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Marketing Agreement

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1 P R O C E E D I N G S

2 8:03 A.M.

3 JUDGE HILLSON: Good morning
4 everybody. This is Judge Marc Hillson
5 presiding over the third day of the Leafy
6 Green Vegetable Hearing on the proposed
7 marketing agreement. Today's September 24th,
8 it's 8:00 a.m. and we're in Monterey,
9 California.

10 We have what appears to be another
11 pretty full day of testimony ahead of us and
12 have counsel figured what the witness order is
13 going to be between you and Mr. English?

14 MR. RESNICK: Well, we haven't
15 conferred, but it's our intention, Your Honor,
16 to put on, you know, the rest of our
17 Proponent's case, straight through today.

18 JUDGE HILLSON: Okay. And Mr.
19 English, do you have a witness who is -- that
20 due to the needs of time or travel, needs to
21 get on earlier, this would be a good time to
22 let me know.

1 MR. ENGLISH: Two, Your Honor.
2 One who's actually been on the list since 8:30
3 Tuesday morning, but, you know, we've moved
4 because of other people, Mr. Runsten and one
5 other who needs to get out by early afternoon,
6 if possible, by 1:00.

7 Relatively short statements, both,
8 especially the second one. You know, we
9 obviously got accommodations yesterday, we
10 know that, and you know, we'll work around
11 things.

12 JUDGE HILLSON: Will you prefer
13 going straight through with your witnesses and
14 then taking a break for Mr. English's two
15 witnesses or would you rather have Mr. English
16 call his two witnesses and then go straight
17 through?

18 MR. RESNICK: You know, --

19 JUDGE HILLSON: Because I sure
20 don't care.

21 MR. RESNICK: Well, we were very
22 accommodating --

1 JUDGE HILLSON: No question about
2 it.

3 MR. RESNICK: And as a result, we
4 may have lost a critical witness who waited
5 around all day yesterday and we didn't get a
6 chance to put him on. We can't afford to
7 allow that to happen again. We may be able to
8 make some accommodations as the day goes on
9 and we'll be able to address that issue.

10 JUDGE HILLSON: Okay. Well, why
11 don't we start off with you putting on
12 witnesses and then Mr. English, when it
13 becomes fairly critical for the earlier
14 witness to testify, you let me know.

15 Maybe -- I'll tell you what, we're
16 going to have our usual break at around, you
17 know, 10:15 or so, why don't you go through --
18 we'll have the Proponent's go through to
19 10:15.

20 We'll come back, Mr. English will
21 call that first witness and then we'll see if
22 it makes sense for you to call both or your

1 witnesses and get it done and then they can go
2 straight through the rest of the day.

3 MR. ENGLISH: But I agree, let's
4 get started.

5 JUDGE HILLSON: All right. Do you
6 have a witness for me?

7 MR. RESNICK: Yes, Your Honor. At
8 this time we would call Dr. Paggi.

9 JUDGE HILLSON: Thank you. I'm
10 marking Dr. Paggi's testimony as Exhibit 31.

11 (Whereupon, the above-referred to
12 document was marked as Exhibit No.
13 31 for identification.)

14 MR. RESNICK: The staff is making
15 copies of Dr. Paggi's testimony as we speak.

16 JUDGE HILLSON: Will you please
17 raise your right hand, sir?

18 WHEREUPON,

19 MECHEL PAGGI

20 was called for examination by Counsel for the
21 Proponent, having been first duly sworn,
22 assumed the witness stand, was examined and

1 testified as follows:

2 JUDGE HILLSON: Okay. Could you
3 please state your name and spell it for the
4 record?

5 THE WITNESS: Mechel Paggi, M-E-C-
6 H-E-L P-A-G-G-I.

7 JUDGE HILLSON: And do you just
8 want to read a written statement? Do you have
9 any preliminary questions or you want him to
10 just go on?

11 THE WITNESS: No, I'll just read
12 mine.

13 JUDGE HILLSON: Go ahead.

14 DIRECT EXAMINATION

15 THE WITNESS: My name is Mechel
16 Paggi, I am the Director of the Center for
17 Agricultural Business at California State
18 University, Fresno. I appreciate the
19 opportunity to testify today on the
20 Proposed Federal Marketing Agreement for Leafy
21 Green Vegetables handled in the United States.

22 California is the major producer

1 of leafy green vegetables consumed in the
2 United States. For example in value terms
3 California accounted for 82 percent of the
4 fresh head lettuce, 79 percent of the fresh
5 leaf lettuce, 80 percent of the fresh romaine
6 lettuce and 70 percent of the fresh spinach
7 produced in the United States in 2008.

8 Historically, the United States
9 has been perceived as having the safest food
10 supply in the world. While this may still be
11 true, a number of microbiological
12 contamination incidents have led to questions
13 regarding the safety of the U.S. food supply
14 and the need for improved food safety control
15 initiatives and standards by both the private
16 and public sectors.

17 As noted in the Federal Register a
18 motivation for this hearing can be directly
19 linked to the September 2006, FDA alerts of a
20 multi-state E. coli outbreak linked to fresh
21 spinach grown in California. The resulting
22 recall was the largest ever for leafy green

1 products.

2 Investigations by the FDA and the
3 California Department of Health Services, in
4 cooperation with the Centers for Disease
5 Control and Prevention and USDA's Animal and
6 Plant Health Inspection Service, concluded
7 that the E. coli contamination might have been
8 attributed to environmental factors in the
9 production area.

10 In response to this outbreak,
11 members of the California industry initiated
12 the establishment of a State marketing
13 agreement for handlers of leafy greens, which
14 became effective February 10, 2007.

15 Currently, signatory handlers
16 under the California state program represent
17 99 percent of leafy green vegetable production
18 volume in that state.

19 In October 2007, a similar program
20 was implemented in Arizona, which reportedly
21 covers approximately 75 percent of the leafy
22 green vegetables produced in the state. While

1 both the California and Arizona programs are
2 voluntary, the requirements of these state
3 agreements are mandatory for all signatories.

4 The purpose of this testimony is
5 to provide information related to the economic
6 and marketing conditions related to the
7 effects of the agreement and impacts on
8 growers, handlers, other industry members and
9 consumers.

10 The testimony focuses on the
11 rapidly evolving nature of the
12 standard-setting process for food safety in
13 the public and the private sectors; the costs
14 borne by the industry when the
15 agricultural-based incident occurs; and the
16 ways in which producers have exercised
17 leadership and can react to these evolving
18 concerns.

19 While more recent examples may be
20 cited in a number of other commodities such as
21 peanuts and pistachios the quantitative
22 analyses in this testimony focuses on the

1 costs born by producers and by those who
2 handle produce utilizing two specific
3 incidents as examples.

4 These incidents include: The 2006,
5 E. coli outbreak associated with the
6 consumption of bagged spinach. The 2008,
7 salmonella outbreak linked to consumption of
8 certain types of red tomatoes and tomato
9 products

10 These outbreaks are not unique.
11 According to the CDC, more than 76 million
12 people are affected and 5,000 die as a result
13 of food poisoning outbreaks every year. The
14 most common foodborne illnesses are
15 campylobacter, salmonella and E. coli.

16 Over the past 12 years, all of the
17 22 leafy green associated E. coli incidents
18 indicated a California source. Other products,
19 both domestically produced and imported, have
20 been linked to other foodborne illnesses such
21 as salmonella and hepatitis.

22 Since the mid-1990s outbreaks in

1 produce have occurred that were linked to
2 raspberries, green onions, and strawberries.
3 Many other examples could be cited in meats,
4 eggs, and dairy products.

5 As a reaction to these incidents,
6 increased efforts have been undertaken to
7 enhance food safety by the government and
8 associated industry groups. These efforts have
9 focused on increasing scrutiny of imported
10 products and the improvement in domestic
11 standards.

12 In some cases, product standards
13 have established tolerance levels for certain
14 pathogens; in other cases process standards
15 have been adopted that recommend or prescribe
16 Good Agricultural Practice, GAP, standards for
17 production, Good Handling Practice standards
18 for handling products.

