, the production of all
- 17 leafy greens in the United States has risen by
- 18 25 percent. However, the production of head
- 19 lettuce has declined by slightly less than a
- 20 billion heads per year from 1990 to 2007 while
- 21 the production of spinach, leaf lettuce, and
- 22 romaine crops have grown.

- 1 U.S. fresh leafy green producers
- 2 compete on both a domestic and international
- 3 level with foreign leafy green producers.
- 4 Since 2002, Mexico has been the largest
- 5 exporter of lettuce to the United States
- 6 followed by Canada, Peru, and Israel. In
- 7 2006, Mexico exported 118 million pounds of
- 8 lettuce to the United States. Canada, Peru,
- 9 and Israel exported 52 million pounds, 1.2
- 10 million pounds, and 365,000 pounds
- 11 respectively.
- 12 Because much of China's leafy
- 13 green production is internally consumed,
- 14 however, the U.S. still exports more lettuce
- 15 than China. As the world's largest producer,
- 16 China is the main competition to U.S. exports
- 17 to Asian markets. Although Japan and India
- 18 both are top ten global producers, neither
- 19 country exports more than 0.1 percent of the
- 20 lettuce they produce.
- 21 Mexico is the largest producer in
- 22 Latin America and was the ninth largest global

- 1 producer in 2006. Their proximity to the U.S.
- 2 markets makes them a competitor for both
- 3 domestic and Latin American markets; however,
- 4 some of the lettuce from Mexico is produced by
- 5 U.S. companies.
- 6 Major producers and exporters in
- 7 the European Union are Spain, Italy, and
- 8 France, all of which are among the top ten
- 9 global producers. Both Spain and Italy produce
- 10 approximately two million pounds annually from
- 11 years 2000 to 2006. Spain exports an average
- 12 of 45 percent of their produce and Italy
- 13 exports approximately ten percent of theirs.
- 14 The U.S. exports slightly less
- 15 than 12 percent of lettuce crops outside of
- 16 the proposed production area. In the United
- 17 States, there are approximately 11,500
- 18 producers. There is a typo next to that so
- 19 I've stricken that. The 2007 Census defines
- 20 large producers as having annual sales over
- 21 250,000 dollars, while the Small Business
- 22 Association defines large producers as having

- 1 annual sales over 750,000 collars.
- 2 The USDA data is most likely
- 3 incomplete, however, as it is based solely on
- 4 those producers who responded to the survey
- 5 and does not include all U.S. producers.
- Based on Blue Book data, there are
- 7 approximately 1,285 handlers in the U.S.
- 8 including approximately 236 shippers.
- 9 Handlers receive the leafy greens from the
- 10 field. Processors change the crops into
- 11 fresh-cut packaged products which are then
- 12 shipped directly to retail, food service
- 13 companies, or wholesale produce operations.
- 14 Processing in the sense defined here does not
- 15 include canning, freezing, extracting,
- 16 dehydrating or pickling.
- 17 Most leafy greens are sold by
- 18 seasonal contract between producers and
- 19 handlers and these relationships are usually
- 20 long-term. Each producer typically has three
- 21 types of contracts in the portfolio: by
- 22 poundage, by acreage, or by the going market

- 1 price per pound. Any crop for sale not
- 2 covered in a contract is considered part of
- 3 the spot market.
- 4 Historically, almost all produce
- 5 was handled through the spot market. But
- 6 today the reverse is true. Almost all leafy
- 7 greens are now sold under contract, at least
- 8 in the United States. The leafy greens
- 9 industry is very often described as a farm to
- 10 fork industry, which includes producers or
- 11 growers, handlers including processors,
- 12 packers, shippers, wholesalers/distributors,
- 13 agents/brokers, exporters/importers, retail
- 14 outlets including grocery stores, and food
- 15 service providers such as restaurants.
- 16 Small to medium-sized farms often
- 17 sell directly to consumers at farmers'
- 18 markets, roadside stands, and through
- 19 community-supported agriculture or CSA
- 20 programs, as well as to retailers. This is
- 21 considered part of the spot market. Large
- 22 farms almost always sell to handlers, either

- 1 first or second, under contracts.
- 2 Head cabbage, leaf lettuce, and
- 3 spinach are grown in all 50 states, with other
- 4 greens being produced in 43 to 45 states. In
- 5 addition to production, handling, and
- 6 processing are also spread out across the
- 7 country so that leafy greens may be produced
- 8 in one state, processed in another state, and
- 9 then shipped for consumption to many states.
- The following five tables
- 11 represent statistics per crop per acre within
- 12 the various zones across the United States,
- 13 showing how many acres were planted and
- 14 harvested and what the total harvest value is,
- 15 allowing us to determine the value of each
- 16 acre per crop.
- 17 The expected economic impact to
- 18 the National Leafy Greens Marketing Agreement,
- 19 absent a national marketing agreement, buyers,
- 20 food service industries, and states will
- 21 develop and implement their own mandatory
- 22 standards for producers and handlers, at times

- 1 for competitive advantage and more than likely
- 2 not based on the scientific data.
- With a national marketing
- 4 agreement, the likelihood of producers and
- 5 handlers being subject to multiple
- 6 inconsistent requirements is reduced, which in
- 7 turn should minimize any production cost
- 8 increases.
- 9 The majority of the leafy green
- 10 industry is already adhering to the marketing
- 11 agreements in Arizona and California, given
- 12 the volume of leafy green productions in those
- 13 states coupled with the success of the two
- 14 marketing agreements in obtaining handler
- 15 acceptance. The California leafy greens
- 16 industry represents about 75 percent of all
- 17 the leafy greens produced in the United
- 18 States, with 99 percent of that volume already
- 19 covered by the marketing agreement.
- 20 The Arizona leafy greens industry
- 21 represents about 15 percent of all the leafy
- greens produced in the U.S., with 90 percent

- 1 of that volume covered by the marketing
- 2 agreement.
- For those growers and handlers not
- 4 currently participating in a marketing
- 5 agreement, the implementation of a National
- 6 Leafy Greens Marketing Agreement will result
- 7 in additional costs for some producers and
- 8 handlers.
- 9 Although the national marketing
- 10 agreement will differ from the California and
- 11 Arizona agreements, the costs associated with
- 12 the state agreements are representative of the
- 13 costs that could result from a national
- 14 agreement. For this reason, producer and
- 15 handler level food safety costs were evaluated
- 16 prior to and after the implementation of the
- 17 LGMA.
- 18 Food safety costs prior to the
- 19 California LGMA were estimated using both the
- 20 LGMA survey from 2007 and a follow-up phone
- 21 survey to growers and handlers in California
- 22 and Washington. Although the number of

- 1 completed calls was limited, they are
- 2 instructive for two reasons. First, the
- 3 interviews validated and updated the operating
- 4 costs per acre in the enterprise budgets for
- 5 romaine and leafy greens from 2004. And
- 6 second, the interviews provided missing data
- 7 for small handlers and growers who do not
- 8 currently participate in the California LGMA.
- 9 Combining costs from both the LGMA
- 10 survey and the phone surveys, potential costs
- 11 for small and large growers and small and
- 12 large handlers were projected for the
- implementation of a national agreement. One
- 14 major finding from the phone calls is that all
- 15 growers and handlers, both small and large,
- 16 are spending or would spend an estimated one
- 17 to two percent of operating costs on food
- 18 safety after the implementation of the LGMA.
- 19 Producer costs, prior to the LGMA,
- 20 small growers were spending little, if any, of
- 21 their operating costs on food safety. And
- 22 clearly there was no water testing, dedicated

- 1 or assigned food safety personal, third-party
- 2 audits, or mandatory record keeping. Even if
- 3 they were making investments in food safety,
- 4 in many cases it was not separated out in line
- 5 item budget details and was based on personal
- 6 time allocation details.
- 7 Unless there are specific buyers
- 8 requirements, farmers' market safety programs,
- 9 or organic certification requirements, food
- 10 safety expenditures were not major
- 11 expenditures or even noted as part of
- 12 enterprise farm budgets.
- With the implementation of the
- 14 California Leafy Greens Marketing Agreement,
- 15 however, costs increased in several areas
- 16 including food safety personnel costs,
- 17 additional monthly water tests, soil amendment
- 18 tests, traceability processes, administrative
- 19 recordkeeping, and documentation.
- 20 The above costs are based on a
- 21 representative 200-acre leafy grew farm
- 22 growing lettuce. While 200 acres was selected

- 1 based on the SBA definition of a small grower,
- 2 there are growers with ten acres and growers
- 3 with 500 acres that will fall into this
- 4 category, meaning if they are implementing a
- 5 food safety program, these will probably be
- 6 typical per carton costs they will incur.
- As shown, the farm spends 3,000 to
- 8 4,000 dollars on personnel costs, typically a
- 9 family member or employee who has
- 10 responsibility for food safety. Water tests
- 11 are conducted monthly during growing season
- 12 averaging 35 to 45 dollars per test and in
- 13 some cases they are higher.
- 14 Third-party audits are not part of
- 15 the LGMA metrics; however, they are food
- 16 safety-related cost growers are reporting
- 17 based on specific buyer requirements. Third-
- 18 party audit costs will not apply to all
- 19 growers and are outside of a marketing
- 20 agreement.
- 21 Without the third-party audit,
- 22 costs will decline to 4,500 or approximately

- 1 2.5 cents per carton. Pest control, including
- 2 rodent traps, is another cost growers are
- 3 reporting that again is not part of the LGMA
- 4 metrics. The total cost per carton ranges
- 5 from three cents to five cents, including the
- 6 third-party audits and pest control. On a per
- 7 acre basis, costs range from 35 dollars to 45
- 8 dollars.
- 9 Large producers, although the LGMA
- 10 survey was mailed to handlers, a number of
- 11 growers responded to the survey since they are
- 12 part of the grower/shipper market in
- 13 California. California's market structure may
- 14 be somewhat unique given the average vegetable
- 15 and melon farm production in the U.S. earned
- 16 137,000 dollars in 2007 and the average
- 17 California farm earned 488,000 dollars. The
- 18 result may be that the majority of the leafy
- 19 green growers selling to handlers are not
- 20 considered small farms according to the SBA
- 21 definition.
- 22 Again, details on food

- 1 expenditures prior to the LGMA are not readily
- 2 available; however, it is clear large growers
- 3 costs increased from 20 to 60 percent, derived
- 4 from phone interviews, primarily as a result
- 5 not of the cost burden from the LGMA but from
- 6 their starting point on food safety costs.
- 7 The largest cost increase was from the hiring
- 8 or assigning of food safety personnel.
- A large grower, producing 10,000
- 10 acres of leafy greens, his total food safety
- 11 costs with the agreement range from 20 dollars
- 12 per acre to 50 dollars per acre or two cents
- 13 per carton to five cents per carton. Again,
- 14 those costs represent one to two percent of
- 15 total operating costs and include most if not
- 16 all food safety costs and not just the costs
- 17 resulting from a national marketing agreement.
- 18 For those growers who would be
- 19 implementing best practices as part of the
- 20 proposed National Leafy Greens Marketing
- 21 Agreement for the first time, costs will
- 22 increase at the farm level. However, not all

- 1 practices will need to be carried out in
- 2 exactly the same fashion in all growing
- 3 regions. Because of environmental variances,
- 4 testing procedures, and required frequency of
- 5 testing, costs may vary across growing
- 6 regions. Exact costs will vary slightly from
- 7 region to region. What is necessary in
- 8 Salinas, California may not be necessary in
- 9 New Jersey.
- 10 Growers who are not currently
- 11 operating under one of the respective
- 12 marketing agreements will eventually have to
- implement farm-level standards, as the buying
- 14 and food service industries will require it as
- 15 seen in Arizona and California.
- 16 Handler costs, as signatories of
- 17 the National Leafy Greens Marketing Agreement,
- 18 handlers will be funding the agreement by
- 19 paying fees. First handlers will pay
- 20 assessment fees for all leafy green product
- 21 covered by the agreement. These fees will be
- 22 determined by the Leafy Green Products

- 1 Administrative Committee that will administer
- 2 the terms and provisions of the National Leafy
- 3 Greens Marketing Agreement. Handlers, other
- 4 than first handlers, will pay inspection
- 5 service fees for USDA audits.
- 6 Currently the USDA charges 92
- 7 dollars per hour for inspection services at
- 8 domestic locations and 92 dollars per hour
- 9 plus travel and per diem for inspection of
- 10 operations outside the U.S. Total cost of
- 11 USDA audits will vary based on the size of
- 12 handler operations.
- 13 Handlers who are already part of
- 14 the marketing agreements in Arizona and
- 15 California would experience additional
- 16 assessment and audit services fees for fresh
- 17 leafy greens purchased from suppliers outside
- 18 of California or Arizona. Handlers that are
- 19 not signatories of the Arizona or California
- 20 marketing agreements will most likely face
- 21 increased cost for additional auditing and
- 22 certification steps.

- 1 Other measures under the National
- 2 Leafy Greens Marketing Agreement that may
- 3 impose additional costs are traceability
- 4 processes and/or equipment and additional
- 5 dedicated food safety personnel. Some costs
- 6 may be one-time costs to meet requirements of
- 7 the agreement while other costs would be
- 8 ongoing.
- 9 For the small handler that is also
- 10 a producer, food safety costs associated with
- 11 growing and shipping approximately 200,000
- 12 cartons of leafy greens would range from seven
- 13 cents to ten cents per carton or 67 to 95
- 14 dollars per acre. Additional costs handlers
- 15 pay include a two cents per carton assessment
- 16 and increased labor costs.
- 17 Large producers/handlers costs are
- 18 expected to range from five cents per carton
- 19 to 12 cents per carton depending on their food
- 20 safety personnel and their production volumes.
- 21 The above produce/handler is growing,
- 22 handling, and in some cases processing 9.5

- 1 million cartons of leafy greens each year.
- 2 Larger producers/handlers will experience
- 3 greater assessment costs as their volumes
- 4 increase Again, for this group, buyer
- 5 requirements are more strenuous and require
- 6 more time and personnel to support.
- 7 Buyer requirements, currently
- 8 there are many different food safety and
- 9 quality requirements levied from the buying
- 10 and food service industries on fresh leafy
- 11 greens producers and handlers. Today,
- 12 handlers, including those who have signed on
- 13 to the Arizona and California marketing
- 14 agreements, are subject to many different
- 15 requirements from the buying and food service
- 16 industries.
- 17 Buyers may develop their own
- 18 quality and safety standards or adopt
- 19 established systems such as the Global Food
- 20 Safety Initiative standards. In 2005, 20
- 21 percent of organic handlers that participated
- in a USDA survey reported that they always

- 1 require their suppliers to have third-party
- 2 food safety certification. And 20 percent
- 3 reported that they sometimes have this
- 4 requirement.
- 5 Some of these requirements are
- 6 very costly to implement. This has not
- 7 deterred the industry from paying for and
- 8 adding on another layer of GAPs as mandated by
- 9 these agreements.
- 10 If a handler does not abide by
- 11 buyer requirements, their leafy greens
- 12 products would not be introduced into commerce
- 13 and could result in a grave economic loss for
- 14 the handler and grower.
- 15 A national marketing agreement
- 16 would establish consistency in leafy green
- 17 production and handling practices through the
- 18 industry supply chain. This would help to
- 19 mitigate the costs of multiple quality and
- 20 food safety requirements since buyers do not
- 21 need to audit producers' production practices
- 22 as often, and buyers would be less likely to

- 1 require producers to adopt practices in
- 2 addition to those included in the national
- 3 agreement.
- 4 Though some buying and food
- 5 service companies may continue to require
- 6 their handlers to meet additional standards,
- 7 the best practices outlined in the National
- 8 Leafy Greens Marketing Agreement would provide
- 9 the baseline for all additional requirements
- 10 as we have seen in Arizona and California.
- JUDGE HILLSON: Thank you.
- 12 Mr. Resnick, do you have any
- 13 further direct of Ms. Wetherington?
- MR. RESNICK: We do not.
- 15 JUDGE HILLSON: I'll turn it over
- 16 to the Government panel. Do you have any
- 17 questions? Don't forget to identify
- 18 yourselves first.
- 19 CROSS EXAMINATION
- 20 MS. DESKINS: This is Sharlene
- 21 Deskins. In looking this over, on page eight,
- 22 you use a term zone. What did you mean by

- 1 zone?
- 2 THE WITNESS: The zones are --
- 3 there are five zones that were developed for
- 4 the purposes of this agreement. I can go
- 5 through which states are in each of those five
- 6 zones but in later testimony, you will
- 7 actually hear why those zones were selected
- 8 and which states actually go into those zones.
- 9 So if you'd like me to, I could
- 10 actually read the states that are in each of
- 11 the zones.
- MS. DESKINS: Okay, well there is
- 13 nothing in here where you define zones. We'd
- 14 have to refer to something else to get that
- 15 definition?
- 16 THE WITNESS: That's correct.
- MS. DESKINS: Okay.
- 18 THE WITNESS: It's actually in the
- 19 -- it's in testimony that is still to come for
- 20 those zones. Would you like me to read the
- 21 states for those zones?
- MS. DESKINS: Well, I'm just

- 1 trying to clarify it because it wasn't defined
- 2 in here. And I just wanted to understand what
- 3 your understanding of that term was.
- 4 THE WITNESS: Okay.
- 5 MS. DESKINS: The other thing is
- 6 you used the term Blue Book. Can you tell us
- 7 what that means?
- 8 THE WITNESS: This is a -- it's an
- 9 industry book that has developed -- and I'm
- 10 apologize, I don't have the exact source for
- 11 it but it is -- I believe that the majority of
- 12 handlers in the United States are participants
- 13 in the book. So they have their data in
- 14 there. And they specify what their role is in
- 15 the handling industry.
- 16 And to some extent, there are
- 17 companies that list their shipping volumes.
- 18 And I believe there also are -- there is
- 19 information in there about their credit
- 20 worthiness.
- 21 MS. DESKINS: I have no further
- 22 questions.

- 1 MS. SCHMAEDICK: This is Melissa
- 2 Schmaedick. Good morning.
- THE WITNESS: Good morning.
- 4 MS. SCHMAEDICK: In your testimony
- 5 on page ten, you refer to some tables that
- 6 talk about acres planted, average yields, and
- 7 then values per carton weight. And I'm
- 8 wondering if in your analysis if you noticed
- 9 any variation in the value assigned to carton
- 10 weight based on the type of market that that
- 11 product was sold in.
- 12 For example, would the value
- 13 weight of head lettuce be different in a
- 14 farmers' market environment versus a retail
- 15 store?
- 16 THE WITNESS: Yes. And there's
- 17 definitely data published across the country
- 18 for different retail markets as well as
- 19 organic markets.
- 20 MS. SCHMAEDICK: All right. But
- 21 you did not present any of that information in
- 22 this study?

- 1 THE WITNESS: Not in this study,
- 2 no.
- 3 MS. SCHMAEDICK: Do you -- are you
- 4 able to describe what some of those
- 5 differences might be offhand?
- 6 THE WITNESS: If it is something
- 7 that you would like to have, I could come back
- 8 later this week and provide that to you. But
- 9 the -- you know, there are obviously regional
- 10 differences. I remember, for example, that I
- 11 believe -- well, I don't want to state it
- 12 without having the facts in front of me. But
- 13 I could come back later this week and provide
- 14 that to you.
- 15 MS. SCHMAEDICK: Okay. Another
- 16 question I have goes to -- based on my
- 17 understanding of your information here, there
- 18 are, for lack of a better description, perhaps
- 19 different sub-industries within the larger
- 20 leafy green industry. There are growers and
- 21 handlers that typically operate in small
- 22 markets, farmers' markets, the SAs, and there

- 1 are larger growers and handlers that typically
- 2 operate in the conventional retail outlets.
- 3 Have you done any studies or have
- 4 you found any information that looks at
- 5 perhaps individuals that might fall between
- 6 those two camps that might operate in both
- 7 farmers' markets and retail markets?
- THE WITNESS: Yes, we have. We
- 9 have attempted to do the research. I would
- 10 have to say that the industry data in that
- 11 area is extremely thin. And that just
- 12 understanding growers and defining them
- 13 according to the SBA definition is exceedingly
- 14 difficult, especially if they are selling into
- 15 the handler market.
- 16 And from what our preliminary
- 17 research is showing, is that a lot of those
- 18 growers who are, according to the SBA
- 19 definition, small growers, would be selling
- 20 into farmers' markets or on some sort of
- 21 buying program directly to consumers.
- 22 But we do not have the statistics

- 1 to support, you know, where they fall in that
- 2 category.
- 3 MS. SCHMAEDICK: Based on your
- 4 knowledge of the greater leafy green industry,
- 5 are there perhaps different thresholds that
- 6 might better reflect what a small grower and
- 7 a larger grower might mean within the industry
- 8 itself? That might be different from SBA
- 9 definitions?
- 10 THE WITNESS: Well, we did analyze
- 11 that. And clearly for a national agreement,
- 12 if you are selling to a handler, then you are
- 13 looking at a farm size or a revenue size much
- 14 greater than the SBA definition. And we came
- 15 up to something that's probably closer to the
- 16 500-acre farm for that.
- 17 There is clearly another market
- 18 which is selling directly to consumers in the
- 19 farmers' markets. And since it is a very
- 20 large growing part of the retail sales, you
- 21 know, it's outside of this agreement that
- 22 we're talking about. But it is still a part

- 1 of the industry.
- 2 MS. SCHMAEDICK: And can you
- 3 explain why you say that it would be outside
- 4 of this agreement?
- 5 THE WITNESS: Because they're not
- 6 selling directly to handlers. They would be
- 7 selling directly to retailers or consumers,
- 8 sorry.
- 9 MS. SCHMAEDICK: So you are saying
- 10 that the producer would be selling directly to
- 11 a consumer?
- 12 THE WITNESS: If they are selling
- 13 directly to a consumer, they would be outside
- 14 or it. Or if they are selling to a handler,
- 15 which is considered an agent, they would also
- 16 be outside of the agreement.
- 17 MS. SCHMAEDICK: Are you familiar
- 18 with the definition that is being proposed for
- 19 the term handle? Or is that something that
- 20 we'll address later?
- 21 THE WITNESS: That's something we
- 22 will address later.

- 1 MS. SCHMAEDICK: Okay. So I have
- 2 another question about your calculation on
- 3 page 12. You say that -- the very last
- 4 sentence on that page. One major finding from
- 5 the phone calls is that all growers and
- 6 handlers, both small and large, are spending
- 7 an estimated one to two percent of operating
- 8 costs on food safety after the implementation
- 9 of the LGMA.
- 10 So is this a one to two percent
- 11 increase?
- 12 THE WITNESS: Yes.
- MS. SCHMAEDICK: Okay. And you
- 14 find that that's -- is that an average?
- 15 THE WITNESS: It's pretty -- it is
- 16 an average but it's actually pretty much
- 17 across the board regardless of size.
- 18 MS. SCHMAEDICK: Those are all the
- 19 questions I have for now. Thank you.
- 20 JUDGE HILLSON: Anything further
- 21 from the USDA panel?
- Go ahead, Ms. Dash.

- 1 MS. DASH: On page 12, in the
- 2 second paragraph, you talk about the
- 3 California leafy greens industry represents 75
- 4 percent by volume?
- 5 THE WITNESS: Yes.
- 6 MS. DASH: So the 99 percent of 75
- 7 percent, that's what you were talking about?
- 8 The 99 percent refers to the 75 percent?
- 9 THE WITNESS: The 75 percent is
- 10 the total volume of the United States. And of
- 11 that total volume, 99 percent --
- MS. DASH: Okay.
- 13 THE WITNESS: -- I'm sorry, within
- 14 California.
- MS. DASH: Okay. Also on page 12,
- 16 there was a survey in 2007 and then there was
- 17 a more recent phone call follow up, is that
- 18 right?
- 19 THE WITNESS: Yes.
- 20 MS. DASH: Can you tell us how
- 21 many people were -- how many entities were
- 22 surveyed were producers and how many were

- 1 surveyed for handlers in 2007 and in the -- I
- 2 mean in 2007 and then in the follow-up phone
- 3 survey?
- 4 THE WITNESS: I believe in the
- 5 2007 survey that the survey was mailed to all
- 6 of the participants in the Leafy Greens
- 7 Marketing Agreement, which is approximately
- 8 120 handlers.
- 9 And in our phone surveys, we
- 10 actually contacted -- we had several sources
- 11 for our calls. We had, on the producers side,
- 12 we actually used the Blue Book data and
- 13 divided that into zones. And the information
- 14 we're talking about here is predominantly for
- 15 Zone 1.
- 16 And we used a subset of those
- 17 calls -- or a subset of that data to make
- 18 calls to producers. We also, for growers had
- 19 a more difficult time. We used Dunn &
- 20 Bradstreet data on that. We went to several
- 21 associations within the State of California.
- 22 We went to small growers groups and attempted

- 1 to interview some of those, some successfully,
- 2 some not.
- And we completed, I believe, 20 to
- 4 30 surveys. And these are pretty in-depth
- 5 surveys. I mean we were asking very specific
- 6 financial information on operating costs and
- 7 growing details. So they were very
- 8 proprietary surveys.
- 9 I can't tell you the exact
- 10 breakout between handlers and growers. And
- 11 one of the reasons for that is that most of
- 12 the handlers had some form of growing
- 13 operations as well. But I could get those
- 14 numbers split out.
- MS. DASH: Were these all in
- 16 California?
- 17 THE WITNESS: No, we also
- 18 conducted some farmers' market surveys in
- 19 Washington State as well.
- 20 MS. DASH: Okay. So California
- 21 and Washington --
- THE WITNESS: State.

- 1 MS. DASH: -- State.
- THE WITNESS: Yes.
- 3 MS. DASH: On page 13, Table 11,
- 4 could you talk about that a little more? I'm
- 5 not sure I understand that table.
- 6 THE WITNESS: Okay. So we
- 7 selected a typical farm size of 200 acres.
- 8 And because, again, the small producers are
- 9 not -- from the survey information that's come
- 10 back to us, I can just tell you that what they
- 11 are saying is that they are not spending money
- 12 on food safety or if they are, it is
- 13 negligible.
- 14 So we actually developed this from
- 15 a 500-acre actual survey results and scaled it
- 16 back to what a minimum program could be under
- 17 a national program. Having said that, there
- 18 are pieces in here that would not fall under
- 19 the proposed national marketing agreement.
- 20 And the third-party audits, we discussed. And
- 21 pest control, which if it includes things like
- 22 rodent traps, would also not be in there.

- 1 But these seem to be, you know,
- 2 fairly realistic costs of what a small grower
- 3 could face if they were to implement this type
- 4 of agreement.
- 5 If you wanted to look at it on a
- 6 scaled basis, I think in terms of a per carton
- 7 cost might be another approach to look at it.
- 8 So, for example, you are looking at a range
- 9 between 1.6 cents to 2.1 cents per carton for
- 10 personnel costs. And by far, regardless of
- 11 the size of the grower or handler, personnel
- 12 costs are the number one cost that they face.
- 13 And as you see here, the third-
- 14 party audits if they are, in fact, selling
- 15 into buyers who require this, then that is
- 16 another significant cost. If they don't have
- 17 that, then their costs would drop
- 18 dramatically.
- 19 Other --
- MS. DASH: Could I --
- 21 THE WITNESS: I'm sorry.
- 22 MS. DASH: -- could I just ask you

- 1 to -- what is the heading on the four columns?
- 2 Is the first heading --
- THE WITNESS: Oh, I see. Yes, I'm
- 4 sorry. It's actually skewed. It should say -
- 5 the first heading should be the three cents
- 6 per carton. The second should be five cents.
- 7 The third should again apply to the three
- 8 cents. What you're looking at is at three
- 9 cents per carton, your total costs would be
- 10 6,500 dollars, which is approximately 3.4
- 11 cents per carton.
- 12 And if it is at five cents, then
- 13 you're looking at 9,500 dollars per year or
- 14 five cents cost.
- MS. DASH: Okay. Could you
- 16 explain, again, what three cents per carton
- 17 refers to?
- 18 THE WITNESS: That would be the
- 19 cost in producing a carton that is associated
- 20 with implementing food safety standards,
- 21 including standards that would -- could
- 22 ultimately be the National Leafy Greens

- 1 Marketing Agreement standards.
- 2 MS. DASH: And so are you saying
- 3 that your estimate is that for a small
- 4 producer, the cost would be three cents per
- 5 carton to five cents per carton?
- 6 THE WITNESS: Yes.
- 7 MS. DASH: And that is based on
- 8 the follow-up surveys that were done this
- 9 year?
- 10 THE WITNESS: That is based on the
- 11 follow-up surveys of what producers are
- 12 spending at approximately a 500-acre or less
- 13 farm. And they are growing a particular mix
- 14 of crops. And yes, that's correct. And
- 15 that's a typical cost that they would face for
- 16 this type of farm.
- 17 MS. DASH: Okay. Can you expand
- on why these costs would be appropriate to
- 19 assume for states other than California and
- Washington?
- 21 THE WITNESS: Well, we are
- 22 verifying, just so you know, we have similar

- 1 work going on throughout the rest of the
- 2 country. And we'll probably present -- if
- 3 there are differences in the data, we'll
- 4 present it for the other hearings.
- 5 But at this point in time, I would
- 6 suggest that these probably are higher than
- 7 some of the other state costs. And mainly
- 8 because the personnel costs in the State of
- 9 California are higher than some of the
- 10 national costs.
- 11 But having said that, if there are
- 12 any other differences, we will be presenting
- 13 them at future hearings.
- MS. DASH: On page 14, it states
- 15 that large growers' costs increased from 20 to
- 16 60 percent from their -- is that food safety
- 17 costs increased 20 to 60 percent?
- 18 THE WITNESS: That's correct.
- 19 MS. DASH: Okay. And --
- 20 THE WITNESS: But as it states in
- 21 there, it says it is not just from LGMA. I
- 22 mean one of the concerns we had with the

- 1 original survey was it incorporated some of
- 2 the costs that may have followed from the E.
- 3 Coli outbreak. And so we tried to split out
- 4 costs that were LGMA-specific.
- 5 And these costs, I believe, are
- 6 greater than just the LGMA side. And we've
- 7 already pointed out two areas where we know
- 8 that to be true.
- 9 MS. DASH: Okay. So -- but this
- 10 is based on phone interviews that were done
- 11 this year and is it asking them to identify
- 12 increased costs in like 2007 versus 2006? Or
- is it asking them to identify their increased
- 14 costs currently compared to prior to
- implementation of the California agreement?
- 16 THE WITNESS: We asked them for
- 17 line item details, the ones that you see on
- 18 the left side of that table. We asked them
- 19 for specific details before and after the
- 20 implementation of Leafy Greens Marketing
- 21 Agreement. And we were looking at ongoing
- 22 costs for food safety under the Leafy Green

- 1 Marketing Agreement.
- 2 MS. DASH: Now were they
- 3 responding to you based on their memory of the
- 4 costs or were you speaking to them and they
- 5 had, you know, their budgets or their taxes
- 6 from that year?
- 7 THE WITNESS: We sent the surveys
- 8 out in advance and so that I would say most of
- 9 them had done quite a bit of work to come up
- 10 with the costs that they had incurred before
- 11 and after the Leafy Greens Marketing
- 12 Agreement. So they had quite a bit of cost
- 13 details.
- MS. DASH: Were you going to
- include a copy of the survey as one of your
- 16 exhibits? I mean blank, not asking for --
- 17 THE WITNESS: Yes, yes, we can do
- 18 that. There are actually two, one for
- 19 producer and one for handler.
- 20 MS. DASH: On page 16, you state
- 21 that a national marketing agreement would
- 22 establish consistency in leafy green

- 1 production and handling practices through the
- 2 industry supply chain. Could you expand on
- 3 that because it seems to assume that if there
- 4 is a national agreement that it will have a
- 5 very high sign up and that everyone would, you
- 6 know, be applying these consistent practices.
- 7 And I'm just wondering if you
- 8 could talk about that a little more.
- 9 THE WITNESS: I think there is
- 10 going to be a number of testimonies that will
- 11 expand on it.
- 12 But just to add to it, in our
- 13 conversations with the growers and handlers
- 14 who are participating in the Leafy Greens
- 15 Marketing Agreement now, I think that there
- 16 are a couple of things that are very common.
- 17 And one is that they feel that this has been
- 18 beneficial for them or for their companies
- 19 because it has standardized the food safety
- 20 practices.
- 21 And at one point, someone had said
- 22 to us that now at least our buyers know what

- 1 to look for when they are looking for food
- 2 safety. They know what to evaluate.
- And on top of that, I think the
- 4 other comment that has come back is that they
- 5 at least would like to feel that their produce
- 6 and what they're paying for food safety is
- 7 reflective of not so much the cost the rest of
- 8 the country would face but the same level of
- 9 food safety would exist throughout the
- 10 country. You know that somehow, that if there
- is another problem, it's not going to be
- 12 because of the lack of food safety in the
- 13 industry.
- MS. DASH: Do you think that there
- 15 could be increased costs in the short run,
- 16 maybe like the first couple of years if there
- is a National Leafy Greens Agreement that has
- 18 requirements but there are also buyer
- 19 requirements because, you know, buyers might,
- 20 you know, want to wait and see, you know, and
- 21 consider whether they would want to, you know,
- 22 move?

- 1 THE WITNESS: It's really going to
- 2 depend on the individual company. I mean
- 3 clearly if you're not investigating in food
- 4 safety now your costs are going to increase.
- 5 And the most likely increase is
- 6 going to be in terms of personnel although
- 7 there are people who are still utilizing their
- 8 family members as their food safety person.
- 9 So there are ways to manage the cost that make
- 10 them not cost prohibitive.
- 11 And I'm sorry, what was your
- 12 second part of your question?
- MS. DASH: I was just asking if
- 14 you think that -- well, I'll rephrase it. How
- 15 long do you think it would take for a National
- 16 Leafy Greens Agreement requirements to gather
- 17 enough support that other buyer requirements
- 18 would start to be reduced?
- 19 THE WITNESS: I don't think I have
- 20 any information on that. An anecdotal piece
- 21 of information I can give you is that the
- 22 third-party audit costs for most of the survey

- 1 participants did go down when the Leafy Greens
- 2 Marketing Agreement was implemented. So the
- 3 food safety cost incurred for third-party
- 4 audits prior to versus after, I'd say in most
- 5 cases went down.
- 6 MS. DASH: That's all the
- 7 questions I have. Thank you.
- 8 JUDGE HILLSON: Go ahead. Please
- 9 identify yourself, too.
- MR. SOUZA: Thank you, Tony Souza.
- 11 On tables 11, 12, and 13, you've
- 12 got a line in there third-party audits. Are
- 13 those in reference to the National Leafy
- 14 Greens Marketing Agreement audits? Or are
- 15 those inclusive of all other third-party
- 16 audits that a shipper/grower would be
- 17 receiving?
- 18 THE WITNESS: These are not
- 19 included in the National Leafy Greens
- 20 Marketing Agreement. These would be the buyer
- 21 requirements that would be outside of it.
- MR. SOUZA: So these third-party

- 1 audits are outside? They're not projected
- 2 costs for the National Leafy Greens Marketing
- 3 Agreement?
- 4 THE WITNESS: They are projected
- 5 costs. If you have -- I'd say that they are
- 6 conservative because they're projecting if you
- 7 have a National Leafy Greens Marketing
- 8 Agreement and you cannot remove buyer
- 9 requirements in the marketplace, they are
- 10 still incurring them. That would be part of
- 11 the cost.
- MR. SOUZA: On page 16, you go in
- 13 and its discussed in your testimony that the
- 14 cost of multiple quality requirements by the
- 15 buyers may be reduced. In your survey, did
- 16 you have any numbers or anything to
- 17 substantiate? Or what percentage might be a
- 18 reduction in those costs?
- 19 THE WITNESS: I don't think we
- 20 have enough data to make an assertion as to
- 21 what the reduction would be.
- MR. SOUZA: Thank you. On page

- 1 seven, under foreign producers, you discuss
- 2 Mexico as a producer and Latin America and was
- 3 ninth largest global in 2006. Is there any
- 4 mechanism in place right now that you are
- 5 aware of under the two marketing agreements
- 6 with the states, both California and Arizona,
- 7 to ensure that that product meets any of the
- 8 standards within those agreements?
- 9 THE WITNESS: I want to defer that
- 10 question. I believe that answer is yes. That
- 11 it applies to produce coming into the United
- 12 States. But I'm going to defer that to later
- 13 testimony.
- MR. SOUZA: Okay. Thank you.
- 15 JUDGE HILLSON: Anything else from
- 16 the USDA panel? Go ahead, Ms. Schmaedick.
- 17 MS. SCHMAEDICK: This is Melissa
- 18 Schmaedick.
- 19 Going back to your table on page
- 20 13, what I'm trying to get a handle on here is
- 21 you -- again, if I understand your information
- 22 correctly, you are assuming that food safety

- 1 costs will represent one to two percent of an
- 2 operation's total budget. And then in this
- 3 table, you look at a total cost based on a
- 4 three percent per carton assumption or a five-
- 5 cent per carton assumption. You come up with
- 6 a total of 6,500 or 9,500.
- 7 Are you saying that that 6,000 to
- 8 roughly 10,000 dollars would represent one to
- 9 two percent of an operation's budget?
- 10 THE WITNESS: No.
- MS. SCHMAEDICK: Okay.
- 12 THE WITNESS: This is just looking
- 13 -- and actually it was developed from the
- 14 individual line items and then translated into
- 15 a per carton cost. But it is just looking at
- 16 a couple of different growers and how they
- 17 allocated their budgets for roughly that same
- 18 type of acreage.
- 19 MS. SCHMAEDICK: Did you do any
- 20 type of analysis that looks at what percentage
- 21 of total farm income would be spent on food
- 22 safety?

- 1 THE WITNESS: Yes. So in each of
- 2 the surveys, we asked what percentage of their
- 3 crops were leafy green crops. And we -- in
- 4 some cases, there are a very small percentages
- 5 represented in their costs. And in those
- 6 cases, the cost we used reflected food safety
- 7 costs across multiple crops.
- 8 In addition to that, we did have
- 9 several cases where companies were reporting
- 10 data where they have already applied these
- 11 metrics to other crops or they may have
- 12 multiple states outside of California, what
- 13 we're calling Zone 1, and while it doesn't
- 14 fall under this current Leafy Greens Marketing
- 15 Agreement, they've already applied those
- 16 practices to that crop in those states.
- 17 And, therefore, they included
- 18 those in the food safety cost. And that would
- 19 put them typically on the high side. And
- 20 that's why when you are looking at, for
- 21 example, a large grower or a large
- 22 shipper/grower, you will see costs that are on

- 1 the high side.
- MS. SCHMAEDICK: Okay.
- THE WITNESS: And I might add that
- 4 there were other costs that were included --
- 5 that again were not required by the Leafy
- 6 Greens Marketing Agreement. And there were
- 7 capital costs thrown in as well.
- 8 MS. SCHMAEDICK: Okay. And so my
- 9 question would also apply to businesses that
- 10 are handlers. Did you do any type of analysis
- 11 that would look at what percentage of their
- 12 operations income would be spent on audit
- 13 verification costs?
- 14 THE WITNESS: Including what
- 15 costs?
- MS. SCHMAEDICK: On compliance
- 17 costs.
- 18 THE WITNESS: I'm sorry, the last
- 19 word? Commodity?
- MS. SCHMAEDICK: On meeting the
- 21 requirements of the program.
- THE WITNESS: Yes. And, again, we

- 1 tried to separate out those food safety costs
- 2 which were specific to the leafy greens.
- 3 However, in some cases, they did include data
- 4 for all of their crops. But we only include
- 5 data on the production side, which came out
- 6 with a per carton cost on our leafy greens
- 7 costs, if that makes any sense to you.
- 8 MS. SCHMAEDICK: Yes. My last
- 9 question is most of your statement focuses on
- 10 costs. Did you do a cost benefit analysis?
- 11 And were you able to quantify the benefits of
- 12 participants in the LGMA program?
- 13 THE WITNESS: The answer is no, we
- 14 did not do a cost benefit analysis.
- 15 MS. SCHMAEDICK: Okay. Thank you.
- 16 JUDGE HILLSON: Mr. Souza?
- 17 MR. SOUZA: Tony Souza. On page
- 18 15 under handler costs, you discuss handlers
- 19 other than first handlers will pay inspection
- 20 fees for USDA audits. Which audits? What
- 21 type of audit is that? And could you explain
- 22 when that would be used?