19 These GAP standards are designed
20 to reduce the potential for contamination.
21 However, additional regulatory actions are
22 being considered, such as the consolidation of

1 food safety regulatory activities currently
2 located in Federal government agencies such as
3 FDA and the United States Department of
4 Agriculture into a new food safety regulatory
5 agency.

6 The testimony speaks to actions in
7 the public and private sectors that affect
8 their present and future operations. It also
9 analyzes the specific costs incurred by the
10 produce industry when these incidents occur.

11 The final section analyzes some of
12 the steps that producers have taken and can
13 take to deal with food safety issues and the
14 associated costs incurred.

15 Contemporary concerns about food
16 safety, arguably, began in 1992 with E. coli
17 contamination of improperly cooked hamburgers.
18 This and subsequent incidents involving the
19 e-coli and salmonella bacteria led to
20 revolutionary changes in state and federal
21 meat and poultry inspection policies.

22 The most significant of these

1 changes was the federally-mandated adoption of
2 management systems in which food safety is
3 addressed through the analysis and control of
4 biological, chemical, and physical hazards
5 from raw material production, procurement and
6 handling, to manufacturing, distribution and
7 consumption of the finished product, HACCP,
8 for the slaughter and handling of fresh meat
9 and poultry.

10 Briefly, HACCP specifies Good
11 Manufacturing Processes that must be used to
12 identify and reduce the likelihood of harmful
13 microbial contamination incidents.

14 An important lesson from the
15 hamburger food safety incidents is that,
16 regardless of where or in what food supply
17 chain subsector a food safety incident occurs,
18 it has potential process standard implications
19 for the other products and subsectors.

20 Therefore, an important current
21 food safety policy issue is the extent to
22 which HACCP procedures should be applied

1 broadly to additional segments of the food
2 supply chain. Such a policy change could
3 include application of HACCP principles to all
4 segments of the food supply chain from farm
5 production through sales at retail.

6 Some would assert that this is
7 already happening. A related issue involves
8 the potential adoption of standards requiring
9 a labeling system whereby the origins of
10 biocontamination could be traced to the farms
11 where the products are grown.

12 For both HACCP and traceback,
13 there is the issue of how the responsibility
14 for food safety should be divided between the
15 public and private sectors.

16 A great many private and public
17 sector resources are being invested in
18 developing systems and standards that address
19 food safety concerns at all levels of the
20 supply chain.

21 The proliferation of these
22 standards, guidelines, and certification

1 programs has created a situation that some
2 have likened to an arms race to prove who is
3 providing the safest food.

4 In the absence of one universally
5 accepted set of standards, producers and food
6 providers are often faced with having to
7 comply with a different set of standards for
8 different customers.

9 This results in increased costs
10 with little evidence of a corresponding
11 increase in compensation in the form of higher
12 product prices. The current labyrinth of food
13 safety and protection standards include, but
14 are not limited to, those being promoted by
15 international organizations, governments,
16 producers, and food retailers, particularly
17 supermarket and fast-food chains.

18 In the U.S. Federal government,
19 the responsibility for food safety is
20 distributed among the Food and Drug
21 Administration, USDA, the Centers for Disease
22 Control and Prevention, and Homeland Security.

1 USDA's food safety
2 responsibilities center on meat and poultry
3 inspection, certification of safe process
4 practices in production and marketing,
5 controlling plant and animal diseases that
6 affect safety, and generating technological
7 progress in dealing with food safety and
8 disease issues.

9 Several of USDA's food safety
10 inspection and disease control functions are
11 performed on a mandatory basis. FDA's
12 responsibilities center on processed foods,
13 including produce. FDA does not have the
14 authority to provide mandatory standards
15 related to practices to assure food safety in
16 the case of fresh produce.

17 Instead, the FDA provides
18 guidelines in the form of the steps that are
19 designed to minimize microbial food safety
20 hazards in produce. CDC is responsible for
21 helping to identify the sources of biological
22 and disease contamination of the food supply.

1 EPA is responsible for regulating
2 the safety of chemicals used in food
3 production and processing and for dealing with
4 issues of water quality as they affect food
5 safety. Homeland Security is responsible for
6 ensuring that imported products meet U.S.
7 standards for food safety.

8 It's important to point out that
9 these federal agencies, to varying degrees,
10 have state counterparts that they delegate to
11 or interact with to carry out their respective
12 food safety responsibilities.

13 While E. coli contamination of
14 hamburger precipitated the USDA to mandate
15 HACCP regulations be applied to meat and
16 poultry, the 2006 E. coli outbreak in spinach
17 is often cited as the cause for an aggressive
18 response by industry to establish stringent
19 food safety standards to be imposed upon their
20 own members.

21 In 2007, the California leafy
22 green industry came together to establish the

1 California Leafy Green Products Handler
2 Marketing Agreement. As stated earlier, to
3 date nearly 99 percent of the volume of
4 California leafy greens are grown with
5 practices that fall within the standards of
6 the voluntary grower, packer, and shipper
7 initiative.

8 Under the terms of the LGMA,
9 signatory members are required to verify
10 compliance with a specific set of food safety
11 practices by submitting to mandatory
12 government audits.

13 The process guidelines used by
14 leafy green are GAP standards for production
15 and Good Handling Practices for the harvest
16 and processing of lettuce and leafy greens.
17 These standards are provided to all members in
18 regularly updated publications.

19 The standards include general
20 requirements for a Best Practices Plan
21 developed by each member that addresses issues
22 related to, water quality, soil amendments,

1 control of environmental factors such as
2 runoff from animal feeding operations, work
3 and field sanitation practices, up-to-date
4 growers list for handlers, handler compliance
5 with the Public Health Security and
6 Bioterrorism Preparedness and Response Act of
7 2002 including the traceability requirements
8 of that act, 24-hour contact information for
9 responsible individuals in case of food
10 emergencies, regular audits to monitor and
11 assure compliance.

12 Details covering each issue are
13 provided as well as special guides for
14 in-depth coverage of water surveys; technical
15 baseline information; product testing
16 protocol; and preparation for
17 process-compliant audits.

18 Producers can take it upon
19 themselves to comply or not with the set of
20 standards. It may be easier for large
21 producers to comply if most of the costs
22 associated with complying with the new

1 standards are fixed costs.

2 However, for example, HEB is also
3 requiring that all of its suppliers in the
4 U.S. and Mexico attend produce training safety
5 courses and comply with the Leafy Green
6 Marketing Agreement requirements.

7 For producers that choose not to
8 comply or are unable to comply, there may be
9 other niche markets that they can target such
10 as farmers' markets and other direct marketing
11 approaches. The numbers of farmers' markets
12 has increased substantially over the past few
13 years and are actively supported by USDA.

14 According to AMS/USDA, since 1994
15 the number of farmers' markets has grown by
16 6.8 percent, from 1,755 to a total of 4,685 in
17 August 2008.

18 Just last week USDA announced 86
19 new grants totaling \$4.5 million in funding
20 for Farmer Market Promotion Programs.

21 Although farmer markets are gaining
22 popularity, they're usually seasonal and

1 riskier as there are no secure buyers.

2 In addition, growers who sell
3 their products through farmer's markets not
4 only have to be good agricultural producers,
5 they also have to spend time and resources in
6 marketing. One element of that marketing will
7 be to provide assurance that the products
8 being purchased are safe.

9 For this reason, all producers
10 will need to seriously consider the potential
11 consequences of not taking actions that assure
12 the safety of products they market.

13 While not explicitly linked to the
14 spinach outbreak, a group of large buyers and
15 retailers of produce published their own set
16 of safety standards in 2007.

17 In an apparent effort to have
18 their suppliers conform to uniform codes of
19 conduct, a consortium of firms, the Food
20 Safety Leadership Council, published their own
21 Farm Produce Standards on September 10, 2007.