- 1 THE WITNESS: Again, that is
- 2 something I think I would like to defer to
- 3 later conversation when they go into detail
- 4 about the USDA audits.
- 5 MR. SOUZA: Thank you.
- JUDGE HILLSON: Ms. Dash?
- 7 MS. DASH: Suzanne Dash, AMS.
- 8 On table 11 on page 13, is the
- 9 three cent per carton to five cent per carton
- 10 a good estimate for most small producers? Or
- 11 is that -- or do you think that the five cent
- 12 per carton is the maximum that a small
- 13 producer might face?
- 14 THE WITNESS: Well, I would say
- 15 again that I think they are high because if
- 16 you were looking at -- I mean I'm not sure how
- 17 small of a producer you are talking about but
- 18 we talked to some individuals who were selling
- 19 a half of acre crops. And for those
- 20 individuals or farms, they certainly are not
- 21 going to incur the third-party audit costs.
- 22 Or if they are, then they could be less than

- 1 that. But we were trying to err on the
- 2 conservative side of these costs.
- 3 MS. DASH: Okay. Let's say for a
- 4 500-acre farm --
- 5 THE WITNESS: Okay.
- 6 MS. DASH: -- could you answer
- 7 that question for a 500-acre farm?
- 8 THE WITNESS: Whether three to
- 9 five cents is appropriate?
- 10 MS. DASH: Whether five cents is
- 11 likely to be the maximum for most producers.
- 12 THE WITNESS: Well, a 500 farm
- 13 would fall under a larger producer.
- 14 MS. DASH: But wasn't this based
- 15 on --
- 16 THE WITNESS: This is based on a
- 17 200-acre farm. The analogy here was just
- 18 saying that while the industry -- or the SBA
- 19 definition, 200 acres is probably about the
- 20 break point or slightly less than 200 acres
- 21 for that revenues. However, a 500-acre cost
- 22 could be similar.

- 1 MS. DASH: Okay. I guess my
- 2 question is then for a 200-acre farm --
- 3 THE WITNESS: Right.
- 4 MS. DASH: -- do you think five
- 5 percent -- five cents per carton is a
- 6 reasonable estimate of the maximum cost for
- 7 the producer?
- 8 THE WITNESS: Well, since we don't
- 9 know what the National Leafy Greens Marketing
- 10 Agreement is going to look like, I would just
- 11 say that based on what the current growers are
- 12 experiencing under the California Leafy Greens
- 13 Marketing Agreement, it is a good -- or it is
- 14 a reasonable cost estimate.
- MS. DASH: Okay. And you may have
- 16 talked about this and I missed it while I was
- 17 looking through some of your stuff but why is
- 18 the recordkeeping zero in table 11?
- 19 THE WITNESS: In this particular
- 20 case, they did not report any separate
- 21 recordkeeping. Some of the larger companies
- 22 did. Or this was a question we asked them.

- 1 Some of them incorporated it into their
- 2 personnel cost. In fact, a lot of them
- 3 incorporated recordkeeping and training costs
- 4 into their personnel costs.
- 5 MS. DASH: Okay. So in personnel
- 6 costs, I mean that makes sense. So you'd have
- 7 recordkeeping and training. What else do you
- 8 think might be in that category?
- 9 THE WITNESS: In personnel costs?
- MS. DASH: Yes.
- 11 THE WITNESS: Depending on the
- 12 type of grower, are you still focused on a
- 13 small producer/grower?
- MS. DASH: Yes.
- 15 THE WITNESS: Well, this is
- 16 usually an individual who is working part-
- 17 time. They are usually the one interfacing
- 18 with the -- for the audits, handling that.
- 19 And the documentation work. And as I said
- 20 before, it's usually part of somebody's job,
- 21 whether it is a owner or if it is a part-time
- 22 employee.

- 1 They could do some water testing,
- 2 some pH testing as well. Very simple testing.
- MS. DASH: On page 15 for table
- 4 13, are the headings for that table correct?
- 5 Or should that be seven cents and ten cents
- 6 and seven cents and --
- 7 THE WITNESS: Correct, you're
- 8 right. They're -- again, they're not correct.
- 9 So as you're seeing there is the first
- 10 columns, the first column to the right of the
- 11 list there, the 13,300 would be the cost at
- 12 seven cents a carton, which would result in a
- 13 seven cents a carton cost. And the second one
- 14 would result in a ten cents a carton cost.
- 15 MS. DASH: On table 13, the seven
- 16 cents per carton to ten cents per carton,
- 17 could you give me your opinion on whether that
- 18 -- most growers -- most producer -- no, I'm
- 19 sorry.
- THE WITNESS: Yes, these are both
- 21 producers and handlers. They're doing both.
- 22 So in other words, you are incorporating the

- 1 cost that you have in table 11 with some
- 2 additional costs as well.
- 3 MS. DASH: Okay. On table 14,
- 4 page 16, I don't mean to keep going on about
- 5 this, but the headings on this table should be
- 6 adjusted also?
- 7 THE WITNESS: No, those are
- 8 correct.
- 9 MS. DASH: Those are correct,
- 10 okay. On your range from five cents to 12
- 11 cents per carton, how comfortable are you that
- that would apply to most producer/handlers?
- 13 THE WITNESS: That, again, based
- 14 on the California Leafy Greens Marketing
- 15 Agreement, I think that covers the very wide
- 16 range with a lot of costs thrown in that is
- 17 not specific to this agreement. And, for
- 18 example, the 12 cents a carton, that is
- 19 definitely -- they're looking at food safety
- 20 as a differentiator. So I think that's above
- 21 and beyond what you would normally see.
- MS. DASH: Do you feel that the 12

- 1 cents per carton is a maximum?
- THE WITNESS: Well, I couldn't say
- 3 that but I haven't found anybody -- I'd just
- 4 say that there were very few costs that high.
- 5 MS. DASH: Could you say what
- 6 benefits you feel consumers would get from
- 7 this agreement that, you know, would be
- 8 exceeding these costs?
- 9 THE WITNESS: I think that I'd
- 10 like to defer that. We have two economists
- 11 who are still to testify that will be
- 12 presenting information there.
- MS. DASH: That's it for me.
- 14 JUDGE HILLSON: Do we have any
- 15 questions from the non-USDA parties for this
- 16 witness?
- 17 Mr. English?
- 18 MR. ENGLISH: Charles English for
- 19 the National Organic Coalition. But very few,
- 20 Your Honor.
- 21 Table 6, page 9, and I just note
- 22 that I think at some point you started

- 1 renumbering so there are two table sixes and
- 2 two table sevens. So just for the clarity of
- 3 the record, it's no big deal, I just want to
- 4 point out that table 6 on page 9, where you
- 5 say small producers by zone and commodity 2007
- 6 --
- 7 THE WITNESS: I'm sorry, what page
- 8 are you on again?
- 9 MR. ENGLISH: Page 9, table 6.
- 10 THE WITNESS: Right.
- 11 MR. ENGLISH: And I merely want to
- 12 know for this purpose, which definition of
- 13 small producers was being used?
- 14 THE WITNESS: We're using the SBA
- 15 definition.
- MR. ENGLISH: So 750,000 --
- 17 THE WITNESS: Yes.
- 18 MR. ENGLISH: -- dollars, which
- 19 you estimate to come out at 200 acres?
- 20 THE WITNESS: Approximately 200
- 21 acres.
- 22 MR. ENGLISH: Thank you. That's

- 1 all I have.
- 2 JUDGE HILLSON: Any other
- 3 questions of this witness?
- 4 (No response.)
- 5 JUDGE HILLSON: Thank you for
- 6 testifying. And I'm going to receive Exhibit
- 7 7 into evidence.
- 8 (Whereupon, the above-referred to
- 9 document was received into the
- 10 record as USDA Exhibit No. 7.)
- 11 JUDGE HILLSON: Did you have
- 12 anything on redirect?
- 13 REDIRECT EXAMINATION
- MR. RESNICK: Your Honor, yes.
- JUDGE HILLSON: I'm sorry. Go
- 16 ahead.
- 17 MR. RESNICK: I'd ask that we just
- 18 like have a placeholder for Exhibit 7 and ask
- 19 this witness to amend the --
- JUDGE HILLSON: Well, I'm going to
- 21 receive Exhibit 7. And if she's going to come
- 22 back, we can call them 7A and 7B or whatever.

- 1 MR. RESNICK: Okay.
- JUDGE HILLSON: I think that I'd
- 3 just rather keep them going consecutively --
- 4 MR. RESNICK: That's fine, Your
- 5 Honor.
- 6 JUDGE HILLSON: -- in case they
- 7 don't come back with anything. It's easier to
- 8 do it that way.
- 9 MR. RESNICK: Okay.
- 10 JUDGE HILLSON: But 7 is admitted.
- 11 And it is understood that you are going to try
- 12 and get some other background documents that
- 13 you are going to --
- 14 MR. RESNICK: We'll add those as
- 15 well.
- JUDGE HILLSON: -- bring in in the
- 17 next few days.
- 18 MR. RESNICK: Correct, Your Honor.
- JUDGE HILLSON: Okay, thanks.
- MR. RESNICK: Thank you.
- 21 Your Honor, the proponent group
- 22 calls Jaime Strachan as the next witness.

- 1 THE WITNESS: Thank you, Your
- 2 Honor.
- JUDGE HILLSON: Do we have any
- 4 written exhibits? Are you just going to read
- 5 something? Or do you actually have a written
- 6 exhibit you want in the evidence?
- 7 THE WITNESS: I have multiple
- 8 copies, Your Honor.
- JUDGE HILLSON: Just one for me.
- 10 I'm going to mark this up front as
- 11 Exhibit 8.
- 12 (Whereupon, the above-referred to
- 13 document was marked as USDA
- 14 Exhibit No. 8 for identification.)
- JUDGE HILLSON: And would you
- 16 please raise your right hand?
- 17 WHEREUPON,
- 18 JAIME STRACHAN
- 19 was called as a witness by Counsel for the
- 20 Proponents, having been first duly sworn,
- 21 assumed the witness stand, was examined and
- 22 testified as follows:

- 1 DIRECT TESTIMONY
- JUDGE HILLSON: Okay. Could you
- 3 please state your name and spell it for the
- 4 record?
- 5 THE WITNESS: Yes, James Strachan,
- 6 last name S-T-R-A-C-H-A-N.
- JUDGE HILLSON: Okay. And are you
- 8 going to read a written statement?
- 9 THE WITNESS: Yes.
- 10 JUDGE HILLSON: Go right ahead and
- 11 do so please.
- 12 THE WITNESS: Okay.
- 13 I'm President and CEO of Growers
- 14 Express and Vice Chair of the California Leafy
- 15 Greens Marketing Agreement.
- 16 The purposes of the proposed
- 17 National Leafy Greens Marketing Agreement are:
- 1. To provide a mechanism to enable
- 19 handlers of fresh leafy greens to organize;
- To enhance quality of fresh leafy
- 21 green vegetable products available in the
- 22 marketplace through the application of good

- 1 agricultural production and handling
- 2 practices;
- To implement a uniform, auditable,
- 4 science-based food quality enhancement
- 5 program;
- 6 To provide for the United States
- 7 Department of Agriculture validation and
- 8 verification of program compliance;
- 9 To foster greater collaboration
- 10 with local, state, and federal regulators;
- 11 and,
- To improve consumer confidence in
- 13 fresh leafy greens.
- 14 Members of the National Leafy
- 15 Greens Marketing Agreement will subject
- 16 themselves to, and pay for, mandatory audits
- 17 and verification processes, ensuring every
- 18 possible preventative step has been taken to
- 19 make certain fresh leafy greens that are put
- 20 into commerce and ultimately consumed
- 21 worldwide have been grown and handled
- 22 according to scientifically-based best

- 1 practices.
- 2 This document presents the case as
- 3 to why the introduction of a National Leafy
- 4 Greens Marketing Agreement would benefit
- 5 consumers and all participants in the fresh
- 6 leafy greens industry.
- 7 I'll give an overview of the leafy
- 8 green crops. Leafy greens are leaves from
- 9 short-lived herbaceous plants that are eaten
- 10 as vegetables. Leafy greens, as used in this
- 11 documents, means the mature and immature fresh
- 12 leafy portions of any of the following:
- 13 arugula, cabbage, chard, cilantro, cress,
- 14 dandelion, endigia, endive, escarole, kale,
- 15 lettuce, mache, mizuna, parsley, radicchio,
- 16 spinach, spring mix, tat soi, and winter
- 17 purslane.
- 18 In the U.S., leafy greens are eaten
- 19 raw or cooked, and are naturally low in
- 20 calories and fat and high in dietary fiber,
- 21 protein per calorie, iron, calcium,
- 22 carotenoids, Vitamin C, and folic acid. In

- 1 the U.S., greatest customer demand is for
- 2 lettuce (head, leaf, and romaine), head
- 3 cabbage, and spinach. Per capita food
- 4 availability, as shown in Figure 1, reflects
- 5 these consumption patterns.
- 6 In recent years, consumer demand
- 7 for less commonly consumed fresh leafy greens
- 8 such as dandelion and winter purslane has
- 9 increased by as much as 20 percent per year.
- 10 These leafy green products are often referred
- 11 to as edible weeds, since many are found
- 12 ubiquitously in people's yards across the
- 13 country.
- 14 Fresh leafy greens grown for
- 15 commercial purposes and covered in this
- 16 proposed agreement include mature and immature
- 17 leafy portions of any of the following:
- 18 arugula, cabbage, chard, cilantro, cress,
- 19 dandelion, endigia, endive, escarole, kale,
- 20 lettuce, mache, mizuna, parsley, radicchio,
- 21 spinach, spring mix, tat soi, and winter
- 22 purslane.

- 1 Most leafy greens are grown in
- 2 raised beds that are either directly seeded or
- 3 transplanted with plugs. Growing cycles range
- 4 from one to six months, depending on the
- 5 seasons. Optimal growing climates for leafy
- 6 greens vary somewhat, but generally grow best
- 7 in cool weather with well-drained loam soil
- 8 and a plentiful water supply. Optimal daytime
- 9 growing temperatures are 60 degrees to 65
- 10 degrees.
- 11 Most leafy greens are hardy
- 12 vegetables that can tolerate a light frost.
- 13 Prolonged exposure to high temperatures and
- long days induces bolting in many leafy green
- 15 vegetables.
- 16 Production areas in most regions
- 17 require irrigation because of inadequate
- 18 rainfall for growing conditions. Typically
- 19 overhead irrigation systems are used to
- 20 irrigate seeded fields and sprouted fields are
- 21 generally irrigated with drip or furrow
- 22 irrigation. Soil amenities used in the

- 1 production of leafy greens include nitrogen,
- 2 phosphorus, potassium, and zinc.
- 3 Leafy greens grown for fresh market
- 4 production are harvested either as single
- 5 leaves or as whole plants. Harvesting is
- 6 usually done by hand, but recently, with the
- 7 innovation of better machines, mechanical
- 8 harvesting has become more common.
- 9 When hand harvested, both head and
- 10 leaf varieties are harvested by bending the
- 11 head to the side and cutting it off at the
- 12 stem with a very sharp knife. The timing of
- 13 harvesting is critical especially for head
- 14 lettuce varieties or head varieties. A delay
- of a few days can result in split heads and
- 16 increased incidence of field disease.
- 17 For head varieties, a few leaves
- 18 are often kept on the stalk to act as
- 19 protection for transport. Fields of some
- 20 types of leafy greens such as chard, kale,
- 21 mizuna, and baby leaf lettuce may be harvested
- 22 more than once.

- 1 Harvested leafy greens are placed
- 2 in storage containers such as bags, boxes,
- 3 cartons, or bins and cooled as soon as
- 4 possible to 32 to 36 degrees at 95 to 100
- 5 percent relative humidity. The next stop is
- 6 the packing facility where leafy green
- 7 products are cleaned, sorted, and packed.
- 8 In some major production areas such
- 9 as California, harvested leafy greens marketed
- 10 as raw commodities may be sorted and bagged in
- 11 the fields with the assistance of harvesting
- 12 aids such as conveyor equipment, often self-
- 13 propelled harvesting machine that integrates
- 14 and automates most of the harvesting and
- 15 packing functions into a single unit.
- 16 Fresh-cut leafy greens are usually
- 17 transported to a storage facility in
- 18 refrigerated or open trailers. Some
- 19 production operations place the leafy greens
- 20 under modified atmosphere, i.e., reduced
- 21 oxygen atmosphere for shipment to processing
- 22 plants. The time frame from harvesting to

- 1 entering a storage/processing facility are
- 2 variable depending on when the product is
- 3 removed from the production site, the distance
- 4 from production site to the storage facility,
- 5 and wait time for unloading at the
- 6 storage/processing facility.
- 7 Because they are highly perishable,
- 8 leafy greens are routinely cooled immediately
- 9 after harvest by either forced-air cooling,
- 10 vacuum cooling or spray or hydrovac cooling.
- 11 At the processing or packing
- 12 facility, some fresh leafy greens are further
- 13 processed into value-added products. They are
- 14 generally held in refrigerated conditions
- between 32 degrees and 45 degrees at 95 to 100
- 16 percent relative humidity. During processing,
- 17 leafy greens are washed in one or more
- 18 vigorous washings. They may be shredded, cut
- 19 and/or blended with other types of fresh-cut
- 20 leafy greens before they are packaged.
- 21 After processing, fresh leafy
- 22 greens are transported in refrigerated trucks

- 1 directly to retail markets or to distribution
- 2 centers that sell to retail markets. Leafy
- 3 greens harvested at prime maturity with no
- 4 major defects vary in the amount of time they
- 5 can be held in refrigerated storage.
- 6 Greens such as lettuce and spinach
- 7 are the most delicate and may be held in ideal
- 8 refrigerated storage for two to three weeks.
- 9 Other hardier leafy greens such as cabbage may
- 10 be held in cold storage for two to three
- 11 months.
- 12 An example of field to market
- 13 schedule for iceberg lettuce from Salinas or
- 14 Santa Maria, California, is given below. On
- 15 day one, you harvest it, transport it to the
- 16 packing/cooling facility, which may take
- 17 anywhere from one to four hours. Day two to
- 18 five, shipping within the U.S., depending on
- 19 destination. Seattle, one day, Denver, two
- 20 days, Chicago, three days, New York or Boston,
- 21 four days, and Japan, 12 to 14 days.
- 22 And then Day three to six, from

- 1 receiving dock to supermarket and through the
- 2 supermarket distribution centers.
- 3 The next section is the overview of
- 4 fresh leafy green industry structure.
- 5 The produce industry, and fresh
- 6 leafy green industry in particular, is
- 7 described as a farm to fork industry.
- 8 Businesses in the farm to fork continuum
- 9 include growers/producers, handlers, i.e.,
- 10 processors, shippers, packers,
- 11 wholesalers/distributors, agents/brokers,
- 12 exporters/importers, retail outlets such as
- 13 grocery stores and food service providers and
- 14 restaurants.
- Farms, especially small- to medium-
- 16 sized operations, may sell directly to
- 17 consumers at farm markets and through
- 18 Community Supported Agriculture programs as
- 19 well as to retailers.
- 20 Larger operations usually sell
- 21 their leafy green crops to handlers or
- 22 directly to retailers at wholesale produce

- 1 auctions. First handlers may process and
- 2 package fresh leafy greens into value-added
- 3 products before selling to other handlers or
- 4 retailers. A fresh leafy green product may
- 5 change hands as many as three times before
- 6 reaching its final destination.
- 7 Most interim handlers between farm
- 8 and fork take possession of the product;
- 9 however, brokers do not typically take
- 10 possession of the product, but negotiate with
- 11 producers or handlers on behalf of their
- 12 customers.
- 13 The next section is producers and
- 14 producer definitions.
- So producer is synonymous with
- 16 grower and means any person engaged in a
- 17 proprietary capacity in the production of
- 18 leafy green vegetables for sale or delivery to
- 19 a handler. Producers of leafy greens are
- 20 farming operations that grow leafy green
- 21 vegetables, and as such are primarily
- 22 responsible for all production-related

- 1 activities including land prep, cultivation,
- 2 fertilization, irrigation, and pesticide
- 3 application.
- 4 Across the U.S. there are variously
- 5 sized producers of leafy greens with the
- 6 highest concentration of production in
- 7 California and Arizona. Large producers
- 8 control enough of the supply that any one
- 9 large producer can have a big impact on the
- 10 fresh leafy green pricing nationwide.
- 11 Handlers, handling, as used in the
- 12 proposed National Leafy Greens Marketing
- 13 Agreement, means to receive, acquire, clean,
- 14 sell, consign, or import leafy green
- 15 vegetables in their natural form. In terms of
- 16 products handled, there are generally two
- 17 types of handlers, those that deal in raw
- 18 leafy green commodities and those that turn
- 19 raw leafy greens into fresh cut, value-added
- 20 products.
- 21 Presently there are three companies
- 22 that supply 70 percent of the value-added

- 1 market. Handlers link producers with consumer
- 2 outlets on the farm-to-fork continuum. They
- 3 represent the value-added segment of the
- 4 industry that process, ship, sell, consign and
- 5 import leafy greens.
- 6 Distributors, packers,
- 7 processors/manufacturers, shippers, and
- 8 wholesalers are handlers. For the purposes of
- 9 the National Leafy Greens Marketing Agreement,
- 10 agents and brokers are not considered handlers
- 11 because they serve as intermediaries between
- 12 buyers and sellers of leafy greens without
- 13 ever taking control of the actual product.
- 14 There are first handlers and
- 15 handlers that are not first handlers, i.e.,
- 16 called second handlers for the purpose of this
- 17 document. First handlers take possession of
- 18 leafy greens in their natural form from the
- 19 producer/grower with the intent to sell them
- 20 to retail or other handlers. First handlers
- 21 may also supply/hire the harvesting crews to
- 22 harvest the crop. However, harvesting

- 1 generally begins when the harvested crop
- 2 leaves the field/production area and is in the
- 3 possession of the handler.
- 4 Typically they are -- handlers
- 5 responsible for transporting the product from
- 6 the field to the processing plant or storage
- 7 facility. Second handlers buy from first
- 8 handlers and not directly from the
- 9 grower/producer.
- 10 Next section is processors. A
- 11 processor is an entity that is engaged in the
- 12 business of processing or manufacturing fresh
- 13 leafy green vegetables. Processing means to
- 14 change fresh leafy green vegetables from their
- 15 natural form into fresh-cut packaged products.
- 16 Processing of fresh leafy greens is a
- 17 particular segment of handling operations.
- 18 Handling includes processing
- 19 operations as well as other segments of the
- 20 industry such as storage, shipping, and
- 21 importing. Processing fresh-cut leafy greens
- 22 includes coring, washing, drying, mixing,

- 1 cutting, and packaging them.
- 2 Processing or value-added fresh
- 3 leafy greens products are then shipped either
- 4 directly to retail or food service companies
- 5 or to wholesale produce operations that supply
- 6 a range of produce products to retail and food
- 7 service companies.
- 8 Most fresh leafy greens are sold by
- 9 seasonal contract between producers and
- 10 handlers. Handlers of raw leafy green
- 11 commodities have shifted away from spot
- 12 markets in order to directly supply large
- 13 economy-of-scale buyers such as national and
- 14 international grocery store chains.
- 15 As such, spot markets play a
- 16 secondary role in the fresh leafy green
- 17 industry. They serve as a source during
- 18 supply shortages and an outlet for small,
- 19 local producers. Because so much of the
- 20 industry does business by contract, spot
- 21 markets have minimal affect on pricing with
- 22 shipping point prices now serving as the

- 1 pricing floor.
- 2 In large production areas such as
- 3 Arizona, California, and Florida,
- 4 relationships between producers and handlers
- 5 are usually long term with handlers buying
- from the same producers for many years.
- 7 In these large production areas
- 8 where handlers supply products nationally
- 9 there are generally three types of contracts,
- 10 by poundage, a specific poundage in a given
- 11 time frame such as a growing season, by
- 12 acreage, a specific poundage per acre at a
- 13 given price with a given expected yield per
- 14 acre, or number three, by the going market
- 15 price, a specific amount of product at the
- 16 current market price with additional contract
- 17 terms and provisions such as premiums,
- 18 extended time frames, and minimum amounts.
- 19 Most large handlers have all three
- 20 types of contracts in their portfolios to
- 21 hedge the risks associated with product
- 22 supply. Fresh leafy greens are sold either as

- 1 a raw commodity in their natural form such as
- 2 head of unpackaged lettuce or cabbage or as
- 3 fresh value-added products such as pre-washed
- 4 bags of salad or braising mixes containing one
- 5 variety of leafy greens or a combination of
- 6 several varieties.
- 7 Some salad mixes include salad
- 8 dressing, nuts, dried fruits, and other
- 9 vegetables in the package as a complete salad
- 10 kit. Leafy greens are also used as
- ingredients in other products in grocery
- 12 outlets such as ready-made salads and
- 13 sandwiches often sold in grocery store deli
- 14 departments.
- 15 All over the U.S., lettuce and
- 16 fresh leafy greens are marketed to consumers
- 17 at grocery outlets or directly to consumers at
- 18 community farmers' markets and through CSA
- 19 programs. California and Arizona, the two
- 20 largest U.S. producers of lettuce and spinach,
- 21 ship fresh leafy green produce from their
- 22 states throughout the U.S.

- 1 Many small producers sell their
- 2 leafy greens locally to independent grocery
- 3 stores, produce markets, and restaurants, or
- 4 directly to the public at community farmers'
- 5 markets or through CSA programs.
- 6 California has a Certified Farmers
- 7 Market Program that allows certified farmers
- 8 to forego packing, sizing, and labeling
- 9 regulations when they sell their products
- 10 directly to consumers.
- 11 Figure X below shows the percentage
- 12 and value of fresh leafy green products that
- were sold directly to consumers as reported by
- 14 farmers in the 2007 Census.
- JUDGE HILLSON: Okay. Do you have
- 16 any further questions you want to ask the
- 17 witness on direct?
- 18 MR. RESNICK: I have no questions.
- 19 JUDGE HILLSON: I'll turn it over
- 20 to the USDA panel then. Go ahead, Ms.
- 21 Schmaedick.
- 22 CROSS EXAMINATION

- 1 MS. SCHMAEDICK: Good afternoon,
- 2 this is -- or is it afternoon yet?
- 3 (Laughter.)
- 4 MS. SCHMAEDICK: This is Melissa
- 5 Schmaedick.
- 6 I have a couple of questions on
- 7 some of the definitions that you have
- 8 described. My first question is under the
- 9 definition of handle and handler, how would a
- 10 producer who sells directly to a consumer fit
- 11 in that definition?
- 12 THE WITNESS: I believe they would
- 13 be considered a producer/handler.
- MS. SCHMAEDICK: So because the
- 15 producer is doing the act of selling, they are
- 16 considered a handler?
- 17 THE WITNESS: Yes. And there are
- 18 all kinds of different variations depending on
- 19 the level of vertical integration that your
- 20 company may have, small or large. And then in
- 21 addition to -- you might have producers that
- 22 sell direct to consumers that also sell to

- 1 first handlers. You may have producers that
- 2 are also handlers. And act as a vertically-
- 3 integrated operation.
- 4 So we grow, pack, and ship product
- 5 at Growers Express. So we are considered a
- 6 producer and handler.
- 7 MS. SCHMAEDICK: So my question, I
- 8 guess, goes more directly towards a very small
- 9 producer operation that may primarily only do
- 10 business in terms of direct sales to
- 11 consumers, let's say a farmers' market type of
- 12 environment. Would those producers be
- 13 considered handlers?
- 14 THE WITNESS: Handler is, I believe
- is intended to mean somebody that, you know,
- 16 transports and distributes product to either
- 17 other handlers or to retailers or to
- 18 storefronts. And in this case, that operation
- 19 would be considered all of those in one. So
- 20 my interpretation would be that they would be
- 21 the producer, the handler, and the storefront.
- MS. SCHMAEDICK: Okay. And so

- 1 based on your understanding of this proposal,
- 2 let's say you have a very small
- 3 producer/handler business. Would they be
- 4 required to participate in this program? Or
- 5 would they have the option to not participate
- 6 in this program?
- 7 THE WITNESS: I believe the program
- 8 is a marketing agreement so they can opt in or
- 9 decide not to opt in.
- 10 MS. SCHMAEDICK: Okay. So simply
- 11 by being a producer/grower -- I'm sorry, a
- 12 producer/handler, that doesn't, if I'm
- 13 understanding your statement correctly, that
- 14 does not imply that they would be required to
- 15 participate in this program if they chose not
- 16 to.
- 17 THE WITNESS: Correct. Yes, that's
- 18 my understanding.
- 19 MS. SCHMAEDICK: Okay. I have
- 20 another question for you. You talked about
- 21 definitions for manufacture and for process.
- THE WITNESS: Yes.

- 1 MS. SCHMAEDICK: Correct?
- THE WITNESS: Correct.
- 3 MS. SCHMAEDICK: And I notice that
- 4 you say manufacturer is synonymous with
- 5 process. And then in process you say process
- 6 is synonymous with manufacturer. So is there
- 7 really a difference between the two terms?
- 8 THE WITNESS: In other industries,
- 9 there can -- somebody that combines
- 10 ingredients for a consumer product may be
- 11 considered a manufacturer.
- 12 And so from a broader understanding
- 13 basis, you know, a processor is the closest
- 14 thing that the industry has to a traditional
- 15 manufacturer for other types of consumer
- 16 goods. So I believe that's why they've made
- 17 the connection there.
- 18 That a processor is somebody that
- 19 adds value to the product, alters the product
- 20 in terms of cutting and chopping and adding
- 21 different ingredients together, and then
- 22 producing a finished product that may be

- 1 different than the original product in its
- 2 natural state.
- 3 MS. SCHMAEDICK: Okay. So if it
- 4 would assist in clarifying the proposed
- 5 language to perhaps look at combining those
- 6 two definitions, would that be appropriate for
- 7 this proposal on how it reflects industry
- 8 operations?
- 9 THE WITNESS: In my personal
- 10 opinion, yes.
- 11 MS. SCHMAEDICK: That's -- I don't
- 12 have any other questions. Thank you.
- 13 JUDGE HILLSON: Anything else? Go
- 14 ahead.
- MR. SOUZA: Thank you. Anthony
- 16 Souza.
- 17 You mentioned in your testimony
- 18 first handler and second handler. Would a
- 19 second handler be afforded the opportunity to
- 20 be a signatory to the marketing agreement?
- 21 THE WITNESS: I'm not certain. I'm
- 22 going to have to defer to somebody else down

- 1 the line here in terms of testimony to answer
- 2 that more specifically.
- 3 MR. SOUZA: Okay.
- 4 THE WITNESS: There will be a
- 5 section on the actual agreement and how it is
- 6 drafted and definitions.
- 7 MR. SOUZA: Okay. Thanks.
- 8 You also briefly touched upon spot
- 9 market. Could you elaborate a little bit more
- 10 on what a spot market entails and how you, as
- 11 a handler, purchase stuff or product on the
- 12 spot market?
- 13 THE WITNESS: Certainly. Due to
- 14 the perishable nature of the product and as
- indicated in the chart on page three, table
- 16 11, typically it takes, for many of the leafy
- 17 green products, there are two to three days of
- 18 optimal maturity when the product is in the
- 19 field. And then there is a similar amount of
- 20 time before the product begins to go bad in
- 21 the cooler in the distribution facilities
- 22 before it has to be shipped to its final

- 1 destination.
- 2 As such, if you don't distribute
- 3 the product very quickly and harvest the
- 4 product when it is available to be harvested,
- 5 then the product is ruined and then it becomes
- 6 worthless.
- 7 And so because of those time
- 8 pressures on the industry, variations in
- 9 weather, whether they be extreme cold or
- 10 extreme heat, for example, will force product
- 11 to grow at a faster pace or a slower pace that
- 12 will cause more product to become available
- 13 sooner or more product to become available
- 14 later than anticipated.
- 15 When those circumstances arise, we
- 16 get what we call in the industry a gap, which
- 17 means a shortage, or a glut or a pile up or a
- 18 wave of product which is excess. And that
- 19 dictates how much is available. It's a pure
- 20 economic model.
- 21 So when you have a gap, then
- 22 everybody has a shortage or a lot of people

- 1 have a shortage. And, therefore, the market
- 2 demand for that week or that day exceeds
- 3 supply. And when that happens, prices go up
- 4 fast throughout the day and throughout the
- 5 week. And the same thing happens in the
- 6 inverse.
- 7 So typically we, through practices
- 8 that have evolved for my company in
- 9 conjunction with California Leafy Greens
- 10 Marketing Agreement, we've developed close
- 11 relationships with other producers and
- 12 handlers to help us manage those variations of
- 13 supply and demand that we need to meet our
- 14 customer requirements.
- Does that answer your question?
- 16 MR. SOUZA: Yes. So if you were to
- 17 go out under let's say a National Leafy Greens
- 18 Marketing Agreement and buy on the spot -- buy
- 19 off the spot market, would there be some sort
- 20 of assurance from your company that indeed the
- 21 product that you are purchasing was grown to
- 22 meet the best practices of industry?

- 1 THE WITNESS: When we source
- 2 regionally from local -- from areas that are
- 3 within our producer areas, we are familiar
- 4 with the producer standards that we are
- 5 sourcing the product from. And we collect the
- 6 information to verify that they have met those
- 7 leafy green standards or it doesn't go in our
- 8 label.
- 9 You know downstream, let's say, for
- 10 example, at a terminal market in some -- in
- 11 another city around the country, that's where
- 12 part of these spot markets exist where people
- 13 can buy and sell product.
- 14 And if those products were
- 15 represented through National Leafy Greens
- 16 Marketing Agreement to have undergone the
- 17 practices required of the program and there
- 18 was a certification mark representing that
- 19 they had done that, then buyers out there in
- 20 the industry that are trading the product on
- 21 that market could be assured that those
- 22 producers were part of the agreement and were

- 1 in substantial compliance with the
- 2 requirements. MR. SOUZA: Thank you. No
- 3 further questions.
- JUDGE HILLSON: Go ahead, Ms.
- 5 Carter.
- 6 MS. CARTER: Antoinette Carter.
- 7 Just one question for you. You defined leafy
- 8 greens as proposed and my question is what is
- 9 the rationale for the inclusion of the
- 10 specific products that are identified in the
- 11 definition?
- 12 THE WITNESS: The products that are
- in the definition all share similar family,
- 14 biological families, biological family traits,
- 15 characteristics. And we believe those to be a
- 16 comprehensive set of products that are under
- 17 national guidelines, for example, FDA.
- 18 So I believe we came up with that
- 19 list as a comprehensive list of the products,
- 20 of the leafy green products that should be
- 21 under these food safety guidelines.
- MS. CARTER: Okay. Thank you.