22 The FLSC was composed -- is

1 composed of, among others, Darden Restaurants,
2 owners of Olive Garden, Red Lobster, the
3 Capital Grill and others; McDonald's
4 Corporation; Publix Super Markets; Wal-Mart
5 Stores; Walt Disney World Company; and Avendra
6 LLC, a food service procurement company.

7 The FLSC standards demonstrate the
8 complexity of issues that emerge when an
9 influential buyer group sets its own food
10 standards with which suppliers are expected to
11 comply.

12 While the FLSC standards provide
13 details for practices in much the same fashion
14 and almost an identical set of activities and
15 areas as the Leafy Green Marketing Agreement,
16 the specifics of the standards vary in some
17 categories.

18 For example, the FLSC water
19 quality standards were far more restrictive
20 than those of the Leafy Green Marketing
21 Agreement. Additionally, required buffer
22 distances of fields from animals lacked

1 uniformity.

2 Such conflicting standards set up
3 a confrontational and confusing setting for
4 individual producers who strive to adhere to
5 GAP and Good Handling Practice standards to
6 satisfy their customers.

7 Increasingly globalization of the
8 food supply in the United States and other
9 countries has resulted in an attempt to
10 develop food safety standards that are
11 recognized across national boundaries.

12 International food marketers such
13 as Wal-Mart, Costco, and Carrefour require the
14 ability to source products from around the
15 world to provide their customers with a daily
16 supply of fruits and vegetables that are not
17 always in season or available from local
18 producers.

19 In sourcing products globally, the
20 ability to have confidence in product safety
21 is essential and a distinct competitive
22 advantage. Recognition of uniform standards

1 among traders is the motivation behind the
2 development of the GlobalGAP system of
3 insuring food safety through third-party
4 audits that guarantee production practices in
5 accordance with detailed guidance criteria.

6 GlobalGAP launched in September
7 2007, sets standards and an accredited
8 certification program developed from the
9 European Retailer Environmental Protocol,
10 EuroGAP, which was a consortium of European
11 retail chains, importers, and suppliers formed
12 in 1997.

13 As the original program grew in
14 acceptance among the industry world wide,
15 other countries developed their own programs
16 such as ChinaGAP, ThaiGap, et cetera. The
17 evolution to GlobalGAP is designed to help
18 prevent confusion in the growing world of food
19 safety standards.

20 It now has established programs in
21 over 80 countries around the world.
22 GlobalGAP's accredited certification programs

1 covers a broad range of crops, livestock,
2 aquaculture, compound feeds, and plant
3 propagation materials.

4 Growers are required to comply
5 with a series of specific practices and are
6 audited by accredited agents consistent with
7 the International Standards Organization, ISO
8 62 and 65 guidelines for certification
9 programs.

10 In addition, auditors must have
11 undergone training according to Iso 9000
12 quality management or ISO 14000 environmental
13 management standards.

14 The Global Food Safety Initiative,
15 in April 2000, was the product of discussions
16 among a group of international retailers who
17 identified the need to enhance food safety,
18 ensure consumer protection, strengthen
19 consumer confidence, and set standards for
20 food safety schemes that would hopefully
21 improve cost efficiency throughout the food
22 supply chain.

1 The GFSI was officially launched
2 in May 2000 and is facilitated by the Food
3 Business Forum. The GFSI vision of being --
4 has the vision of being one certified,
5 accepted everywhere as adopted by Carrefour,
6 Tesco, Metro, Migros, Ahold, Wal-Mart, and
7 Dehaize.

8 These major international food
9 retailers have agreed to reduce duplication
10 into the supply chain through the common
11 acceptance of any of the four GFSI benchmarked
12 schemes.

13 This brief review of the current
14 state of food safety standards illustrates the
15 various programs that growers and handlers
16 face as they attempt to qualify their products
17 for acceptance by today's food supply chain.

18 Increasing consolidation on the
19 buyer side and concerns over the liability
20 associated with foodborne illness events
21 create demands on producers to be in line with
22 specified standards or to face exclusion from

1 the marketplace.

2 At the same time, knowing which
3 standards to accommodate, for what buyer, and
4 for what product is increasingly challenging
5 for growers -- excuse me. For growers, having
6 one set of specific standards for specific
7 products will simplify management decisions
8 and should reduce the cost of compliance.

9 It appears to be desirable to have
10 the industry and their associations at the
11 state, regional, national, and international
12 levels work collaboratively to establish a
13 uniform set of standards.

14 In this section, the economic
15 consequences for production of a biological
16 contamination incident are quantified. This
17 analysis is limited to the costs born by
18 producers and handlers so that they can have
19 a guide for knowing the direct revenue and
20 cost consequences for their operations of a
21 food safety incident.

22 It does not attempt to estimate

1 that cost to the consumers who experience food
2 poisoning. In a related manner, it does not
3 analyze the risk exposure for liability in
4 food safety incidents litigation.

5 In general terms, following public
6 awareness of a biological contamination
7 incident, consumers would be expected to
8 reduce their consumption of the affected
9 products.

10 Following official government
11 notification of an incident, there may be a
12 period of time when the affected products are
13 banned for sale in the market until the
14 contamination source is identified, the
15 affected products are withdrawn from the
16 market channel, and the source of
17 contamination is brought under control.

18 Even after the products are
19 allowed back in the market following an
20 outbreak, consumption levels may not rebound
21 due to the perceived risk by consumers. The
22 reduction in sales depends on the severity of

1 the outbreak, in terms of the number of people
2 affected, number of deaths, regional scope,
3 the type of product, and its origin.

4 For the two incidents of
5 contamination studied, the contemporaneous
6 effects were analyzed primarily from a U.S.
7 perspective. The variables quantified for the
8 affected product included industry shipments,
9 including imports; prices; the length of time
10 required for consumption to return to normal
11 levels; and the associated revenue reductions
12 to the U.S. and the supplying countries'
13 producers.

14 In order to estimate the impacts
15 of these food illness outbreaks on each
16 producer subsector, we forecasted domestic
17 shipments, imports, and prices that would have
18 existed in the absence of the outbreak.

19 The market, excuse me, the market
20 news data from production periods prior to the
21 food outbreaks were used to make these
22 forecasts. These market news data were

1 obtained from the Agriculture Marketing
2 Service of USDA, which are regularly relied
3 upon by the produce industry for market
4 information.

5 The specific data used were
6 monthly shipments, and average prices for
7 domestic production and imports of spinach and
8 tomatoes from AMS, USDA. The difference
9 between forecasted variables and actual values
10 was attributed to information arising from the
11 outbreaks.

12 The forecasting technique used to
13 estimate domestic shipments, imports, and
14 prices is referred to as triple exponential
15 smoothing. This is a commonly used price
16 forecasting method used to produce results
17 that account for both trend and seasonality,
18 which are very important in agricultural
19 products.

20 While emphasis was on estimating
21 changes in producer revenue flows, the
22 analysis was extended to the retail level by

1 utilizing an estimate of the marketing margin.

2 The marketing margin being the
3 difference between the retail price and the
4 farm level price, which includes expenses
5 associated with packing, wholesaling,
6 distribution, and retailing.

7 According to USDA, in the 1990 and
8 early 2000, marketing margins for fresh leafy
9 greens averaged 81 percent, while fresh
10 tomatoes averaged 72 percent. The inclusion of
11 the retail margin was performed because in
12 certain products, such as leafy greens, the
13 industry is becoming sufficiently
14 producer-handler integrated that the levels of
15 the marketing chain are difficult to
16 distinguish.

17 Not studied were the effects of
18 other related products, substitutes or
19 complements, on prices, shipments, or imports.
20 Also not studied were the human costs
21 associated with illnesses, deaths, or the
22 effects on farm labor, management, and asset

1 values.

2 The incidents analyzed were those
3 described at the beginning of this paper,
4 namely the tomato incident officially
5 acknowledged on June 3, 2008 and the spinach
6 incident acknowledged on September 13, 2006.

7 Tomatoes. While FDA did not
8 officially acknowledge incidents of Salmonella
9 food poisoning attributable to raw tomatoes
10 and tomato products until June 3, 2008, the
11 CDC identified the onset of the outbreak as
12 occurring in mid-April.