- 1 MS. DESKINS: Sharlene Deskins,
- 2 USDA. I had a question about the definition,
- 3 too, of leafy greens. You are using a term in
- 4 there spring mix. Is there a particular
- 5 definition of what is in a spring mix?
- 6 THE WITNESS: Typically, it is baby
- 7 leaf lettuces, and baby mustards, and baby
- 8 chards, which are various different families
- 9 of baby leafy green-type products.
- 10 Examples of those would be, you
- 11 know, immature romaine, immature tat soi,
- 12 immature spinach, immature endives and
- 13 escaroles, immature radicchios, so many of
- 14 these other ones that are included in the
- 15 proposal in an immature and baby state would
- 16 be mixed together into what is considered to
- 17 be a spring mix.
- 18 MS. DESKINS: Oh, and also this
- 19 definition, it's pretty broad. Is there any
- 20 type of leafy greens that you see not be
- 21 included in this definition?
- 22 THE WITNESS: Not to my knowledge,

- 1 no.
- 2 MS. DESKINS: And the other
- 3 question I had is for this definition, are
- 4 there any kind of hybrids out there that
- 5 should be included in leafy greens?
- 6 THE WITNESS: Well, we've grappled
- 7 with this issue a little bit at the California
- 8 Leafy Greens Marketing Agreement and we
- 9 believe it is a comprehensive list of the ones
- 10 that are generally produced, generally
- 11 available. There are new forms and new
- 12 varieties of lettuces and leafy greens that
- 13 come out on an annual basis.
- 14 And most of those varieties would
- 15 be covered by this arrangement because they
- 16 may be a romaine variety or an extrapolation
- 17 of an existing type of plant that is already
- 18 defined here even though there may be some
- 19 slight variation to it.
- 20 MS. DESKINS: And I also had a
- 21 question, you were talking in the introduction
- 22 about the purposes of this. Is the overall

- 1 purpose of this order to try to make leafy
- 2 greens more marketable?
- THE WITNESS: The purpose of the
- 4 agreement, as indicated in my introduction,
- 5 would be to provide a mechanism to enable
- 6 handlers of fresh leafy greens to organize.
- 7 It's -- I think it is imperative that we build
- 8 an industry standard that -- and expectations
- 9 and accountability that go along with that to
- 10 enhance the quality of food -- of fresh leafy
- 11 green vegetable products available in the
- 12 marketplace through application of good
- 13 agricultural production handling practices.
- 14 There are debatable best practices
- 15 out there. And a vetting process that
- 16 involves regulators and industry and academia
- 17 to formulate those best practices and document
- 18 those best practices.
- 19 And then to put those best
- 20 practices in place is essential to implement a
- 21 uniform, auditable, science-based food quality
- 22 enhancement program, food safety enhancement