13 Tomato sales declined immediately
14 as news began to spread that tomatoes produced
15 in both the United States and Mexico were
16 implemented as being the potential source. The
17 movement data began to indicate below normal
18 sales near the time of the CDC finding.

19 In April, as illness incidents
20 were reported, shipments of U.S. tomatoes
21 declined by 20,700 metric tons while imports,
22 mainly from Canada, increased by 37,000 metric

1 tons. In May, imports increased even more by
2 40,900 metric tons as speculation shifted to
3 Mexico as the potential source of the problem,
4 while U.S. tomato sales rebounded.

5 Below normal sales of both Mexican
6 and U.S. tomatoes continued through July as
7 the source of contamination, jalapeno peppers,
8 was not identified until July 21, 2008.

9 During the outbreak, tomato prices decreased
10 by an average of \$3 per hundred weight or 7
11 percent at the farm level as demand decreased
12 and returned to normal levels by August.

13 In value terms, the farm level
14 loss in U.S. tomato sales was \$25 million, the
15 retail loss was \$89 million. While U.S. and
16 Mexican producers lost revenue, producers from
17 Canada and other tomato exporting countries
18 gained as U.S. tomato imports increased by
19 96,900 metric tons estimated to be \$97 million
20 at farm level.

21 Spinach. While FDA did not
22 officially acknowledge incidents of E. coli

1 food poisoning attributed to spinach until
2 September 13, 2006, the CDC identified the
3 onset of the outbreak as being as early as
4 August 25, 2006.

5 Once again, the data immediately
6 began to indicate below normal movement began
7 in the August reporting period for both U.S.
8 production and for imports. Sales of U.S.
9 spinach declined by 4,175 metric tons, while
10 imports declined by 2,170 metric tons in
11 September.

12 In October, as attention shifted
13 to California production as the source of the
14 problem, U.S. spinach movements dropped by
15 2,912 metric tons while imports declined by
16 1,361 metric tons as consumers were still
17 concerned about the safety of both domestic
18 and imported spinach.

19 Despite an early October
20 indication that the source of the problem was
21 under control, it was November before spinach
22 sales rebounded from both U.S. and imported

1 sources.

2 Spinach prices followed the same
3 pattern as spinach shipments; farm level
4 prices were down by an average of \$4.07 per
5 bunch or 58 percent in September and October.
6 Prices stayed low through November by an
7 average of \$3.37 per bunch and went back to
8 normal levels by December.

9 In value terms, the farm level
10 loss to U.S. spinach sales was about \$12
11 million, and the retail loss was over \$63
12 million. Marketing margins for spinach is
13 higher than for tomato because spinach is
14 mainly sold bagged and ready to serve.

15 Compliance Costs. From a grower
16 perspective, making decisions on actions that
17 need to be taken to deal with the issues of
18 food safety are highly complex. It's
19 simplistic to assert that it is a matter of
20 weighing the costs and the benefits, although
21 that is a starting point.

22 The benefits to growers accrue not

1 only from taking leadership to prevent
2 occurrences of incidents that disrupt revenue
3 flows but also from adjusting the organization
4 of their operations to be in compliance with
5 process standards.

6 These benefits may be in the form
7 of higher product prices, maintaining and
8 growing sales in existing markets, expanding
9 to new markets, reducing the adverse revenue
10 effects of an incident, reducing legal
11 liability and insurance costs, and improving
12 operational efficiency.

13 While the benefits accrue over
14 time and are uncertain, the costs of
15 compliance are up front and in many cases are
16 required to participate in a preferred
17 markets. Clearly, taking actions to be in
18 compliance with process standards represents
19 an added cost of doing business.

20 Information on costs is difficult
21 to find and document. Many examples are more
22 anecdotal than reflective of the result of

1 careful economic analysis.

2 In a survey of participants in the
3 California Leafy Green Marketing Agreement,
4 the annual cost of compliance for industry
5 members reported the following major areas
6 where costs increased as a result of
7 compliance with the Leafy Green Marketing
8 Agreement.

9 They included Third Party Audits,
10 one of the substantial additional costs is
11 that of obtaining third-party compliance
12 audits and of performing required self-audits.
13 The cost of third-party audits are typically
14 reported on a per farm or ranch basis and
15 appeared to run about \$400-500 in 2008.

16 Staffing, those members who
17 responded to the survey reported having one
18 trained staff person overseeing food safety
19 issues before the leafy green incident; they
20 now have two.

21 Water Testing, the mandatory
22 requirements that all sources of water used in

1 production of leafy greens be tested resulted
2 in the approximate number of monthly water
3 tests increasing from 10 to 52 at a projected
4 total cost of about \$3,657 monthly.

5 In summary, the bottom line is
6 there is a role for the government in helping
7 promote a common set of standards and
8 regulation that provides a win-win situation
9 for all players in the industry.

10 The challenge is finding a mix of
11 private and government sector initiatives that
12 facilitate an equitable sharing of the costs
13 of assuring a safe food supply. Extending the
14 existing Leafy Green Marketing Agreement to
15 the national level appears to be a first step
16 in the right direction.

17 Extension of the provisions of the
18 Leafy Green Marketing Agreement to all green
19 vegetables handled, leafy green vegetables
20 handled in the United States would appear to
21 be an attractive option for industry
22 participants for many reasons, including but

1 not necessarily limited to, participation in
2 the agreement is voluntary, participants are
3 bound by the terms of the agreement, however
4 non-participants are free to market theft
5 products without restriction.

6 Having one set of standards
7 provides a clear set of goals and objectives
8 that once obtained insure participants the
9 ability to compete on a level playing field
10 for sales in all markets.

11 Existing members of the Leafy
12 Green Marketing Agreement, representing a
13 large proportion of total production, will not
14 face additional compliance costs, except as
15 standards are modified over time to reflect
16 increased knowledge on practices that reduce
17 the probability of foodborne disease
18 occurrences.

19 Thank you for arranging for this
20 public hearing to better understand the issues
21 surrounding the proposal for a national Leafy
22 Green Marketing Agreement and for allowing me

1 to share information and my views on this
2 initiative.

3 JUDGE HILLSON: Thank you doctor.
4 Mr. Resnick, do you have any other direct
5 before we turn him over to the panel?

6 MR. RESNICK: We do not.

7 JUDGE HILLSON: Okay. I'm going
8 to receive Exhibit 31, Dr. Paggi's written
9 testimony into evidence and I will ask the
10 panel if they have questions for the doctor.

11 (Whereupon, the above-referred to
12 document was admitted into
13 evidence as Exhibit No. 31.)

14 JUDGE HILLSON: Ms. Dash, go
15 ahead.

16 CROSS EXAMINATION

17 BY MS. DASH:

18 Q Suzanne Dash, and I'm not used to
19 going first.

20 A Me either.

21 Q I don't have page numbers, but
22 just before you have summary and conclusions

1 you talk about some costs. Are those costs to
2 grower or cost to the handler?

3 A We were looking at grower cost.
4 Our primary focus was to and is to work on
5 issues that have to do with compliance cost to
6 growers. So as we interpreted the report that
7 was provided, it was a grower cost, cost per
8 farm or ranch.

9 Q We heard from some witnesses
10 yesterday that they feel that even though it
11 is a voluntary program that if a certain
12 number, and they were saying 50 percent, sign
13 up that it might not in effect be a voluntary
14 program, that some sellers might not have, you
15 know, anyone -- might not be able to sell
16 their produce. Could you give me your opinion
17 on that.

18 A It's my understanding that it is a
19 voluntary program and depending on, right now
20 it covers California and Arizona. What an
21 individual buyer chooses to do in terms of his
22 source of supply is up to that buyer.

1 All we can do as growers is
2 really, to the best of our ability, comply
3 with the standards that we understand are
4 required and offer our products for sale. We
5 really have no control over the buyer.

6 And quite frankly it's my
7 observation that as we see concentration at
8 the retail level, particularly in
9 supermarkets, the bar of standards is being
10 raised at the retail level and it's not the
11 Leafy Green Marketing Agreement which might
12 perhaps prohibit the sale of any product, it's
13 the demands on the part of the buyer himself
14 or herself.

15 Q And in your summary and conclusion
16 you talk about having one set of standards, do
17 you think that a national agreement will lead
18 to one standard or maybe less standards and
19 requirements than we currently have?

20 A It appears that it would be a step
21 in the right direction. What we find or
22 observe in studying and visiting with growers

1 is that there's a complicated set of standards
2 that are being imposed upon them.

3 And what we're trying to do is
4 figure out a way that we can have one set of
5 goals and objectives that we need to comply
6 to, which will satisfy the buyer.

7 Increasingly, that set of
8 standards and requirements is shifting over
9 from just good agricultural practices to
10 practices that include fair trade, different
11 process standards, things that are -- it seems
12 to be increasing on a daily basis. So we're
13 hoping -- or not daily basis, but increasing
14 over time.

15 And so we hope that we can come to
16 some consensus about what exactly it is you'd
17 like us to do and we'll try to do that for you
18 and the Leafy Green Marketing Agreement as a
19 voluntary program would appear to put
20 everybody in the same boat in terms of what
21 they were expected to do so that we have
22 common understanding of what those practices

1 should be. And again, it's a voluntary
2 program.

3 Q Have you spoken to any small
4 producers, can you tell us anything about the
5 ability of small producers to comply with
6 requirements compared to larger producers?

7 A I work with small producers. I
8 live in Fresno, California, which is a
9 predominately agriculture community and have
10 personal contact with small growers. For the
11 most part, folks are trying to do the best
12 they can.

13 In terms of specific compliance
14 with regulations that have to do with
15 something like that Leafy Green Marketing
16 Agreement, the small producers I work with or
17 are associated with or know generally market
18 their products in farmer markets, in a
19 farmer's market set up or to restaurants
20 directly.

21 So they're not signatories to the
22 Leafy Green Marketing Agreement, but they

1 certainly practice -- their code of conduct
2 and their agricultural practices is such that
3 they produce a product that's repeatedly
4 purchased in these avenues and I would assume
5 that because that's the case they're producing
6 safe product, or perceived to be.

7 Q Is there any differences that you
8 can share on your research between tomatoes
9 and spinach that would be helpful for these
10 proceedings? I mean I'm not aware of any
11 proposal for a marketing agreement for
12 tomatoes or something like that.

13 A No. The purpose of this
14 particular study was, or at least that portion
15 of it, was to try to get a handle on what are
16 the cost of foodborne illness outbreaks to
17 producers or to the industry.

18 Tomatoes was an example that we
19 used, we also have tried to look at other
20 commodities, I just chose those two as
21 examples. Spinach just being obviously
22 relative, but tomatoes is just another

1 example.

2 Q Would you say that within a year
3 after an outbreak that the tomato industry and
4 the spinach industry were back to normal?

5 A That's a really good question and
6 it's difficult to say. We have one set of
7 analyses here and there's been some work by
8 Linda Galvin at USDA ERS that would suggest a
9 different length of adjustment period.
10 There's been some work by Jill McClusky at
11 Washington State University that would give
12 you yet another time frame.

13 So we don't have a real precise
14 handle on that. It appears that there is some
15 time lag that the industry comes back to some
16 state of normalcy. The question would be
17 better answered, I think, if we had access to
18 retail scanner data and could look at what's
19 happening at supermarket sales instead of a
20 more aggregate market sales, which is the data
21 that we had to use.

22 So I can't answer that with any

1 precision, but it appears that it comes back
2 to some more normal state, whether it's like
3 gasoline prices where they go up and come
4 down, but they never seem to come down back to
5 where they were. I don't know with precision.

6 Q Something on your paper, yes, in
7 your summary and conclusions you refer to all
8 green vegetables, did you mean to say leafy
9 green vegetables?

10 A No, I meant to say leafy green.
11 If I didn't it was just the wording was wrong.

12 Q Have you seen the list of proposed
13 leafy greens to be included in the national --

14 A Yes.

15 Q Does that seem like a good list to
16 you, are there that you would add or subtract?

17 A It seems fairly robust. You start
18 to get to -- it seems to cover the list that
19 I would try to put out there, some of which I
20 don't partake of, that's just me.

21 Q That's all I had. Thank you this
22 is very helpful to us.

1 A Thank you.

2 JUDGE HILLSON: Anyone else have
3 questions? Go ahead Ms. Schmaedick.

4 BY MS. SCHMAEDICK:

5 Q Melissa Schmaedick, USDA. Is it
6 Paggi, is that how you pronounce your last
7 name?

8 A Paggi.

9 Q Paggi. Good morning Mr. Paggi,
10 thank you for your testimony. I have a
11 question about a couple of terms that you
12 used.

13 A Okay.

14 Q And this is mainly just for
15 clarification on the record.

16 A Sure.

17 Q You, under individual initiatives,
18 you said for example, HEB is requiring, what
19 is HEB?

20 A HEB is a large grocery firm
21 primarily in Texas and the southwest, and I
22 don't honestly know what HEB stands for. I

1 shopped there a lot when I was a kid, but I
2 don't know what it means.

3 Q But it's a company then?

4 A Yes. It would be like Save Mart
5 or whatever is in the D.C. area, I forget.

6 Q Under the heading of standards
7 setting organizations you talk about a program
8 called HACCP.

9 A Yes.

10 Q Do you know what government agency
11 oversees the HACCP program?

12 A I think it's FDA, but I may be
13 incorrect in that.

14 Q Could you look under your -- on
15 the next page under producer industry
16 standards, the first sentence.

17 A Okay, if I could figure it out.

18 Q I'll read it just for --

19 A Is there a question?

20 Q Well, it reads, well, "E. coli
21 contamination of hamburger precipitated USDA
22 to mandate HACCP regulations."

1 A Actually, you know, I'll yield to
2 the higher authority if it's USDA that
3 actually enforces HACCP so be it, if it's FDA
4 so be it. I don't know quite frankly. I
5 probably knew at one time, but I don't know
6 this morning.

7 Q Okay. Is HACCP a system-based
8 quality program, quality control program?

9 A Yes, as I understand HACCP and
10 again I'm not a food -- product handler,
11 producer processor, it's a system by which you
12 examine the process and identify those areas
13 in the process where potential for
14 contamination occurs and try to exercise
15 whatever controls are available to minimize
16 the potential for contamination at that stage
17 of the process.

18 So you identify from throughout
19 the process where those individual incidences
20 are likely to occur and try to exercise the
21 best practice or science available to minimize
22 that occurrence. That's my interpretation of

1 it.

2 Q And in your experience and the
3 studies that you have done, does that type of
4 quality control system lead to a higher
5 quality product?

6 A Quality is a curious word, it
7 depends on how you define it. In my own
8 experience trying to exercise a system like
9 HACCP or a HACCP-based system leads to a
10 decrease in the potential for problems to
11 arise.

12 One of the problems we have
13 throughout this system that absent a final
14 kill step, say a radiation, I don't believe
15 it's possible to eliminate foodborne illness
16 or contamination. The best we can do is to
17 exercise the best science and practices we
18 have to minimize that those occurrences will
19 take place.

20 So a HACCP system, as it's
21 applied, can provide a better chance to
22 minimize that outcome, whether it results in

1 a higher quality product depends on what you
2 mean by quality. Quality can speak to the
3 color of the fruit or to the lack of blemish
4 or the food safety depending on how you want
5 it defined.

6 Q And in your opinion does quality
7 include the absence of contamination?

8 A In my opinion, yes.

9 Q On the next to the last page of
10 your statement right above summary and
11 conclusions you have a bullet point for water
12 testing.

13 A Right.

14 Q And you conclude that projected
15 total cost of \$3,657 monthly is that per acre
16 or if it's per farm can you tell me what size
17 of farm you used for your calculations?