- 1 program, and to provide the USDA validation
- 2 verification, which also provides buyers and
- 3 consumers with the knowledge that there has
- 4 been validation and verification, and to
- 5 foster greater collaboration among regulatory
- 6 authorities, academia, and industry, and to
- 7 ultimately improve consumer confidence and
- 8 take all the preventative measures available
- 9 to the industry in a best practice forum.
- 10 MS. DESKINS: I have no further
- 11 questions.
- 12 JUDGE HILLSON: I sense that there
- 13 are more questions for Mr. Strachan. And this
- 14 might be -- it is noon. And I'm just thinking
- 15 why don't we just break for lunch now. And
- 16 take an hour for lunch.
- 17 Come back here at one o'clock. As
- 18 I'll just repeat the bit that -- anyone who
- 19 can only be here today, I need to know who
- 20 they are and try to figure out how to work you
- 21 in. I have you down for that, Mr. Gonzales.
- 22 And I have Mr. Etka as either today or by

```
1
     tomorrow morning.
 2
                 If there is anyone else who needs
     to testify today, just come and see me -- how
 3
     about right before lunch, like I'll be here a
     few minutes before one. And then I'll figure
 5
     out how to fit everybody in, okay?
 6
 7
                 Okay. So we're off until one
 8
     o'clock.
 9
                  (Whereupon, the foregoing matter
                 went off the record at 12:03 p.m.
10
11
                 to be reconvened in the afternoon.)
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- 1 A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N
- 2 1:05 p.m.
- JUDGE HILLSON: Let's go back on
- 4 the record.
- 5 MS. CARTER: Antoinette Carter with
- 6 the USDA.
- 7 Just a couple of follow-up
- 8 questions for you. With regards to the
- 9 definition for leafy green vegetables, isn't
- 10 it correct that one of the things that the
- 11 products that have been identified have in
- 12 common is that they all do not require further
- 13 processing prior to consumption? Would that
- 14 be correct? Or --
- 15 THE WITNESS: You know there are
- 16 other families of vegetables that don't
- 17 require further processing.
- 18 MS. CARTER: Yes.
- 19 THE WITNESS: You know, celery, and
- 20 broccoli, and cauliflower, and things like
- 21 that.
- MS. CARTER: Okay.

- 1 THE WITNESS: They have -- they
- 2 also have leaves coming off of them but you
- 3 don't typically eat the leaves.
- 4 MS. CARTER: Yes.
- 5 THE WITNESS: So I think the
- 6 commonality really boils down to the fact that
- 7 they have green leaves or different colored
- 8 leaves and they are consumed generally in the
- 9 raw format.
- 10 MS. CARTER: Okay. So what about
- 11 products such as mustards and collards, those
- 12 types of products? What's --
- 13 THE WITNESS: I believe there is
- 14 potential to add them. I think as the
- 15 proposal is drafted today, some of those items
- 16 may be included in the spring mix category.
- 17 But, you know, maybe there is additional
- 18 consideration that needs to be given to that.
- 19 MS. CARTER: Okay. And then just
- 20 one last question for you. On page one of
- 21 your prepared statement, you noted that you
- 22 were going to explain what the benefit of this

- 1 proposal is to consumers. Could you further
- 2 elaborate on that?
- THE WITNESS: I think food safety
- 4 is an evolving process of best practices and
- 5 science and research and experience that takes
- 6 close collaboration between industry and
- 7 regulatory and academic authorities. And in
- 8 order to gain consumer confidence, you have to
- 9 routinely and consistently provide safe food.
- 10 And I believe the best way to do
- 11 that is by creating this standard by which it
- is a platform for collaboration and evolution
- 13 of best practice. And then institution of
- 14 that best practice and then verification of
- 15 that best practice across the vast majority if
- 16 not all of the producers out there.
- 17 MS. CARTER: So the benefits for
- 18 consumers would be that they would have
- 19 increased confidence in the quality of the
- 20 products that are covered under this
- 21 agreement? Is that what you're saying?
- 22 THE WITNESS: Yes, they would have

- 1 further assurances that safe handling
- 2 practices were being performed. They'd have
- 3 assurances that they were being verified.
- 4 And, you know, implementation of best
- 5 practices appears to me to be the best way to
- 6 ensure that you have the safest food possible
- 7 out there.
- 8 MS. CARTER: Okay. All right.
- 9 Thank you. I have no further questions.
- JUDGE HILLSON: Ms. Staley?
- 11 MS. STALEY: Kathleen Staley. Go
- 12 back to spring mix. So as a consumer, if I
- 13 buy a bag of spring mix, is it going -- the
- 14 contents of that spring mix is going to be
- 15 consistent? Or does it change?
- 16 THE WITNESS: It changes. For
- 17 example, during Christmas seasons, I'm aware
- 18 of one company that adds more red varieties in
- 19 their spring mix than other times of the year.
- 20 So it is possible that the timing of the year
- 21 and the source that you purchase it from would
- 22 impact the blend of the product. So there is

- 1 not a universal, standard ingredient blend for
- 2 spring mix. It is a combination of baby leaf
- 3 lettuces, chards, and mustards that are
- 4 blended together.
- 5 MS. STALEY: Thank you.
- JUDGE HILLSON: Ms. Dash?
- 7 MS. DASH: Suzanne Dash. I just
- 8 had one question. Would you identify yourself
- 9 as a large or a small grower and handler
- 10 according to the Small Business Administration
- 11 definition?
- 12 THE WITNESS: We are a integrated
- 13 grower/shipper. We have -- or grower/handler,
- 14 producer/handler. We have operations that
- 15 exceed the Small Business definition and
- 16 operations that are less than the Small
- 17 Business definition from a producer
- 18 standpoint. So it is common that handlers,
- 19 like ourselves, have a combination of
- 20 different types of suppliers that may -- you
- 21 know, anywhere from, you know, a handful of
- 22 acres up to hundreds of thousands of acres.

- 1 And we will source or produce product from
- 2 different producers in different areas of the
- 3 state and internationally at different times
- 4 of the year.
- 5 MS. DASH: Does your company grow
- 6 any leafy greens itself? Or do you --
- 7 THE WITNESS: Yes.
- 8 MS. DASH: Okay. I guess I'm just
- 9 confused.
- 10 THE WITNESS: It is common for
- 11 shipping organizations or handling
- 12 organizations, first handlers to have either
- 13 dedicated crop -- a crop investment in the
- 14 crop or direct operations in ranch and farming
- 15 to produce a portion of their supply. And
- 16 then source additional components of their
- 17 supply outside of that controlled base. So we
- 18 do both.
- MS. DASH: Okay. Thank you.
- 20 JUDGE HILLSON: Ms. Schmaedick, do
- 21 you have a question? Go ahead.
- 22 MS. SCHMAEDICK: This is Melissa

- 1 Schmaedick. You just mentioned that you
- 2 source from several different growers. And
- 3 are some of those growers outside of the State
- 4 of California?
- 5 THE WITNESS: Yes.
- 6 MS. SCHMAEDICK: Okay. And you
- 7 also touched on the fact that sometimes you
- 8 might source from outside of the United
- 9 States.
- 10 THE WITNESS: Yes.
- 11 MS. SCHMAEDICK: So as a business
- 12 owner, as a handler, how important is it to
- 13 you to have a program like this in place?
- 14 What does that mean for you as a business and
- 15 as your -- for your relationships, for your
- 16 customers? What would this program do?
- 17 THE WITNESS: I think it provides a
- 18 universal standard and it sets an expectation
- 19 with the buying community that product that is
- 20 received with us will comply with these
- 21 standards no matter where it is grown or
- 22 produced.

- 1 MS. SCHMAEDICK: Would you say that
- 2 if this program were in place and you were a
- 3 participant that that would maybe contribute
- 4 to your customers' confidence in your product?
- 5 THE WITNESS: I think a lot of the
- 6 buyers in the industry and the second handlers
- 7 or the distributors or the retailers or the
- 8 food service companies have tried to develop
- 9 standards by which they hold their suppliers
- 10 to. And those vary widely across the
- 11 industry.
- 12 And so we are often faced with the
- 13 challenge of trying to comply with all those
- 14 standards in combination, which is very
- 15 challenging. So this would provide us with a
- 16 unified standard whether the crop is being
- 17 produced in Canada, or Ohio, or Colorado, or
- 18 California, or Arizona, or wherever.
- 19 MS. SCHMAEDICK: And that would
- 20 help your business?
- 21 THE WITNESS: Yes, yes, and it
- 22 would provide our buyers with a standard that

- 1 they can endorse and get behind in terms of a
- 2 simple way to ensure that we are meeting some
- 3 scientifically-based requirements that are
- 4 verified.
- 5 MS. SCHMAEDICK: Okay. Thank you.
- 6 I have no other questions.
- 7 JUDGE HILLSON: Anything else on
- 8 the USDA panel? Go ahead, Mr. Souza.
- 9 MR. SOUZA: Thank you.
- 10 You mentioned about -- earlier in
- 11 your testimony it was discussed about
- 12 different sets of standards and possibly
- 13 holding to a higher set of standards -- if a
- 14 company is growing and there are three or four
- 15 sets of standards out there that you may be
- 16 using the practices of the most rigid
- 17 standards out there, if best practices were to
- 18 be set up differently with the different
- 19 zones, with Zone 1, Zone 2, Zone 3, Zone 4,
- 20 and Zone 5, and some of the interests within
- 21 the best practices differed somewhat, as a
- 22 handler, how would you handle that?

- 1 Would you take the most stringent
- 2 and require that they all meet that in order
- 3 to receive the product? Or would each region
- 4 just have to meet the basic best practices and
- 5 that product would be acceptable to you?
- 6 Thank you.
- 7 THE WITNESS: My opinion, and it
- 8 would be -- and logistically most of the
- 9 standards apply at the farm or at the harvest.
- 10 And those are where, I believe, most of the
- 11 variations would be.
- 12 And so those should be applied
- 13 regionally or by zone. And so whatever
- 14 standards are set up by zone are the standards
- 15 that zone should adhere to.
- 16 And then the distribution
- 17 requirements would tend to be more uniform and
- 18 so those could apply universally across the
- 19 country.
- 20 JUDGE HILLSON: Ms. Schmaedick
- 21 again.
- 22 MS. SCHMAEDICK: Melissa

- 1 Schmaedick. You said something that just sort
- 2 of triggered, I think, a point that might be
- 3 really important to clarify. In the proposal,
- 4 the term zone is used as well as the term
- 5 region. Can you talk about those two terms
- 6 and whether or not they are different or the
- 7 same?
- 8 THE WITNESS: I'm vaguely familiar
- 9 with the definition of zone as used in the
- 10 proposal so I can't comment on whether all the
- 11 zones would have uniform food -- would
- 12 logically have the uniform food safety
- 13 practices or not. I'm not certain if that was
- 14 taken into account when the zones were formed.
- 15 I know there are some variations in
- 16 treatment of different areas of the country,
- 17 you know, whether it's, you know, Florida,
- 18 flooding, amphibians, things like that might
- 19 impact some of the food safety practices
- 20 differently than some of the other areas of
- 21 the country. But that's about the extent of
- 22 my understanding.

- 1 MS. SCHMAEDICK: So based on what
- 2 you're saying, what I understand is that
- 3 within a zone there might be differences
- 4 between the states that are included in that
- 5 zone. And, therefore, there might be
- 6 different regions within the zone that might
- 7 need to be treated or evaluated differently.
- 8 Is that correct?
- 9 THE WITNESS: Absolutely.
- MS. SCHMAEDICK: Okay. Thank you.
- 11 JUDGE HILLSON: Any questions from
- 12 the non-USDA reps of this witness?
- 13 (No response.)
- 14 JUDGE HILLSON: Seeing none, I will
- 15 -- I don't think I did this before. I'll
- 16 receive your Exhibit 8 into evidence.
- 17 (Whereupon, the above-referred to
- 18 document was received into the
- record as USDA Exhibit No. 8.)
- JUDGE HILLSON: And you may sit
- 21 down. Thank you for testifying.
- 22 I'm going to allow -- two people

- 1 have asked me -- actually one of the people
- 2 have asked me but two people are ready to
- 3 testify somewhat out of sequence. They're not
- 4 part of the proponents case.
- 5 And the first person I'm going to
- 6 allow to testify would be Roger Medina. If
- 7 you could come up here? If you're going to
- 8 testify, you can sit down over here, sir.
- 9 Have a seat.
- 10 Now you do not have a written
- 11 statement, correct?
- MR. MEDINA: No.
- 13 JUDGE HILLSON: Okay. I need to
- 14 swear you in though. All witnesses must
- 15 testify under oath.
- 16 Could you please raise your right
- 17 hand?
- 18 WHEREUPON,
- 19 ROGER MEDINA
- 20 was called as a witness, having been first
- 21 duly sworn, assumed the witness stand, was
- 22 examined and testified as follows:

- 1 DIRECT TESTIMONY
- JUDGE HILLSON: Okay. If you can
- 3 state your name and spell it for the record?
- 4 THE WITNESS: Roger Medina, R-O-G-
- $5 \quad E-R \quad M-E-D-I-N-A.$
- JUDGE HILLSON: Okay. And you may
- 7 testify.
- 8 THE WITNESS: My name is Roger
- 9 Medina. I come from Lakeside Organic Gardens.
- 10 We are a small organic farm operation in
- 11 Watsonville. This is the Pajaro Valley about
- 12 30 minutes north of here.
- One of the things that we kind of
- 14 wanted to come out and say is that it is a
- 15 good program, Leafy Greens.
- As a small farmer, it actually
- 17 takes a bigger toll on us than it does the big
- 18 operations. I've heard a couple of numbers be
- 19 thrown out there today, five cents per carton
- 20 for food safety costs. We've estimated 25
- 21 cents on our part.
- Water sampling, about 45 dollars.

- 1 We've estimated about 65 dollars on our part.
- 2 And in great part because we have 1,200 acres
- 3 on 55 parcels. Each parcel may have one to
- 4 four wells. And we are required to test every
- 5 single well, even though it comes from the
- 6 same aquifer.
- 7 There are thousands of tests out
- 8 there for our region. And we think it is a
- 9 little redundant to keep testing month after
- 10 month after month and getting the same
- 11 results, all negative or less than one part
- 12 per million.
- 13 There are other things that become
- 14 redundant. For instance, the audits. We are
- 15 not only leafy greens signatories but we do
- 16 get third-party audits.
- 17 Some people do not recognize, for
- 18 instance, the third-party auditors that we
- 19 use, Davis Fresh. They require Primus Labs.
- 20 So, therefore, you have to do a specific audit
- 21 for a specific client or customer. Other
- 22 companies -- or other handlers require, for

- 1 instance, GSFI, which is the Global Safety --
- 2 Food Safety Initiative or also known as Global
- 3 Gap. That also adds to our cost.
- 4 Other things that are not
- 5 considered are, for instance, organic growing,
- 6 at any given time to mention 200 acres of a
- 7 certain product, at any given time we may have
- 8 from half an acre to four acres of a single
- 9 leafy green commodity, which would translate
- 10 to having our operations so scattered
- 11 throughout the valley that it doesn't make
- 12 sense to come out and audit one full audit for
- 13 a little parcel where other people audit for,
- 14 you know, 200 acres. So that kind of drives
- 15 the cost significantly high for us.
- 16 Another thing, our operations, even
- 17 though we have 1,200 acres, we have 45
- 18 different commodities, all of which go under
- 19 the same strict program as Leafy Greens. We
- 20 apply it straight across the board. We don't
- 21 differentiate from one product to the next.
- 22 One of the things that we kind of

- 1 felt has been kind of productive in the
- 2 organic industry is the beneficials -- they
- 3 are called plants that attract natural
- 4 predators for pests. And even though Leafy
- 5 Greens does not require for those to be
- 6 destroyed, a lot of the people do require it
- 7 because they are afraid of rodent infestation,
- 8 stuff like that.
- 9 Even though we try to explain to
- 10 them time and time again that it doesn't apply
- 11 to us since we handpick everything and since
- 12 we cannot use pesticides or herbicides because
- of organic growing, it kind of puts a toll on
- 14 us in regards to labor because we have to send
- out there people to weed down around like the
- 16 wells, stuff like that.
- 17 Even though we don't consider it
- 18 overgrowth, as soon as they see a little bit
- 19 of grass growing, it is considered overgrowth.
- 20 I've gone as far as comparing our wells to
- 21 other wells that have been significantly
- 22 overgrown to kind of show some perspective to

- 1 the auditors on what should be considered
- 2 overgrowth and whatnot.
- I guess what we're trying to get
- 4 here is saying that, you know, it is a good
- 5 thing that we are having policies that should
- 6 be implemented across the board, not just for
- 7 leafy greens but for all farming operations.
- 8 And that there should be a little more of a
- 9 way to dispute certain things that are called
- 10 for.
- 11 For instance, you know, since we've
- 12 already taken the test of water after so many
- 13 times, that we should have, you know, once a
- 14 year maybe or be able to skip to once a year.
- 15 Or certain exemptions to certain rules for
- 16 certain operations.
- 17 For instance, we are a -- we grow
- 18 our own product, we harvest our own product,
- 19 we ship our own product, we cool our own
- 20 product, we have our own sales force, okay, so
- 21 when people come and buy 30 boxes from us,
- 22 they treat us like we are their grower. And,

- 1 therefore, want us to audit and go through
- 2 those same procedures either with a third-
- 3 party auditor or with their own food safety
- 4 auditor. And that, again, adds to the cost of
- 5 food safety.
- I think I pretty much summarized it
- 7 all.
- JUDGE HILLSON: Yes, I'm going to
- 9 give people the opportunity to ask you some
- 10 questions.
- 11 THE WITNESS: Go ahead.
- 12 JUDGE HILLSON: I'll let the USDA
- 13 folks have the first crack. Do you have any
- 14 questions of Mr. Medina?
- 15 CROSS EXAMINATION
- 16 MS. SCHMAEDICK: This is Melissa
- 17 Schmaedick. Good afternoon, Mr. Medina.
- 18 Thank you for your statement.
- 19 I'm particularly interested in your
- 20 comment that you have done an analysis of your
- 21 cost per carton. And I believe you said it
- 22 was 25 cents?

- 1 THE WITNESS: Twenty-five cents.
- MS. SCHMAEDICK: It would be very
- 3 helpful to know how you arrived at that
- 4 number. Is there any way that you could walk
- 5 us through your calculation or at some point
- 6 provide us with some information to that
- 7 effect?
- 8 THE WITNESS: Yes, definitely.
- 9 Well, part of the cost that we are associating
- 10 with food safety is, for instance, deer
- intrusion where we used to have a, you know, a
- 12 couple or rows being eaten up, now we have
- 13 entire four-acre blocks being eaten up because
- 14 we have to put up fencing which, where these
- 15 deer had an abundant food source, now they are
- 16 limited to certain growers that cannot put up
- 17 these fences. And, therefore, they kind of
- 18 concentrate on these feeding lots.
- 19 So we have to disk up the whole
- 20 field. We -- in certain occasions where it
- 21 gets really bad, we actually have to invest
- 22 into the fencing which, again, has led to

- 1 finding dead deer on the other side of the
- 2 fence because there is their natural run-away
- 3 from predators, I guess, route, and all of a
- 4 sudden they're caught in the fence. They are
- 5 being killed there. Now we have to go around
- 6 that fence to go clean it up.
- 7 Other costs include, you know, the
- 8 abundance of auditing, which would be Leafy
- 9 Greens coming out to audit us, Davis Fresh
- 10 coming out and audit us, Primus Labs coming
- 11 out and audit us, and now Global Gap, which is
- 12 also Primus Labs but it is a whole separate
- 13 audit. And those costs, you know, all the
- 14 labor for cleaning the fields, cleaning the
- 15 edges, monitoring the harvest, the pre-
- 16 harvest, inspecting the fields.
- 17 The costs just go on and on. I
- 18 hope I've kind of given you enough to kind of
- 19 see where the costs rise.
- 20 MS. SCHMAEDICK: Yes, that's
- 21 helpful. But I quess my question is is that
- 22 based on what you've just stated that perhaps

- 1 some of those costs aren't directly associated
- 2 with the California program. You mentioned
- 3 that you were part of the California Leafy
- 4 Green program.
- 5 THE WITNESS: I'm not just
- 6 associated with the Leafy Greens. I'm
- 7 associated with food safety in general.
- 8 MS. SCHMAEDICK: Right. Okay. So
- 9 you're really talking about a more
- 10 comprehensive set of costs that really
- 11 addresses a lot of issues that maybe aren't
- 12 directly identified or addressed in this
- 13 proposal. Is that correct?
- 14 THE WITNESS: Yes. Well, one of
- 15 the things is that Leafy Greens was introduced
- 16 and everybody has this tendency to try to
- 17 trump their matrixes around the industry.
- 18 They are known as super metrics where if they
- 19 call for a 30-feet buffer zone, somebody will
- 20 else will say no, we require 60. Stuff like
- 21 that.
- 22 And also -- and so -- and all that,

- 1 we kind of put all that into the cost.
- 2 Having, you know, to buffer out five feet into
- 3 your harvest area because there are tracks
- 4 along side of your field, things that are
- 5 matrixes that, you know, that kind of adds to
- 6 it.
- 7 So you have now one, two, or three
- 8 maybe rows that you can't harvest off of just
- 9 because you happen to have somebody walk their
- 10 dog along side of the road or ride their horse
- 11 along side of the road, especially in areas
- 12 where we grow that has a lot of like
- 13 academies, schools that have horseback riding,
- 14 a lot of ranchers that, you know, like to have
- 15 their horses.
- 16 You have 14 cows on 40 acres and an
- 17 auditor comes out and considers that a CAFO, a
- 18 concentrated animal feeding operation, where I
- 19 would tell them go over to Hollister and look
- 20 at the 1,000 cows on one acre. That's a CAFO.
- 21 So kind of things like that are
- 22 just -- we think are exaggerated, not on

- 1 science based.
- MS. SCHMAEDICK: Have you read the
- 3 proposed language in its entirety?
- THE WITNESS: No, I haven't, ma'am.
- 5 MS. SCHMAEDICK: You haven't, okay.
- 6 So you wouldn't be able to maybe point to a
- 7 specific section within the proposal that is
- 8 troubling you?
- 9 THE WITNESS: Not at the moment,
- 10 ma'am.
- 11 MS. SCHMAEDICK: Okay. Do you
- 12 understand the proposal and what -- how it is
- 13 intended to operate?
- 14 THE WITNESS: I believe I do. And
- 15 I actually think it is a positive thing if it
- 16 were implemented across the board and certain
- 17 limitations were put on, for instance,
- 18 handlers to try to impose on growers.
- MS. SCHMAEDICK: Okay. Thank you.
- 20 JUDGE HILLSON: Anything else from
- 21 the USDA? Ms. Dash, go ahead.
- MS. DASH: Suzanne Dash, AMS.

- 1 How many acres is your farm?
- THE WITNESS: We have 1,200 acres
- 3 on 55 parcels.
- 4 MS. DASH: We ask all witnesses who
- 5 are either a farmer or a handler if they could
- 6 identify themselves as large or small. And
- 7 you have identified yourself. But we use a
- 8 Small Business Administration definition,
- 9 which is receipts of 750,000 dollars per year.
- 10 Less than that is a small grower. And then
- 11 for a handler, it's seven million dollars.
- 12 Less than that is a small handler.
- 13 Under that criteria, would you be
- 14 willing to identify yourself as a small or
- 15 large grower or small or large handler?
- 16 THE WITNESS: I would consider
- 17 ourselves a small grower since we do have our
- 18 cooler and our own -- basically we are our own
- 19 handler. But the growing operation I would
- 20 say it is a small -- it's a small operation.
- 21 And one of the reasons is since we
- 22 are organic, we have to do a lot of crop

- 1 rotation, which doesn't allow us to do 200
- 2 acres on one plot. We have to do two to four
- 3 acres and then, you know, trade it with
- 4 broccoli or any one of the other 45
- 5 commodities that we handle. Leafy greens is
- 6 actually only about ten to 15 percent of our
- 7 total volume. But yes, we would consider
- 8 ourselves a small farm.
- 9 MS. DASH: Thank you.
- 10 THE WITNESS: I know the numbers
- 11 maybe seem a little deceptive but if -- I
- 12 believe you guys are going to get a chance to
- 13 see our operation, which is, you know, little
- 14 sections of five, ten acres here and scattered
- 15 all over a valley. So --
- 16 JUDGE HILLSON: Anything else from
- 17 the USDA side?
- Go ahead, Ms. Deskins.
- 19 MS. DESKINS: Yes, I have a
- 20 question for you. Do you see this agreement
- 21 as helping you with marketing leafy greens to
- 22 your customers?

- 1 THE WITNESS: It's hard to say. A
- 2 lot of people won't buy from us if we're not
- 3 signatories. So yes, I guess it would be
- 4 helpful.
- 5 MS. DESKINS: Thank you.
- 6 JUDGE HILLSON: Any questions from
- 7 the non-USDA representatives?
- 8 (No response.)
- 9 JUDGE HILLSON: Any questions from
- 10 the proponents?
- 11 MR. RESNICK: I just have one
- 12 question, a clarification.
- JUDGE HILLSON: Don't forget to say
- 14 who you are.
- MR. RESNICK: Thank you. Jason
- 16 Resnick, Western Growers, a proponent group.
- 17 The 25 cents per carton that you
- 18 identified as your food safety compliance
- 19 cost, is that the cost of complying with the
- 20 California Leafy Greens Marketing Agreement?
- 21 And in addition to that other cost of
- 22 complying with your buyers' requirements?

- 1 THE WITNESS: Yes.
- 2 MR. RESNICK: Have you
- 3 distinguished what the costs are for complying
- 4 with the Leafy Greens Marketing Agreement are
- 5 compared to all of your other food safety
- 6 costs?
- 7 THE WITNESS: Well, it would be
- 8 hard to do that since we actually implement
- 9 our program. Our food safety program is
- 10 implemented straight across our commodities.
- 11 So when one thing applies to one field, it
- 12 will apply to all fields. So it is kind of
- 13 hard to distinguish between the two.
- But, again, you know, Leafy Greens
- 15 came out. It's a good program. However,
- 16 everybody has kind of tried to trump that one
- 17 and, you know, and that's where -- and that's
- 18 kind of where the problem lies I'd say.
- 19 But we do associate the 25 cent
- 20 cost to everything that we have to comply to,
- 21 not just -- everything in regards to food
- 22 safety. I'm not even throwing in there the

- 1 organic certification and everything else.
- 2 MR. RESNICK: Thank you, Mr.
- 3 Medina. I have nothing else.
- 4 JUDGE HILLSON: Mr. Horsfall?
- 5 MR. HORSFALL: I'm Scott Horsfall
- 6 with the California Leafy Greens Marketing
- 7 Agreement.
- Understanding, as we've heard, you
- 9 know, from you and others that there are a lot
- 10 of different requirements out there for food
- 11 safety, as an organic grower is there anything
- in the LGMA requirements that conflicts with
- 13 your practices as an organic grower?
- 14 THE WITNESS: Actually not really.
- 15 We've looked at it, the Leafy Greens Marketing
- 16 Agreement and it pretty much says what it
- 17 says. But it's not what it says, it's how
- 18 people interpret it that kind of puts a toll
- 19 on us.
- 20 Let me give you a good example. We
- 21 have a pile of compost next to a field.
- 22 Somebody comes out and says oh, no, no, no,

- 1 you cannot have that pile of compost on the
- 2 side of the field.
- Okay, where do you want us to put
- 4 it? Well, it is going to go into the field in
- 5 two days. Well, as long as it is in the field
- 6 but not on the side of the field. So it's
- 7 just how people interpret it that kind of puts
- 8 a toll on us.
- 9 So now you -- now instead of piling
- 10 it on the side and having our own guys go out
- 11 there and spread it, now we pay the person
- 12 that brings it to us to spread it for us so
- 13 it's not sitting on the side of the field.
- 14 And that adds to the cost.
- MR. HORSFALL: Thank you.
- 16 JUDGE HILLSON: Okay. Thank you
- 17 for testifying, Mr. Medina. You may step
- 18 down.
- 19 THE WITNESS: Thank you.
- 20 JUDGE HILLSON: Thanks a lot.
- 21 Mr. McClung, did you want to
- 22 testify now?

- 1 MR. McCLUNG: Yes, sir.
- JUDGE HILLSON: Come on up. Do you
- 3 have any extras for the --
- 4 Mr. McClung just handed me a
- 5 written statement that I'm going to mark as
- 6 Exhibit No. 9.
- 7 (Whereupon, the above-referred to
- 8 document was marked as USDA Exhibit
- 9 No. 9 for identification.)
- 10 WHEREUPON,
- 11 JOHN McCLUNG
- 12 was called as a witness, having been first
- duly sworn, assumed the witness stand, was
- 14 examined and testified as follows:
- 15 DIRECT TESTIMONY
- JUDGE HILLSON: Could you would
- 17 please state your name and spell it for the
- 18 record.
- 19 THE WITNESS: My name is John
- 20 McClung, pc-C-L-U-N-G. I am President and CEO
- 21 of the Texas Produce Association,
- 22 headquartered in Mission, Texas, in the Rio

- 1 Grande Valley.
- 2 The association represents the
- 3 interests of growers, shippers, importers,
- 4 marketers, and processors of fresh fruits and
- 5 vegetables from Texas and Latin America. I
- 6 have the honor today to also speak on behalf
- 7 of the Texas Vegetable Association.
- 8 My purpose is to encourage adoption
- 9 of the proposed leafy greens rule. We, in
- 10 Texas, clearly understand the need to assure
- 11 the consuming public that fresh produce is as
- 12 safe and wholesome as good science and good
- 13 growing and handling practices can make it.
- We have worked with other produce
- 15 organizations nationwide to develop the
- 16 proposed Leafy Green Marketing Agreement, and
- 17 believe it is an excellent vehicle to maximize
- 18 the safety of the handful of commodities that
- 19 pose the greatest risk to consumers.
- We believe that with the help of
- 21 consistent government oversight, we can drive
- 22 the risk from pathogens in domestic and

- 1 imported greens to acceptable minimums if
- 2 there is such a thing as acceptable minimums.
- 3 The fact is we have a problem in that we
- 4 cannot totally eliminate risk but we can
- 5 certainly do everything possible with some
- 6 help from government to minimize it.
- 7 You will recall that the recent
- 8 outbreak of disease associated first, and
- 9 erroneously, with tomatoes, and later with
- 10 Jalapeno peppers, was traced initially to
- 11 South Texas and then to a farm in Mexico.
- 12 That episode badly frightened consumers, and
- 13 rightly so. It was in the headlines for weeks
- 14 and resisted a rapid withdrawal of tainted
- 15 peppers from the marketplace because
- 16 government was unable, for a long while, to
- 17 identify the offending commodity.
- 18 That event eroded public
- 19 confidence, badly damaged the tomato and
- 20 pepper industries, embarrassed the Food and
- 21 Drug Administration and the Centers for
- 22 Disease Control, outraged the food advocacy

- 1 community and the U.S. Congress, and further
- 2 stained the reputation of imported produce,
- 3 specifically Mexican produce. But, if we can
- 4 learn from it and implement safeguards as a
- 5 result of it, perhaps all is not in vain.
- 6 The proposed rule would, at the
- 7 industry's recommendation, introduce a
- 8 blueprint for safety that will cause growers
- 9 and shippers to voluntarily adopt good growing
- 10 practices and handling practices in their day-
- 11 to-day activities to a degree that has not
- 12 consistently occurred in the past.
- 13 Ironically, the U.S. food supply, including
- 14 leafy green vegetables, is remarkably safe
- 15 now.
- 16 But public tolerance for perils in
- 17 the food parents provide their children every
- 18 day is exceedingly low and the industry simply
- 19 has to recognize and deal with that reality.
- 20 I, and many others in industry, believe that
- 21 we can best do that using a government
- 22 structure laying out expectations.

- 1 As a marketing agreement,
- 2 participation would be voluntary, but once a
- 3 shipper/supplier agrees to abide by the terms,
- 4 that handler agrees to a mandatory framework,
- 5 which includes requiring that the handler
- 6 source from certified growers.
- 7 It is my belief and hope that
- 8 retailers, food-service operators and other
- 9 buyers would quickly demand that their
- 10 suppliers are signatory to the agreement.
- 11 That said, details of the agreement and my
- 12 testimony says as currently written --
- 13 actually it is not currently written in the
- 14 agreement so I should simply say that details
- of the agreement, as they will be worked out
- 16 over time, may be subject to amendment.
- 17 For example, the metrics for
- 18 growing and handling should reflect regional
- 19 differences; ideal agricultural practices in a
- 20 given area depend on a number of variables
- 21 including water quality, bacterial load in the
- 22 soil, regional weather, drainage, and other

- 1 variables. And as a result, the proverbial
- 2 one-size-fits-all model just doesn't work
- 3 optimally.
- 4 A second concern for Texas is the
- 5 treatment of imports. During the past couple
- 6 of decades, Texas has gone from being the
- 7 number three state in producing fruits and
- 8 vegetables and marketing to somewhere below
- 9 number ten. I'm not sure where we are but
- 10 Produce Marketing Association just completed a
- 11 pretty massive study that they did through the
- 12 Battelle Corporation. And there are at least
- 13 ten states that are producing more than Texas.
- 14 However, we currently ship more
- 15 product to the rest of the country and outside
- 16 of the country than we ever have before. And
- 17 we are the number three shipper. We've always
- 18 lagged behind California and Florida. The
- 19 reason is that nearly 60 percent of the
- 20 produce we ship, including leafy greens, is
- 21 grown in Mexico.
- We have become importers more than

- 1 growers, although we still grow very
- 2 substantial volumes of many fruits and
- 3 vegetables. And if you get behind the
- 4 numbers, you discover that it is the same
- 5 individuals doing the importing, and growing
- 6 in Mexico, by and large, that used to do it in
- 7 Texas.
- 8 They grow to U.S. specifications,
- 9 mindful of U.S. chemical and other
- 10 regulations, with the intention of shipping to
- 11 the U.S. for U.S. consumers. So in a very
- 12 real practical sense, it is U.S. produce grown
- 13 in Mexico. My point is it is easy to say that
- imported produce must meet the same standards
- 15 as domestic produce, which is required under
- 16 the proposed agreement, not so easy to do.
- 17 For one thing, the government of
- 18 Mexico may have something to say about
- 19 maintaining good agricultural practices on
- 20 Mexican farms. Actually the government of
- 21 Mexico, in my discussions with them in the
- 22 last few weeks, they are remarkably receptive

- 1 to this proposed agreement because they
- 2 recognize the risk to their markets if Mexican
- 3 produce is suspect. In any event, this cross-
- 4 border issue is not an insurmountable problem
- 5 but it will demand the attention to U.S. and
- 6 Mexican interests to meet the agreement's
- 7 terms.
- 8 While it is important to anticipate
- 9 and address details for metrics in the
- 10 agreement as they are discovered or as they
- 11 evolve, we in the Texas/Mexico produce
- industry see the proposed pact as a strong,
- 13 effective tool to minimize risk and ensure
- 14 safe, wholesome food. We are encouraged that
- 15 both AMS and FDA have endorsed the concept,
- 16 and are willing to collaborate with us and
- 17 each other to bring it about.
- I heard a presentation at the
- 19 United Government Relations Program in
- 20 Washington ten days or two weeks ago, whenever
- 21 it was, from Margaret Hamburg, who is the new
- 22 FDA Commissioner. And she was very strong on

- 1 the cooperative nature of the relationship
- 2 between FDA and USDA on food safety. I was
- 3 very pleased to hear that because she clearly
- 4 considered USDA an asset in FDA's capability
- 5 to ensure public safety.
- In any event, I believe that's most
- 7 of my testimony. I do thank USDA for the
- 8 progress to date on this proposal, including
- 9 the Department's willingness to hold this
- 10 series of hearings to, hopefully, put the
- 11 agreement to work for us and for consumers as
- 12 soon as possible.
- 13 That's the end of my written
- 14 testimony. I'd be glad to answer any
- 15 questions.
- 16 JUDGE HILLSON: I'm going to
- 17 receive your written testimony into evidence
- 18 as Exhibit No. 9.
- 19 (Whereupon, the above-referred to
- 20 document was received into the
- record as USDA Exhibit No. 9.)
- THE WITNESS: Thank you.

- 1 JUDGE HILLSON: And then I'm going
- 2 to ask the panel if they have any questions
- 3 for Mr. McClung.
- 4 CROSS EXAMINATION
- 5 MS. SCHMAEDICK: Good afternoon,
- 6 Mr. McClung. This is Melissa Schmaedick.
- 7 You mentioned that you are the CEO
- 8 of the Texas Produce Association. And you are
- 9 also speaking on behalf of the Texas Vegetable
- 10 Association. Can you describe the membership
- 11 of those two groups?
- 12 THE WITNESS: The Texas Produce
- 13 Association represents primarily shippers
- 14 although a lot of shippers are also growers.
- 15 And we have fewer grower members. We also
- 16 represent importers. Huge volumes of produce
- 17 coming into the United States from Mexico come
- 18 through Texas.
- 19 The Texas Vegetable Association
- 20 does not represent importers and represents
- 21 predominantly the growers of vegetables. And
- 22 in Texas, that means largely but not

- 1 exclusively the Rio Grande Valley.
- MS. SCHMAEDICK: Yes. And does the
- 3 membership of these two organizations include
- 4 representation of, according to the SBA
- 5 standards, small and large business entities?
- 6 THE WITNESS: Yes, we do have both
- 7 small and large under SBA definitions. But my
- 8 suspicion, and I can't provide you with data
- 9 on this, is that we probably have a
- 10 disproportionate number of smaller entities.
- 11 MS. SCHMAEDICK: And has this
- 12 proposal been widely discussed among your
- 13 memberships?
- 14 THE WITNESS: We have certainly
- 15 discussed it at the board and at the committee
- 16 level in the Produce Association. And I know
- 17 that the Vegetable Association has done
- 18 likewise.
- 19 We have some practical questions
- 20 about how it will work assuming it is put in
- 21 place. But there is very real recognition
- 22 that there has to be better control of safety

- 1 issues, that the consequences of food
- 2 poisoning outbreaks are just too catastrophic
- 3 to the industry to not drive the risk as low
- 4 as we possibly can.
- 5 MS. SCHMAEDICK: Among your
- 6 membership, the issue of product coming in
- 7 from Mexico is a very real and important
- 8 issue, as you've already described. How has
- 9 the membership responded to this proposal's
- 10 attempt to look at certification or audit
- 11 verifications of imported product?
- 12 THE WITNESS: In Mexico are you
- 13 asking?
- 14 MS. SCHMAEDICK: In anywhere but I
- 15 guess for your membership, it would be mainly
- 16 for Mexico.
- 17 THE WITNESS: Well, as I understand
- 18 the question, there has been this rather
- 19 facile position that has been taken by both
- 20 the regulatory and the legislative areas in
- 21 Washington to say well, obviously you are
- 22 going to have to treat imported produce

- 1 precisely as you do domestic produce in terms
- 2 of what the requirements are to ensure safety.
- 3 MS. SCHMAEDICK: Yes.
- 4 THE WITNESS: What we have
- 5 recognized in the association for quite a
- 6 while is that that is a much easier thing to
- 7 talk about doing than it is necessarily to do.
- 8 Mexico is obviously a sovereign entity and
- 9 they are jealous of their prerogative just as
- 10 we are.
- 11 But I don't think there is any
- 12 question that wherever produce comes from,
- 13 Mexico, U.S., any place else, it has to meet
- 14 certain safety requirements in order to keep
- 15 from damaging the marketplace and to protect
- 16 consumers. So -- and I would add that there
- 17 are a lot of small farms in Mexico that it is
- 18 going to be a challenge bringing them into the
- 19 more sophisticated components of food safety
- 20 technology. But it simply has to be done.
- 21 MS. SCHMAEDICK: Does the portion
- 22 of your membership that represents small

- 1 businesses, would it be fair to say that in
- 2 reviewing this proposal and understanding what
- 3 some of the costs might be, that a conclusion
- 4 is that, as you've just stated, following
- 5 through with a program is important. And,
- 6 therefore, there has been sort of a cost-
- 7 benefit analysis of yes, it is more costly but
- 8 it has a potential to be beneficial. Has that
- 9 happened among your membership?
- 10 THE WITNESS: I'm not sure that I
- 11 fully understand the question but if the
- 12 question is have we run a thorough cost-
- 13 benefit analysis of the disparity between what
- 14 it costs the little guys and the big guys, the
- 15 answer is no, we haven't.
- 16 There is the assumption that it
- 17 will impact the smaller guys somewhat
- 18 disproportionately, depending on what they are
- 19 growing and what their situation is, what
- 20 their contract arrangement with shippers is.
- 21 But this is frankly an area where there is
- 22 some discomfort because the little guys are

- 1 going to have a harder time meeting all of the
- 2 requirements that are going to be placed on
- 3 them than the larger guys do.
- 4 But you cannot, in my
- 5 organizations' opinion, you can't allow
- 6 contaminated produce from any source because
- 7 when the damage is done, the consuming public
- 8 is as badly damaged and the industry is as
- 9 badly damaged whether it comes from a small
- 10 source as from a large source.
- 11 MS. SCHMAEDICK: Okay. Thank you.
- 12 JUDGE HILLSON: Any further
- 13 questions from the panel?
- 14 Mr. Souza?
- MR. SOUZA: Thank you. Tony Souza.
- 16 A question, you stated or had
- 17 mentioned in your testimony that you bring in
- 18 more product from Mexico than you produce in
- 19 the State of Texas, your members.
- 20 How do your members see as being
- 21 covered under -- right now you are listed as
- 22 being in Zone 3. Would the product being

- 1 grown in Mexico be covered under Zone 3?
- 2 There are five zones in here. Or would that
- 3 be approached in a different zone, different
- 4 area? How does your membership --
- 5 THE WITNESS: My understanding of
- 6 the zones is that they are predominantly a
- 7 matter of dividing the fruit and vegetable
- 8 producing areas in the United States in order
- 9 to establish equal -- more or less equal
- 10 representation on the committee.
- 11 The zones do not really have much
- 12 to do with the regional variations in
- 13 technology that is used or anything. They are
- 14 more of a political method of getting -- of
- 15 trying to get equality between various parts
- 16 of the nation.
- I don't know if I've answered your
- 18 question.
- 19 MR. SOUZA: Yes, I believe you did.
- 20 Thank you.
- JUDGE HILLSON: Anything else from
- 22 USDA? I'm going to let Ms. Dash go.

- 1 MS. DASH: Suzanne Dash, AMS.
- 2 Are you a leafy green producer
- 3 and/or handler?
- 4 THE WITNESS: No. I run the
- 5 association. I've never -- I don't
- 6 participate in the marketplace. I don't grow.
- 7 MS. DASH: Has your organization
- 8 ever considered doing a state agreement
- 9 similar to Arizona or California?
- THE WITNESS: We've watched very
- 11 carefully what has come out of California and
- 12 Arizona. A lot of the growers have adopted
- 13 practices that are similar to what is being
- 14 done in those states. We have not formally
- 15 adopted an agreement, a state agreement the
- 16 way California and Arizona have, or the way
- 17 Florida has with tomatoes.
- 18 But -- and we are mindful of the
- 19 fact that there are regional differences
- 20 between the -- it's not a matter of states or
- 21 zones but it is just a matter of growing areas
- 22 where different rules, different metrics need

- 1 to be assigned to those areas because of
- 2 differences in the problems you face.
- 3 MS. DASH: Thank you.
- 4 JUDGE HILLSON: Ms. Deskins?
- 5 MS. DESKINS: Mr. McClung, you
- 6 testified a little bit about the food scares
- 7 and how that hurt particular industries. In
- 8 terms of this agreement, how would this help
- 9 in situations like that?
- 10 THE WITNESS: The idea ultimately
- 11 is to minimize the number of food poisoning
- 12 incidents that occur both because it is the
- 13 right thing to do and because the economic
- 14 damaging, the bruising that happens when you
- 15 have a food poisoning outbreak is enormous for
- 16 whatever crop or commodity is involved.
- 17 You know sort of the rule of thumb,
- 18 is there is one, is that if you have a
- 19 noteworthy food poisoning incident involving a
- 20 given commodity, you've lost a marketing year.
- 21 You've lost about a year in terms of being
- 22 able to grow and market products successfully.

- 1 And sometimes it is more than one product, as
- 2 it was with the tomato, Jalapeno situation.
- 3 MS. DASH: Thank you.
- 4 JUDGE HILLSON: Anything else from
- 5 the panel?
- 6 (No response.)
- 7 JUDGE HILLSON: Anything from the
- 8 non-USDA representatives?
- 9 (No response.)
- 10 JUDGE HILLSON: Anything from the
- 11 proponents panel?
- 12 (No response.)
- JUDGE HILLSON: Okay, Mr. McClung,
- 14 thank you for testifying.
- 15 THE WITNESS: Thank you very much.
- 16 JUDGE HILLSON: Mr. Gonzales, are
- 17 you one of the people who needs to testify
- 18 today? Is that what you said?
- MR. GONZALES: Yes.
- 20 JUDGE HILLSON: Okay. I'm going to
- 21 let you come on up.
- Okay, I'm going to mark Mr.

- 1 Gonzales' written statement as Exhibit No. 10.
- 2 (Whereupon, the above-referred to
- 3 document was marked as USDA Exhibit
- 4 No. 10 for identification.)
- JUDGE HILLSON: Would you please
- 6 raise your right hand?
- 7 WHEREUPON,
- 8 JOHNNY GONZALES
- 9 was called as a witness, having been first
- 10 duly sworn, assumed the witness stand, was
- 11 examined and testified as follows:
- 12 DIRECT TESTIMONY
- JUDGE HILLSON: Okay. Could you
- 14 please state your name and spell it for the
- 15 record?
- 16 THE WITNESS: My name is Johnny
- 17 Gonzales, J-O-H-N-N-Y G-O-N-Z-A-L-E-S. And I
- 18 represent the California Environmental
- 19 Protection Agency, the State Water Resources
- 20 Control Board.
- 21 Thank you, first off, for the
- 22 opportunity to comment at the hearing. I

- 1 certainly appreciate having that opportunity
- 2 to deal with this very important issue.
- 3 California has long been a leader
- 4 in water quality protection. The California
- 5 Water Code authorizes the State Water
- 6 Resources Control Board, in conjunction with
- 7 the nine Regional Water Quality Control
- 8 Boards, to regulate water quality by
- 9 establishing and implementing water quality
- 10 control plans to ensure that the waters of the
- 11 State of California are not contaminated by
- 12 point and non-point sources of discharges.
- 13 We support a National Leafy Greens
- 14 Marketing Agreement, which provides for the
- 15 co-management of food safety goals and
- 16 environmental goals. We support a marketing
- 17 agreement that reduces conflict with existing
- 18 conservation, or best management practices,
- 19 intended to protect water quality, habitat,
- 20 and fish, and wildlife. We wish to avoid or
- 21 prevent food safety practices or metrics which
- 22 contribute to the degradation of water quality

- 1 and wildlife habitat and are not
- 2 scientifically based.
- 3 California has identified
- 4 discharges from irrigated agricultural lands
- 5 as a source of impairment to certain waters of
- 6 California. To correct these impairments,
- 7 growers in California have implemented soil
- 8 conservation practices, including the
- 9 installation of riparian vegetation and buffer
- 10 strips, which have been installed with public
- 11 and private funds.
- 12 Growers, however, have, in some
- 13 cases, been required by buyers to remove these
- 14 riparian vegetation and buffer strips based on
- 15 the assumption that these actions were
- 16 necessary to improve food safety when this has
- 17 not been shown to be the case. This bare
- 18 earth requirement is part of the so-called
- 19 super metrics.
- 20 We recognize that jointly managing
- 21 food safety and water quality is a very
- 22 complex and challenging issue. Food safety

- 1 and water quality protection, however, should
- 2 not be in conflict. To address the super
- 3 metrics issue, the State and Regional Water
- 4 Boards and the California Environmental
- 5 Protection Agency are collaborating with other
- 6 state agencies in California, an example is
- 7 the California Department of Public Health,
- 8 the California Department of Food and
- 9 Agriculture, the California Department of
- 10 Pesticide Regulation, the California
- 11 Department of Fish and Game, U.S.
- 12 Environmental Protection Agency Region 9,
- 13 University of California Davis Center for
- 14 Produce and Safety, Western Growers
- 15 Association, and Resource Conservation
- 16 Districts as well as the Natural Resources
- 17 Conservation Service.
- 18 We recommend that these state
- 19 agencies be involved in direct dialogue to
- 20 develop unified practices for food safety that
- 21 are scientifically based and provide for the
- 22 joint management of food safety and water

- 1 quality protection. We recommend that, at
- 2 minimum, the California Department of Fish and
- 3 Game and other wildlife type of agencies and
- 4 agricultural agencies be included in the
- 5 technical review board.
- 6 We also recommend that agencies
- 7 provide cross training that would allow for
- 8 auditors to be speaking with a common voice
- 9 and looking at common standards when they
- 10 conduct their audits in the field.
- We want to ensure that food safety
- 12 requirements work in conjunction with efforts
- 13 to protect water quality. Water quality
- 14 programs that could be affected by the
- 15 proposed marketing agreement include the State
- 16 Water Board's Irrigated Lands Regulatory
- 17 Program, our Non-Point Source Program, our
- 18 Total Maximum Daily Load Program, our Recycled
- 19 Water Program, and our Agricultural Grants and
- 20 Loans Program.
- We are interested in making sure
- 22 that food safety programs are compatible with

- 1 these water quality protection programs.
- 2 Also, the State Water Board is interested in
- 3 assuring that adequate research is being
- 4 developed to address the environmental impacts
- 5 of food safety practices.
- 6 We understand farmers want a single
- 7 consistent set of metrics to follow rather
- 8 than the multi-food safety programs imposed by
- 9 different companies. Farmers have a strong
- 10 commitment to stewardship of the land and we
- 11 should help them keep our food safety and our
- 12 environment protected.
- Thank you.
- JUDGE HILLSON: Thank you, Mr.
- 15 Gonzales.
- 16 I'm going to receive your written
- 17 comments into evidence as Exhibit 10.
- 18 (Whereupon, the above-referred to
- 19 document was received into the
- 20 record as USDA Exhibit No. 10.)
- 21 JUDGE HILLSON: And I'm going to
- 22 ask the USDA panel if they have any questions

- 1 of you.
- 2 CROSS EXAMINATION
- 3 MS. SCHMAEDICK: This is Melissa
- 4 Schmaedick. Good afternoon.
- 5 Mr. Gonzales, have you had an
- 6 opportunity to read the proposal and the
- 7 language?
- 8 THE WITNESS: Yes, I have.
- 9 MS. SCHMAEDICK: All right. So are
- 10 you familiar with the way the current section
- 11 on the technical review board is drafted?
- 12 THE WITNESS: The one in
- 13 California?
- MS. SCHMAEDICK: No, in the
- 15 proposal --
- 16 THE WITNESS: The national one?
- MS. SCHMAEDICK: -- that is being
- 18 discussed today.
- 19 THE WITNESS: From my
- 20 understanding, that it is in the process of
- 21 getting the panel together, the review board
- 22 together, which would provide the technical

- 1 proposals to the administrative board.
- MS. SCHMAEDICK: Yes. And are you
- 3 aware of the type of membership that is
- 4 currently being proposed to be included in
- 5 that board?
- 6 THE WITNESS: Yes, it called for
- 7 several agencies. The one that caught my
- 8 attention was the NRCS and the Environmental
- 9 Protection Agency.
- 10 MS. SCHMAEDICK: Do you believe
- 11 that that is a good proposal?
- 12 THE WITNESS: Yes, I do. We work
- 13 closely with both of those agencies. However,
- 14 I don't know how it would be determined who
- 15 would represent that zone for those agencies.
- 16 Of course, I'm biased so I would
- 17 recommend California for several reasons.
- 18 We're the biggest fish in this fight, I think.
- 19 And so we really want to make sure that
- 20 California is represented in that technical
- 21 review board.
- MS. SCHMAEDICK: In your opinion,

- 1 would it be helpful to have the flexibility to
- 2 include other government representatives of
- 3 other government agencies as needs may arise?
- 4 Should a certain flexibility be built in to
- 5 the proposal to accommodate that?
- 6 THE WITNESS: Yes, I would be a
- 7 proponent of that. Again, with the agencies
- 8 that I work with in California in dealing with
- 9 food safety, that's the group that I think
- 10 would best fit the interests of the mission
- 11 and goals of the national agreement.
- 12 MS. SCHMAEDICK: I believe that the
- 13 draft language also proposes that
- 14 subcommittees may be proposed under this
- 15 technical review board, do you see that as a
- 16 positive part of the proposal?
- 17 THE WITNESS: Yes, I do.
- 18 MS. SCHMAEDICK: And how might that
- 19 portion of the proposal be used to address
- 20 some of your concerns that you've brought up
- 21 about state --
- 22 THE WITNESS: I think with the

- 1 variety of agencies, each having a common
- 2 interest but also having their own areas of
- 3 concerns and standards, it would provide for
- 4 the linking of those areas of concern and
- 5 reach a collaborative effort in terms of what
- 6 would be best supported under a
- 7 scientifically-based proposal and be a good
- 8 pool to eliminate the opposite practices which
- 9 do not have the science behind them.
- 10 MS. SCHMAEDICK: I believe that
- 11 concludes my questions. Thank you.
- 12 JUDGE HILLSON: Anyone else from
- 13 the panel?
- 14 (No response.)
- JUDGE HILLSON: Okay, I don't see
- 16 anything else from the panel.
- 17 Anything else from the non-USDA
- 18 representatives?
- 19 (No response.)
- JUDGE HILLSON: Or from the
- 21 proponents?
- 22 (No response.)

- 1 JUDGE HILLSON: Thank you very much
- 2 for your testimony, sir.
- 3 THE WITNESS: Okay.
- 4 JUDGE HILLSON: You may step down.
- 5 THE WITNESS: Can I make one
- 6 comment?
- 7 JUDGE HILLSON: Yes.
- 8 THE WITNESS: I appreciate it. I
- 9 forgot to mention that in looking at the super
- 10 metrics issue, the one area that has been
- 11 brought forward is the vegetative buffer
- 12 strips. I've heard that several times.
- But I also get information that
- 14 animals as significant risks and also the
- 15 support of using reclaimed water or recycled
- 16 water. In California, we support and
- 17 encourage the use of properly-created recycled
- 18 water. And I have gotten some information
- 19 that indicates that some of the areas are
- 20 discouraging that use.
- 21 And so that's something else that
- 22 we need to look at when we talk about areas of

- 1 super metrics nature.
- JUDGE HILLSON: Thank you. If
- 3 there are no more questions, you may step
- 4 down. You may step down.
- 5 THE WITNESS: Okay. Thank you.
- 6 MR. RESNICK: Mr. Gonzales?
- 7 THE WITNESS: Sir?
- 8 MR. RESNICK: Do you have an extra
- 9 copy? We didn't receive a copy of your
- 10 testimony.
- 11 THE WITNESS: I know I've got one.
- MR. RESNICK: If you don't mind,
- 13 thank you.
- 14 JUDGE HILLSON: Was there anyone
- 15 else who had to testify today? Do you have to
- 16 testify today? Are you ready? Why don't you
- 17 come on up. Bring your name tag with you.
- 18 Do you have a written statement to
- 19 give me? Do you have copies for everyone
- 20 else?
- 21 And I'm going to mark this as
- 22 Exhibit 11.

- 1 (Whereupon, the above-referred to
- 2 document was marked as USDA Exhibit
- No. 11 for identification.)
- 4 JUDGE HILLSON: Have a seat and
- 5 raise your right hand.
- 6 WHEREUPON,
- 7 JOVITA PAJARILLO
- 8 was called as a witness, having been first
- 9 duly sworn, assumed the witness stand, was
- 10 examined and testified as follows:
- 11 DIRECT TESTIMONY
- 12 JUDGE HILLSON: Okay. Can you
- 13 please state your name and then spell it for
- 14 the record?
- 15 THE WITNESS: My name is Jovita
- 16 Pajarillo. My first name is J-O-V-I-T-A.
- 17 Last name is Pajarillo, P-A-J-A-R-I-L-L-O.
- 18 JUDGE HILLSON: Okay. And you have
- 19 a statement you want to read, right?
- THE WITNESS: Yes.
- JUDGE HILLSON: You may proceed.
- 22 THE WITNESS: I want to thank

- 1 everyone for the opportunity to come today to
- 2 present this testimony.
- 3 I'm Jovita Pajarillo and I am an
- 4 Associate Director in the Water Division at
- 5 U.S. Environmental Protection Agency in San
- 6 Francisco.
- 7 Our region covers the states of
- 8 California, Hawaii, Arizona, Nevada, the
- 9 Pacific Basin, and approximately 147
- 10 federally-recognized tribes. We have an
- interest in commenting on the proponents'
- 12 proposal and the USDA regulatory framework for
- 13 the National Leafy Greens Marketing Agreement,
- 14 giving our concerns and experience with the
- 15 California Leafy Greens Marketing Agreement,
- 16 and the fact that California and Arizona, and
- 17 to a lesser degree, Hawaii, dominate the leafy
- 18 green production.
- 19 We support an National Leafy Greens
- 20 Marketing Agreement, which provides for the
- 21 co-management of food safety and environmental
- 22 goals. I'm going to basically reenforce and

- 1 support much of what Johnny Gonzales said of
- 2 the State Water Board.
- We support a national agreement
- 4 that reduces conflict with existing
- 5 conservation, or best management practices,
- 6 intended to protect water quality, habitat,
- 7 fish, and wildlife. We wish to avoid or
- 8 prevent food safety practices or metrics which
- 9 contribute to the degradation of water quality
- 10 and wildlife habitat and are not
- 11 scientifically based.
- We have observed such practices
- 13 that are now known as super metrics, which has
- 14 been given much attention this morning, which,
- 15 despite a dearth of conclusive data relative
- 16 to their contribution to food safety,
- 17 proliferate nonetheless. For example, best
- 18 management practices such as vegetated buffer
- 19 strips are torn out in the belief that they
- 20 attract wildlife such as rodents.
- 21 Science bears out the fact that
- 22 rodents are not a significant risk of e. coli

- 1 0157:H7. In fact, removing these buffer
- 2 strips can be counter productive to food
- 3 safety as it may promote the movement of e.
- 4 coli as vegetation slows and attenuates
- 5 pollutants.
- 6 Farmers and federal programs have
- 7 financially invested in central coast
- 8 watersheds for the implementation of practices
- 9 that protect natural resources including water
- 10 quality and wildlife. Federal programs such
- 11 as the Clean Water Act and the USDA Farm Bill
- 12 -- the Farm Bill specifically technical -- the
- 13 technical and financial assistance via the
- 14 conservation title programs such as the
- 15 Environmental Quality Improvement Program.
- 16 The Clean Water Act investments go
- 17 toward improving impaired waters, and Johnny
- 18 mentioned the total maximum daily loads, our
- 19 TMDL program, reducing and preventing non-
- 20 point source pollution and protecting
- 21 wetlands. We do not support the rollback of
- 22 on-farm environmental stewardship practices.

- 1 This year we received a complaint
- 2 concerning a wetland filled in the Salinas
- 3 River watershed. We conducted an inspection
- 4 in February of this year and we were told that
- 5 farmers were required to do this in order to
- 6 comply with food safety guidelines.
- 7 The U.S. Army Corps of Engineers,
- 8 the San Francisco District, has told us that
- 9 they received other complaints similar to this
- 10 one and will continue to forward them to us
- 11 for attention. And we believe this is an
- 12 indicator of these super metrics.
- We support inclusion of
- 14 environmental and wildlife interests on the
- 15 various committees being suggested at the
- 16 national and regional levels as operational
- 17 rules, regulations and metrics are developed.
- 18 We believe this will promote the co-management
- 19 of food safety and environmental goals.
- 20 In conclusion, the National Leafy
- 21 Greens Marketing Agreement must ensure the
- 22 best available science that supports good

- 1 agricultural, handling, and food safety
- 2 management practices. This approach must be
- 3 rationale, transparent, and scientifically
- 4 credible.
- 5 USDA's consultation with other
- 6 federal and state agencies in the development
- 7 of the metrics or practices should follow a
- 8 process to ensure that input is duly
- 9 considered and responded to.
- 10 Food safety auditors should receive
- 11 formal training for certification in order to
- 12 provide certainty and consistency.
- The national agreement should not
- 14 conflict with the Clean Water Act or other
- 15 regulations or conservation programs.
- 16 We understand farmers want a single
- 17 consistent set of metrics to follow rather
- 18 than multiple food safety programs imposed by
- 19 different companies. We do not want to see
- 20 farmers continue to be placed in a Catch 22
- 21 situation where if they are in compliance with
- 22 a certain set of regulations but yet in

- 1 conflict or not in compliance with another set
- 2 of environmental regulations. That's just a
- 3 situation we don't want to see.
- 4 And in conclusion, much as what
- 5 Johnny said, is we understand that farmers do
- 6 have a strong commitment to stewardship of the
- 7 land. And so we want to work with them and
- 8 help them to keep our food safe and to protect
- 9 our environment and our wildlife.
- 10 And that concludes my remarks.
- 11 JUDGE HILLSON: Thank you.
- 12 I'm going to admit your written
- 13 remarks as Exhibit 11.
- 14 (Whereupon, the above-referred to
- document was received into the
- record as USDA Exhibit No. 11.)
- JUDGE HILLSON: And I'm going to
- 18 ask the panel if they have any questions.
- 19 Go ahead, Ms. Schmaedick.
- 20 CROSS EXAMINATION
- MS. SCHMAEDICK: Good afternoon.
- 22 This is Melissa Schmaedick.

- 1 Hello, Ms. Pajarillo.
- 2 My first question is you introduced
- 3 yourself as U.S. EPA Region 9. Are you
- 4 speaking specifically on behalf of Region 9?
- 5 Or U.S. EPA in general?
- 6 THE WITNESS: Region 9.
- 7 MS. SCHMAEDICK: Just Region 9.
- 8 Okay.
- 9 THE WITNESS: Yes.
- 10 MS. SCHMAEDICK: Okay. Do you --
- 11 have you had conversations with U.S. EPA, the
- 12 greater -- all of the other regions? Has this
- 13 been discussed?
- 14 THE WITNESS: Yes, in the past. I
- 15 mean I've been working on this issue for over
- 16 two years. And I've had opportunity to go to
- 17 national meetings to talk to some of our other
- 18 regional representatives in U.S. headquarter's
- 19 program managers about the food safety issue.
- 20 And in the letters that EPA Region
- 21 9 has sent to USDA and AMS when this first
- 22 proposal came to light and then in June we

- 1 also commented, we shared those comments with
- 2 our Office of Water at U.S. EPA as well as our
- 3 new Agricultural Counselor who reports
- 4 directly to the Administrator of EPA.
- 5 MS. SCHMAEDICK: Okay. And so --
- 6 I'm sorry to ask this question but I'm
- 7 assuming that you have read the language and
- 8 you made some comments that are specific to
- 9 the proposed technical review board. And I
- 10 just wanted to again clarify that based on
- 11 your statement, it seems to me that you see
- 12 that proposed language as being a positive
- thing in terms of the proposed membership.
- 14 THE WITNESS: Yes.
- MS. SCHMAEDICK: Would you see that
- 16 in -- perhaps in the future development of
- 17 subcommittees of that technical review board
- 18 that other regions of U.S. EPA would be
- 19 included?
- 20 THE WITNESS: Yes. And you know I
- 21 see that EPA is added to the technical review
- 22 board and I am most appreciative of seeing EPA

- 1 as an agency included.
- I don't know -- I do know actually
- 3 that many of our other regional offices just
- 4 aren't that involved at this point on food
- 5 safety issues, especially where there is a
- 6 nexus of water quality.
- 7 I would like to see some discretion
- 8 or flexibility perhaps given to EPA perhaps
- 9 designating a state water quality agency or
- 10 the State Department of Environmental Quality
- 11 to play a larger role at the regional office
- 12 as highest priority perhaps for the agency in
- 13 a particular region.
- 14 And also I would like to see some
- of the subcommittees structured around topics
- 16 of interest, whether it would be like for
- 17 small organic growers for one or, for example,
- 18 wildlife and habitat as another. But that
- 19 could be, of course, something that could be
- 20 discussed via committee and the board.
- 21 MS. SCHMAEDICK: Yes. In the
- 22 proposed language, the terms zone and region

- 1 are used. And what I'm interested in
- 2 specifically is the relationship between the
- 3 term region and the proposed process of the
- 4 technical review board working collaboratively
- 5 to develop metrics.
- 6 And I'm wondering if you can
- 7 explain to me your understanding of how
- 8 metrics might be developed for regions. And
- 9 why that is important. Or I don't know if my
- 10 question is very clear.
- 11 THE WITNESS: I know that some of
- 12 the states in our region are in a different
- 13 zone. For example, I think Hawaii is in a
- 14 different zone than California. I think
- 15 California is with the Washington/Oregon zone.
- 16 Is that correct? It has been a while since I
- 17 looked at the composition of states to the
- 18 zone.
- But when you mean region, are you
- 20 meaning EPA regions and how they are
- 21 organized?
- MS. SCHMAEDICK: No, no, under the

- 1 proposed language.
- 2 THE WITNESS: Okay. Right. So is
- 3 there like a Northwest Region? I'm sorry. It
- 4 has been a while since I looked at the actual
- 5 region composition. Do you have it there?
- 6 Okay.
- 7 MS. SCHMAEDICK: Let me see if I
- 8 can rephrase my question.
- 9 THE WITNESS: Okay.
- MS. SCHMAEDICK: Do you believe
- 11 that given that there can be very significant
- 12 differences in production and handling
- 13 environment throughout the country, that it is
- 14 important to have participation and
- 15 representation from different areas in the
- 16 development process of the metrics for the
- 17 purpose of identifying appropriate metrics?
- 18 THE WITNESS: Yes, because I think
- 19 -- for example, one needs to take into account
- 20 where you may have threatened or endangered
- 21 species, you may look at where you have
- 22 impaired waters. And if it is a source

- 1 because of its irrigated lands or if it is
- 2 something related to CAFOs or if it is the
- 3 National Marine Estuary, like the Monterey Bay
- 4 is, I think you need to take those factors
- 5 into consideration as you develop metrics.
- 6 MS. SCHMAEDICK: Okay. Thank you.
- 7 JUDGE HILLSON: Anyone else on the
- 8 panel have any questions?
- 9 Ms. Deskins?
- 10 MS. DESKINS: Sharlene Deskins,
- 11 Office of General Counsel.
- 12 You used the term co-management in
- 13 your testimony. I was wondering if you could
- 14 tell us what you meant by that.
- 15 THE WITNESS: I think -- it's
- 16 looking at food safety practices and also
- 17 practices like conservation practices, best
- 18 management practices, so that you don't do one
- 19 to the exclusion of the other, that you don't
- 20 have a practice that has unintended
- 21 consequences to another practice. It is the
- 22 way you kind of jointly manage the two

- 1 together. So it's not -- they are not
- 2 mutually exclusive.
- I know that NRCS here has been
- 4 working on their best management practices to
- 5 take into account food safety considerations.
- 6 So it's not just a BMP that looks at soil or
- 7 water or habitat. But it actually integrates
- 8 food safety concerns.
- 9 MS. DESKINS: In terms of this
- 10 agreement, who would you see as being in the
- 11 co-management position?
- 12 THE WITNESS: In terms of leading
- 13 development of those kinds of --
- MS. DESKINS: Well, in terms of
- 15 this agreement. I'm just trying to
- 16 understand, you know, what the term means.
- 17 THE WITNESS: NRCS has been a
- 18 leader here in the Central Coast on that as
- 19 well as statewide. And also the local
- 20 resource conservation district. And they work
- 21 with a group of stakeholders like the
- 22 Extension Service and I think maybe the Ag

- 1 Commissioner's Office has been involved in
- 2 that. But it is basically a stakeholder-
- 3 driven kind of effort.
- 4 MS. DESKINS: Thank you.
- 5 THE WITNESS: You're welcome.
- 6 JUDGE HILLSON: Anything else from
- 7 the panelists?
- 8 (No response.)
- 9 JUDGE HILLSON: Anything from the
- 10 non-governmental representatives?
- 11 (No response.)
- 12 JUDGE HILLSON: Anything from the
- 13 proponents?
- 14 (No response.)
- JUDGE HILLSON: Okay. Well, thank
- 16 you very much for testifying.
- 17 THE WITNESS: Thank you.
- JUDGE HILLSON: Thank you.
- 19 And I don't think there was anyone
- 20 else who said they had to testify today. So -
- 21 oh, there is? Oh, okay. I'm trying to give
- 22 you guys the case back to run with it. But

- 1 I'm going to try to accommodate --
- 2 MR. RESNICK: He's on our list.
- 3 And we would have called him next.
- 4 JUDGE HILLSON: Oh, you would have
- 5 called him next anyway?
- 6 MR. RESNICK: Mr. Richards.
- JUDGE HILLSON: Oh, okay. Well, in
- 8 that case, why don't I like hand the ball back
- 9 to you, Mr. Resnick.
- 10 (Laughter.)
- 11 MR. RESNICK: Thank you, Your
- 12 Honor.
- JUDGE HILLSON: You may call your
- 14 next witness.
- MR. RESNICK: The proponent group
- 16 will call Tim Richards at this time.
- 17 JUDGE HILLSON: I'm going to mark
- 18 this as Exhibit 12. I don't know if I -- yes,
- 19 I did receive 11 into evidence. Okay, yes,
- 20 Exhibit 12.
- 21 (Whereupon, the above-referred to
- 22 document was marked as USDA Exhibit

- No. 12 for identification.)
- JUDGE HILLSON: Would you please
- 3 raise your right hand?
- 4 WHEREUPON,
- 5 TIMOTHY RICHARDS
- 6 was called as a witness by Counsel for the
- 7 proponents, having been first duly sworn,
- 8 assumed the witness stand, was examined and
- 9 testified as follows:
- 10 DIRECT TESTIMONY
- 11 JUDGE HILLSON: Okay, please state
- 12 your name and spell it.
- THE WITNESS: Tim Richards, T-I-M
- 14 R-I-C-H-A-R-D-S.
- 15 JUDGE HILLSON: Okay. Do you have
- 16 a statement that you want to read or a
- 17 presentation that you want to make?
- 18 THE WITNESS: A presentation, I
- 19 guess. But seeing as I don't have PowerPoint,
- 20 I'll just read it.
- JUDGE HILLSON: Okay.
- 22 THE WITNESS: Thank you. Thank you

- 1 for your --
- MS. DESKINS: Your Honor?
- 3 THE WITNESS: -- allowing me to
- 4 talk on this --
- JUDGE HILLSON: Yes, hang on a
- 6 second.
- 7 MS. DESKINS: We may have
- 8 PowerPoint.
- 9 MS. SCHMAEDICK: We do have a
- 10 PowerPoint.
- 11 JUDGE HILLSON: If you have a
- 12 computer printout with you, then you can hook
- it up to the PowerPoint.
- 14 THE WITNESS: Let's -- I'll just
- 15 talk. I don't want to take up your time in
- 16 getting the thing to work -- to link up with
- 17 my computer.
- 18 JUDGE HILLSON: It's a deal. Go
- 19 right ahead then.
- 20 THE WITNESS: Okay. Basically what
- 21 I want to present today is a summary, a brief,
- 22 hopefully intuitive explanation of a paper

- 1 that some colleagues and I have coming out in
- 2 The Journal of Agricultural and Resource
- 3 Economics this December speaking to food
- 4 safety investment issues in general and
- 5 specifically using the California spinach/e.
- 6 coli outbreak in 2006 as a case study.
- 7 This paper is called "Public Goods,
- 8 Hysteresis and Underinvestment in Food
- 9 Safety." As you can tell by the title, it is
- 10 a little technical but I will try and keep it
- 11 as intuitive as possible.
- 12 I'm going to start by laying out
- our research objective and why we started this
- 14 research effort. I'm going to give a little
- 15 bit of background and a little bit of context
- 16 for the paper and explain in detail the
- 17 research question that we sought to explain.
- 18 Then we are going to look at some
- 19 potential explanations for what we observed as
- 20 a lack of investment or an underinvestment in
- 21 food safety up until the 2006 incident.
- 22 I'm going to explain briefly our

- 1 research method, again in hopefully an
- 2 intuitive way. I'm going to look at our case
- 3 study in some specifics and I'm going to
- 4 summarize our findings. And then present some
- 5 conclusions and some policy implications and
- 6 ways that we can address some of the failings
- 7 that we saw.
- 8 Let me just presage this by laying
- 9 out the -- sort of the motivation for this
- 10 research. We take it as given that seeing as
- 11 how the 2006 E. coli outbreak happened that
- 12 there has been underinvestment in food safety
- in the produce industry.
- So we chose this research to
- 15 explain why growers did not make the
- 16 investment required to prevent a food-borne
- 17 disease outbreak in spinach in 2006. And I'm
- 18 going to be a little bit more specific about
- 19 what we mean by underinvestment in a second.
- Just a little bit of context here
- 21 just to explain who I am and where the
- 22 motivation for this study comes from. I am an

- 1 economist. And I teach at Arizona State
- 2 University in the School of Agribusiness.
- 3 As an economist, I like to explain
- 4 policies and I do believe that the market
- 5 works well. I like to joke with my students
- 6 that as a Ph.D. student, the Hoover Tower
- 7 actually looked down on my office. And Milton
- 8 Friedman could probably look down on my desk
- 9 every day. So if you know economics, Milton
- 10 Friedman is kind of the God of free market
- 11 economics.
- 12 As a professor of Agribusiness, I
- 13 conduct most of my research and teach on how
- 14 we can find market solutions to policy
- 15 problems, specifically in the agricultural
- 16 industry. And most of my research interest is
- in fruit and vegetable industries. So I am
- 18 very well aware of a lot of the institutions
- 19 that we're talking about today.
- 20 So I fundamentally believe that
- 21 markets work well. And that they are the best
- 22 solution. But that being said, markets do

- 1 fail in some important cases.
- 2 Specifically, textbook cases of
- 3 externalities, like pollution. They are --
- 4 there are situations where the market just
- 5 plain doesn't correct for pollution. So there
- 6 is a role for government in that case.
- 7 Asymmetric information, when one
- 8 party to an agreement has more information
- 9 over the quality of the product than the other
- 10 party does. Examples there, a mortgage
- 11 incident that happened this last fall. That's
- 12 largely a problem of asymmetric information.
- 13 And our healthcare debate that we're talking
- 14 about right now, that's largely an asymmetric
- 15 information problem.
- 16 Another -- the third case of market
- 17 failure is monopolies, OPEC, the reason why we
- 18 have high oil prices is largely due to
- 19 monopolies, monopolization of control over key
- 20 resource.
- 21 And finally, public goods, and that
- is the example that I'm going to be talking

- 1 about today. And I'll define that a little
- 2 bit more clearly later but just as examples
- 3 are national defense, border security, and
- 4 largely food safety I define as public goods.
- 5 So, again, explanations for
- 6 underinvestment. Why did growers apparently
- 7 under invest in food safety prior to 2006?
- 8 There is a large number of explanations
- 9 potentially. But to keep this study
- 10 tractable, we looked at two of the most
- 11 plausible ones and I think the most important
- 12 ones.
- Number one, that there were people
- in the industry that were free riding on other
- 15 people's efforts to maintain a safe food
- 16 supply. We call that the free riding or the
- 17 public good effect.
- 18 A second one, a little bit more
- 19 detailed, a little bit more technical is the
- 20 hysteresis effect, a hysteretic effect of the
- 21 fact that there is what we call a real option
- 22 embedded in investments in food safety. And

- 1 I'll explain that in a little bit more detail
- 2 later.
- 3 So we've got a food safety
- 4 explanation -- or, sorry, a public good
- 5 explanation or a hysteretic explanation.
- 6 To this point, in the academic
- 7 research in economics on food safety, most of
- 8 the research has been done on the demand side.
- 9 In other words, what would consumers pay for
- 10 safe food? There is any one of a number of
- 11 studies out there, dozens of studies have been
- 12 done in the last 15 years on that topic.
- Just to cite three of the most
- 14 heavily cited papers, the Hayes Paper in 1995,
- 15 the American Journal of Agricultural Economics
- 16 found that consumers would pay 70 cents a meal
- 17 as a premium to guarantee that their food was
- 18 safe.
- 19 Lusk, in 2006, found that in the
- 20 specific case of antibiotic-free meat, that
- 21 consumers would pay a 76 percent premium for
- 22 that.

- 1 Roe and Tiesl, in a study funded by
- 2 by Chair at Arizona State University last
- 3 year, found that the premium in the case of
- 4 hamburger would be 80 cents to guarantee that
- 5 their food was safe.
- 6 So there is a real demand out
- 7 there. Consumers will pay for food safety.
- 8 We take the other perspective. We
- 9 take a supply side perspective. And we say
- 10 what is the supply of food safety out there?
- 11 If there is this demand, are growers, are
- 12 handlers stepping up and meeting that demand
- 13 with the equivalent supply of food safety
- 14 investment.
- 15 Our basic criteria that we're going
- 16 to look at when we explain something from a
- 17 food safety side is going to be what we call a
- 18 net present value criteria. Think of it as
- 19 cost benefit. If the present value, meaning
- 20 all the future benefits of investing in food
- 21 safety is greater than the current cost, then
- 22 growers should go ahead. That's basic

- 1 economics, basic Finance 100 explanation.
- 2 There's two problems with this
- 3 simple criteria, though, in explaining the
- 4 supply. Number one, that it ignores the
- 5 potential savings that go beyond an
- 6 individual's farm, the benefit to the industry
- 7 as a whole, the public good effect of
- 8 investing in food safety.
- 9 Number two, it ignores the fact
- 10 that the potential returns, that is avoiding a
- 11 food safety outbreak, are inherently
- 12 uncertain. We don't know when an outbreak is
- 13 going to occur. And the value of that
- 14 outbreak is unknown. So that's an
- 15 uncertainty. And that uncertainty is going to
- 16 lead to what we call the hysteretic effect.
- 17 With respect to the public good
- 18 effect, we have to be a little bit more
- 19 careful about how we define the public good
- 20 with respect to food safety. A pure public
- 21 good is something that we call non-rivaling
- 22 consumption and non-exclusive in use. That

- 1 simply means that if I use the public good, I
- 2 can't prevent you from using it and I can't
- 3 stop you from using it.
- 4 Think of a lighthouse. If I use a
- 5 lighthouse, I can't prevent you from using
- 6 that lighthouse. Or I can't prevent you from
- 7 using the lighthouse. And if I use the
- 8 lighthouse, I'm not going to diminish your
- 9 ability to use the lighthouse. In that case,
- 10 it is a pure public good.
- 11 With respect to food safety,
- 12 though, it is more of what we call a weaker
- 13 link public good. A weaker link public good
- 14 is one where an individual can derive some
- 15 benefits from their investment but their
- 16 investment will be diminished, the value of
- 17 their investment will be diminished if someone
- 18 else doesn't invest, okay?
- 19 A really good example of that is I
- 20 also do a lot of work in invasive species and
- 21 insect management, okay? If you are a grower
- 22 and you invest in spraying your insects, you

- 1 can keep your insects down on your farm. But
- 2 a lot of your efforts will be thwarted if your
- 3 neighbors don't because if they don't spray
- 4 their insects, they are going to migrate on to
- 5 your land and you will have an infestation
- 6 problem as well.
- 7 So the public good effect is not a
- 8 pure public good but we call it a weaker link
- 9 public good. So that's how we are going to
- 10 context our public goods in our research.
- Now with respect to hysteresis,
- 12 basically the technical definition of
- 13 hysteresis is the perpetuation of an economic
- 14 decision after its initial cause has
- 15 disappeared. So it is something that doesn't
- 16 seem to make sense from today's perspective
- 17 but it did at the time the decision was made.
- 18 And because we have no incentive to get rid of
- 19 it, to reverse it, it continues on.
- 20 A good example of that is -- that I
- 21 always use on my students is red delicious
- 22 apples in the store. Hopefully there are no

- 1 red delicious apple growers in the audience
- 2 but it was amazing for years, you would go
- 3 into the store and see these racks and racks
- 4 of red delicious apples. And you'd always
- 5 look at them and wonder who bought them
- 6 because there are such superior apple
- 7 varieties out there.
- 8 The hysteretic effect there is the
- 9 fact that it cost growers a lot to change an
- 10 apple variety. They have to rip out their old
- 11 apple varieties. They have to invest in new
- ones. And because the returns to growing
- 13 apples are inherently uncertain, if we look at
- 14 the price of red delicious apples, it goes
- 15 like this, they don't know from today's
- 16 perspective whether or not the price of red
- 17 delicious apples will someday make that
- 18 investment viable again. So they default to
- 19 just keeping their apples in the ground, okay?
- 20 I've used hysteresis to explain a
- 21 lot of different phenomena over the years.
- 22 And it makes a lot of sense.

- Okay, the thing is about a
- 2 hysteretic effect, though, for the hysteresis
- 3 effect to exist, there has to be a real option
- 4 embedded in that investment. To have a real
- 5 option, we have to have uncertain returns. We
- 6 have to have a fixed investment. And we have
- 7 to have a unique opportunity to invest.
- 8 Think about the red delicious case.
- 9 Returns to growing apples is definitely
- 10 uncertain. There is a fixed investment to
- 11 ripping them out. And there is a unique
- 12 opportunity to invest because we own our
- 13 orchards.
- In the food safety case, is there
- 15 uncertainty? Yes, there is because we don't
- 16 know when a food safety outbreak or a food-
- 17 borne disease outbreak is going to occur and
- 18 we don't know its value.
- 19 Is there a fixed investment? Yes,
- 20 there is an investment of resources that is
- 21 required to maintain a safe food supply. And
- 22 individual growers do own their plots of land.

- 1 So yes, there is a unique opportunity to
- 2 invest.
- Just thinking about a real option,
- 4 the analogy to real options to financial
- 5 options is direct. A financial option, or an
- 6 option on a stock, gives you the right but not
- 7 the obligation to either buy or sell a stock
- 8 at a fixed price. Because that price is
- 9 volatile and there is a chance that that
- 10 option may give you something of value that
- 11 you may be able to buy at a lower price than
- 12 what the market is currently, then that option
- 13 will have a value.
- 14 About 15 years ago, the economics
- 15 profession realized that real investments,
- 16 investments in things like food safety, were
- 17 likely to have real options embedded in them
- 18 as well.
- 19 The key thing is that when growers
- 20 are comparing the net present value of those
- 21 benefits to their costs, they have to include
- 22 that real option as well. So if the real

- 1 option exists, then growers are more likely to
- 2 have to wait in order for returns to cover
- 3 that real option.
- 4 All right. So what do we do then?
- 5 Our objective is to decide which of these two
- 6 effects is stronger, if either exists at all.
- 7 Is there a hysteretic effect? Or is there a
- 8 public good effect in investing in food
- 9 safety?
- 10 So what we do is we basically
- 11 construct an economic model with the net
- 12 present value criteria and we add these
- 13 components in. Whether it is a real option
- 14 effect or a public good effect, we build both
- 15 of those into our economic model. And then we
- 16 simulate returns to a hypothetical industry
- 17 that looks like the California spinach
- 18 industry. And we calculate the number of
- 19 weeks that are required before investment will
- 20 take place.
- 21 So in other words, we set up a
- 22 hypothetical new industry, okay thinking right

- 1 from ground zero if we all of a sudden start
- 2 up the new produce industry and we give the
- 3 growers the opportunity to invest in food
- 4 safety technology or not, okay?
- 5 We make it look exactly like the
- 6 spinach industry, meaning we mimic the prices
- 7 of spinach and the returns of spinach and the
- 8 cost of investing in food safety and then we
- 9 simulate a returns process. And we calculate
- 10 how long it would take before growers will
- 11 make an investment in food safety.
- 12 We compare benchmark cases between
- 13 a freely competitive, efficiently operating
- 14 market with no hysteretic effect and no public
- 15 good effect and then we compare one with the
- 16 hysteretic effect but no public good effect
- 17 and then finally one with the public good
- 18 effect and no hysteretic effect. So we
- 19 compare a benchmark case against our two
- 20 economic phenomena that we seek to find out.
- 21 Our case study, again we apply to
- 22 the California spinach industry. We used

- 1 historical data on prices to what we call
- 2 parameterize our model or to describe that
- 3 hypothetical industry.
- 4 I'm sure you all know the
- 5 background behind the California spinach case
- 6 so I won't belabor that but we know that the
- 7 shock to returns was significant at the time.
- 8 Prices dropped from almost 50 cents a pound
- 9 down to about 20 cents a pound. The industry
- 10 lost in total revenue, we estimate at ASU to
- 11 be about 80 percent. And it persisted for
- 12 quite some time.
- Our investment, and the amount of
- 14 the investment that we assume is 4.5 million
- 15 dollars. Now that was taken from, I believe,
- 16 an article in the Packer that was quoted
- 17 Western Growers Association sources. And that
- 18 includes things like investing in detection
- 19 technology, paying staff, establishing
- 20 certification standards, and things.
- 21 And in this model, we assume that
- 22 there is a baseline, 120 firms in the

- 1 industry. And in this case, we assume that
- 2 they share that 4.5 million dollars equally
- 3 among themselves.
- 4 And we also estimate the
- 5 probability of another shock occurring -- or a
- 6 shock to our hypothetical industry. And we
- 7 assume that that investment will prevent that
- 8 from happening.
- 9 This case study is appropriate. We
- 10 think it will generalize. When we do academic
- 11 articles, we want them to generalize beyond
- 12 the specific case study that we consider. So
- 13 we think this one is important.
- 14 The spinach example is important
- 15 because we think that it will generalize and
- 16 because there was this recent experience, it
- 17 allows us to get an idea as to what the
- 18 magnitude of a potential shock would look
- 19 like.
- Now we have ready access to the
- 21 data on costs and returns for spinach. And we
- 22 can compare what we see to an observed

- 1 response from the industry. So this was a
- 2 valuable case study to use.
- Just some of our specific
- 4 assumptions, we assume that the returns going
- 5 forward to this investment are equal to the
- 6 prevented loss. So in other words, we
- 7 calculate the amount of the loss that happened
- 8 during the outbreak and we assume that this
- 9 investment allows us to avoid that. So that
- 10 is a return to our investment.
- 11 Cost of the investment, as I just
- 12 explained, was 4.5 million dollars. And,
- 13 again, firms invest their proportionate share
- in our benchmark, no public good case.
- 15 We also estimate the returns to the
- 16 volatility, returns to spinach, again, that's
- 17 necessary to calculate our option value and
- 18 measure our hysteretic effect. And then we
- 19 calculate our delay in investment, as I
- 20 mentioned earlier, relative to our benchmark.
- To capture the weaker link effect,
- 22 what we assume is that the marginal benefit

- 1 for small contributions will be -- for
- 2 contributions will be smaller than what it
- 3 would be if the market was operating
- 4 efficiently but it won't be zero. So there's
- 5 not that pure public good effect but there's a
- 6 weaker link how the public good effect
- 7 happened. And we assume that the protection,
- 8 again, is equal across all growers.
- 9 So what are some of our results,
- 10 some of the technical results in estimating
- 11 our spinach returns process, we estimated that
- 12 a shock could be expected in this new
- 13 hypothetical industry to occur about .6 times
- in every 288-week period. That was the length
- of our data set or approximately once every
- 16 ten years. So that's about on average if we
- 17 look at a typical industry.
- 18 But when a shock does occur --
- 19 JUDGE HILLSON: Just to interrupt
- 20 for a second, just so you'll know that the
- 21 copy that I got -- and I don't know if this is
- 22 others -- but after page 13, it went back to

- 1 page 6 and repeated pages 6 to 13.
- THE WITNESS: Oh, I shuffled them.
- JUDGE HILLSON: Well, all I have --
- 4 I don't have anything after page 13.
- 5 THE WITNESS: Oh, you don't?
- JUDGE HILLSON: No.
- 7 THE WITNESS: Okay.
- JUDGE HILLSON: That's me. I don't
- 9 know about the rest of you. I mean I'm
- 10 following along and it just -- are you in the
- 11 same position?
- 12 PARTICIPANT: Yes.
- 13 THE WITNESS: Okay. I can turn
- 14 this into you when --
- 15 JUDGE HILLSON: Okay, I guess
- 16 you'll have to.
- 17 THE WITNESS: All right. So this
- 18 is going to be a surprise then.
- 19 (Laughter.)
- 20 THE WITNESS: So when a shock does
- 21 occur, though, we can expect that on average
- 22 the returns would fall by 10.7 percent. So

- 1 we're talking about a shallower event than
- 2 what we actually observed in reality.
- 3 And finally, once something
- 4 happens, once an event happens, we can expect
- 5 returns to go back to -- to revert to their
- 6 mean at a rate of 34.2 percent per week or
- 7 roughly return to normal within three weeks.
- 8 So, again, that's a more rapid recovery than
- 9 what we saw either. So this is a conservative
- 10 estimate of the effect.
- 11 Okay, so what did we find? We
- 12 found a baseline real option value. Remember
- 13 our initial investment was 4.5 million
- 14 dollars? The option value is 11.4 million
- 15 dollars if we account for that volatility. So
- 16 that real option value that the returns have
- 17 to cover is many times larger than the initial
- 18 investment. So the hysteretic effect is
- 19 likely to be pretty significant in this case.
- 20 And the option values we find, as
- 21 is typical, that the amount of the option will
- 22 rise with the initial investment and it rises

- 1 with volatility as well.
- 2 The bottom line though, when we
- 3 actually calculate, simulate our time to
- 4 investment is that in the baseline case with
- 5 the market operating efficiently with no
- 6 hysteretic effect and no weaker link public
- 7 good effect, the growers would take 2.2
- 8 roughly weeks to invest in a food safety
- 9 program.
- 10 If we allow for the hysteretic
- 11 effect, that increases to about 7.2 weeks, so
- 12 about three times as long with the hysteretic
- 13 effect. The public good effect, though, we
- 14 find was stronger. That it would take them 11
- 15 weeks to invest in a food safety program. So
- in other words, the public good effect is much
- 17 stronger than the hysteretic effect but that
- 18 both hysteresis and the public good effect can
- 19 explain some of the delay.
- 20 Again, the free rider effect will
- 21 not invest until week 11. It is fully 154
- 22 percent longer than the real option effect.

- 1 And it is almost 500 percent longer than the
- 2 freely operating market, the net present value
- 3 investment rules that I talked about.
- 4 We find that we simulate our
- 5 results under a number of different baseline
- 6 assumption to just make sure that we didn't
- 7 pick that one anomolistic result. We do some
- 8 sensitivity analysis. The most important
- 9 variable is that size of the initial
- 10 investment. Remember that 4.5 million
- 11 dollars.
- 12 If we reduce that to 1.5 million
- 13 dollars, we find that the baseline effect
- 14 falls to 1.9 weeks. The public -- sorry, the
- 15 hysteretic effect is about 6.8 weeks, so it
- 16 falls a little bit. And the public good
- 17 effect falls down to 1.97 weeks. So just
- 18 above the competitive result.
- 19 So the lower the investment, the
- 20 smaller the public good effect, as we'd
- 21 expect, because if there is nothing to free
- 22 ride on, people won't free ride.

- 1 If we increase the size of the
- 2 investment, though, out to 7.5 million
- 3 dollars, we find that the baseline effect
- 4 increases to 2.4 weeks, so just a little bit
- 5 higher, that the hysteretic effect is about
- 6 7.25 weeks, so just a little bit higher than
- 7 it was before, but the public good effect
- 8 increases to 19 weeks. So it is very -- the
- 9 public good effect is very sensitive to the
- 10 amount of our initial investment. Again, as
- 11 we'd expect.
- 12 Another sensitivity analysis we did
- 13 was with respect to the number of firms.
- 14 Remember our baseline assumption is 120 firms,
- 15 which is about the size of the California
- 16 spinach industry. If we reduce that to 40
- 17 firms, we see that the -- now this is just the
- 18 public good effect because that is the one
- 19 that the number of firms will impact, it falls
- 20 to 4.32 weeks.
- 21 If we increase it to 200 firms, it
- 22 increases to 15 weeks. So the more firms we

- 1 have, the worse the public good effect would
- 2 be, again, as we'd expect because everyone has
- 3 more incentive to free ride if they see
- 4 themselves as a little part of a bigger whole.
- 5 So what are our conclusions then?
- 6 Several conclusions. Number one, that the
- 7 real option effect does exist and gives rise
- 8 to a hysteretic effect in investment. We find
- 9 that the weaker link public good effect though
- 10 is stronger than the hysteretic effect at the
- 11 most plausible parameter values.
- We find that both effects depend
- 13 upon the size of the initial investment. And
- 14 that the public good effect depends critically
- 15 on what we call the structure of the market or
- 16 the number of firms that exist.
- 17 So what are some of the policy
- 18 solutions? What are some of the things we can
- 19 do to reduce both these effects?
- Number one, we can use the hammer.
- 21 We can force growers to be more responsible
- 22 for uncertainty. We can do such things within

- 1 that category of responses.
- We can increase fines. We can
- 3 develop better trace-back technology. Or we
- 4 can increase funds for federal testing. We
- 5 can also, kind of counterintuitively, we can
- 6 reduce the likelihood that individuals growers
- 7 will be wiped out.
- If we can assure that people, if
- 9 they invest, will not be reduced to zero if an
- 10 event does occur, then that will increase the
- 11 probability that they will contribute because
- 12 they have a stake in the game, that they
- 13 realize that they will be an ongoing concern
- if something does happen. Obviously, we can
- 15 reduce the cost of the initial investment.
- 16 All of these things that I've
- 17 talked about though are government solutions
- 18 basically. Our government policies that cost
- 19 money, money that is not likely to exist.
- 20 So the most obvious solution, I
- 21 think, that we came up with is to use either
- 22 voluntary or mandatory marketing agreements.

- 1 It is a common solution to a lot of problems
- 2 in agriculture just because the coordination -
- 3 the incentives to coordinate are not there.
- 4 If there is institutional support for them,
- 5 they will arise though.
- A marketing order is obviously the
- 7 more stringent, more severe of the two. But a
- 8 voluntary marketing agreement, if it would
- 9 work, would be a viable solution to reducing
- 10 that public good effect.
- 11 It is well known that that is
- 12 standard in economic theory to reduce the free
- 13 rider effect is to incentivize a cooperative
- 14 effect among growers.
- 15 And that's all.
- 16 JUDGE HILLSON: So that's the only
- 17 copy you have, the only full copy?
- THE WITNESS: Yes, yes.
- 19 JUDGE HILLSON: Okay. Will we be
- 20 able to make extra copies of that? Or should
- 21 I have the proponents do that?
- MS. SCHMAEDICK: Your Honor, if you

- 1 could keep that as your exhibit, we can make
- 2 copies and post them.
- JUDGE HILLSON: All right.
- 4 MS. SCHMAEDICK: Thank you.
- 5 JUDGE HILLSON: All right. So I'm
- 6 going to mark this as Exhibit 12 and this will
- 7 be the official one. And I will receive it
- 8 into evidence as well.
- 9 (Whereupon, the above-referred to
- 10 document was received into the
- 11 record as USDA Exhibit No. 12.)
- 12 JUDGE HILLSON: And I will ask the
- 13 panel if they have questions of you. And if
- 14 anyone needs the official copy to ask their
- 15 questions, I'll be happy to make it available
- 16 to you.
- 17 CROSS EXAMINATION
- 18 MS. SCHMAEDICK: This is Melissa
- 19 Schmaedick. Thank you, Dr. Richards. That
- 20 was a lot of information in a very short
- 21 amount of time.
- 22 But if I understand correctly what

- 1 you're saying is that there is an initial cost
- 2 that is associated with a food scare. Is that
- 3 the 4.5 million that you're talking about?
- 4 THE WITNESS: That's the initial
- 5 cost to avoid a future food scare.
- 6 MS. SCHMAEDICK: Okay.
- 7 THE WITNESS: So we assume that
- 8 that 4.5 million dollar investment essentially