18 A Actually, I can't -- that's an
19 increase in the water test cost and as I
20 understood it from the survey, and I can't
21 answer that question. However, that is
22 available I believe on the Leafy Green

1 Marketing Agreement's website, that the
2 specifics of this survey and its results are
3 available.

4 We simply took that number as an
5 illustration of some level of magnitude. And
6 again, it's on a per farm or what they call
7 ranch out here basis, which is different from
8 Texas. But I never was clear on what size
9 unit that was, whether it was 100 acres, 25
10 acres or what have you.

11 But that's an issue that can be
12 addressed by simply going to the Leafy Green
13 Marketing Agreement group and going deeper
14 into the survey data.

15 Q Okay. Attached to your statement
16 is a page that has two figures. I have some
17 questions about the bar graph at the bottom of
18 the page.

19 A Yes.

20 Q It shows an increase in the number
21 of operating farmer's markets since 1994 and
22 through 2008.

1 A Right.

2 Q And I believe if I heard you
3 correctly, in your earlier testimony you spoke
4 to your understanding of participants who sell
5 their products in farmer's markets and how
6 they may not necessarily be signatories of the
7 California of the Leafy Green Marketing
8 Agreement.

9 A Right.

10 Q So is that a fair summary of what
11 you said?

12 A I supposes, yes.

13 Q So my question is in your analysis
14 of the leafy green industry in its entirety,
15 are there two industries that sort of co-
16 exist; a smaller direct sales to consumer
17 industry and a larger retail sales industry?

18 A I don't know that that's a
19 characterization I'd choose to make. Clearly
20 there are different scales of production
21 throughout agriculture. It doesn't matter if
22 we're talking about leafy green production or

1 cotton or wheat. There are varying degrees of
2 scale throughout agricultural production that
3 co-exist everywhere.

4 So clearly there are people that
5 are, especially in the Fresno area for
6 example, we have limited resource farmers that
7 are operating on two and four acre plots that
8 do quite well with specialty vegetables,
9 particularly Asian vegetables. They produce
10 some leafy greens.

11 And then we have, you know, large-
12 scale operations, Salinas Valley that produce
13 leafy greens, which is a whole different level
14 of scale, but I mean I think that's -- I don't
15 know that I would characterize it the way you
16 put it, but clearly there are different scales
17 of production throughout the industry.

18 And the smaller folks -- the
19 smaller scale folks that I'm associated with,
20 again their primary outlets are in farmer's
21 markets, direct sales to restaurants. But
22 they actually benefit from the sort of buy

1 locally movement that seems to be going on, at
2 least in the Fresno area. I can't speak to
3 other places.

4 Q In your statement you described
5 the 2006 E. coli outbreak, did that impact the
6 farming operations that you're familiar with
7 at the farmer's market level?

8 A Yes, it did. It sure did.

9 Q But that E. coli -- the outbreak
10 that you -- it was reflected or it was
11 attached to bagged spinach, right?

12 A Correct. And that's an important
13 point I think that when something like that
14 happens it cast a doubt in the consumer's mind
15 over the entire industry. You know, in point
16 of fact if I remember correctly, when all was
17 said and done we may have figured out that the
18 spinach was really isolated in one production
19 area and not even in Salinas Valley as I
20 recall.

21 But that's sort of not the case
22 with the consumer pretty much considered

1 spinach to be bad. You had the David
2 Letterman Top 10 list of why not to eat
3 spinach and it wasn't why not to eat bagged
4 spinach from the Salinas Valley it was cast
5 upon the entire industry.

6 And when I say it was effected to
7 the small producer and the farmer's market it
8 was that, that sort of behavior on the part of
9 the consumer, well if it's spinach, then all
10 spinach is bad. Let me go either away from
11 leafy greens in general or let me move to a
12 different kind of leafy green.

13 So it -- that's the way I meant it
14 in terms of that. It's really -- and the
15 reverse of that is also true I think. If we
16 can project an image of increased safety,
17 enhanced quality, to use your term, I think
18 everyone in the industry benefits from that,
19 whether they're a signature of the agreement
20 or not.

21 Q On page 3 of your testimony,
22 standards setting organizations, again the

1 last paragraph you have a sentence that reads,
2 "This results in increased costs with little
3 evidence of a corresponding increase in
4 compensation in the form of higher product
5 prices."

6 A Right.

7 Q Okay. And you're talking about
8 the multitude of audits that are out there and
9 standards and you need to comply to those, is
10 that correct?

11 A Yes. What I'm suggesting there is
12 that it's unclear to us, and again we don't --
13 we're actually in the process of trying to do,
14 not trying to do, we're in the process of
15 doing a study where we're going to have a lot
16 better answer to these sorts of questions,
17 regulatory compliance costs and returns to
18 compliance.

19 But it's not clear at all that
20 producers are receiving compensation in the
21 form of higher prices or some sort of
22 compensation for performing these particular

1 practices that are beyond what they were doing
2 before. But it is clear that they're being
3 required to engage in them in order to sell to
4 certain buyers and certain customers.

5 So on the one had we have what
6 might in other forums be referred to as an
7 unfunded mandate. I'm being required to do
8 this, it's not clear to me that I'm going to
9 be compensated for having done it at a higher
10 level than I was.

11 And the same is true of issues
12 like traceability systems where at first we
13 thought we'd be able to sell an attribute and
14 it would be something of value and now we find
15 it's a cost of doing business.

16 Q In your opinion, would a program
17 that brings uniformity throughout the
18 marketplace, would that potentially lead to a
19 mitigation of some of these costs that you
20 speak to?

21 A I can vision -- I can envision a
22 case where that would occur. I mean, if you

1 have one set of standards, then you begin to
2 get specialization in the provision of
3 whatever it takes to comply with those
4 standards, for example, auditors and this that
5 and the other.

6 And as competition in that
7 industry increases, the cost of that activity
8 should in theory go down. So I could see
9 where the cost of compliance would be reduced
10 if you didn't have a sort of inconclusive set
11 of standards that you're trying to comply
12 with. It's not to say it would happen it's
13 just I could envision that.

14 Q Thank you. That's all the
15 questions I have for now. Thank you.

16 A Thanks.

17 JUDGE HILLSON: Ms. Staley.

18 BY MS. STALEY:

19 Q Good morning, Kathleen Staley.

20 Can you explain the term super metrics?

21 A I don't believe I used super
22 metrics in my paper. I heard the term

1 yesterday and I don't quite understand what's
2 meant by that. I suspect what people are
3 getting at is a uniform set of metrics that
4 covers all things as opposed to a specific set
5 of metrics that it takes to comply with one
6 particular set of standards or another.

7 But I'm honestly -- no, I guess
8 would be the simple answer.

9 Q And can you explain, you talk
10 about a lot of these different standard
11 requirements when buyers started asking
12 growers to meet these requirements?

13 A The date on which they started?

14 Q Around. I mean --

15 A I think, I can't identify the
16 exact date that that happened, but I think
17 they've become more visible since the spinach
18 outbreak. It seems like we've dug into the
19 more topics of research tend to follow the
20 curiosity of the researcher as well as the
21 public awareness of it.

22 I know the proliferation of

1 research that I'm familiar with started in the
2 mid-2000s when we started looking at this,
3 when Wal-Mart started requiring this or when
4 HEB started requiring that, I can't give you
5 those dates.

6 Q And you talk about HEB and Food
7 Safety Leadership Council and GlobalGAP, are
8 you familiar with how those standards are set?

9 A How they're set?

10 Q How they're developed?

11 A Not with specificity, no.

12 Q Thank you.

13 A Sure.

14 JUDGE HILLSON: Ms. Carter?

15 BY MS. CARTER:

16 Q Good morning, Antoinette Carter
17 with USDA. Just a couple of questions for
18 you. On page, it's page I guess, 2 of your
19 written statement, prepared statement, you
20 provide some background on the incidents of
21 outbreaks associated with, I believe it's 22
22 leafy green vegetables.