- 9 buys us immunity from another.
- 10 MS. SCHMAEDICK: Okay. So what you
- 11 are trying to do is quantify the benefit.
- 12 THE WITNESS: Yes, as part of the
- 13 analysis, we would have to quantify the
- 14 benefit. But the ultimate goal is to predict
- 15 how long it will take before we are willing to
- 16 commit to that 4.5 million dollars.
- 17 MS. SCHMAEDICK: Yes, okay. Thank
- 18 you.
- 19 JUDGE HILLSON: Anything else from
- 20 the panel?
- Go ahead, Ms. Dash.
- MS. DASH: Suzanne Dash, AMS.

- 1 In your article that is coming out,
- 2 when is that coming -- going to be published?
- 3 THE WITNESS: December of this
- 4 year.
- 5 MS. DASH: December? In your
- 6 conclusions, do you suggest that one of the
- 7 solutions is a USDA marketing agreement or
- 8 order?
- 9 THE WITNESS: Yes, yes we do.
- 10 MS. DASH: You do? What other
- 11 suggestions -- are there any other
- 12 suggestions?
- 13 THE WITNESS: Yes, the ones that I
- 14 just outlined in terms of government
- 15 responses.
- MS. DASH: Okay.
- 17 THE WITNESS: To reduce the
- 18 hysteretic effect, we can reduce the amount of
- 19 the initial investment if we could somehow
- 20 subsidize the amount of the investment in food
- 21 safety, that reduces -- remember our
- 22 sensitivity analysis with respect to that to

- 1 the hysteresis, if we reduce the amount of the
- 2 initial investment, that time to invest gets a
- 3 lot smaller. So we can -- that's one option
- 4 we can do.
- 5 MS. DASH: I don't know if you have
- 6 read the proposal? Are you familiar with the
- 7 proposal?
- 8 THE WITNESS: Yes, yes, I am.
- 9 MS. DASH: Can you give us your
- 10 opinion on the marketing agreement, the
- 11 proposed marketing agreement? If you think
- 12 that it would be useful to reduce incidents of
- 13 --
- 14 THE WITNESS: I think it would be
- 15 very useful.
- 16 MS. DASH: -- produce outbreaks,
- 17 contamination outbreaks?
- 18 THE WITNESS: Yes. I think it
- 19 would be very useful. That was the rationale
- 20 behind the legislation when it was initially
- 21 passed to enable things like this. It was
- 22 written with some very good economic theory in

- 1 mind that they knew this was the fundamentals
- 2 of the way the market worked. And that if we
- 3 would allow them to get together to operate in
- 4 this way, we could get around a lot of these
- 5 public good effects that -- food safety is
- 6 just one example of them. I do a lot of
- 7 research in collective marketing and market
- 8 power issues and things like this.
- 9 Any time there is a market failure,
- 10 if we can enable growers to get together to do
- 11 cooperative efforts like this, particularly
- 12 voluntary agreements, it is the most valuable
- 13 thing we could do. And, most importantly, it
- 14 is the cheapest thing we could do, too,
- 15 because it doesn't involve subsidization.
- 16 MS. DASH: Some of your research
- 17 results, you were reporting things in weeks.
- 18 Can you explain how we might use that to
- 19 analyze this proposal? I mean how can we use
- 20 your research when we're looking at costs and
- 21 benefits of this proposal?
- 22 THE WITNESS: Well, I think that is

- 1 a very good question. Remember, to calculate
- 2 the number of weeks that it would take to
- 3 participate in it, to make an investment from
- 4 a grower perspective, it is still a cost
- 5 versus benefit comparison.
- 6 But what I do in this paper is just
- 7 address some of those weaknesses of just
- 8 comparing cost versus benefits. There are
- 9 lots of other things that we have to take into
- 10 account here.
- 11 So I think when we look at
- 12 explaining delays in investment or a lack of
- 13 willingness to make an investment, we have to
- 14 go beyond just comparing cost to benefits. We
- 15 have to say how can we put this into a time
- 16 frame? How can we say that there was a delay
- 17 in investing?
- 18 I think that is a more relevant
- 19 question than just comparing costs and
- 20 benefits because what we observed is that
- 21 growers didn't invest. And if we just look at
- 22 the numbers, their benefit versus cost, I

- 1 cited some of the demand literature that
- 2 consumers would pay. It looks -- to an
- 3 average person on the street, it looks like it
- 4 is a no-brainer for an individual grower to
- 5 invest in food safety because the benefits are
- 6 there and the costs are quite a bit less based
- 7 on our analysis anyways.
- 8 But it is a more subtle thing to
- 9 explain why they didn't invest. If it is so
- 10 obvious, why didn't they? There has to be
- 11 some more underlying reasons behind it.
- 12 So I think in terms of your
- 13 analysis, you know, to go beyond that, just
- 14 looking at the cost and benefits, I think it
- is an important one because the real economic
- 16 issue here is the value of the cooperative
- 17 effort. And that gets around the public good
- 18 effect, which we show to be stronger.
- 19 The thing is, too, is that the
- 20 hysteretic effect is a market response. It is
- 21 not a market failure. This is still the
- 22 market working well and growers responding to

- 1 the incentives that they face. So it is a
- 2 market outcome.
- 3 The market fails in the public good
- 4 case. So this is something that we'd need an
- 5 institution to address. And that's what the
- 6 marketing agreement does.
- 7 MS. DASH: And your recommendations
- 8 were those several recommendations. And did
- 9 you recommend one more than --
- 10 THE WITNESS: Well, they're not
- 11 necessarily recommendations. Most of the ones
- 12 that I laid out were potential policy
- 13 solutions, things that we can do. But, you
- 14 know, realizing that a lot of the more heavy-
- 15 handed government solutions just aren't either
- 16 politically feasible or economically feasible
- 17 because they involve budgetary outlays that
- 18 aren't likely to happen.
- 19 My sole recommendation is to either
- 20 have a marketing agreement or marketing order.
- 21 Either one of those would achieve the same
- 22 purpose.

- 1 MS. DASH: Thank you.
- JUDGE HILLSON: Anything else from
- 3 the panel?
- 4 (No response.)
- 5 JUDGE HILLSON: Anything from -- go
- 6 ahead, Mr. English.
- 7 MR. ENGLISH: Good afternoon,
- 8 Charles English.
- 9 Sir, have you been here all day?
- 10 THE WITNESS: No, I just got in
- 11 from Arizona about one o'clock.
- MR. ENGLISH: A few moments ago in
- 13 response -- sir, I'm sorry, I apologize, I
- 14 represent the National Organic Coalition,
- 15 since you weren't here earlier, I apologize.
- 16 And we have expressed some concerns legally
- 17 and otherwise. And I just have some questions
- 18 for you.
- I believe in answer to a question
- 20 from the Department, you said that you agreed,
- 21 that's your assumption that by making the
- 22 investment of 4.5 million dollars, you would

- 1 be able to avoid a future outbreak, was a big
- 2 assumption?
- THE WITNESS: Oh, that is -- it's
- 4 a strong assumption but it is a necessary
- 5 assumption to do the analysis. If we wanted
- 6 to, we could have said that that 4.5 million
- 7 would reduce the probability by X. It
- 8 wouldn't change our results. It would just be
- 9 a --
- 10 MR. ENGLISH: It would change the
- 11 numbers. It would change --
- 12 THE WITNESS: Yes.
- 13 MR. ENGLISH: -- some of the weeks.
- 14 THE WITNESS: It would change them
- 15 to a degree. But it wouldn't change the
- 16 nature of the conclusions.
- 17 MR. ENGLISH: You indicated that
- 18 you ultimately conclude that some of the
- 19 solutions you suggest are "heavy handed" and
- 20 that is why you conclude ultimately for a
- 21 marketing agreement or marketing order.
- 22 First, why do you conclude that a

- 1 marketing agreement or a marketing order are
- 2 the same thing?
- THE WITNESS: No, no, I'm sorry if
- 4 I was misunderstood.
- 5 MR. ENGLISH: If I heard that,
- 6 please correct me.
- 7 THE WITNESS: They would have the
- 8 same effect --
- 9 MR. ENGLISH: Okay.
- 10 THE WITNESS: -- because they would
- 11 -- if we look at the results from the
- 12 California Leafy Greens, what is it, 99
- 13 percent participation of that order? What's
- 14 the difference between 99 percent and having
- 15 everyone participating between the agreement
- 16 and the order? So it's a very small
- 17 difference in the effect.
- 18 Now, in terms of the legislation
- 19 and the politics to bring it off, there is a
- 20 significant difference between the agreement
- 21 and the order.
- MR. ENGLISH: And I apologize and

- 1 thank you for the correction. That -- it is
- 2 the same effect. And I think that is the
- 3 point I was trying to get at.
- 4 You agree that it has had the same
- 5 effect in California. That for you, as an
- 6 economist, 99 percent is --
- 7 THE WITNESS: Very close.
- 8 MR. ENGLISH: -- very close to 100
- 9 percent and ultimately has the same effect of
- 10 eliminating free riders.
- 11 THE WITNESS: Right.
- MR. ENGLISH: Correct?
- 13 THE WITNESS: Yes.
- MR. ENGLISH: Is that correct, sir?
- THE WITNESS: Yes.
- MR. ENGLISH: In terms of other
- 17 solutions that you conclude are either for
- 18 budgetary or other reasons not likely to
- 19 occur, is one of those that you considered and
- 20 discarded for this purpose regulation by the
- 21 FDA?
- 22 THE WITNESS: It would fall under

- 1 one of those -- the category of solutions, I
- 2 guess I call as being a government mandate.
- 3 And a government mandate is always a possible
- 4 solution I guess. But just in terms of this
- 5 climate, in terms of the industry itself, I
- 6 guess it would be politically less acceptable
- 7 to the industry.
- 8 I don't know the dynamics. That's
- 9 not my job. I'm an economist. I'm not a
- 10 political scientist. But I would imagine that
- 11 something like would be less acceptable to the
- 12 industry.
- MR. ENGLISH: How less acceptable
- 14 to consumers?
- 15 THE WITNESS: Well, I quess there
- 16 is a certain swath of consumers that don't
- 17 like any government intervention no matter
- 18 what its ilk. So there would be a lot of
- 19 consumers that would look at it that way. I
- 20 suppose consumers that were only interested in
- 21 food safety wouldn't mind.
- MR. ENGLISH: Would you agree that

- 1 an FDA mandate, however, or FDA regulation
- 2 could deal with the same issues of free riders
- 3 as a USDA marketing agreement or marketing
- 4 order?
- 5 THE WITNESS: I would agree, yes.
- 6 MR. ENGLISH: You mentioned in your
- 7 case study the cost being shared by 120 firms.
- 8 And I'm wondering where you got the number 120
- 9 for costs in this case.
- 10 THE WITNESS: Again, I'd have to
- 11 look back on my sources. But, again, this
- 12 article is accepted as a publication in a
- 13 journal so I remember we did have a source for
- 14 that in the written article. I have a copy of
- 15 it here if you want to see it.
- MR. ENGLISH: Is that the 120
- 17 signatories, handler/signatories to the
- 18 California Leafy Greens Vegetable?
- 19 THE WITNESS: I don't believe so.
- 20 I believe we used the Agricultural Census for
- 21 that. Again, I'd have to look.
- MR. ENGLISH: So you think it is

- 1 the growers? You think it is the number of
- 2 growers?
- THE WITNESS: It's growers and
- 4 handlers. It's everyone who would share in
- 5 this investment.
- 6 MR. ENGLISH: Okay. This is why I
- 7 asked you the question about when you got
- 8 here. And so Exhibit 5 from the Department of
- 9 Agriculture indicates that there are 158
- 10 spinach growers, just the growers, forget the
- 11 handlers for a moment, in California. Does
- 12 that number ring a bell with you? Or -- no?
- 13 Okay.
- 14 And the 4.5 million dollars was not
- 15 a number that you independently derived? It
- 16 was a number that you got from a Western
- 17 Growers' citation in the Packer, is that
- 18 correct?
- 19 THE WITNESS: Right. I believe so.
- 20 MR. ENGLISH: Is the risk of
- 21 liability, legal liability for a food-borne
- 22 illness factored into your model in any way?

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1 THE WITNESS: Implicitly. Again,
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- 2 this is an economic model so we can't build in
- 3 all the legal details that potentially exist.
- 4 But given that we are only interested in
- 5 grower returns, the implicit assumption is
- 6 that growers are 100 percent legally liable.
- 7 MR. ENGLISH: And if they are
- 8 legally liable, they have another incentive
- 9 built in for making sure that they have some
- 10 food safety. Maybe not the level you are
- 11 looking at, but some food safety protections.
- 12 THE WITNESS: I wouldn't call it
- 13 another, I would call it the incentive --
- 14 MR. ENGLISH: You would call it --
- 15 THE WITNESS: -- that they have.
- 16 MR. ENGLISH: -- the incentive.
- 17 THE WITNESS: Right.
- 18 MR. ENGLISH: Now you talked about
- 19 -- at one point you mentioned that this is a
- 20 good candidate for the study because there is
- 21 a fixed investment, correct?
- THE WITNESS: Yes.

- 1 MR. ENGLISH: Does the fixed
- 2 investment change if there are buyers who,
- 3 after the fixed investment has been made,
- 4 require additional audits or additional --
- 5 impose additional destructions?
- 6 THE WITNESS: Yes. Remember we
- 7 considered a range of initial investments from
- 8 1.5 to 7.5 million. If there was other buyers
- 9 that imposed those costs, we would just add
- 10 that on to our 4.5 million and interpret our
- 11 results closer to our 7.5 million initial
- 12 investment.
- MR. ENGLISH: And do you know if,
- in fact, there are such buyers today who still
- 15 have requirements?
- 16 THE WITNESS: I've heard that there
- 17 are, yes.
- 18 MR. ENGLISH: Yes?
- 19 THE WITNESS: Yes.
- 20 MR. ENGLISH: That's all the
- 21 questions I have. Thank you.
- JUDGE HILLSON: Any other questions

- 1 from the non-USDA folks?
- 2 (No response.)
- JUDGE HILLSON: Did you have any
- 4 redirect you wanted to ask Dr. Richards?
- 5 MR. WILKINSON: I have just a
- 6 couple of questions, Your Honor, Robert
- 7 Wilkinson for Western Growers Association.
- 8 REDIRECT EXAMINATION
- 9 MR. WILKINSON: So, Dr. Richards,
- 10 your calculation takes into account the
- 11 potential legal liability of the growers and
- 12 the handlers, correct?
- 13 THE WITNESS: Again, it is not
- 14 something that is explicitly in the model.
- 15 But because growers take the market returns,
- 16 the implicit assumption is that they are
- 17 legally liable for it.
- 18 MR. WILKINSON: And the market
- 19 returns would reflect legal liability?
- 20 THE WITNESS: Right.
- 21 MR. WILKINSON: Could you give us a
- 22 brief summary of your education? For example,

- 1 where did you take your undergraduate degree?
- 2 THE WITNESS: My undergraduate
- 3 degree is in Commerce and Economics from the
- 4 University of British Columbia in Vancouver.
- 5 My Master's and Ph.D. are in Agricultural
- 6 Economics from Stanford, that Hoover Tower
- 7 reference.
- 8 MR. WILKINSON: And when did you
- 9 get your undergraduate degree?
- 10 THE WITNESS: 1988.
- 11 MR. WILKINSON: And when did you
- 12 get your Master's degree?
- 13 THE WITNESS: Master's in 1989 and
- 14 Ph.D. in 1994.
- MR. WILKINSON: And where have you
- 16 worked since you took your Ph.D.?
- 17 THE WITNESS: I taught for one year
- 18 at University of Alberta in Edmonton, Alberta.
- 19 And I've been at Arizona State University ever
- 20 since.
- 21 MR. WILKINSON: And that's on a
- 22 tenure track position?

- 1 THE WITNESS: Tenure track, yes.
- 2 I'm currently the Marvin and June Morrison
- 3 Chair of Agribusiness.
- 4 MR. WILKINSON: And you publish,
- 5 obviously.
- THE WITNESS: Yes.
- 7 MR. WILKINSON: And can you give us
- 8 an estimate of how many peer review
- 9 publications you've had?
- 10 THE WITNESS: Sixty.
- MR. WILKINSON: And do you serve on
- 12 the editorial boards of any journals?
- 13 THE WITNESS: Currently of the
- 14 Agricultural Economics Journal out of the U.K.
- 15 and I have, in the past, served on the
- 16 American Journal of Agricultural Economics
- 17 Board, which is our flagship journal.
- MR. WILKINSON: Thank you.
- 19 THE WITNESS: Thank you.
- 20 JUDGE HILLSON: Any further
- 21 questions?
- (No response.)

- JUDGE HILLSON: Okay. You may step
- 2 down, Doctor.
- 4 inclination, unless people tell me different,
- 5 is to go until six today. And then start at
- 6 eight tomorrow in order to make sure we get
- 7 our way through this process, which we seem to
- 8 be making some pretty good progress on.
- 9 MR. RESNICK: That would be fine
- 10 with us, Your Honor.
- 11 JUDGE HILLSON: And so let's take -
- 12 it's three o'clock approximately. Let's
- 13 come back in 15 minutes.
- Oh, I've been asked to advise you
- 15 that there is another event -- there is an
- 16 event going on on the patio. And if you are
- 17 going to go that way, turn right and go --
- 18 rather than going out onto the patio, turn
- 19 right.
- 20 (Whereupon, the foregoing matter
- went off the record at 3:03 p.m.
- 22 and went back on the record at 3:23

- 1 p.m.)
- JUDGE HILLSON: Let's go back on
- 3 the record please.
- 4 Mr. Resnick?
- 5 MR. RESNICK: Thank you, Your
- 6 Honor.
- 7 At this time, we're going to recall
- 8 Dr. Richards briefly.
- 9 (Witness recalled.)
- 10 JUDGE HILLSON: I have been asked
- 11 to remind witnesses to stay close to the
- 12 microphone please.
- MR. WILKINSON: Your Honor, Robert
- 14 Wilkinson, Baker Manock & Jensen, on behalf of
- 15 the Western Growers Association.
- 16 Dr. Richards, during your
- 17 testimony, there was a discussion of a time
- 18 period of weeks. And I wanted to give you the
- 19 opportunity to explain what you were referring
- 20 to.
- 21 THE WITNESS: Okay. Thank you for
- 22 that opportunity. Basically the week metric

- 1 that I was talking about is our measure of the
- 2 potential delay in making an investment.
- 3 So, again, to reiterate the sort of
- 4 the counterfactual or the hypothetical
- 5 situation that we set up, is imagine we start
- 6 an industry from ground zero. We invent a new
- 7 produce item. And we start the industry up.
- 8 There are 120 growers. That each have the
- 9 opportunity to make an investment in a food
- 10 safety program.
- 11 What we're trying to do is explain
- 12 that delay that they apparently make in
- investing in a food safety program. So when
- 14 we talk about weeks, that means the number of
- 15 weeks that they would wait before they take
- 16 the opportunity to invest in a program that
- 17 will prevent any kind of a food safety
- 18 outbreak from happening.
- 19 So think of that number of weeks as
- 20 being the measure of the delay or the
- 21 reluctance to invest in a food safety
- 22 investment.

- 1 So the longer that delay in number
- 2 of weeks, the greater the probability they are
- 3 not going to invest and the greater the chance
- 4 that there is going to be a food-borne disease
- 5 outbreak that reduces their revenues.
- 6 MR. WILKINSON: So a zero would be
- 7 the beginning of the industry, correct?
- 8 THE WITNESS: Zero would be --
- 9 that's a good way to think about it. A zero
- 10 result will be when the growers put their
- 11 plants in the ground at the same time they
- 12 invest in a sufficient food safety program to
- 13 prevent any food-borne disease outbreaks from
- 14 happening.
- 15 MR. WILKINSON: And then five weeks
- 16 out, what would that represent?
- 17 THE WITNESS: They would wait five
- 18 weeks before they invest. And I think if you
- 19 take the argument reductio ad absurdum, you
- 20 take it to an extreme, if it was 500 weeks,
- 21 that would mean ten years before they invest
- 22 or they virtually never invest in a food

- 1 safety program.
- 2 MR. WILKINSON: And with the
- 3 proposed 4.5 million dollar investment, how
- 4 many weeks would they wait before they invest?
- 5 THE WITNESS: Again, if I remember
- 6 the results under our baseline scenario, with
- 7 the hysteretic effect, they would wait seven
- 8 weeks. With the public good effect, they
- 9 would wait 11 weeks. And in a perfectly
- 10 operating industry, they would only wait two
- 11 weeks.
- MR. WILKINSON: Thank you. That's
- 13 all I have.
- JUDGE HILLSON: Did that open the
- 15 door for any more questions from the panel or
- 16 from Mr. English?
- 17 (No response.)
- 18 JUDGE HILLSON: Okay. Thanks.
- 19 THE WITNESS: Thank you.
- JUDGE HILLSON: You may step down.
- 21 And you may call your next witness,
- 22 Mr. Resnick.

- 1 MR. RESNICK: Thank you, Your
- 2 Honor.
- 3 Proponent group will call Sammy
- 4 Duda.
- 5 JUDGE HILLSON: I'm going to mark
- 6 Mr. Duda's statement as Exhibit 13.
- 7 (Whereupon, the above-referred to
- 8 document was marked as USDA Exhibit
- 9 No. 13 for identification.)
- 10 JUDGE HILLSON: Please raise your
- 11 right hand, sir.
- 12 WHEREUPON,
- 13 SAMMY DUDA
- 14 was called as a witness by Counsel for the
- 15 Proponents, having been first duly sworn,
- 16 assumed the witness stand, was examined and
- 17 testified as follows:
- 18 DIRECT TESTIMONY
- 19 JUDGE HILLSON: Okay, please state
- 20 your name and spell it for the record.
- 21 THE WITNESS: My name is Sammy
- 22 Duda. That's S-A-M-M-Y D-U-D-A.

- 1 JUDGE HILLSON: And you have a
- 2 statement you want to read, sir?
- 3 THE WITNESS: Yes, I do.
- JUDGE HILLSON: You may go ahead.
- 5 THE WITNESS: Thank you.
- 6 My name is Sammy Duda. I am Vice
- 7 President of Duda Farm Fresh Foods, a large
- 8 leafy green grower/shipper with operations in
- 9 the Salinas and San Joaquin Valleys of
- 10 California, Yuma, Arizona, and Belle Glade,
- 11 Florida. I have held my present position for
- 12 the past seven years and have been in the
- industry virtually my entire life.
- 14 Our company plants and harvests
- 15 approximately 3,500 acres of iceberg lettuce,
- 16 1,600 acres of romaine, and approximately 500
- 17 acres of mixed leaf lettuces including green
- 18 leaf, red leaf, and butter lettuces. We are
- 19 considered a large handler.
- 20 As a participant in the California
- 21 Leafy Greens Marketing Agreement for the last
- 22 three years, I have seen this program in

- 1 action. The California LGMA has resulted in a
- 2 new focus on food safety in which we, as
- 3 growers/handlers abide by best practices that
- 4 are consistent, specific, measurable, and
- 5 verifiable in the field. Historically,
- 6 without uniform safety requirements, we were
- 7 dependent on the safety practices of all other
- 8 growers and shippers in the county, state, and
- 9 beyond.
- 10 Outbreaks such as the E. coli
- 11 outbreak in September 2006 effected the entire
- 12 industry and we destroyed crops and
- 13 experienced financial losses even though we
- 14 don't grow and ship spinach because consumers
- 15 lost confidence in our entire industry's
- 16 ability to put forward the safest products
- 17 possible.
- 18 The leafy green marketing
- 19 agreements, governing fresh leafy greens in
- 20 Arizona and California respectively, assist us
- 21 in doing just that. We believe that as a
- 22 signatory to the marketing agreements, we are

- 1 less likely to be detrimentally impacted by
- 2 the safety performance of another grower or
- 3 shipper.
- While they are voluntary programs,
- 5 the signatories undergo regular and random
- 6 audits conducted by their state's Department
- 7 of Agriculture based on specific good
- 8 agricultural practices that are both
- 9 protective and practical. Those enrolled
- 10 handlers agree to purchase only leafy greens
- 11 grown according to the accepted good
- 12 agricultural practices.
- 13 By adhering to these best
- 14 practices, we are effectively minimizing the
- 15 potential for product contamination.
- 16 Participation is renewed on an annual basis.
- 17 As a signatory to the California
- 18 Leafy Greens Agreement, we also believe we are
- 19 effectively minimizing the potential for
- 20 contamination and that the state LGMAs
- 21 position the industry to engage directly with
- 22 the FDA and state public health agencies to

- 1 facilitate the rapid identification and
- 2 mitigation of any contamination as well as to
- 3 refine the program with an eye towards
- 4 continual improvement.
- 5 The implementation of the
- 6 California and Arizona Leafy Greens Marketing
- 7 Agreements provides our buyers and ultimately
- 8 the consumer with a science-based safety
- 9 program.
- 10 They now know the full scope of
- 11 what we look for, test, and monitor when
- 12 implementing food safety programs and we can
- 13 have confidence that our efforts are
- 14 consistently and constantly verified by state
- 15 government inspectors. While some buyers
- 16 still have unique requirements, the marketing
- 17 agreement has fostered consistency in safety
- 18 requirements.
- 19 With approximately 90 percent of
- 20 all leafy greens already being covered by the
- 21 California or Arizona LGMA, the implementation
- 22 of a national marketing agreement should bring

- 1 about nominal incremental costs for both
- 2 growers selling to handlers and handlers who
- 3 are signatories of those state's agreements.
- 4 Involvement in a national program could be
- 5 financially beneficial with improved buyer and
- 6 consumer confidence.
- 7 I do not expect our costs to
- 8 increase significantly under the National
- 9 Leafy Greens Marketing Agreement since we have
- 10 already made the necessary investments to
- 11 comply with the California and Arizona Leafy
- 12 Greens Marketing Agreements and have, on our
- own, implemented similar programs in our
- 14 regional areas of production. The addition of
- 15 a national agreement will not result in
- 16 additional personnel, capital, or testing
- 17 costs for our company.
- 18 I have also examined the business
- 19 case study financials as a large
- 20 grower/shipper and find them to be
- 21 representative of the costs we have incurred
- 22 and may incur.

- 1 Our experience with the California
- 2 Leafy Greens Marketing Agreement has been
- 3 positive and we would expect the same kind of
- 4 experience nationally. This national
- 5 agreement will bring the same standards to all
- 6 companies growing, packaging, or selling leafy
- 7 greens across the U.S.
- 8 This is a huge leap forward for
- 9 product safety. With national standards in
- 10 place, industry buyers can now see the issues
- 11 on food safety much more clearly and thus
- 12 address these issues with a consistent and
- 13 cost-effective direction or plan.
- We would, therefore, like to go on
- 15 record as supporting the National Leafy Greens
- 16 Marketing Agreement, which should bring
- 17 standardization across the country to our
- 18 industry that will improve all aspects and
- 19 phases of growing, handling, processing, and
- 20 shipping, thereby allowing consumers, the
- 21 final end users, confidence and trust in these
- 22 nutritious products.

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1 Thank you.
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- JUDGE HILLSON: Thank you.
- 3 Do you have any further direct of
- 4 this witness?
- 5 (No response.)
- 6 JUDGE HILLSON: Okay. I'm going to
- 7 receive Exhibit 13 into evidence.
- 8 (Whereupon, the above-referred to
- 9 document was received into the
- 10 record as USDA Exhibit No. 13.)
- JUDGE HILLSON: And I'm going to
- 12 ask the panel if they have any questions for
- 13 Mr. Duda.
- Go ahead, Ms. Schmaedick.
- 15 CROSS EXAMINATION
- 16 MS. SCHMAEDICK: This is Melissa
- 17 Schmaedick.
- 18 Mr. Duda, in your prepared
- 19 statement, you said that -- where did it go --
- 20 that because consumers lost confidence in the
- 21 industry, that there were huge losses. And
- 22 the confidence that was lost was in the entire

- 1 industry's ability to put forward the safest
- 2 products possible.
- 3 By making that statement are you
- 4 saying that consumers view food safety or the
- 5 absence of risk to be important in determining
- 6 whether or not their food is quality?
- 7 THE WITNESS: Well, I think food
- 8 safety is a food quality issue, no question.
- 9 You know people, you know, I think in -- as
- 10 with anything, if the quality or the safety of
- 11 that product is somehow in doubt, I think it
- 12 does impact the quality or at least the
- 13 perceived quality of that purchase, yes.
- 14 MS. SCHMAEDICK: In the development
- of this proposal have you been aware of
- 16 discussions within the industry and has the
- 17 national agreement that is being proposed been
- 18 widely discussed among your peers, growers,
- 19 and handlers that you interact with? Is there
- 20 a wide base knowledge and understanding that
- 21 this proposal exists?
- 22 THE WITNESS: In the areas in which

- 1 we operate, I would say yes. You know in some
- 2 areas that we don't, I don't know how widely
- 3 known the agreements or the outline is
- 4 understood or -- I can't speak to that. But
- 5 within the areas in which we operate, I
- 6 believe it is widely known and discussed.
- 7 MS. SCHMAEDICK: Would you be
- 8 comfortable saying that there certainly has
- 9 been an effort made to have an open discussion
- 10 about this proposal and its development?
- 11 THE WITNESS: I think so, yes.
- MS. SCHMAEDICK: You also mentioned
- in your testimony that currently roughly 90
- 14 percent of growers in California and Arizona
- 15 participate. And so that if a program were to
- 16 go national, that the costs would be
- 17 incremental.
- 18 My question is for a grower or
- 19 handler that currently isn't actively
- 20 conducting some of the actions that would be
- 21 required under the program, is there sort of a
- 22 cost of entry, if you will, or are there some

- 1 start up costs that would be present in order
- 2 for those folks to become compliant with the
- 3 program?
- 4 THE WITNESS: That would be yes.
- 5 MS. SCHMAEDICK: Once those initial
- 6 costs are made, the costs are then continuing
- 7 to implement and run that program on a regular
- 8 basis, are those costs then diminished or
- 9 minimized over time after that initial cost
- 10 impact?
- 11 THE WITNESS: It depends on the
- 12 circumstances of the individual grower. And
- 13 it depends on how that individual grower
- 14 really wants to set up their program.
- MS. SCHMAEDICK: Yes.
- 16 THE WITNESS: I don't know that
- 17 they diminish because you have, you know, set
- 18 backs and stuff that you would have to --
- 19 well, we don't really know what the regulation
- 20 would be so it is very hard to -- or I
- 21 shouldn't say regulation but what the
- 22 guidelines will be on a national basis.

- 1 MS. SCHMAEDICK: Yes.
- 2 THE WITNESS: But once they are
- 3 implemented, there is a maintenance or
- 4 maintaining, I would think, those guidelines.
- 5 So I don't know that it diminishes. It stays
- 6 perhaps steady.
- 7 MS. SCHMAEDICK: Okay.
- 8 THE WITNESS: But it is a steady
- 9 cost that doesn't -- and depending on what the
- 10 agreement would be, obviously if they change
- 11 and there are higher requirements, it could go
- 12 up. Some things could go away. So it's very
- 13 difficult to say on a year-to-year basis if it
- 14 would go up or down honestly.
- MS. SCHMAEDICK: You have
- 16 identified yourself as a large handler. Do
- 17 you -- within your community, do you interact
- 18 with businesses that would be considered a
- 19 small handler?
- 20 THE WITNESS: Yes. We -- actually
- 21 there would be quite a few witnesses for what
- 22 I consider small growers. There is a network

- 1 of growers that we use from what would be
- 2 considered large growers to relatively small
- 3 growers. And so there is a great deal of
- 4 interaction between growers of all sizes.
- 5 MS. SCHMAEDICK: And based on your
- 6 observations and your interactions with those
- 7 other businesses, growers or handlers, are
- 8 those other businesses currently participating
- 9 in the California Leafy Greens Program?
- 10 THE WITNESS: Yes.
- 11 MS. SCHMAEDICK: Have those
- 12 businesses, in particular the smaller business
- 13 entities, have they suffered losses because of
- 14 their participation in the program?
- 15 MR. ENGLISH: Objection. No
- 16 foundation. Calls for speculation.
- JUDGE HILLSON: Oh, I'll let him
- 18 answer it.
- MS. SCHMAEDICK: I'm sorry.
- 20 JUDGE HILLSON: I said he can
- 21 answer the question.
- MS. SCHMAEDICK: Okay.

- 1 JUDGE HILLSON: He objected that
- 2 that called for speculation but given that
- 3 this is a rulemaking hearing, we see a lot of
- 4 speculation.
- 5 (Laughter.)
- 6 JUDGE HILLSON: If it was a trial,
- 7 it might be different. You can answer it if
- 8 you have an answer.
- 9 THE WITNESS: The growers we have
- 10 dealt with, you know, they have certainly
- 11 incurred the cost like any other grower. If
- 12 they incurred losses? Not that I'm aware of.
- MS. SCHMAEDICK: Within your
- 14 business community, is there a belief that the
- 15 program has been beneficial in spite of the
- 16 costs?
- 17 THE WITNESS: Yes.
- MS. SCHMAEDICK: Okay. That's it
- 19 for me. Thank you.
- 20 JUDGE HILLSON: Anyone else? Go
- 21 ahead, Mr. Souza.
- MR. SOUZA: Thank you. Tony Souza.

- 1 Mr. Duda, you mentioned that you
- 2 have operations in California, Yuma, and Bell
- 3 Glade, Florida. And I was wondering how or
- 4 what the differences are between your
- 5 operations in the two areas, Arizona and
- 6 California, that are under leafy greens
- 7 marketing agreements. And that of your
- 8 operation in Florida, which is not.
- 9 THE WITNESS: Well, there are a lot
- 10 of similarities but there are differences that
- 11 I think, based on the region, you know there's
- 12 weather patterns, time of the year, a number
- 13 of different just environmental differences
- 14 just based on the location.
- There's different methods of
- 16 growing based on the soil types and water
- 17 delivery systems and so forth. So there are
- 18 regional differences. You know growing the
- 19 same crops but the way you grow them based on
- 20 those environmental conditions specific to
- 21 that region, there are some differences.
- 22 MR. SOUZA: The differences that

- 1 you operate under in Bell Glade, Florida
- 2 compared to those that are under marketing
- 3 agreements that exist already, are those
- 4 internal measurements that your company looks
- 5 for to see whether or not you achieve those?
- 6 Do you go outside and have another
- 7 third-party organization come in and audit to
- 8 that? How did you develop the differences
- 9 between the best practices that you are
- 10 currently using in both Arizona and California
- 11 and those that you adapted to Florida? And
- 12 then how do you measure those?
- 13 THE WITNESS: We do have third-
- 14 party audits. We also have our own internal
- 15 food safety manuals that take into account
- 16 those different areas. For instance, Yuma
- 17 gets 2.2 inches of rain a year, Bell Glade
- 18 gets 60. So that in and of itself would, you
- 19 know, create some differences in the
- 20 environment. And that we have adapted based
- 21 on certain I quess things that are unique to
- 22 those specific areas.

- 1 And it has been developed over a
- 2 course of time. Even before the leafy greens
- 3 agreement in the West, we had those things in
- 4 place to some degree.
- 5 But I think the audits and the
- 6 greater emphasis on the audit trail is a
- 7 living document. So it continues to evolve
- 8 and develop as things are discovered or
- 9 uniqueness in those areas are fleshed out and
- 10 adjusted to.
- 11 MR. SOUZA: That's all my
- 12 questions. Thank you.
- JUDGE HILLSON: Go ahead, Ms.
- 14 Carter.
- MS. CARTER: Good afternoon.
- 16 Antoinette Carter with the USDA.
- Just a couple of questions one of
- 18 which is a follow-up question concerning --
- 19 you noted in your prepared statement, you
- 20 discussed that your company did suffer a loss
- 21 with regards to the 2006 outbreak. Are you
- 22 able to quantify that loss and/or discuss how

- 1 long of a period your company was negatively
- 2 impacted?
- THE WITNESS: I'd rather not
- 4 specify the loss.
- 5 MS. CARTER: Yes.
- 6 THE WITNESS: But I would say the
- 7 industry -- we feel like the industry, at
- 8 least our area because we're not in the
- 9 spinach business, was impacted for probably
- 10 six months, I would say, at least, as a lot of
- 11 the -- I would say fall out from lack of an
- 12 agreement such as what we're talking about
- 13 today, that it exists and what kinds of
- 14 balances that you have in place created some
- doubt in consumers' and buyers' minds, which
- 16 is never a good thing for our industry.
- 17 MS. CARTER: Just as a follow up,
- 18 prior to the outbreak, was your company -- did
- 19 you already have systems in place where you
- 20 were utilizing and implementing best practices
- 21 on your own?
- THE WITNESS: Yes, we did.

- 1 MS. CARTER: Okay. Thank you.
- JUDGE HILLSON: Anything else from
- 3 the USDA panel?
- 4 Okay, Ms. Dash.
- 5 MS. DASH: Suzanne Dash, AMS.
- 6 I'm sorry to sound really picky but
- 7 when you classify yourself as a large handler,
- 8 is that according to the SBA definition?
- 9 THE WITNESS: Yes.
- 10 MS. DASH: Thanks. And in your
- 11 statement, you said that you could identify
- 12 with the projected costs of a large producer
- 13 that was presented earlier? I don't know if
- 14 you have a copy of that but there's a 20-
- 15 dollar per acre scenario and a 30-dollar, and
- 16 a 50-dollar per acre. Was there one that, you
- 17 know, you felt was more representative of your
- 18 company that you care to share with us?
- 19 THE WITNESS: There was a -- yes,
- 20 it was the 50 dollar was more along the lines
- 21 of what we have experienced.
- MS. DASH: Okay. Within that

- 1 example, are there costs there that seem too
- 2 high or too low for your -- I mean how are you
- 3 most similar? Is there anything that you feel
- 4 not similar to? And then I was wondering if
- 5 you could give some examples of -- since
- 6 personnel cost is such a big part of it, you
- 7 know, what sorts of things go into that
- 8 category?
- 9 THE WITNESS: Well, we had food
- 10 safety -- a smaller staff of food safety on
- 11 our payroll before leafy greens and so forth.
- 12 And so as the audit trail and the requirements
- increased, we did add personnel. In fact, we
- 14 added a Ph.D. to our staff. And so that would
- 15 be an example.
- 16 Now that is not required,
- 17 obviously. But it was just something we felt
- 18 like internally to be able to do it the way we
- 19 felt like we needed to do it across states in
- 20 various operations. That was what we felt
- 21 like we needed to do to be consistent. So in
- 22 our instance, that would be an example of an

- 1 increase in cost.
- MS. DASH: Well, you don't have it
- 3 in front of you. I was just wondering do you
- 4 -- if, within that 50-dollar per acres, the
- 5 categories seem reasonable for your costs? Or
- 6 if you remember when you looked at it?
- 7 THE WITNESS: From what I've seen,
- 8 we fit into those categories. To say it is
- 9 exactly this or exactly that, I wouldn't say.
- 10 But the range is accurate.
- MS. DASH: Okay. Do you have other
- 12 commodities other than lettuce? I know you
- 13 said you don't do spinach. Did you just
- 14 mention the leafy greens you do? Or do you do
- 15 other --
- 16 THE WITNESS: I did. We do quite a
- 17 few other things, yes.
- 18 MS. DASH: Okay. That's all I
- 19 have. Thank you.
- 20 JUDGE HILLSON: Anything else from
- 21 the USDA panel?
- 22 (No response.)

- 1 JUDGE HILLSON: Anything else from
- 2 any of the other folks up here? Do you have
- 3 any questions? Do you have any redirect?
- 4 (No response.)
- 5 JUDGE HILLSON: Okay. Thanks very
- 6 much, Mr. Duda. You may step down. Thank you
- 7 for testifying.
- 8 Mr. Resnick, you may call your next
- 9 witness.
- 10 MR. RESNICK: Thank you, Your
- 11 Honor. The proponent group will call Hank
- 12 Giclas.
- JUDGE HILLSON: I'm marking the
- 14 document I just received as Exhibit 14.
- 15 (Whereupon, the above-referred to
- 16 document was marked as USDA Exhibit
- No. 14 for identification.)
- 18 JUDGE HILLSON: Please raise your
- 19 right hand.
- 20 WHEREUPON,
- 21 HENRY GICLAS
- 22 was called as a witness by Counsel for the

- 1 Proponents, having been first duly sworn,
- 2 assumed the witness stand, was examined and
- 3 testified as follows:
- 4 DIRECT TESTIMONY
- JUDGE HILLSON: Okay. State your
- 6 name please and spell it for the record.
- 7 THE WITNESS: My name is Henry
- 8 Giclas, H-E-N-R-Y G-I-C-L-A-S.
- 9 JUDGE HILLSON: Okay. And you have
- 10 a statement you want to read, sir?
- 11 THE WITNESS: I do, sir.
- 12 JUDGE HILLSON: Go right ahead.
- 13 THE WITNESS: Again, my name is
- 14 Henry Giclas. I am the Vice President for
- 15 Strategic Planning, Science, and Technology
- 16 for Western Growers. Western Growers is a
- 17 non-profit trade association representing
- 18 growers and handlers of fresh fruits, nuts,
- 19 and vegetables throughout the States of
- 20 California and Arizona.
- 21 I've been with Western Growers for
- 22 19 years. I have served as a Policy and

- 1 Government Affairs staffer as well in
- 2 Strategic Planning, Science, and Technology.
- In the last few years, I have been
- 4 fundamentally engaged in the development of
- 5 the California and Arizona Leafy Greens
- 6 Marketing Agreements as well as the metrics.
- 7 And led the proponent drafting team in terms
- 8 of the development of the proposal that has
- 9 been moved forward by the proponent group.
- In 2006, after the outbreak
- 11 associated with spinach that halted sales of
- 12 fresh market spinach and significantly
- 13 depressed sales of all leafy greens, our
- 14 Western Growers Board of Directors instructed
- 15 staff to try to develop a leafy green program
- 16 that would help ensure that growers and
- 17 handlers were implementing best practices that
- 18 were specific, measurable, and verifiable and
- 19 to engage government inspectors in the
- 20 auditing of those practices in the field and
- 21 facility.
- We looked at many scenarios

- 1 including the pursuit and promulgation of
- 2 state law and the development of regulation at
- 3 both the state and federal levels.
- 4 We ultimately determined that the
- 5 state and federal marketing authority would
- 6 provide the industry with the best option to
- 7 work collaboratively with state and federal
- 8 regulators in the design and implementation of
- 9 a program that would enhance quality of leafy
- 10 greens by allowing willing handlers to
- 11 voluntarily subject themselves to, and pay
- 12 for, mandatory audits and verification
- 13 processes, ensuring every possible
- 14 preventative step has been taken to make
- 15 certain that leafy greens put into commerce
- 16 and ultimately consumed worldwide have been
- 17 grown and handled according to the best
- 18 available scientific data.
- 19 Western Growers believes that USDA
- 20 is the most appropriate federal agency to
- 21 oversee a national food quality enhancement
- 22 program because of its significant expertise

- 1 and experience in the design and delivery of
- 2 programs that involve inspections for product
- 3 quality and verification of production
- 4 practices.
- 5 At industry's request, USDA has
- 6 incorporated food safety-related elements into
- 7 several of its programs and has established
- 8 programs such as the Qualified Through
- 9 Verification and the GAP&GHP Audit
- 10 Verification Programs to provide independent
- 11 verification that growers and handlers are
- 12 following Food and Drug Administration
- 13 guidance and commodity-specific best
- 14 practices.
- Both the leafy green industry and
- 16 the USDA have a good working relationship with
- 17 the FDA on food quality programs that include
- 18 food safety issues.
- 19 The Agricultural Marketing Service
- 20 of the USDA offers the Fresh Produce Audit
- 21 Verification Program, a voluntary, audit-based
- 22 program for the fresh produce industry based

- 1 on the Guide to Minimize Microbial Food Safety
- 2 Hazards for Fresh Fruits and Vegetables and
- 3 the California and Arizona Leafy Green
- 4 Marketing Agreements.
- 5 Another example of interagency
- 6 cooperation in ensuring safety of our nation's
- 7 food supply is the co-sponsorship of the
- 8 National Advisory Committee on Microbiological
- 9 Criteria for Foods by the Food Safety and
- 10 Inspection Service of the USDA and the FDA
- 11 along with our federal agencies such as the
- 12 Centers for Disease Control and Prevention.
- 13 The FDA has been supportive of the
- 14 utilization of marketing agreements and orders
- 15 to address food safety issues and has worked
- 16 with the fruit and vegetable industry and the
- 17 USDA in developing and implementing best
- 18 practices included in marketing agreements and
- 19 orders.
- In his testimony before the U.S.
- 21 House of Representatives' Subcommittee on
- 22 Domestic Policy and Oversight and Government

- 1 Reform on July 29, 2009, Michael Taylor,
- 2 Senior Advisor to the Commissioner of the FDA
- 3 said the following about the FDA's view of
- 4 marketing agreements and orders to enhance
- 5 produce safety:
- 6 "Although FDA has not had a direct
- 7 role in creating such an agreements, we do
- 8 work collaboratively with our colleagues at
- 9 AMS, which is the federal agency responsible
- 10 for marketing agreements and orders. When AMS
- 11 has incorporated food safety standards into
- 12 its marketing orders, FDA has provided
- 13 technical assistance to AMS on the appropriate
- 14 safety practices and would provide such
- 15 assistance for marketing agreements as well.
- 16 "It is our shared goal that any AMS
- 17 safety standards would incorporate the
- 18 applicable FDA regulations or guidance
- 19 documents.
- 20 "As FDA moves forward to establish
- 21 science-based standards to improve the safety
- 22 of produce, the Agency must have a plan to

- 1 help ensure high rates of adoption. Given the
- 2 number of producers, FDA recognizes the
- 3 importance of leveraging its resources with
- 4 other federal, state, and local agencies to
- 5 help achieve greater compliance.
- 6 "In particular, FDA plans to
- 7 continue to work closely with USDA, which has
- 8 a great deal of experience in agricultural
- 9 production and which has a significant
- 10 workforce, including through its contracts
- 11 with states. We believe that AMS, by
- 12 incorporating FDA's produce safety standards
- in produce-related marketing agreements or
- 14 orders, can help ensure high rates of
- 15 compliance with FDA's standards.
- 16 "The USDA is currently
- 17 administering marketing orders for almonds and
- 18 pistachios that involve food safety-related
- 19 requirements. In September 2007, the USDA
- 20 implemented the requirement for pasteurization
- 21 of almonds as an amendment to Marketing Order
- 22 No. 981 in order to reduce bacterial

- 1 contamination after two Salmonella outbreaks
- 2 in 2001 and 2004."
- The main issue for the marketing
- 4 order for California pistachios that went into
- 5 effect in February 2005 was aflatoxin and the
- 6 economic consequences of a contamination
- 7 event. The marketing order for pistachios
- 8 mandated testing for aflatoxin to improve food
- 9 safety.
- 10 It is critical and timely for the
- industry to demonstrate the ability to apply
- 12 standardized best practices and preventative
- 13 controls to improve and ensure the safety of
- 14 their product in light of the current
- 15 regulatory climate as illustrated again in the
- 16 following statement by Michael Taylor, Senior
- 17 Advisor to the Commissioner of the FDA in his
- 18 testimony before the U.S. House of
- 19 Representatives' Subcommittee on Domestic
- 20 Policy and Oversight and Government Reform on
- 21 July 29, 2009:
- "In the short term, FDA's approach

- 1 is to issue commodity-specific guidance for
- 2 industry on the measures they can implement to
- 3 prevent or minimize microbial hazards of fresh
- 4 produce. To improve compliance with such
- 5 measures, FDA also plans to work with USDA's
- 6 Agricultural Marketing Service to include
- 7 these recommended standards in their marketing
- 8 agreements and orders when appropriate. Our
- 9 long-term plan is to set enforceable produce
- 10 safety standards through a regulation.
- "As the federal regulatory agency
- 12 responsible for ensuring produce safety, FDA
- 13 has begun work on a regulation to establish
- 14 enforceable standards for produce safety under
- 15 our current authorities. The regulation will
- 16 be based on the prevention-oriented public
- 17 health principles embraced by the Working
- 18 Group. It will capitalize on what we have
- 19 learned over the past decade, since we
- 20 published our good ag practices guidelines in
- 21 1998. The regulation also will utilize the
- 22 progress industry has made in establishing

- 1 quantitative metrics for the control of some
- 2 of the factors affecting produce safety by
- 3 incorporating appropriate measures of success.
- 4 These metrics, or measures, will improve our
- 5 ability to verify that certain measures or
- 6 practices are being carried out and are
- 7 effective.
- 8 "Together with its federal and
- 9 state partners, FDA will work to plan and
- 10 implement an inspection and enforcement
- 11 program to ensure high rates of compliance
- 12 with the produce safety regulation. If
- 13 Congress passes food safety legislation that
- 14 includes explicit authority to require
- 15 preventive controls, FDA would modify and
- 16 update this rulemaking in light of the new
- 17 authority.
- 18 "The regulation will include the
- 19 following key elements: clear standards for
- 20 implementation of modern preventive controls
- 21 by all participants in the fresh produce
- 22 supply chain, from farm to market. These

- 1 performance-oriented standards will recognize
- 2 that operators must tailor their preventive
- 3 controls to the particular hazards and
- 4 conditions affecting their operations, but the
- 5 regulation will ensure they do so in
- 6 accordance with modern food safety principles;
- 7 product-specific standards and guidance, where
- 8 appropriate, for high-risk commodities;
- 9 quantitative measures of the effectiveness of
- 10 control systems, to the extent they are
- 11 feasible and valid; and microbial testing
- 12 protocols to verify the effectiveness of
- 13 preventive controls.
- "In order to ensure the quality of
- 15 fresh leafy greens by protecting them from
- 16 potential contamination, the provisions of the
- 17 National Leafy Greens Marketing Agreement will
- 18 include the scientifically-based best
- 19 practices for production and handling, that
- 20 cover all processes involved in the handling
- 21 of leafy greens including all field operations
- 22 from pre- to post-harvesting and all handling

- 1 operations occurring after the crop leaves the
- 2 field. A national marketing agreement would
- 3 allow for verification of the use of best
- 4 practices by audit.
- 5 "It is with this background that I
- 6 am pleased to present the proposal from
- 7 Western Growers, United Fresh Produce
- 8 Association, Produce Marketing Association,
- 9 Georgia Fruit and Vegetable Association, Texas
- 10 Vegetable Association, Growers Shipper
- 11 Association of Central California, Imperial
- 12 Valley Vegetable Growers Association,
- 13 California Farm Bureau Federation, Georgia
- 14 Farm Bureau Federation, Arizona Farm Bureau
- 15 Federation and the California Leafy Green
- 16 Handler Marketing Agreement for a national
- 17 marketing agreement for leafy greens."
- 18 And what I would like to do is walk
- 19 through the first few sections of the
- 20 agreement, beginning with the definitions.
- 21 And the first definition is the
- 22 definition of Act. It means Public Act No.

- 1 10, 73d Congress (May 12, 1933), as amended,
- 2 and as re-enacted and amended by the
- 3 Agricultural Marketing Agreement Act of 1937.
- 4 The Agricultural Marketing
- 5 Agreement Act of 1937 provided authority for
- 6 federal marketing orders, and also reaffirmed
- 7 the marketing agreements provisions of the
- 8 Agricultural Adjustment Act of 1933.
- 9 Under the authority of this
- 10 permanent law and subsequent amendments,
- 11 marketing orders have been established for
- 12 numerous fruits, vegetables, and specialty
- 13 crops.
- 14 Marketing orders and agreements are
- 15 legal instruments issued by the USDA Secretary
- 16 that are designed to stabilize market
- 17 conditions for certain agricultural
- 18 commodities by regulating the handling of
- 19 those commodities in interstate or foreign
- 20 commerce. Under the applicable regulations,
- 21 marketing orders for any commodity or its
- 22 products, must be designed to accomplish at

- least one of the following goals:
- 2 Limit and/or allot the amount of
- 3 any commodity, or any grade, size, or quality
- 4 of that commodity that is marketed;
- 5 Provide for control and disposition
- 6 of surplus commodities and establish reserve
- 7 pools;
- 8 Require inspection of the commodity
- 9 covered by the marketing order or agreement;
- 10 Provide a method for fixing the
- 11 size, capacity, weight, dimensions, or pack of
- 12 the container, or containers, which may be
- 13 used in the packaging, transportation, sale,
- 14 shipment, or handling of any fresh or dried
- 15 fruits, vegetables, or tree nuts; and
- 16 Establish research and development
- 17 projects to assist, improve, or promote the
- 18 marketing, distribution, and consumption or
- 19 efficient production of commodities covered by
- 20 a particular marketing order.
- 21 970.2 talks about audit
- 22 verification, which means the physical visit

- 1 to the farm and/or the facility when it is in
- 2 operation by an Inspection Service audit team
- 3 to verify and document that good agricultural,
- 4 handling, and manufacturing practices are
- 5 adhered to throughout the growing, harvesting,
- 6 packing, operation, and transportation as
- 7 defined later in the document. This
- 8 verification shall take the form of an
- 9 official audit conducted by the Inspection
- 10 Service.
- 11 An audit verification is a snapshot
- in time based on documentation reviewed,
- 13 persons interviewed, and operations observed,
- 14 and is intended to represent the past and
- 15 ongoing activities of the auditee.
- Broker, 970.3, means any individual
- 17 or entity that coordinates the sale and
- 18 transport of fresh leafy green vegetables
- 19 retail or food service buyers without taking
- 20 ownership of the product.
- 21 970.4 is critical --
- 22 JUDGE HILLSON: Excuse me for a

- 1 second. Are you just reading the language
- 2 that is already published in the proposed
- 3 Federal --
- 4 THE WITNESS: I am.
- 5 JUDGE HILLSON: I mean it is
- 6 already in the record. I mean I understand
- 7 that there are some places where you are
- 8 explicating on certain sections of it --
- 9 THE WITNESS: Yes, sir.
- 10 JUDGE HILLSON: -- but I mean to
- 11 read the entire thing that has already been
- 12 published, I'm not sure --
- 13 MR. RESNICK: If there is no
- 14 objection to taking the definitions as they
- 15 appear in the notice and then --
- 16 JUDGE HILLSON: I mean if he's
- 17 reading word for word the same that is in the
- 18 notice, then he's not adding. But if he's
- 19 explaining why some -- I mean I notice that
- 20 there is a part here which is more like an
- 21 explanation.
- MR. RESNICK: Yes.

- 1 JUDGE HILLSON: If he wants to just
- 2 focus on that, I would just think -- I mean
- 3 the whole statement will go in the record.
- 4 But part of my job is to avoid redundant and
- 5 repetitive --
- 6 MR. RESNICK: Yes, we can move --
- JUDGE HILLSON: -- testimony.
- 8 MR. RESNICK: -- things along. And
- 9 just get to the explanation point.
- 10 JUDGE HILLSON: Unless someone
- 11 objects to that and wants to hear him read the
- 12 whole thing into the record where it is
- 13 already at.
- Do you object, Mr. English?
- MR. RESNICK: No, no objections.
- 16 (Laughter.)
- 17 MR. RESNICK: Let the reflect that
- 18 he shook his head no.
- 19 THE WITNESS: All right. I'll
- 20 focus on those definitions where I have some
- 21 explanation.
- 22 JUDGE HILLSON: That would be

- 1 great. That would make a lot of sense. Thank
- 2 you.
- THE WITNESS: Okay. Well, then
- 4 we'll turn first to 970.5, Crop Year. Crop
- 5 year is synonymous with fiscal year and and
- 6 means the 12-month period beginning with April
- 7 1st of any year and ending with March 31st of
- 8 the following year.
- 9 Leafy greens are produced year
- 10 round in the production area, the production
- 11 area being all 50 states. The crop year is
- 12 merely a fixed timeline that is established
- 13 for the administrative purposes and functions
- 14 of the agreement.
- I was going to go into, you know, a
- 16 fairly lengthy description of all of the
- 17 different leafy green vegetables but I think
- 18 some of that has been introduced already so
- 19 maybe what I would do is tell you why, because
- 20 this question has come up, this list is what
- 21 it is.
- The definition, 970.15, Leafy Green

- 1 Vegetables, includes fresh mature and immature
- 2 leafy portions of any of the following:
- 3 arugula, cabbage, chard, cilantro, endive,
- 4 escarole, kale, lettuce, parsley, radicchio,
- 5 spinach, and spring mix. And then within
- 6 spring mix, baby leaf items including but not
- 7 limited to cress, dandelion, endigia, mache,
- 8 mizuna, tat soi, and winter purslane.
- 9 The definition also provides that
- 10 any other leafy green vegetable that might be
- 11 recommended by the administrative committee or
- 12 that might want to be deleted by the
- 13 administrative committee, and if that action
- 14 is approved by the Secretary, this list is
- 15 flexible. It can change.
- We included these leafy green
- 17 products primarily because these are the
- 18 products that potentially could go into a
- 19 fresh salad blend or are sold as a raw
- 20 agricultural commodity fresh.
- 21 So questions have come up about
- 22 some of the other leafy greens like mustard

- 1 and things like that that are not included.
- 2 Predominantly those products, you
- 3 know, are cooked prior to consumption. And so
- 4 we were including, as the scope of this
- 5 agreement, those leafy greens that were sold
- 6 as raw agricultural commodities or potentially
- 7 marketed as part of a salad blend.
- 8 The next part of the agreement that
- 9 I would focus on is the definition of
- 10 manufacturer because this question came up
- 11 this morning, too, manufacturing process.
- 12 Manufacturer means any person who
- 13 manufactures, provided that this definition
- 14 does not include a retailer, food service
- 15 distributor, or a broker, except to the extent
- 16 that that person is otherwise engaged in
- 17 handling.
- 18 Processing of fresh leafy greens is
- 19 a particular segment of handling operations.
- 20 Handling includes processing operations as
- 21 well as other segments of the industry such as
- 22 storage, shipping, importing. Processing

- 1 fresh-cut leafy greens includes coring,
- 2 washing, drying, mixing, and packaging.
- 3 Processed or value-added fresh
- 4 leafy greens products are then shipped
- 5 directly to retailer food service companies or
- 6 to wholesale produce operations that supply a
- 7 range of produce products to retail and food
- 8 service.
- 9 We said that processor and
- 10 manufacturer were synonymous but we defined
- 11 the two of them because there is a reference
- in the document to good manufacturing
- 13 practices, which is the document that FDA and
- 14 the industry relies on. And we wanted to
- 15 connect or intersect the fact that that's what
- 16 we're talking about when we talk about that in
- 17 terms of a processor.
- 18 A producer is synonymous with a
- 19 grower. This is 970.20. It is any person
- 20 engaged in a proprietary capacity. Producers
- 21 of leafy greens are farming operations that
- 22 grow leafy green vegetables. As such, they

- 1 are responsible for all the product-related
- 2 activities, including the land preparation,
- 3 cultivation, fertilization, irrigation,
- 4 pesticide applications.
- 5 Across the United States there are
- 6 variously-sized producers of leafy greens.
- 7 The highest concentration of producers are in
- 8 California and Arizona. Large producers
- 9 control enough of the supply that any one
- 10 large producer can have some impact on pricing
- 11 nationwide.
- 12 Production area is all 50 states
- 13 and the District of Columbia. The proposed
- 14 production area for the national marketing
- 15 agreement includes all 50 states. While a
- 16 particular type of leafy green may only be
- 17 grown in a subset of states, the openness and
- 18 diversity of the U.S. agricultural market
- 19 ensures that handlers and processors and
- 20 retailers and ultimately consumers will
- 21 purchase fresh leafy greens from multiple
- 22 growers, handlers, and processing facilities

- 1 from many states, especially with the drive
- 2 towards local produce.
- 3 Because of the diverse and open
- 4 market, fresh leafy greens may be produced in
- 5 one state, processed in another state, and
- 6 ultimately shipped to many states for
- 7 consumption.
- 8 970.26 is the signatories.
- 9 Signatories of the National Leafy Greens
- 10 Marketing Agreement are handlers of leafy
- 11 green vegetables. By signing the agreement,
- 12 signatories agree to handle leafy green
- 13 vegetables identified in the agreement that
- 14 are verified by an official audit as meeting
- 15 the provisions of the marketing agreement.
- 16 And, again, handling, as used in
- 17 the proposed NLGMA, National Leafy Greens
- 18 Marketing Agreement, means to receive,
- 19 acquire, clean, sell, consign, or import leafy
- 20 green vegetables in their natural form. In
- 21 terms of products handled, there are a couple
- 22 of types of handlers, those that deal in raw

- 1 leafy greens and those that turn raw leafy
- 2 greens into fresh cut, value-added products.
- 3 Zones, there are five zones. I
- 4 won't read the states that are included in
- 5 each zone but I'm going to talk about the
- 6 rationale. The zones were created strictly
- 7 for the establishment of an administrative
- 8 committee. They were developed based on
- 9 looking at the volume of production that was
- 10 attributable to the states in each zone.
- 11 We know that leafy greens are
- 12 produced in all 50 states in the production
- 13 area but California and Arizona account for
- 14 approximately 90 percent of the United States'
- 15 production. California and Arizona, we felt
- 16 it was important to separate those into two
- 17 different zones, Zones 1 and 2 respectively.
- 18 And while they do have more seats on the
- 19 administrative committee, they do not have a
- 20 majority nor is it a quarantee that all the
- 21 seats in those zones would be filled by
- 22 California and Arizona handlers or growers.

- 1 Zones 1 and 2 together account for
- 2 ten of the 23 seats on the administrative
- 3 committee. Zones 3, 4, and 5 account for nine
- 4 of the 23 states -- 23 seats, excuse me. We
- 5 tried to ensure that every zone was anchored
- 6 by a key leafy greens-producing state.
- 7 Zone 1 would be California. Zone 2
- 8 would be Arizona. Zone 3, I believe, would be
- 9 Texas and Colorado. Zone 4, Ohio and Georgia.
- 10 And Zone 5, Florida.
- 11 And we tried to, you know,
- 12 distribute seats on this administrative
- 13 committee such that no individual zone could
- 14 have, you know, a majority, if you will. It
- 15 was set up to try to ensure that there was
- 16 balance among the zones.
- 17 And when we did that, we got a lot
- 18 of complaints from California producers that
- 19 we didn't allocate enough. I mean they have
- 20 70 percent of the volume, why don't they have
- 21 70 percent of the seats? We got the same sort
- 22 of commentary from the other side. They

- 1 needed more representation.
- 2 This was the, you know, the
- 3 industry's best proposal, if you will, for an
- 4 administrative committee. Now the
- 5 administrative committee doesn't do the
- 6 metrics and those types of things.
- 7 The purpose, the proposed Leafy
- 8 Greens Marketing Agreement would be a
- 9 voluntary program that would provide a clear
- 10 and logical framework for signatory handlers
- 11 to improve the quality of U.S. and imported
- 12 leafy greens products. A national leafy
- 13 greens marketing agreement would empower
- 14 industry representatives to engage proactively
- 15 with USDA, the U.S. Food and Drug
- 16 Administration, and others in the development
- 17 of production and handling practices,
- 18 otherwise known as best practices or metrics.
- 19 Formation of these best practices
- 20 within the agreement framework would ensure
- 21 the adoption of science-based, scalable, and
- 22 regionally flexible metrics in conformance

- 1 with FDA's GAPs, Good Handling Practices, and
- 2 Good Manufacturing Practices.
- We believe that coupled with a
- 4 corresponding audit-based verification
- 5 program, these best practices would minimize
- 6 microbial contamination of fresh leafy green
- 7 vegetables in the growing and handling
- 8 processes. They would enhance the overall
- 9 qualify of fresh products in the marketplace,
- 10 boost public confidence in these commodities,
- 11 and ultimately support the marketability of
- 12 fresh leafy green vegetables and the overall
- 13 stability of the industry.
- 14 The proposed marketing agreement
- 15 would:
- 16 Provide a mechanism to enable leafy
- 17 green handlers to organize;
- 18 Enhance the quality available in
- 19 the marketplace through the application of
- 20 standardized and good ag practices and
- 21 production practices -- handling practices;
- 22 Implement a uniform, auditable,

- 1 science-based food quality enhancement
- 2 program;
- 3 Provide for USDA government
- 4 validation and verification of program
- 5 compliance;
- 6 Foster greater collaboration with
- 7 local, state, and federal regulators; and
- 8 Ultimately improve consumer
- 9 confidence in leafy greens.
- 10 The entire program is designed to
- 11 minimize microbial contamination in the
- 12 production and handling of leafy green
- 13 vegetables placed in the marketplace for human
- 14 consumption.
- In recent years, microbial
- 16 contamination of food products in the
- 17 marketplace has led to public and industry
- 18 concern for food safety, a drop in consumer
- 19 confidence of products related with food
- 20 safety events, and severe economic
- 21 consequences for producers and handlers of
- 22 those products effected.

- 1 The proposed program is designed to
- 2 develop a system to fortify the leafy green
- 3 vegetable industry's ability to proactively
- 4 engage in the improvement of product quality
- 5 and consumer confidence through the
- 6 development of these production and handling
- 7 best practices.
- 8 The next part of the agreement that
- 9 I would talk about is the administrative
- 10 committee. And I won't read it but the
- 11 administrative committee is different than
- 12 what has been proposed in state marketing
- 13 agreements. And this is one of the major
- 14 differences between what is proposed on the
- 15 national level and what has been contemplated
- 16 before.
- 17 And that is we're -- in response to
- 18 comments from the -- that came in relative to
- 19 the ANPR and comments that we've received as
- 20 proponents, we are putting growers at the
- 21 table in the administrative committee with the
- 22 handlers who are actually the regulated party

- 1 in the marketing agreement.
- 2 So while the handler is regulated,
- 3 the grower has a seat and a stake and a say in
- 4 the administration of the agreement because
- 5 they are secondarily impacted by any kind of
- 6 regulations that the handlers agree to.
- 7 Again, we've allocated four
- 8 handlers and two producers from Zone 1. That
- 9 is the zone with California and the largest,
- 10 Three handlers and one producer from Zone 2,
- 11 two handlers and one producer from Zone 3, two
- 12 handlers and one producer from Zone 4, and two
- 13 handlers and one producer from Zone 5.
- 14 So Zones 1 and 2, California and
- 15 Arizona, controlling 90 percent of the
- industry, have those ten seats. Zones 3, 4,
- 17 and 5 have the remaining nine seats.
- 18 We also in the administrative
- 19 committee wanted to bring in input from others
- 20 who we are hopeful and know will help engage
- 21 in driving towards a standardized system or a
- 22 standardized audit in the marketplace. So we

- 1 have one retail representative, one food
- 2 service representative, and one importer
- 3 designated as members of the administrative
- 4 committee as well.
- 5 There are restrictions. An
- 6 individual company, like, for example, you've
- 7 heard from growers and handlers today, would
- 8 have to pick a category that they would serve
- 9 in if they were serving. They would be a
- 10 handler or a producer, they could not be
- 11 engaged in both.
- 12 And the Secretary, upon
- 13 recommendation of the Committee, could
- 14 reapportion these members among zones. It can
- 15 change the number of members and alternates,
- 16 including their alternates, and can recommend
- 17 changes that deal with things like shifts in
- 18 production, the importance of new production,
- 19 equitable relationship between members and
- 20 zones if we didn't get it right, economies to
- 21 result in promoting efficient administration,
- 22 and other relative factors.

- 1 Clear distinction of the proposal
- 2 for the National Leafy Greens Marketing
- 3 Agreement is the recognition by proponents
- 4 that growers should have a direct say in the
- 5 administration of the agreement. Even though
- 6 they are not the regulated party, it was a
- 7 common theme in comments -- and I've been over
- 8 that.
- 9 We've attempted to propose an
- 10 administrative committee that is equitable,
- 11 that is balanced, and takes into account the
- 12 diverse perspectives of the supply chain. We
- 13 have left the Committee and the Secretary
- 14 discretion to reapportion the Committee to
- 15 better reflect the needs of the industry
- 16 should they deem it necessary.
- 17 The next section of the agreement
- 18 that I have a comment on is 970.45, the
- 19 technical review board.
- 20 The technical review board is
- 21 critically important. This is the body that
- 22 is charged with actually developing the audit

- 1 metrics that will be utilized by the marketing
- 2 agreement. There is much interest in the
- 3 metrics as these best practices can have great
- 4 impact on the costs of food safety programs,
- 5 the efficacy, other agricultural operations,
- 6 as well as the impact on surrounding
- 7 environments as well as environmental
- 8 features, wildlife, domestic animals, and
- 9 workers.
- 10 It is important that science and
- 11 technical expertise from a variety of
- 12 disciplines be incorporated and considered in
- 13 the development of audit metrics. It is
- 14 important that metrics are tailored to varying
- 15 production practices and regions so they
- 16 enhance safety without adversely impacting
- 17 smaller growers, handlers, or the environments
- 18 in which they operate.
- 19 The technical review board was
- 20 designed to bring this varying expertise
- 21 together in one body and to have flexibility
- 22 to add regional or technical expertise as

- 1 necessary to develop practical and protective
- 2 standards and corresponding audit metrics.
- I also would like to talk about the
- 4 market review board. The marketing review
- 5 board was set up to assist in the promotion
- 6 and acceptance of a national marketing
- 7 agreement.
- 8 It is anticipated that this Board
- 9 will work to extend the marketing agreement
- 10 both up and down the supply chain as well as
- 11 advise on how to best communicate its benefits
- 12 to consumers. The Board is anticipated to be
- 13 a fundamental driver for the acceptance and
- 14 thus minimization of the need for discrete
- 15 audit metrics and buyer specifications.
- So I'll just summarize.
- 17 Signatories of the National Leafy Greens
- 18 Marketing Agreement are handlers of leafy
- 19 green vegetables. By signing the agreement,
- 20 signatories agree to handle leafy green
- 21 vegetables identified in the agreement that
- 22 are verified by an official audit as meeting

- 1 the provisions of the marketing agreement.
- 2 The United States is the production
- 3 area and it is divided into five zones --
- 4 proposed zones as described in the agreement.
- 5 The terms and provisions of a national
- 6 marketing agreement would be administered by a
- 7 National Leafy Greens Administrative Committee
- 8 that would consist of 23 members, each of whom
- 9 shall have an alternate. The alternates have
- 10 the same qualifications as the members for
- 11 whom he or she is an alternate. And Committee
- 12 membership is allocated as I described.
- 13 A majority of the six producers on
- 14 the committee must not be involved in the
- 15 handling or processing business, two of the
- 16 producers on the committee must be small
- 17 farmers, at least four of the handler
- 18 committee members must be manufactures of
- 19 fresh-cut leafy green products. The retail,
- 20 food service, importer, and public members as
- 21 well as their alternates may not be engaged in
- 22 the production or handling of leafy greens in

- 1 a proprietary capacity.
- 2 Upon recommendation by the
- 3 committee, the USDA Secretary has the
- 4 authority to reapportion committee members
- 5 among the zones, change the number of members
- 6 and alternates, and change the composition by
- 7 changing the ratio of members, including their
- 8 alternates. Alternate members will act in the
- 9 place of a member if that member is absent,
- 10 resigns, or is removed until a successor is
- 11 selected.
- 12 In order to be eligible for a
- 13 committee position, one must be serving as a
- 14 handler, producer, retailer, importer, or a
- 15 food service personnel at the time of their
- 16 appointment and throughout their term in
- 17 office. Both members and their alternates
- 18 will serve two-year terms with no more than
- 19 three consecutive two-year terms.
- 20 Producers and handler members of
- 21 the initial committee will be selected by the
- 22 USDA Secretary. Subsequent producer and

- 1 handler committee members will be nominated by
- 2 zone with selection by vote with the voting
- 3 population comprised of all individuals that
- 4 are eligible themselves to serve on the
- 5 committee.
- 6 All persons eligible to vote get
- 7 only one vote, even if they have business
- 8 operations in more than one zone. Producer
- 9 and handler members will nominate the retail,
- 10 food service, importer, and public members and
- 11 their alternates.
- 12 In addition, the technical review
- 13 board and a market review board will assist
- 14 the administrative committee with developing
- 15 audit metrics and addressing retail, food
- 16 service, and consumer issues respectively.
- 17 The administrative committee makes
- 18 decisions by quorum with a simple majority of
- 19 the members constituting the quorum and a
- 20 required one voting member per zone.
- 21 Decisions effecting assessment rates,
- 22 termination of the agreement, for good

- 1 agricultural, handling, and manufacturing
- 2 practices actually require a two-thirds
- 3 majority of the committee. They were deemed
- 4 to be much more significant decisions.
- 5 Committee meetings may take place
- 6 in a variety of geographical location with
- 7 votes cast in person or they can meet and vote
- 8 by videoconference, phone, or other means of
- 9 communication. The administrative
- 10 committee is charged with:
- 11 Administering the agreement;
- 12 Making rules and regulations with
- 13 the approval of the USDA Secretary, as may be
- 14 necessary to effectuate the agreement;
- To adopt, with the approval of the
- 16 USDA Secretary after notice and comment, audit
- 17 metrics to administer the terms and provisions
- 18 of the agreement;
- 19 To collaborate with existing state
- 20 boards, commissions, and agreements through
- 21 memorandums of understanding;
- 22 To receive, investigate, and report

- 1 to the USDA Secretary complaints of violation;
- 2 To recommend to the Secretary
- 3 amendments to the agreement.
- 4 They have the duties:
- 5 To act as the intermediary between
- 6 the USDA Secretary and any signatory with
- 7 respect to the operations of the agreement;
- 8 To select from among its members a
- 9 chairperson and officers;
- 10 To establish subcommittees and
- 11 advisory boards as they deem necessary;
- To adopt bylaws for the conduct of
- 13 business;
- To keep books;
- To appoint such employees or agents
- 16 as they deem necessary;
- 17 To have financial statements
- 18 audited by certified public accountants;
- 19 To investigate the production and
- 20 handling and marketing of leafy greens and to
- 21 assemble data in connection therewith; and
- 22 To furnish available information as

- 1 deemed pertinent or requested by the
- 2 Secretary.
- 3 I'm sorry. I was going to read a
- 4 lot of the language of the draft into the
- 5 agreement. I've dispensed with that. That
- 6 sort of summarizes the comments that I was
- 7 going to make.
- JUDGE HILLSON: Thank you.
- 9 Did you have any further direct
- 10 before I turn this witness over to the panel?
- 11 MR. RESNICK: No, we just
- 12 appreciate your summarizing the definitions.
- 13 No direct.
- 14 JUDGE HILLSON: Okay. Let me ask
- 15 the panel if they have any questions of this
- 16 witness. I'm guessing the answer is yes. Who
- 17 wants to go first?
- 18 Go ahead, Ms. Schmaedick.
- 19 CROSS EXAMINATION
- 20 MS. SCHMAEDICK: Good afternoon.
- 21 This is Melissa Schmaedick.
- So, Mr. Giclas, you covered quite a

- 1 bit of information. And as it has been noted,
- 2 a lot of the definitions have already been
- 3 published in the Federal Register.
- I do have questions, though, about
- 5 certain aspects of the proposed definitions.
- 6 So some of the questions might relate to
- 7 things that weren't actually read into the
- 8 record. Is that appropriate?
- 9 JUDGE HILLSON: Sure.
- 10 MS. SCHMAEDICK: Okay.
- 11 JUDGE HILLSON: I mean it's in the
- 12 record.
- MS. SCHMAEDICK: Okay.
- 14 JUDGE HILLSON: He said it was the
- 15 same language that was already --
- MS. SCHMAEDICK: Yes.
- 17 JUDGE HILLSON: -- published.
- 18 MS. SCHMAEDICK: Okay. So a lot of
- 19 these questions have to do with just
- 20 clarification of terms that have been used
- 21 over the course of today. The first one that
- 22 I'd like clarification on is the difference

- 1 between zone and region. Is there a
- 2 difference? And if so, why is it important?
- THE WITNESS: There is a difference
- 4 between zone and region. In the draft
- 5 marketing agreement, a zone is an area of land
- 6 or states that has been created to allocate,
- 7 you know, members for the administrative
- 8 committee, to basically populate the
- 9 administrative committee with representatives
- 10 from the handler and producer community in
- 11 those areas.
- 12 A region is -- I don't know -- it's
- 13 referred to in the Technical Committee section
- 14 of the document. It may be in other areas.
- 15 But really what we're talking about in terms
- of region is usually a discreet production
- 17 environment or production area that may have
- 18 some commonalities associated with it.
- 19 So a lot of times when we're
- 20 talking about regions, we're talking about,
- 21 you know, making metrics that are regionally,
- 22 you know, regionally based. They might deal

- 1 with Midwestern production or they might deal
- 2 with desert production or they might deal with
- 3 Florida production, which we heard was
- 4 dramatically different than what's done in
- 5 California.
- 6 So regions, we're typically talking
- 7 about production environments. Zones, we're
- 8 typically talking about just a construct for
- 9 the administrative committee.
- 10 MS. SCHMAEDICK: So in your opinion
- 11 would it be helpful to make that clarification
- in the proposed language?
- 13 THE WITNESS: I think we could do
- 14 that by adding a definition of the term
- 15 region, which I don't believe is in the
- 16 document now. So we could do that, yes. That
- 17 would probably be helpful.
- 18 MS. SCHMAEDICK: Okay. Thank you.
- 19 I have a question about
- 20 signatories. You stated earlier that
- 21 signatories must be handlers. Are signatories
- 22 limited to first handlers? Or any handler?

- 1 THE WITNESS: Signatories can be
- 2 first or second handlers. A second handler is
- 3 an operation that might receive product from a
- 4 handler for, for example, for further
- 5 processing or for further distribution.
- 6 Like sometimes there might be a
- 7 Midwestern facility that would source product
- 8 from a handler in California but then take
- 9 that product into their facility, chop it, bag
- 10 it, send it off to, you know, their points of
- 11 sale.
- We have tried to create flexibility
- 13 within the marketing agreement to, you know,
- 14 allow willing handlers, be their first
- 15 handlers or second handlers, you know, to sign
- 16 up, to have that audit service and those, you
- 17 know, best practices, handling practices, and
- 18 production practices, you know, for their work
- 19 because we believe that it's important for the
- 20 entire supply chain, you know, to have access
- 21 to this kind of a construct enhancing the
- 22 overall quality of leafy greens.

- 1 MS. SCHMAEDICK: Okay. You talked
- 2 about the development of an administrative
- 3 committee. And on that proposed committee,
- 4 there are several different seats that have
- 5 been allocated between producers, handlers,
- 6 but also different representatives from within
- 7 the industry, specifically importers, food
- 8 service, retailers, and public members.
- 9 Can you explain the importance of
- 10 including these other non-producer/handler
- 11 members on the administrative committee?
- 12 THE WITNESS: I think one of the
- 13 things that we learned in our experience with
- 14 the California marketing agreements and the
- 15 Arizona market agreements, although they do
- 16 have public members associated with their
- 17 Marketing Committees, is that in order to put
- 18 something forward that really has broad
- 19 industry buy in and that really works adeptly
- 20 for all parts of the supply chain, you know,
- 21 from production all the way through to retail,
- 22 it is important to give, you know, each one of

- 1 those potential stakeholders a voice in the
- 2 administration and the development of the
- 3 agreement.
- 4 So, you know, to the extent that we
- 5 want to push back on buyer-specific metrics,
- 6 it is important to provide, you know, an
- 7 opportunity for buyers to be represented in
- 8 the development of metrics that might help
- 9 facilitate that. To the extent that, you
- 10 know, we want to address some effectively
- 11 consumer concerns, it is important to have
- 12 somebody from the public, you know, as part of
- 13 the administrative committee. So that's the
- 14 intent.
- 15 And that same intent goes to our
- 16 engagement with growers. In order to have,
- 17 you know, growers supportive and engaged in
- 18 this program voluntarily, which, you know,
- 19 they would -- I mean they would actually be
- 20 brought into it by their signatory handlers,
- 21 you know we felt that it was important to put
- 22 growers on the administrative committee to,

- 1 you know, get their input in the development
- 2 and the administration of the marketing
- 3 agreement.
- 4 And I guess -- I'm sorry but I
- 5 didn't address importers but because we have
- 6 many operations that are sourcing product from
- 7 outside the United States borders, we think it
- 8 is very important to have an importer on the
- 9 administrative committee as well so that we
- 10 can, you know, bring into consideration all of
- 11 the, you know, unique factors associated with
- 12 handling imported product.
- MS. SCHMAEDICK: So in reading the
- 14 proposed language and in looking at the
- 15 technical review board and its role, it is
- 16 stated in the proposal that the technical
- 17 review board advises the administrative
- 18 committee and that the administrative
- 19 committee then makes recommendations for
- 20 approval by USDA.
- 21 So in that process then these
- 22 administrative committee members who are not

- 1 necessarily producers or handlers, there is an
- 2 opportunity for those other members to have a
- 3 say in the process. Is that correct? In the
- 4 administrative committee's moving forward with
- 5 a recommendation?
- 6 THE WITNESS: Well, there are
- 7 several opportunities for their involvement.
- 8 I mean there is a prescripted opportunity in
- 9 the formation of the administrative committee.
- 10 Each one of those individual entities,
- 11 retailers, food service, importers, public
- 12 have a seat on the administrative committee.
- But in addition to that, there is
- 14 probably greater latitude, you know, to engage
- 15 and involve people from those different parts
- 16 of the industry and interested parties in the
- 17 actual work of the technical review board
- 18 because the technical review board has some
- 19 designated seats that it has to have but it
- 20 also -- we gave it the ability to create
- 21 regional subcommittees.
- 22 And the idea behind those regional

- 1 subcommittees were to bring the experts
- 2 together to be able to form and compile, you
- 3 know, recommendations that would work for the
- 4 entire spectrum of the supply chain and those
- 5 interested stakeholders.
- 6 So when we talk about, you know,
- 7 environmental organizations, water quality,
- 8 conservation experts, consumers, et cetera, we
- 9 want those people to be engaged in the
- 10 developmental process primarily with that
- 11 technical review board but they also have a
- 12 seat on the administrative committee, which
- 13 has the deciding -- with the Secretary, the
- 14 deciding part of the, you know, agreement.
- MS. SCHMAEDICK: Do you foresee any
- 16 situation in the future where there might be a
- 17 need to add additional representation from
- 18 state or federal agencies that are not
- 19 specifically mentioned on the technical review
- 20 board?
- 21 THE WITNESS: Well, we've heard a
- 22 couple of suggestions today and I don't

- 1 necessarily think those are bad suggestions.
- 2 I mean I think, you know, what the proponent
- 3 group would really like to do is, you know,
- 4 again engage as many broad stakeholders as
- 5 possible in the development of, you know,
- 6 metrics that work, audit metrics that work
- 7 well for, you know, that are scalable for
- 8 smaller producers, that work for different
- 9 regions of the country, that co-manage
- 10 environmental issues and food safety issues,
- 11 et cetera.
- 12 And so to the degree that the right
- 13 expertise is not at the table now, I think the
- 14 technical review board has the ability to
- 15 bring that in through the subcommittees. And
- 16 to the degree that the subcommittees can't
- 17 bring that in, I think we would be open to
- 18 revising, you know, the technical review board
- 19 such that it meets those needs.
- 20 MS. SCHMAEDICK: Going back to the
- 21 administrative committee, I'd like to talk a
- 22 little bit about quorum. There's one part in

- 1 the proposed language that I think needs some
- 2 clarification.
- 3 Quorum, I'm looking specifically at
- 4 970.48, Procedure, Paragraph (a), it says a
- 5 majority of all the members of the committee.
- 6 Does that mean a majority of all the members
- 7 committee present at the meeting? Or all of
- 8 the members of the committee, the total
- 9 committee?
- 10 THE WITNESS: I'm sorry, I missed
- 11 the reference.
- MS. SCHMAEDICK: 970.48, paragraph
- 13 (a).
- 14 THE WITNESS: I believe it was our
- 15 intent that that means a majority of the
- 16 members of the committee and not a majority of
- 17 the members of the committee that are present.
- MS. SCHMAEDICK: Okay.
- 19 THE WITNESS: So the full
- 20 committee.
- 21 MS. SCHMAEDICK: Thank you. And
- 22 you've identified a few key issues that would

- 1 require a two-thirds majority vote. Can you
- 2 explain why those are standing out as needing
- 3 a larger majority vote? That would also be
- 4 under paragraph (a).
- 5 THE WITNESS: Each one of these
- 6 special circumstances, assessment rates,
- 7 termination of the agreement, and acceptance
- 8 of good agricultural handling and
- 9 manufacturing practices, will have some kind
- 10 of economic impact on the signatories and the
- 11 producers who supply signatories. So we
- 12 wanted to hold those votes to a higher
- 13 threshold than simple majority.
- MS. SCHMAEDICK: Thank you. I
- 15 apologize for jumping back and forth here. I
- 16 have another question on the administrative
- 17 committee. This goes to Section 970.40 where
- 18 the proposed language discusses authority to
- 19 reapportion members, reestablish districts
- 20 perhaps. Can you explain to me why these
- 21 types of flexibilities are important?
- 22 THE WITNESS: I think there's a

- 1 couple of reasons why this kind of flexibility
- 2 is important. You know number one, it's
- 3 important that the administrative committee
- 4 be, you know, reflective of the industry. The
- 5 industry is diverse. The industry is
- 6 changing. We're seeing shifts in practices
- 7 all the time. People are moving more towards
- 8 locally produced sometimes. I mean that's a
- 9 niche market that is expanding.
- 10 So, you know, we wanted to give the
- 11 administrative committee and the Secretary the
- 12 latitude to adjust this administrative
- 13 committee, if you will, as necessary to keep
- 14 pace with the industry.
- MS. SCHMAEDICK: Thank you.
- 16 THE WITNESS: I guess I would also
- 17 add that, you know, that's also one of, I
- 18 think, our kind of fundamental beliefs in the
- 19 merits of the marketing agreement, too, is
- 20 that the marketing agreement has, you know,
- 21 inherent flexibility that allows it to react
- 22 to the needs of the industry much more readily

- 1 and much more adeptly than other, you know,
- 2 proposed solutions to this type of an issue.
- 3 MS. SCHMAEDICK: Okay. And I'm
- 4 assuming you will have further witnesses that
- 5 will talk to the other sections of the
- 6 proposed language.
- 7 THE WITNESS: Yes and I'm sure they
- 8 won't read it into the record like I tried to.
- 9 (Laughter.)
- 10 MS. SCHMAEDICK: Okay. Then that
- 11 is the end of my questions for now. Thank
- 12 you.
- JUDGE HILLSON: Whose next? Okay,
- 14 go ahead.
- 15 MS. STALEY: Kathleen Staley. In
- 16 the current California marketing agreement,
- 17 does it include good manufacturing practices?
- 18 THE WITNESS: The current marketing
- 19 agreement in California stops at the harvest
- 20 in terms of handling practices. Manufacturing
- 21 practices, processing is not included in
- 22 either the California or the Arizona marketing

- 1 agreements.
- 2 MS. STALEY: So then my next
- 3 question, why did you feel it was important to
- 4 include good manufacturing practices in the
- 5 national marketing -- this proposed national
- 6 marketing agreement.
- 7 THE WITNESS: Well, there's a
- 8 couple of reasons for that. Number one, we
- 9 believe that food safety is everybody's
- 10 responsibility, up and down the supply chain,
- 11 from the producer all the way through to the
- 12 consumer, as a matter of fact.
- We wanted to give also the ability
- 14 for some of the unique, specific metrics that
- 15 might be associated with good manufacturing
- 16 practices, the expertise of the industry to be
- 17 brought out in an auditable and verifiable
- 18 form.
- 19 We know that FDA has authority over
- 20 and inspects facilities on occasion. But, you
- 21 know, the proposal that we're talking about
- 22 here would allow for a much higher level of

- 1 scrutiny. And we would be able to tailor the
- 2 best practices in addition to the GMPs that
- 3 are required by 21 CFR, you know, to the best
- 4 -- the best in class, if you will, of the
- 5 industry. So that's why we were trying to
- 6 include it here.
- 7 And frankly, we would do it in
- 8 California and Arizona, too. We're talking
- 9 about doing that in California and Arizona.
- 10 MS. STALEY: One last question.
- 11 You talk that this proposed National Leafy
- 12 Greens Agreement would cover all 50 states.
- 13 Any reason why we wouldn't include Puerto Rico
- 14 or the other territories?
- 15 THE WITNESS: No. I may have
- 16 misspoken. I'd have to go back and look at
- 17 the definition of the production area but --
- 18 MS. STALEY: No, it's actually the
- 19 50 states.
- THE WITNESS: Yes, okay. No, we
- 21 probably should include -- I mean our design
- 22 is to be as inclusive as possible. We don't

- 1 know that we're going to have handlers from
- 2 Alaska, you know, that want to participate in
- 3 the national marketing agreement. But we know
- 4 we want to have it accessible to handlers in
- 5 Alaska should they want to.
- 6 JUDGE HILLSON: Okay, go ahead, Ms.
- 7 Carter.
- 8 MS. CARTER: Good afternoon.
- 9 Antoinette Carter with the USDA.
- 10 Just a follow-up question from the
- 11 one posed by Kathy Staley. You mentioned that
- 12 one of the differences between the proposed
- 13 national agreement and the current California
- 14 market agreement is the addition of -- to
- 15 provide for GMP -- to cover the GMPs. Are
- 16 there any other fundamental differences
- 17 between what's being proposed and the current
- 18 state marketing agreements that are in place?
- 19 THE WITNESS: I may not get these
- 20 all off the top of my head but there are some
- 21 discreet fundamental differences between the
- 22 national marketing agreement and those that

- 1 are currently in force in California and
- 2 Arizona.
- 3 First and foremost is the inclusion
- 4 of growers and the administrative committee
- 5 associated with the marketing agreement.
- 6 Growers are not engaged in the marketing
- 7 committees in either of the states of
- 8 California or Arizona.
- 9 Secondly, one significant
- 10 difference is the national marketing agreement
- 11 proposes to allow for inspection of product
- 12 beyond the United States' borders. So it
- 13 covers and can cover imported product. If
- 14 there is a signatory in the United States who
- is an importer who wants to be part of the
- 16 marketing agreement and have that product
- inspected in a foreign soil, they are, you
- 18 know, they are able to sign in.
- 19 And I'm sorry, I know you mentioned
- 20 one that I was going to address, too. But
- 21 that's the one I forgot about. Growers,
- 22 importers, oh, and I'm sorry, yes, and this

- 1 marketing agreement extends beyond good
- 2 agricultural practices to include good
- 3 agricultural practices and good handling
- 4 practices to include good manufacturing
- 5 practices.
- 6 MS. CARTER: Okay.
- 7 THE WITNESS: So those are probably
- 8 the fundamental significant differences
- 9 between the state agreements and the proposed
- 10 national agreement.
- 11 MS. CARTER: Okay. You mentioned
- 12 the coverage of imports for signatory handlers
- 13 that are sourcing from outside of the U.S.,
- 14 what is the rationale for including --
- 15 expanding the coverage to include imports?
- 16 THE WITNESS: The rationale is
- 17 that, you know, there are many United States'
- 18 companies that in an effort to be a year-long
- 19 provider of leafy greens, source product from
- 20 a variety of regions. One of the limitations
- 21 of the state agreements now is that, you know,
- 22 they are unable to handle that product under

- 1 the, you know, under the seal, if you will, of
- 2 the state agreements because the auditing
- 3 programs can't extend beyond state borders to
- 4 verify practices from those growers that are
- 5 supplying their product from other places
- 6 where the agreement doesn't exist.
- 7 Sometimes that product comes from
- 8 Mexico. You heard that described earlier
- 9 today. So one of the things that is really
- 10 important about a national marketing agreement
- 11 is, you know, being able to facilitate better
- 12 interstate commerce, you know, by allowing
- 13 these products to come in to, you know,
- 14 handling operations, be they in Texas or
- 15 California or Arizona or Florida, from other
- 16 places either inside or outside the United
- 17 States.
- MS. CARTER: And just a follow up
- 19 on that. There's been -- we discussed a
- 20 little bit about the technical review board
- 21 and I guess what is intended in terms of the
- 22 development of best practices. And there was

- 1 some discussion about ensuring that those are
- 2 regionally based and account for differences
- 3 in production and handling practices among
- 4 various regions.
- Is it envisioned that that will
- 6 also be applied to imports as well for -- to
- 7 account for differences that may exist in
- 8 those areas?
- 9 THE WITNESS: Yes, it doesn't make
- 10 -- the technical review board doesn't make a
- 11 distinction as to whether or not it is a U.S.
- 12 product or, you know, another country's
- 13 product. I mean we want to recognize and
- 14 reflect the, you know, variabilities in
- 15 different regions regardless of where they
- 16 are, whether they be, you know, in Mexico,
- 17 Canada, or Ohio.
- 18 MS. CARTER: Okay. I quess you
- 19 also discussed the definition of producer.
- 20 Can you discuss or briefly explain the
- 21 different types of producers that could be
- 22 impacted by this proposal either directly or

- 1 indirectly?
- THE WITNESS: Well, I'm not sure
- 3 what you mean by different type of producers.
- 4 I mean a producer to me is somebody who, you
- 5 know, plants the seed, grows the product, and
- 6 sometimes, you know, they harvest the product
- 7 and put it to market.
- But they are really, you know, the
- 9 entity that, you know, is involved in the
- 10 growing of the crop if you will. There are
- 11 variances in terms of, you know, size. There
- 12 are small producers and there are, you know,
- 13 large producers. And I think others have
- 14 talked about, you know, the difference in
- 15 terms of size.
- 16 Western Growers, as a trade
- 17 organization, has, you know, both small and
- 18 large handlers or producers, excuse me. We've
- 19 spoken with some of them. You know we haven't
- 20 found anybody who does not have food safety
- 21 practices in place. And most of them,
- 22 frankly, are gravitating towards the same or

- 1 similar practices as have already been
- 2 established in conjunction with the California
- 3 marketing agreement.
- 4 MS. CARTER: Okay. You answered my
- 5 other question. Okay. Thank you. Go ahead.
- 6 JUDGE HILLSON: Ms. Deskins, what
- 7 do you have next?
- 8 MS. DESKINS: Why don't you go
- 9 ahead?
- 10 MS. STALEY: Kathleen Staley,
- 11 again.
- 12 In the good agricultural practices,
- 13 you talk about the FDA guidance. And you talk
- 14 about the Association of Food and Drug
- 15 Officials' Model Code. Could you explain what
- 16 the Association of Food and Drug Officials'
- 17 Model Code is?
- 18 THE WITNESS: Well, the Association
- 19 of Food and Drug Officials has been working on
- 20 a model code for produce safety -- for leafy