1 Are you able to elaborate on
2 those? Did you do any further research with
3 regards to --

4 A Now that's a statement that's
5 taken from another document. We can --
6 certainly if you wish I can go back and get
7 you a list of each one of those and let you
8 know what they were and when they occurred.
9 They're document in CDC or FDA.

10 Q Yes. I guess --

11 A We can do that.

12 Q Well I'm specifically interested
13 in knowing in, I guess, in your review of the
14 information, was there -- can you comment on
15 whether or not if these incidents were traced
16 back at various stages within the supply chain
17 or --

18 A That's something I can't answer at
19 this time, but we can certainly get you that
20 information.

21 Q Okay. And then just one question
22 to followup with regards to a question by Ms.

1 Dash under summary and conclusions., the
2 statement where you refer to, I think you
3 corrected it to say all leafy green
4 vegetables. As you understand the proposal as
5 submitted, is it to cover specific leafy green
6 vegetables as proposed and not all leafy green
7 vegetables?

8 A I'm sorry I didn't understand that
9 question. Well, let me just answer what I
10 think you asked me. As I read it or
11 understand it, it covers leafy green
12 vegetables as specifically outlined in the
13 proposal and then there's a catch phrase, like
14 there often is, and those that the Secretary
15 may deem something, something.

16 There's language that allows for
17 additional products to be included in that
18 list. That's how I read the proposal.

19 Q Okay. Thank you.

20 A It's a pretty robust list of leafy
21 greens.

22 Q Okay. Thank you.

1 JUDGE HILLSON: Anything else from
2 the panel? Go ahead Ms. Dash.

3 BY MS. DASH:

4 Q Suzanne Dash. Did you hear Diane
5 Wetherington's testimony or have you had a
6 chance to read her testimony?

7 A I wasn't present and have not seen
8 it.

9 Q Okay. That's all I have.

10 A Okay. Thanks.

11 JUDGE HILLSON: Mr. English, do
12 you have questions of this witness?

13 MR. ENGLISH: No, Your Honor.

14 JUDGE HILLSON: Does anyone else
15 in the audience have questions of this
16 witness? How about any redirect? Go ahead
17 Mr. Giclas.

18 BY MR. GICLAS:

19 Q Hank Giclas, Western Growers.
20 Dr. Paggi, are you -- you referenced the FSLC,
21 the Food Safety Leadership Council and
22 promulgation of their specifications, if you

1 will, for purchasing September 10, 2007.

2 A Right.

3 Q Are you aware of the status from
4 the FSLC's buyers specifications in the
5 marketplace today?

6 A No. And that's a very good
7 question because it came on the scene with
8 great fanfare and then I really have not seen
9 reference to it in quite some time. I'm
10 curious about that myself.

11 Q Thank you.

12 JUDGE HILLSON: Thank you for
13 testifying doctor. You may step down. Thank
14 you very much for your testimony.

15 THE WITNESS: Thank you.

16 JUDGE HILLSON: And Mr. Resnick,
17 you may call your next witness.

18 MR. RESNICK: Thank you, Your
19 Honor. Proponent group calls Laura Mills.

20 JUDGE HILLSON: And I'm marking
21 the document that Ms. Mills just handed me as
22 Exhibit 32.

1 (Whereupon, the above-referred to
2 document was marked as Exhibit No.
3 32 for identification.)

4 JUDGE HILLSON: Please raise your
5 right hand.

6 WHEREUPON,

7 LAURA MILLS

8 was called for examination by Counsel for the
9 Proponent, having been first duly sworn,
10 assumed the witness stand, was examined and
11 testified as follows:

12 JUDGE HILLSON: Okay. Could you
13 please state your name and spell it for the
14 record?

15 THE WITNESS: My name is Laura
16 Giudici Mills, L-A-U-R-A G-I-U-D-I-C-I M-I-L-
17 L-S.

18 JUDGE HILLSON: Okay. And are you
19 just going to read your statement to start us?

20 THE WITNESS: Yes, Your Honor.
21 Thank you.

22 JUDGE HILLSON: Okay, you may

1 proceed.

2 DIRECT EXAMINATION

3 THE WITNESS: My name is Laura
4 Giudici Mills and I represent the fourth
5 generation in the Giudici family to be
6 involved in farming and agriculture in the
7 Salinas Valley. I have been employed as the
8 Director of Food and Workplace Safety for Metz
9 Fresh, LLC the past two years.

10 My work in the Central Coast
11 agricultural industry began as a youth on my
12 family's farm in San Lucas. Since 1985, my
13 work experience has included produce sales,
14 commodity management, agricultural
15 environmental consulting and food and
16 workplace safety consulting for growers,
17 grower-shippers and two non-profits Central
18 Coast Water Quality Preservation, Inc. and the
19 Salinas River Channel Coalition.

20 Metz Fresh's President, Andrew N.
21 Cumming, currently serves on the California
22 Leafy Green Marketing Agreement Advisory Board

1 and on the Board of Directors for both the
2 Grower-Shipper Association of Central Coast
3 and the California Leafy Greens Research
4 Board.

5 Metz Fresh, established May 30, 2000,
6 handles only leafy greens and has growing and
7 harvesting operations in both the Salinas,
8 California and Yuma, Arizona growing regions.
9 We are considered to be, based on Small
10 Business Administration's definitions a large
11 grower/shipper and handler.

12 Our 10 growers, who grow our fresh
13 spinach, spring mix and arugula crops and the
14 majority of our freezer spinach crops, have
15 operations that range in size from 100 acres
16 to over 4,000 land-acres.

17 These 10 growers are also
18 investors in our company and they all grow
19 crops for other handlers. We contract with
20 another six growers to grow the balance of our
21 freezer spinach crops.

22 All of our primary growers are

1 either second, third or fourth-generation
2 family farmers. Only two of them employ a
3 full-time food safety person in their
4 operations. The other eight growers have
5 utilized a combination of food safety
6 consultants and/or their own personal time to
7 develop, implement and manage their food
8 safety programs.

9 Annually, Metz Fresh grows and
10 harvests approximately 2,500 crop-acres of
11 fresh leafy greens and approximately 1,200
12 crop-acres of freezer spinach. We contract
13 with a co-packer to process, package and
14 vacuum-cool and/or freeze our fresh and frozen
15 leafy green crops.

16 Historically, leafy green handlers
17 developed their own Good Agricultural
18 Practices or GAPs, Good Handling Practices or
19 GHPs and/or Good Manufacturing Practices or
20 GMPs programs utilizing existing FDA guidance
21 documents and USDA programs.

22 Prior to the implementation of the

1 California and Arizona Leafy Green Marketing
2 Agreement programs and even today, many
3 handlers incorporate buyer requirements into
4 their food safety programs.

5 Often, these requirements are not
6 science-based and only contribute to a false
7 sense of security and added production costs.
8 Driving factors behind these buyer
9 requirements include product liability, brand
10 protection and, in some cases, a competitive
11 marketing advantage.

12 Metz Fresh has been a Signatory
13 and Handler to both the California and Arizona
14 Leafy Greens Marketing Agreements since 2007.
15 While these are voluntary programs, the
16 requirements of these LGMA programs are
17 mandatory for all Signatories/Handlers.

18 We grow, harvest and, when
19 necessary, purchase, only leaf greens grown
20 and harvested in compliance with the Commodity
21 Specific Guidelines for the Production and
22 Harvest of Lettuce and Leafy Greens or the

1 Metrics.

2 These best practices are
3 consistent, specific, measurable and
4 verifiable in the field. The majority of the
5 Metrics are science-based and on-going
6 research allows for updating the Metrics, as
7 needed.

8 As a Signatory and Handler, we
9 undergo both regular and unannounced audits
10 from the CDFA based on the respective
11 California and Arizona Audit Metrics.

12 We do not expect our production
13 costs to increase with the implementation of
14 the national LGMA program since we have
15 already made the necessary investments under
16 both the California and Arizona leafy green
17 programs.

18 We don't anticipate the National
19 LGMA would result in additional personnel,
20 capital or testing costs. Metz Fresh already
21 tests and holds every field lot of raw leafy
22 greens product and every production lot of

1 finished leafy greens product prior to
2 shipment.