- 21 greens safety. I don't believe that they have
- 22 submitted or published that. But, I mean, in

- 1 essence, the code would be a guidelines for
- 2 states to take and, you know, utilize in
- 3 developing state programs or state regulations
- 4 associated with food safety practices.
- 5 MS. STALEY: Thank you. And FDA is
- 6 also working on updating the GAPs Guide. And
- 7 has just recently come out with a commodity-
- 8 specific guide for leafy greens. How would
- 9 you see those documents incorporated into this
- 10 proposed agreement?
- 11 THE WITNESS: Well, you know, we
- 12 want the best practices, the metrics that are
- 13 associated with any national marketing
- 14 agreement to be grounded in the best, you
- 15 know, science available, to be scalable,
- 16 regionally flexible.
- But, you know, we understand that
- 18 there are, you know, key areas of risk that
- 19 have been understood for years -- years and
- 20 years. I mean water, wildlife, workers,
- 21 cross-contamination, you know, by equipment,
- 22 these are all well understood potential risk

- 1 factors.
- 2 And they are all embodied in any
- 3 guidance, whether it is industry guidance,
- 4 whether it is FDA guidance, whether it is new
- 5 commodity-specific guidance. We expect that
- 6 metrics will be developed, you know, that are
- 7 informed by all of these documents.
- 8 You know, that product that is
- 9 being worked on by AFDO, that product that is
- 10 being worked on by FDA, industry guidelines as
- 11 well as CODEX and others. Our goal and our
- 12 drive is to, you know, try to establish a
- 13 baseline set that works for the entire
- 14 industry. And in doing that, you know, try to
- 15 drive away from some of these other standards.
- 16 Does that answer your question?
- 17 MS. STALEY: Yes, thank you.
- 18 MS. SCHMAEDICK: Melissa
- 19 Schmaedick. I just wanted to clarify then
- 20 that currently the proposal identifies
- 21 specific -- a specific version of guidelines
- 22 from FDA. Would it be reflective of the

- 1 proponent group's intent to recognize that any
- 2 future iteration of FDA guidelines would be
- 3 appropriate to include? Or to have the
- 4 flexibility to do so?
- 5 THE WITNESS: It would be prudent
- 6 to do that. And I actually thought that was
- 7 in there. But -- yes, if you look at 970.9,
- 8 you are looking at good ag and handling
- 9 practices. The last line, any other revised
- 10 or modified versions thereof or any other FDA
- 11 document approved as a replacement thereof or
- 12 approved by the Secretary. So, I mean, we
- 13 tried to build that latitude or that
- 14 flexibility in.
- 15 MS. SCHMAEDICK: Okay. I just
- 16 wanted the clarify that that was your intent.
- 17 THE WITNESS: And we'd expect --
- 18 metrics are -- we'd expect metrics and audit
- 19 practices to change over time. As the science
- 20 evolves, there's a lot of research going on in
- 21 terms of food safety for leafy greens and
- 22 other commodities.

- 1 As the science evolves, the
- 2 industry needs to adapt. And the industry,
- 3 you know, gets better every day with the
- 4 results from that stuff. So that's, you know,
- 5 that's why we want these things to be
- 6 flexible.
- 7 MS. SCHMAEDICK: Thank you.
- 8 MS. DESKINS: Sharlene Deskins,
- 9 USDA.
- 10 I just wanted to clarify -- ask you
- 11 a couple more questions about zones and
- 12 regions. You said zone is a term used
- 13 administratively to set up the committee for
- 14 leafy greens. Is that correct?
- 15 THE WITNESS: That's correct.
- 16 MS. DESKINS: Okay. And then the
- 17 term region, that's supposed to be a
- 18 geographic terms?
- 19 THE WITNESS: Well, it's not
- 20 defined. And I think we recognize that we'll
- 21 probably need to define it. But it's use in
- 22 areas like, for example, the technical review

- 1 board section, you know, we intended to mean
- 2 those kind of specific production regions or
- 3 areas, geographic areas that have, you know,
- 4 something in common like the environments.
- 5 For example, the desert would be an
- 6 example of a production region where, you
- 7 know, practices are pretty similar across, you
- 8 know, all operators within the desert.
- 9 Coastal California might be another region.
- 10 Midwest might be another region. I don't
- 11 know. You know Florida might be another
- 12 region. But that's what we're talking about
- 13 when we talk about regions.
- 14 And when we talk about, you know,
- 15 the technical review board has the latitude to
- 16 move audit metrics forward that work for those
- 17 different regions.
- 18 MS. DESKINS: That's why I'm trying
- 19 to understand your use of the term region. By
- 20 geographic, are you trying to say that it is a
- 21 contiguous area? Or if it's just defined by
- 22 temperature so it could be say the Coastal

- 1 California and Coastal Florida?
- 2 THE WITNESS: I think it could be
- 3 either. I don't think that, you know, we were
- 4 trying to say within the context of the
- 5 definition that it is a specific, unique
- 6 geographic area.
- 7 I think often times it does set up
- 8 that way but, for example, you might have, you
- 9 know, coastal environments on either coast.
- 10 You might have -- I mean there are a lot of
- 11 different micro climates and micro
- 12 environments associated with the production of
- 13 leafy greens. And that is why we have a year-
- 14 round supply of leafy greens from the United
- 15 States.
- MS. DESKINS: Okay. So that's why
- 17 we need the definition of the term to find out
- 18 it is being used.
- 19 Okay. The other question I had,
- 20 you were asked if secondary handlers could be
- 21 a signatory to the agreement. And my question
- 22 for you is the definition of handlers as it is

- 1 in there now, would it cover secondary
- 2 handlers?
- 3 THE WITNESS: The definition of
- 4 handler that is in there now covers secondary
- 5 handlers as well.
- 6 MS. DESKINS: Okay. And then --
- 7 the other question I had is about importers.
- 8 The way the administrative committee is set up
- 9 now in the agreement, importers have their own
- 10 seat.
- 11 THE WITNESS: Importers would have
- 12 one seat, yes.
- MS. DESKINS: Okay. Are importers
- 14 meant to be covered by the zones that are set
- 15 up?
- 16 THE WITNESS: The importer's seat
- 17 is not tied to a specific zone. It can come
- 18 from any of the states, you know, in the
- 19 production area.
- MS. DESKINS: I guess what I'm
- 21 trying to find out is if I am an importer and
- 22 I also handle domestically, under this

- 1 agreement, I would be covered by whatever zone
- 2 I am in? Or would it be just considered an
- 3 importer?
- 4 THE WITNESS: Just considered an
- 5 importer. There is one seat for importer and
- 6 it is not tied to a zone.
- 7 MS. DESKINS: Okay. Thank you.
- 8 JUDGE HILLSON: Any further
- 9 questions?
- 10 Go ahead, Mr. Souza.
- MR. SOUZA: Thank you.
- 12 Mr. Giclas, I've got some
- 13 questions. In the first part of your
- 14 statement, you stated that Western Growers
- 15 felt that it was important to engage
- 16 government inspectors in the auditing of
- 17 practices in the field and the facility.
- 18 Could you elaborate a little bit more on that?
- 19 THE WITNESS: Absolutely. There
- 20 was some initial, you know, work done by the
- 21 Produce Marketing Association and some others.
- 22 I think we'd probably have to find these

- 1 studies. But they were consumer confidence
- 2 surveys that after the 2006 outbreak in E.
- 3 coli demonstrated kind of a lack of trust, if
- 4 you will, or confidence in the leafy green
- 5 industry. But a higher level of confidence
- 6 in, you know, government and government
- 7 inspection programs.
- And so when we talked about it,
- 9 discussed it, you know, in the terms of our
- 10 leadership and within our industry, what we
- 11 wanted to do was ensure that the best
- 12 practices that were being crafted by industry
- 13 experts in collaboration with, you know,
- 14 academic and regulatory entities, were, in
- 15 turn, verified by an independent, objective
- 16 third party. And that meant to us the
- 17 government. Somebody, you know, that was, you
- 18 know, not, you know, a profit-making motive,
- 19 if you will, for inspection and could provide
- 20 those verification services.
- 21 And when we further talked about
- 22 it, you know, we wanted those inspectors to be

- 1 very familiar with production and handling
- 2 practices. We don't see a lot of FDA
- 3 inspectors on farms. We see a lot of USDA.
- 4 USDA, AMS to be more specific.
- 5 And so we wanted people that
- 6 understood, you know, what the production and
- 7 handling practices were, had experience in
- 8 those programs, and could provide that, you
- 9 know, objective, third-party government seal
- 10 of approval, if you will.
- 11 MR. SOUZA: Thank you. I'd like to
- 12 spend a little bit of time going over a few
- 13 definitions. Could I have you explain a
- 14 little bit under 970.11? What is meant by
- 15 acquire? Handle means to receive, acquire,
- 16 sell, process. What is meant by the inclusion
- 17 of acquire there?
- 18 THE WITNESS: Well, I think it's --
- 19 I don't know that it was a targeted term. I
- 20 think that acquire may mean to, you know, to
- 21 bring it in for some kind of remuneration
- 22 other than cash, you know, as part of a

- 1 contract. As part of -- sometimes handlers
- 2 will actually help other handlers out when
- 3 they, you know, are missing product and things
- 4 like that, to fill gaps.
- I just think it means, you know,
- 6 the receipt, if you will, of the leafy greens.
- 7 MR. SOUZA: Moving over under your
- 8 explanation under signatory under 970.26, you
- 9 discuss somewhat about secondary handlers.
- 10 Would acquiring a product fall under the line
- 11 of secondary handlers there?
- 12 THE WITNESS: It could. Again, you
- 13 know, as I was describing earlier, you know, a
- 14 primary handler may be receiving product from
- 15 a producer and packaging that in one way,
- 16 shape, or form. But then distributing it to a
- 17 secondary handler who, in turn, further
- 18 processes it for further distribution. So,
- 19 you know, those secondary handlers may be
- 20 acquiring that product from a first handler.
- 21 MR. SOUZA: Thank you. Under
- 22 970.3, you got the term broker listed. And

- 1 you give the definition of broker. And then
- 2 it goes on to state that they do not take
- 3 ownership of the product there. Is it the
- 4 intent for them to be covered -- could a
- 5 broker be a signatory?
- 6 THE WITNESS: It's not our intent
- 7 to, you know, allow a broker to become a
- 8 signatory. They don't have -- they don't
- 9 actually ever take possession of products so
- 10 they don't have any control over or
- 11 comportment over its, you know, any of the
- 12 practices associated with it. I mean they are
- 13 effectively moving paper as opposed to
- 14 product.
- 15 MR. SOUZA: I understand that. But
- 16 if we go back to 970.11 under handle, they do
- 17 acquire the product whether it is through
- 18 paper or not. So could they wiggle in and
- 19 become a signatory under this program?
- 20 THE WITNESS: Well, that's
- 21 something that maybe we need to take a look
- 22 at. I don't believe they could. I don't

- 1 believe that they technically acquire the
- 2 product. I mean they don't take ownership, if
- 3 you will. They are moving it on behalf of
- 4 another party.
- 5 MR. SOUZA: Okay. One of the
- 6 reasons I have concern under 970.2 under audit
- 7 verification, the audit verification means
- 8 physical visit to a farm and facility. So if
- 9 we get into having to verify second handlers,
- 10 brokers, or such, we would not be able to
- 11 perform an audit verification as stated under
- 12 the current proposed rule.
- 13 You may want to take a look at
- 14 possibly putting something in as some sort of
- 15 compliance review or some mechanism such as
- 16 that to be able to verify that the product
- 17 was, indeed, handled under those provisions.
- 18 THE WITNESS: I agree. I quess I
- 19 would just say that it was our intent to
- 20 exclude, you know, those types of operations
- 21 from audit verification. And that's why we
- 22 crafted the definitions the way that they are.

- If it does not do that, then we
- 2 definitely need to go back and look at those
- 3 definitions and ensure that it does.
- 4 MR. SOUZA: Thank you.
- 5 No further questions.
- 6 JUDGE HILLSON: Anyone else?
- 7 Go ahead, Ms. Dash.
- 8 MS. DASH: Suzanne Dash. I just
- 9 have one question that is a follow up from
- 10 Kathy's. And I think you implied the answer
- 11 so I'll just ask it of you directly.
- 12 Do you feel that the addition of
- 13 good handling practices and good manufacturing
- 14 practices, in addition to the good
- 15 agricultural practices, will make the leafy
- 16 greens supply safer? And that it could --
- 17 will reduce the incidents of contamination
- 18 outbreaks?
- 19 THE WITNESS: I think we absolutely
- 20 believe that a standardized set of best
- 21 practices that is collaboratively developed by
- the industry, the FDA, the USDA, and extends

- 1 from production in the field all the way
- 2 through good handling practices, good
- 3 manufacturing practices in the facility will
- 4 minimize the potential for microbial
- 5 contamination and foster greater confidence in
- 6 our industry and in our markets. And
- 7 facilitate, you know, the marketing of leafy
- 8 greens.
- 9 MS. DASH: Thank you.
- 10 JUDGE HILLSON: That's it from the
- 11 panel?
- 12 (No response.)
- JUDGE HILLSON: Okay.
- MR. RESNICK: I have one point for
- 15 clarification, Your Honor.
- 16 JUDGE HILLSON: Okay. I was going
- 17 to give the --
- 18 MR. ENGLISH: Go ahead if it makes
- 19 sense.
- JUDGE HILLSON: Okay.
- 21 MR. RESNICK: Thank you -- just for
- 22 clarification. Looking -- this is Jason

- 1 Resnick -- looking at the definition of
- 2 handler at .11 and handle, does that inform
- 3 your answer to Mr. Souza's question about
- 4 whether it includes brokers or not?
- 5 THE WITNESS: Well, when Mr. Souza
- 6 asked me the question, we were focused on the
- 7 definition of broker. And I wasn't looking at
- 8 the definition of handler. But 970.11,
- 9 handle, and 970.12, handler, both specifically
- 10 exclude brokers as handlers. So I should have
- 11 brought that out.
- 12 JUDGE HILLSON: Anything else from
- 13 the USDA folks?
- 14 (No response.)
- 15 JUDGE HILLSON: Mr. English, do you
- 16 have any questions of this witness?
- 17 MR. ENGLISH: Good afternoon, sir.
- 18 My name is Charles English. And I represent
- 19 the National Organic Coalition.
- I'm not sure I saw it but you
- 21 referenced a little bit of a discussion about
- 22 the Agricultural Marketing Agreements Act but

- 1 let me ask and this will help prepare my
- 2 questions a little bit. Are you a lawyer by
- 3 training?
- 4 THE WITNESS: No.
- 5 MR. ENGLISH: Okay. In referencing
- 6 the Agricultural Marketing Agreements Act and
- 7 for a shortcut, it's easier for me if I call
- 8 it the AMAA, did you, beyond your statement,
- 9 research the history of the AMAA in any way?
- 10 THE WITNESS: No, not beyond my
- 11 statement.
- MR. ENGLISH: Are you aware that
- 13 the AMAA is viewed as a producer-driven
- 14 statute?
- THE WITNESS: I'll take your word
- 16 for it. I'm not aware per se.
- MR. ENGLISH: You're not aware. Do
- 18 you know if it was adopted by Congress in
- 19 order to address certain concerns that
- 20 processors, or the term we use, handlers, had
- 21 power over producers or farmers that needed to
- 22 be equalized or addressed in some way by

- 1 Congress?
- THE WITNESS: No.
- 3 MR. ENGLISH: Do you know whether
- 4 handlers or processors are mentioned in the
- 5 declared policy of the Act?
- 6 THE WITNESS: No, not off the top
- 7 of my head.
- 8 MR. ENGLISH: Do you know if in the
- 9 early days marketing agreements were prepared
- 10 at the request of producers, submitted to
- 11 handlers, and handlers refused to sign
- 12 marketing agreements in the early days of the
- 13 AMAA?
- 14 THE WITNESS: I'm only familiar
- 15 with my history of marketing agreements, which
- 16 dates back to 2006 in California. So no.
- MR. ENGLISH: So you don't have any
- 18 direct experience with a federal marketing
- 19 agreement?
- 20 THE WITNESS: No direct experience
- 21 with a federal marketing agreement.
- MR. ENGLISH: Is there a reason why

- 1 you proposed that only handlers be signatories
- 2 as opposed to producers?
- THE WITNESS: It is my
- 4 understanding that producers cannot be
- 5 signatories.
- 6 MR. ENGLISH: And if your
- 7 understanding were wrong and agreements could
- 8 be entered into with producers would that
- 9 alter your thinking?
- 10 THE WITNESS: In terms of a
- 11 marketing agreement, I think, again, I stated
- 12 earlier, it is our intention to involve, you
- 13 know, collaboratively and voluntarily the
- 14 entire industry. So if producers were, in
- 15 fact, eligible to sign into a marketing
- 16 agreement, I think we would definitely want to
- 17 consider that.
- 18 MR. ENGLISH: Would that then
- 19 change your thinking on the allocation of
- 20 seats on the administrative committee vis-a-
- 21 vis handlers and producers?
- 22 THE WITNESS: It may. It may. As

- 1 a matter of fact, I think it probably would
- 2 result in us wanting to have a more balanced
- 3 representation between producers and handlers.
- 4 MR. ENGLISH: You are the second
- 5 proponent witness to quote somewhat
- 6 extensively from testimony given by Michael
- 7 Taylor --
- 8 THE WITNESS: Correct.
- 9 MR. ENGLISH: -- of the FDA. Would
- 10 I be correct that you, by quoting, also
- 11 endorse his statements?
- 12 THE WITNESS: We endorse FDA's
- 13 positioning on the marketing agreement and, in
- 14 collaboration with the industry, and I guess,
- in short, yes, we would endorse most of his
- 16 statement. I mean there are some statements
- in there, in his remarks about movement
- 18 towards federal regulation that, you know, we
- 19 are trying to propose an alternative to.
- 20 MR. ENGLISH: That's what I'm
- 21 getting at. So thank you. You look at this
- 22 as an alternative to FDA regulation?

- 1 THE WITNESS: I think one of the
- 2 things, you know, that industry was interested
- 3 in was acting proactively, you know, to take
- 4 this upon ourselves, if you will, to develop
- 5 some kind of a construct that would put
- 6 industry at the table with FDA and with USDA
- 7 in terms of developing this kind of program.
- 8 We don't believe that, you know,
- 9 the promulgation of regulation when FDA or if
- 10 FDA gets new law mandating preventive
- 11 practices necessarily puts the industry at the
- 12 table with FDA in a collaborative fashion as
- 13 does a marketing agreement.
- MR. ENGLISH: Nonetheless, you
- 15 accept, I believe, and some of the answers to
- 16 the questions from the Department, that FDA
- 17 guidance or if it was FDA regulations would
- 18 play a significant role in developing the
- 19 metrics that would be adopted under any
- 20 marketing agreement, correct?
- 21 THE WITNESS: Yes. I mean we
- 22 believe that FDA brings the science for it in

- 1 many instances. And that's why we worked with
- 2 them collaboratively on a whole host of
- 3 industry guidance documents.
- 4 And we anticipate working with them
- 5 on this. And we've also embedded in the
- 6 marketing agreement some connection in terms
- 7 of the compliance issues that FDA might be
- 8 interested in as well.
- 9 MR. ENGLISH: You have been here
- 10 all day, correct?
- 11 THE WITNESS: I have been here all
- 12 day.
- MR. ENGLISH: And I asked an
- 14 earlier proponent witness this question so in
- 15 fairness, I'll ask it of you as well. If,
- 16 contrary to what I -- and if I mischaracterize
- 17 it, I apologize, as I perceive it that if FDA
- 18 nonetheless moves ahead and adopts
- 19 regulations, what, at that point, is the point
- 20 of having the marketing agreement if the
- 21 regulation is already out there?
- 22 THE WITNESS: Well, I think, you

- 1 know, it is incumbent upon the industry to see
- 2 what FDA's regulatory package and/or proposal
- 3 may look like. I think, you know, the
- 4 industry number one, could be more specific in
- 5 a lot of areas than any kind of FDA guidance
- 6 that has been written so far.
- 7 In the areas where FDA hasn't
- 8 written, you know, specifics into any of their
- 9 guidance, we kind of doubt that they are going
- 10 to come forward with that kind of specificity
- 11 in terms of regulation.
- 12 An example might be in the area of
- 13 water quality. Water quality, in an FDA
- 14 regulation or guidance document now, says
- 15 ensure that water is appropriate for its
- 16 intended use. A regulation might ask for some
- 17 documentation that you've looked at that.
- 18 But a marketing agreement
- 19 promulgated by the industry can actually get
- 20 into specific, measurable, verifiable-type
- 21 metrics that work for the industry.
- 22 MR. ENGLISH: There is a term that

- 1 was used by Mr. Taylor in his testimony that
- 2 you quoted from. And I'm wondering how it
- 3 relates to what you just said in terms of
- 4 specific, measurable metrics. And that is the
- 5 term preventive controls. How do you -- what
- 6 do you understand -- how do you understand
- 7 what Mr. Taylor meant when he said, and you
- 8 quoted him, if Congress passes food safety
- 9 legislation that includes explicit authority
- 10 to require preventive controls?
- 11 THE WITNESS: Well, we understand
- 12 it to mean science-based best practices that
- 13 will prevent contamination.
- 14 MR. ENGLISH: Sort of like your
- 15 marketing agreement program?
- 16 THE WITNESS: I think the marketing
- 17 agreement program is really designed to, you
- 18 know, put forward any practice that can
- 19 prevent contamination but also, you know, to
- 20 really focus on trying to do everything
- 21 feasible to minimize contamination.
- 22 MR. ENGLISH: Let me turn to a

- 1 couple of questions about the first handler,
- 2 second handler. Would a second handler, for
- 3 instance, be an entity running a large bagging
- 4 operation that receives from other handlers
- 5 leafy green vegetables that those other
- 6 handlers have purchased from growers?
- 7 THE WITNESS: Yes, that could be a
- 8 second handler.
- 9 MR. ENGLISH: And since your
- 10 proposal includes all 20 metrics for good
- 11 manufacturing practices that would be
- 12 applicable to that second handler, correct?
- 13 THE WITNESS: Yes.
- 14 MR. ENGLISH: Why shouldn't that
- 15 second handler -- let me strike that. I'll
- 16 get to the why in a second but doesn't that
- 17 second handler, through those good
- 18 manufacturing practices, benefit as much,
- 19 maybe more but at least as much as first
- 20 handlers in the marketing agreement program?
- THE WITNESS: Yes.
- MR. ENGLISH: Why shouldn't that

- 1 second handler share in the assessment burden
- 2 as opposed to just the audit burden?
- 3 THE WITNESS: Well, the assessments
- 4 are tied to the product. And I think there is
- 5 going to be subsequent testimony that talks,
- 6 you know, about the assessment rates and the
- 7 funding.
- 8 But the assessment rate is tied to
- 9 the product. And one of the things that we
- 10 wanted to try to prevent was having the
- 11 product paid for in terms of an assessment at
- 12 multiple points along the distribution chain.
- 13 So a first handler pay on that product and
- 14 then a second handler pay on the same product
- 15 didn't seem to be an equitable way to manage
- 16 that.
- 17 So we built in, if you will, first
- 18 handler pays the assessment rate. The second
- 19 handler will pay for those incremental
- 20 inspection services that occur, you know,
- 21 after that original product inspection at the
- 22 farm. And we do that through the fee-based

- 1 rate at USDA.
- 2 MR. ENGLISH: Well, going back to
- 3 the testimony from earlier today, doesn't that
- 4 effectively allow the second handler to be a
- 5 bit of a free rider?
- 6 THE WITNESS: No, I don't believe
- 7 it does. I think that they both pay. One is
- 8 paying, you know, on the product based on the
- 9 assessment rate. And the other is paying a
- 10 fee for service.
- 11 MR. ENGLISH: I'd like to talk --
- 12 spend most of the rest of my time on the
- 13 zones, the administrative committee, and the
- 14 technical committee.
- I understand what you've told us
- 16 about the zones. And I'll see if I can
- 17 restate it. And when I do so, you can tell me
- 18 whether I have it correct or not.
- 19 As opposed to looking at whether or
- 20 not a state such as Wisconsin and a state such
- 21 as Minnesota might be in the same kind of
- 22 region, as the term has been used, a zone is

- 1 effectively a way of dividing up for political
- 2 purposes only. Is that correct? Is that a
- 3 fair characterization?
- 4 THE WITNESS: That is a fair
- 5 representation.
- 6 MR. ENGLISH: And in light of that,
- 7 you deliberately -- and I don't use that word
- 8 pejoratively -- but you deliberately set out
- 9 to divide out certain key states, California,
- 10 Arizona, Texas, Colorado, Ohio, Georgia, and
- 11 Florida, I think, are the ones, so that they
- 12 weren't all in two or three regions, correct?
- 13 THE WITNESS: That's correct.
- 14 MR. ENGLISH: And all of that is
- 15 volume based, correct? The concept is volume
- 16 based.
- 17 THE WITNESS: The concept is volume
- 18 based.
- MR. ENGLISH: Is it grower volume
- 20 based or is it handler volume based?
- 21 THE WITNESS: It's production
- 22 volume based. So it is grower volume based.

- 1 MR. ENGLISH: Did you give any
- 2 consideration to modifying that along the
- 3 lines that were found in the -- I'm just
- 4 looking at the testimony, Exhibit 7, from
- 5 Diane Wetherington earlier -- and her
- 6 testimony didn't go to volume, and this is
- 7 Table 6 and 7 on page 9, but were sort of the
- 8 percent of growers. And had the numbers of
- 9 growers.
- 10 Did you consider looking, as
- 11 opposed to volume, to numbers of growers?
- 12 THE WITNESS: No. We looked only
- 13 at volume.
- 14 MR. ENGLISH: Once you had your
- 15 anchor states, and that's my own term, not
- 16 yours, I realize that, but sort of the five
- 17 key states divided up, what methodology
- 18 applied for the other states that were in a
- 19 zone? Using the term zone rather than region?
- THE WITNESS: Well, we looked at
- 21 2007 production volumes. We looked at every
- 22 state and every leafy green commodity that

- 1 there was data for in the Ag Census. We tried
- 2 to, you know, add those up in the different
- 3 zones and draw basically north-south lines
- 4 throughout the United States in a manner that,
- 5 you know, would balance them.
- 6 We couldn't balance them really
- 7 because California and Arizona, in and of
- 8 themselves, just outweigh the rest of the
- 9 country combined. So we -- this was a very
- 10 difficult thing for us to do to, you know, to
- 11 try to put forward these zones.
- But we determined that we would
- 13 anchor them by key production states and then
- 14 we would add the rest of the volumes in in
- 15 those remaining states. I think the other
- 16 three zones probably account for, you know,
- 17 less than four percent of the volume in each
- 18 one of the zones. So -- or five percent of
- 19 the volume in each one of the zones.
- 20 So we were challenged. And then
- 21 once we -- you know once we sort of settled on
- 22 those north-south divisions, we talked about

- 1 the smallest administrative committee that
- 2 could function.
- 3 And we started allocating seats
- 4 such that, again, no individual zone or state,
- 5 you know, could have a majority, if you will.
- 6 We wanted it to be balanced as possible.
- 7 MR. ENGLISH: What did you do -- I
- 8 asked the questions earlier today of the USDA
- 9 witness -- what did you do with the number of
- 10 states that had restricted data? Even though
- 11 they had like 54 farms or 40 farms, they
- 12 didn't provide the data. How did you account
- 13 for the volume in those jurisdictions?
- 14 THE WITNESS: If the data wasn't
- 15 available, we didn't account for the volume.
- 16 I mean we used the data that we had at hand.
- 17 MR. ENGLISH: Okay. So that would
- 18 mean that for those states where the data
- 19 wasn't available, you under counted. I mean
- 20 assuming it wasn't zero but I think the
- 21 Department usually tells us if it is zero, you
- 22 under counted for those states in volume,

- 1 correct?
- 2 THE WITNESS: I guess it is
- 3 reasonable to assume that. I don't -- I mean
- 4 I don't know if we under counted or maybe they
- 5 had no production.
- 6 MR. ENGLISH: Fifty-four farms had
- 7 no production? They actually had a specific
- 8 number of farms that would have no production?
- 9 THE WITNESS: No, I didn't hear the
- 10 term 54 farms. We could have -- I mean we
- 11 certainly could have under counted in certain
- 12 areas where the data was not available.
- MR. ENGLISH: Now unlike volume,
- 14 the Census of Agriculture gives us the number
- 15 of producers precisely. Correct?
- 16 THE WITNESS: I'm not sure how
- 17 precise --
- 18 MR. ENGLISH: Let me correct that.
- 19 And I'll correct the number for myself because
- 20 to the extent they did not response, it is a
- 21 voluntary response.
- 22 THE WITNESS: Right.

- 1 MR. ENGLISH: So to the extent it
- 2 is a voluntary response, that could be under
- 3 counted as well. Correct?
- 4 THE WITNESS: Correct.
- 5 MR. ENGLISH: But at least we have
- 6 all the survey results for those numbers
- 7 whereas we don't have for volume. Correct?
- 8 THE WITNESS: Correct.
- 9 MR. ENGLISH: Now as to the
- 10 administrative committee, sort of understand
- 11 the voting, and I've dealt with some of these
- 12 committees in other industries, are there any
- 13 present restrictions on the number of seats
- 14 that any one entity could have on the
- 15 committee?
- 16 THE WITNESS: I think, you know, we
- 17 attempted to design the administrative
- 18 committee such that you would declare your
- 19 seat. You would have one seat. And you would
- 20 be -- you would not be able to hold, you know,
- 21 two discreet seats, you know, from one company
- 22 even if you were involved in that company in

- 1 different states.
- 2 MR. ENGLISH: Okay. If it doesn't
- 3 say that, though, that you would be prepared
- 4 to say that is your position then?
- 5 THE WITNESS: Yes.
- 6 MR. ENGLISH: As the Department is
- 7 going through this, they ought to look at
- 8 that?
- 9 THE WITNESS: Yes.
- 10 MR. ENGLISH: That it is not your
- 11 anticipation that one handler could have a
- 12 seat on Zone 1, Zone 2, Zone 3, Zone 4, and
- 13 Zone 5 if they do business?
- 14 THE WITNESS: That is counter to
- 15 our intent.
- 16 MR. ENGLISH: I mean I agree with
- 17 you, by the way, that for voting purposes if a
- 18 secondary -- after the Secretary has selected
- 19 the first time around, I agree with you. I
- 20 think you've dealt with voting purposes that
- 21 no entity has more than one vote.
- But I question whether or not you

- 1 have dealt with the question of whether it is
- 2 a handler or a producer. And I hear you as
- 3 saying no, you don't think anybody should have
- 4 more than one seat on the administrative
- 5 committee.
- 6 THE WITNESS: That's correct.
- 7 MR. ENGLISH: Would that also go to
- 8 related companies such as if a company had a
- 9 subsidiary or a sister company, would it go so
- 10 far as to address that?
- 11 THE WITNESS: Yes. I mean we want
- 12 this committee to be, you know, diverse and
- 13 not populated, if you will, by related
- 14 companies.
- 15 MR. ENGLISH: I note also that you
- 16 have a provision that a minimum of four of the
- 17 handler members must be engaged in the
- 18 manufacturing of fresh cut leafy green
- 19 products.
- 20 THE WITNESS: Correct.
- 21 MR. ENGLISH: Okay. Along a
- 22 similar line, should there either be a maximum

- 1 on that or a minimum of handlers that are
- 2 involved only in the fresh market?
- 3 THE WITNESS: Well, I think the
- 4 intent in spelling it out was to try to,
- 5 again, you know, increase the, you know, the
- 6 diversity to make sure that we had
- 7 manufacturers represented and to make sure
- 8 that we had handlers of raw product
- 9 represented.
- 10 And to the extent that further
- 11 clarification in the membership of the
- 12 administrative committee, you know, could
- 13 highlight that, I think we would be open to
- 14 that.
- MR. ENGLISH: Further as to the
- 16 initial members, I think I understand it that
- 17 after the initial members of handlers and
- 18 producers have been nominated, and I assume, I
- 19 guess, yes, they have been selected and
- 20 appointed by the Secretary, that it is that
- 21 group that would nominate the retail, food
- 22 service, importer, and public members.

- 1 THE WITNESS: That is correct.
- 2 MR. ENGLISH: Should the Secretary
- 3 have the opportunity to nominate as well in
- 4 addition?
- 5 THE WITNESS: The Secretary has the
- 6 opportunity to approve the nominations. So I
- 7 mean yes.
- 8 MR. ENGLISH: So by saying no to a
- 9 nomination, then -- is that what you mean?
- 10 THE WITNESS: Yes.
- 11 MR. ENGLISH: But before that, you
- 12 don't look for the Secretary to have that
- 13 input?
- 14 THE WITNESS: I don't believe that
- 15 we, you know, built in the power for the
- 16 Secretary to nominate. But again, you know, I
- 17 thin it is our intent, you know, to try to
- 18 construct the administrative committee to be
- 19 as diverse as possible and populated by, you
- 20 know, people who are coming together to kind
- 21 of collaboratively engage in this.
- 22 And if those kinds of

- 1 clarifications are necessary, I think those
- 2 are the types of things that we are open to
- 3 and, you know, very receptive to that kind of
- 4 input.
- 5 MR. ENGLISH: I want to go back and
- 6 I may have misheard but I think it was a
- 7 question fairly early on from the Department
- 8 to you with respect to -- I think the question
- 9 was about the technical review board. And
- 10 you, I thought, answered it both as the
- 11 technical review board and the market review
- 12 board.
- 13 And I think the tenor of the
- 14 question was whether the technical review
- 15 board has sort of control over itself or
- 16 whether it is subject to the review of the
- 17 administrative committee.
- 18 And if I misstated that, I quess
- 19 what I'm getting at is what are the relative
- 20 roles for the administrative committee, the
- 21 technical review board, and the market review
- 22 board as to who ultimately is answerable?

- 1 THE WITNESS: I'm sorry. As to who
- 2 ultimately is --
- 3 MR. ENGLISH: Is answerable.
- 4 THE WITNESS: Well, the technical
- 5 review board is set up as a -- you can call it
- 6 maybe, for lack of a better term, a
- 7 subcommittee, if you will, of the -- well,
- 8 it's not a subcommittee because it is not
- 9 populated by the same people, but an agent of
- 10 the administrative committee or advisory
- 11 capacity to the administrative committee.
- 12 Its sole intent is to develop the
- 13 audit metrics. And, you know, that's why it
- 14 was important to populate it with food safety
- 15 experts, industry members, regulatory bodies,
- 16 et cetera. They will make a recommendation to
- 17 the administrative committee.
- 18 The administrative committee has
- 19 the approval power, if you will. So the buck
- 20 stops at the administrative committee.
- 21 MR. ENGLISH: I quess that was what
- 22 I was really getting at. And I apologize.

- 1 The actual language of the definition says the
- 2 technical review board is hereby established
- 3 for the purpose of assisting the committee in
- 4 developing audit metrics.
- 5 But your explanation down below
- 6 said the technical review board is critically
- 7 important as this body is charged with
- 8 actually developing the audit metrics. And
- 9 I'm just wondering if there is an
- 10 inconsistency in what you say in the
- 11 definition versus what you say in the
- 12 explanation.
- 13 THE WITNESS: Well, my definition
- is probably not as -- I mean my explanation is
- 15 probably not as artful. I mean it is
- 16 certainly not, you know, as a definition.
- 17 But I can tell you from our
- 18 drafting standpoint, the intent behind this
- 19 was to actually populate a technical review
- 20 board with experts in production practices,
- 21 food safety practices, environmental and
- 22 conservation practices.

- 1 And have them work through, you
- 2 know, existing industry and regulatory
- 3 documents and come forward with a set of
- 4 recommendations that could be approved by the
- 5 administrative committee as the audit metrics
- 6 for the marketing agreement.
- 7 MR. ENGLISH: Okay. And I
- 8 appreciate that. And I appreciate the fact
- 9 we've been having a conversation of the
- 10 diversity of the committee.
- 11 So if the food safety expert
- 12 members of the technical committee are limited
- 13 to being only from land grant universities and
- 14 then have to be elected by the
- 15 producer/handler board members for each zone,
- 16 is that limiting the diversity?
- 17 THE WITNESS: I don't know that it
- 18 limits diversity. I mean if it was
- 19 demonstrated that it did, I think we would,
- 20 you know, we would be open to changing that.
- 21 Because I mean I think, again, you know, what
- 22 we are interested in doing is, you know,

- 1 expanding this and making it as accessible as
- 2 possible.
- 3 And I think, you know, even if you
- 4 have that in the actual makeup of the
- 5 designated seats within the technical review
- 6 board, the technical review board still has
- 7 the opportunity to establish subcommittees.
- 8 And can, you know, bring in greater diversity
- 9 through those subcommittees as well.
- 10 MR. ENGLISH: I have misplaced two
- 11 or three questions. I think in answer to
- 12 questions from the Department, you indicated
- 13 that there are a number of regions. Now I'm
- 14 going to use the word region and not zones.
- 15 That there are a number of regions.
- 16 You don't have a number today of how many
- 17 regions there are. Do you?
- 18 THE WITNESS: No. No. And I'm not
- 19 sure there is a definitive number either. I
- 20 mean a region, you know, could be determined
- 21 by the technical committee to be a very small,
- 22 you know, set of production practices or

- 1 geographic area or those types of things.
- I think we were trying to describe
- 3 the fact that there is a need within this
- 4 extremely diverse industry to be able to
- 5 tailor those best practices, you know, as
- 6 appropriate to different geographical,
- 7 different micro climates, different production
- 8 practices, different water sources, et cetera.
- 9 So --
- 10 MR. ENGLISH: Well, just being very
- 11 basic for a moment, you've got -- in Zone 1,
- 12 you've got Hawaii, Alaska, Washington, Oregon,
- 13 and California.
- 14 THE WITNESS: Correct.
- MR. ENGLISH: I would expect you
- 16 would agree with me that Hawaii is going to be
- 17 its own region. Maybe even more than one
- 18 region but at least one region. Alaska would
- 19 be its own region, maybe at least Washington
- 20 and Oregon, the Pacific Northwest, and whether
- 21 you divide California up, and I would suspect
- 22 you would.

- 1 So I'm just hypothesizing with you
- 2 for a moment that you probably have at least
- 3 four regions in Zone 1. Probably more but at
- 4 least four.
- 5 THE WITNESS: Are you asking me to
- 6 --
- 7 MR. ENGLISH: Yes. Yes. Would you
- 8 agree that at least four?
- 9 THE WITNESS: I think you could
- 10 have, you know, I think you could have four
- 11 regions within California.
- MR. ENGLISH: And I wasn't -- yes,
- 13 I was not suggesting I was limiting. I just -
- 14 okay.
- 15 THE WITNESS: Yes.
- 16 MR. ENGLISH: So that could mean
- 17 that as opposed to sort of having five sets of
- 18 standards, we could have 30,40, 50 -- you
- 19 don't know right now how many sets of
- 20 standards we might have.
- THE WITNESS: Well, that's correct.
- 22 But, again, we have to think about the intent

- 1 here. The intent is to try to, you know,
- 2 develop or devise a baseline set of best
- 3 practices that work commonly across the entire
- 4 industry.
- 5 The experience with California and
- 6 Arizona marketing agreements have demonstrated
- 7 to us that with very minimal adaptation in
- 8 terms of addendums and things like that, one
- 9 set of metrics can be very easily employed in
- 10 a lot of different geographic areas and a lot
- 11 of different diverse production areas.
- 12 The only thing that we were trying
- 13 to do in terms of, you know, describing
- 14 regions was to provide the flexibility for the
- 15 technical committee to recognize those, you
- 16 know, those regional differences that might be
- 17 necessary, you know, to make it workable in
- 18 those areas.
- 19 We could have, and I think the
- 20 desire would be, to try to get to, you know,
- 21 one single baseline set of standards. And,
- 22 for example, the California metrics are

- 1 adaptable and workable in coastal
- 2 environments, in Central California
- 3 environments, in the desert environment, and
- 4 the desert environment in Arizona. And we've
- 5 even seen them implemented in Florida,
- 6 Colorado, and other areas -- Mexico -- other
- 7 areas with minor modifications to reflect, you
- 8 know, irrigations practices or something like
- 9 that.
- 10 So while it is conceivable that you
- 11 could have 50 different standards, that's not
- 12 the desire of the industry. The desire of the
- industry is to get to one standard and those
- 14 addendums that are necessary to make it work
- 15 in different areas.
- 16 MR. ENGLISH: But nonetheless you
- 17 recognize there is a whole lot of regions out
- 18 there.
- 19 THE WITNESS: Correct.
- 20 MR. ENGLISH: And you indicated
- 21 that -- well, more than indicated, I think you
- 22 testified point blank that you had a fair -- a

- 1 significant amount of a role in the leafy
- 2 greens vegetables agreement here in
- 3 California. Correct?
- 4 THE WITNESS: Correct.
- 5 MR. ENGLISH: Turning just to one
- 6 final issue and that is encroachment by
- 7 animals.
- 8 THE WITNESS: Okay.
- 9 MR. ENGLISH: How would you
- 10 envision the administrative committee -- the
- 11 technical committee determining which animals
- 12 are of significant risk?
- 13 THE WITNESS: Well, let me talk
- 14 first about what we did in California as maybe
- 15 a preface to that.
- 16 The California agreement was
- 17 largely established in response to the 2006
- 18 outbreak, I think as you know. That outbreak
- 19 was an E. coli event. And as such, you know,
- 20 we focused on animals that are principally
- 21 associated with E. coli, that are either, you
- 22 know, known repositories, if you will.

- 1 And the list of significant --
- 2 animals of significance risk that is utilized
- 3 in the California agreements was derived from
- 4 an early CDC document that had all of those
- 5 animals on it with the exception of wild pigs,
- 6 which we added because the investigation into
- 7 the 2006 outbreak implicated wild pigs as well
- 8 as other potential factors.
- 9 So on a national level, you know,
- 10 we're going to look to, I think, CDC, the
- 11 academic community, and the regulatory
- 12 community to try to tell us, you know, what
- 13 are the animals that we need to be focused on.
- I will say one thing and that is
- 15 when you start thinking about pathogens other
- 16 than E. coli, like salmonella and wisteria and
- 17 some others, we have to bring in another
- 18 broad, you know, suite of animals that
- 19 potentially can be a vector for that
- 20 contamination.
- 21 So I think in general people should
- 22 be concerned about animals in fields and how

- 1 you write metrics to deal with that. You know
- 2 it is going to be important for the national
- 3 agreement.
- 4 MR. ENGLISH: Let's just stick with
- 5 E. coli for one moment. You agree with me
- 6 that the CDC study that was relied on in 2006
- 7 was somewhat dated? I think it was from 1985.
- 8 THE WITNESS: I don't recall the
- 9 date. I mean, you know, we developed those
- 10 metrics in kind of collaboration with FDA and
- 11 CDC. I mean when we put things forward, they
- 12 would read it and give us their feedback.
- That was actually on a CDC website
- 14 that we accessed that had, you know, animals
- 15 listed that were E. coli carriers.
- MR. ENGLISH: Including deer?
- 17 THE WITNESS: Including deer,
- 18 goats, sheep, livestock, and there may be some
- 19 others but --
- 20 MR. ENGLISH: And at least as to E.
- 21 coli, would you agree that at least deer and
- 22 maybe other wildlife that were targeted by the

- 1 California Leafy Greens Marketing Agreement as
- 2 being of high risk are now having been shown
- 3 as not being of high risk for E. coli?
- 4 THE WITNESS: No, I would not agree
- 5 with that statement. What I would agree with
- 6 is the fact that there is research underway to
- 7 try to determine, you know, the risk that is
- 8 associated with deer.
- 9 Most of the studies show, you know,
- 10 that populations can have two percent or so E.
- 11 coli. I think one of the things that is
- 12 incumbent upon the industry is to discuss
- 13 whether that is an acceptable level of risk or
- 14 not.
- 15 You know the work that has been
- 16 done here in California so far in terms of
- 17 sampling deer populations is preliminary.
- 18 It's only half a year's worth of study. It
- 19 studied a deer population that does not come
- 20 into contact with domestic livestock. So it
- 21 may be skewed data.
- We need to give that research a

- 1 chance to ripen. And we need to, you know,
- 2 consult with the regulatory community and the
- 3 academic community about whether or not they
- 4 truly are a risk. And whether or not we can
- 5 de-emphasize them.
- 6 MR. ENGLISH: So you agree at least
- 7 it should be reconsidered?
- 8 THE WITNESS: I agree that we need
- 9 to look at animals and target our resources at
- 10 those that have the greatest amount of risk to
- 11 the commodity.
- 12 MR. ENGLISH: I thank you very
- 13 much, sir.
- 14 JUDGE HILLSON: Do you have any
- 15 redirect of this witness?
- MR. RESNICK: We have none.
- 17 JUDGE HILLSON: Any other questions
- 18 of the government?
- 19 (No response.)
- JUDGE HILLSON: Okay. You may step
- 21 down. Thank you.
- THE WITNESS: Thank you.

- 1 MS. SCHMAEDICK: Excuse me.
- JUDGE HILLSON: I'm sorry. Did you
- 3 have a question?
- 4 MS. SCHMAEDICK: I do.
- 5 JUDGE HILLSON: All right. I'm
- 6 sorry. I didn't see a reaction. Go ahead,
- 7 Ms. Schmaedick.
- 8 MS. SCHMAEDICK: Thank you.
- 9 This is Melissa Schmaedick.
- 10 Mr. Giclas, another proposed
- 11 definition of handler, let me just read to you
- 12 what was published in the Federal Register.
- 13 It says handler means any person
- 14 who handles -- which reflects back to the
- 15 definition of handle -- provided that this
- 16 definition does not include a retailer, food
- 17 service distributor, or broker, except to the
- 18 extent that such a person is otherwise engaged
- 19 in handling.
- Now person -- could a person be a
- 21 producer that is engaged in handling?
- 22 THE WITNESS: A person could be a

- 1 producer that is engaged in handling. I
- 2 believe that's correct, yes.
- 3 MS. SCHMAEDICK: So the statement
- 4 that producers cannot be signatories is
- 5 perhaps not completely accurate?
- 6 THE WITNESS: Yes. I mean in that
- 7 question, I guess I would have been including
- 8 them as a handler because that part of their
- 9 operation where they are handling is what I
- 10 understood made them eligible for a marketing
- 11 agreement.
- 12 But there are definitely many
- 13 handlers who also are producers and could be
- 14 signatories to the agreement.
- MS. SCHMAEDICK: Thanks.
- 16 JUDGE HILLSON: Anything else?
- 17 (No response.)
- 18 JUDGE HILLSON: And I'm going to
- 19 receive your statement, Exhibit 14, into
- 20 evidence.
- 21 (Whereupon, the above-referred to
- 22 document was received into the

- record as USDA Exhibit No. 14.)
- JUDGE HILLSON: You may step down.
- It's about 5:50. I'm not sure that
- 4 it makes sense to start a new witness at this
- 5 time of day.
- I did have a conversation with Mr.
- 7 English and Mr. Resnick before on our last
- 8 break and we all seem to agree that maybe the
- 9 next couple of days we should start early and
- 10 run late and see if maybe somehow we can get
- 11 finished on Thursday.
- 12 So my suggestion is that we plan to
- 13 go from eight to six-thirty tomorrow. Is that
- 14 going to kill anybody besides me?
- 15 (Laughter.)
- 16 JUDGE HILLSON: And I mean
- 17 depending on where we are with a witness, we
- 18 could go later. But it makes no sense to
- 19 start another witness now. And so we'll plan
- 20 on going from eight to six-thirty.
- I had a few people who indicated
- 22 that they needed to testify tomorrow. We'll

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1 try to sort that out in the morning at a few
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- 2 minutes of eight before we start. We'll
- 3 figure what order or how far out of order
- 4 people ought to go in order to testify.
- 5 But we'll plan on starting with
- 6 your next -- who is your next witness going to
- 7 be?
- 8 MR. RESNICK: It's going to be
- 9 Scott Horsfall.
- JUDGE HILLSON: Okay. Okay. Well,
- 11 we'll plan on starting with Mr. Horsfall
- 12 tomorrow morning at eight o'clock. Okay?
- 13 We're done for today.
- 14 (Whereupon, the above-entitled
- 15 public hearing was concluded at
- 16 5:49 p.m.)
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