3 I have examined the business case
4 study financials prepared by Intertox and find
5 them to be representative of the costs Metz
6 Fresh and our growers have incurred and/or may
7 incur under the National LGMA. Those costs
8 ranged from \$25 to over \$50 per acre.

9 Our company has seen the LGMA
10 programs in action and observed the
11 improvements in on-farm process risk
12 management following the September 2006
13 spinach E. coli outbreak.

14 Immediately following the
15 outbreak, we destroyed crops and suffered
16 serious financial losses, together with our
17 growers and our competitors, as retail and
18 food service buyers and the consumer public
19 lost confidence in our industry's ability to
20 produce and deliver a safe product.

21 We now promote the benefits of the
22 LGMA programs to our employees, growers,

1 customers and vendors, Standardized
2 science-based best practices; and reduced risk
3 growing and harvesting operations; increased
4 buyer acceptance; and, increased consumer
5 confidence.

6 We strongly believe that all
7 growers and handlers, regardless of size, who
8 produce and sell leafy greens commercially in
9 the U.S., should comply with the appropriate
10 GAP, GHP and/or GMP programs.

11 We recognize the provision in the
12 USDA's Proposed Rule Section 970.72,
13 "Exemptions" that could exempt from the
14 National LGMA program leafy greens grown
15 and/or handled by small farmers across the
16 U.S.

17 We believe doing so would defeat
18 the primary purposes of the National LGMA and
19 those are to minimize the potential for
20 microbial contamination in the production and
21 handling systems and improve consumer
22 confidence of fresh leafy greens vegetables in

1 the marketplace.

2 Senior Food and Drug Administrator
3 -- Administration or FDA officials including
4 Commissioner Peggy Hamburg visited small farms
5 in Delaware September 18, 2009, as part of a
6 fact-finding tour to learn more about produce
7 safety, including traceability.

8 That tour, planned by the Produce
9 Marketing Association, included a town hail
10 meeting with area growers. Luncheon
11 discussion included the need to level the
12 playing field by ensuring that food safety
13 standards apply to all operators, quote
14 "What's good for one is good for all," end
15 quote, noted one tour participant.

16 Several participants stressed the
17 need for a risk-based approach, and one
18 participant noting that when it comes to
19 produce quote, "One program does not fit all,"
20 end quote. Small growers stressed that they
21 would need extra help, which could range from
22 education to grants. A state health official

1 asked FDA to avoid unfunded mandates, which
2 are a particular challenge for small states
3 like Delaware.

4 Both Hamburg and Senior Advisor to
5 the FDA Commissioner Michael Taylor stressed
6 the agency's interest in hearing from and
7 involving industry, including small operators,
8 as the agency considers its future direction.

9 Recognizing the value of the farm
10 tours and listening session, FDA's
11 Commissioner Hamburg said quote, "We're doing
12 this because we know we need to listen and
13 learn to do our job right. And doing our job
14 right includes being sensitive to the concerns
15 and circumstances of small-scale operators and
16 organic growers."

17 "As I've said before everyone in
18 the business of growing and selling food has
19 a duty to make the food safe, but there is
20 more than one pathway to that result. Our
21 rules will be based on an adaptable set of
22 preventive principles. They will not be

1 'one-size-fits-all'. They will be scale
2 appropriate," end quote.

3 Mr. Steve Etko, with the National
4 Organic Coalition yesterday testified, as did
5 several others that there is an absence of
6 data on small, local, and/or organic and
7 conventional growers and diversified farms to
8 indicate they are responsible for any leafy
9 greens food borne illnesses and/or related
10 outbreaks.

11 Therefore, I recommend an
12 amendment to the national Leafy Green
13 Marketing Agreement and that the USDA consider
14 revising their existing Agricultural Marketing
15 Service Microbiological Data Program or MDP,
16 to focus their leafy greens sampling and
17 pathogenic bacteria testing efforts at the
18 point of production or the farm and/or initial
19 shipment the packing shed and/or cooler.

20 Currently, sampling is conducted
21 at the point of wholesale or retail sales.
22 This allows for cross-contamination to occur

1 at several locations in the distribution chain
2 after the leafy greens have been shipped by
3 the grower/handler.

4 The MDP should include all
5 commercial leafy greens growers and handlers
6 regardless of size, small, medium,
7 large-scale, location, California, Arizona,
8 local growers, regional growers or export,
9 marketing style, farmers markets, Community
10 Supported Agriculture or CSAs, retail, food
11 service, et cetera and conventional and/or
12 organic operations.

13 Since February 2007, I have served
14 on the Farm, Food Safety and Conservation
15 Network's Steering Committee. The network is
16 in Monterey Bay Region Working Group who's
17 membership includes the Monterey Bay National
18 Marine Sanctuary, the Nature conservancy, the
19 USCPA from Region 9, Wild Farm Alliance, the
20 Santa Clara Valley Water District, the Central
21 Coast Ag Water Quality Coalition, Community
22 Alliance with Family Farmers or CAFF, the

1 California Department of fish and Game, NOAA
2 Fisheries, the Natural Resource Conservation
3 Service, the Resource Conservation District of
4 Monterey County, the Central Cost Regional
5 Water Quality Control Board, and from the Ag
6 industry, Ocean Mist Farms and Metz Fresh.

7 The network's purpose is to
8 facilitate the coordinated -- the coordination
9 of related organizations to support the
10 agricultural industry's efforts to reduce food
11 safety risks through methods which also
12 minimize or avoid impacts to water quality,
13 wildlife and habitat through education,
14 training, outreach, research, communication.

15 Several members of the Network
16 have and/or will testify during these
17 hearings, some in opposition and some in
18 favor, with revisions, of the National LGMA.
19 I encourage those in opposition to actively
20 engage in the Audit Metrics development
21 process.

22 Metz Fresh fully supports this

1 process and recognizes the value of having a
2 diverse group of stakeholders involved. In
3 addition, we recommend that the USDA Secretary
4 appoint representatives of the U.S. Fish and
5 Wildlife Service, NOAA's Fisheries, and U.S.
6 Environmental Protection Agency to the
7 Technical Review Board and any others deemed
8 appropriate following this hearing process.

9 We respectfully request the USDA
10 also consider including an educational
11 requirement in the National LGMA for all leafy
12 greens handlers and their respective growers
13 to include basic food safety or GAP, GHP and
14 GMP practices as well as conservation
15 practices to protect public health, water
16 quality, wildlife and habitat throughout the
17 U.S. and countries that export in leafy greens
18 into the U.S., existing U.S. EPA, land-grant
19 universities, the Natural Resources
20 Conservation Service, local Resource
21 Conservation Districts, U.S. Fish and Wildlife
22 Service and other agencies could develop the

1 curriculum together with the Technical Review
2 Board or an Advisory Board named by the
3 Secretary or through this process to develop
4 that curriculum and present it to growers,
5 handlers, buyers, the USDA and third-party
6 auditors, buyers and others that are deemed
7 appropriate.

8 Our experience with the California
9 and Arizona Leafy Greens Marketing Agreements
10 has been very positive. Through the diligent
11 efforts of our industry, the USDA, the
12 California Department of Food and Agriculture,
13 and the Arizona Department of Agriculture,
14 these buyer programs -- excuse me, these
15 programs have increased buyer and consumer
16 confidence in leafy greens, yet, we realize
17 there is still work to be done and we expect
18 the federal government to further regulate
19 leafy greens in the U.S. within the near
20 future.

21 The FDA has the right to
22 collaborate with USDA to regulate food quality

1 and food safety for leafy greens. The USDA has
2 already demonstrated the willingness to
3 develop and implement the National Leafy Green
4 Marketing Agreement program.

5 We can build on the existing
6 foundation USDA has with its QTV and GAP and
7 GHP Audit Verification programs for the
8 development of the National LGMA.

9 We wish to state for the record
10 that Metz Fresh supports the National LGMA
11 knowing it will bring the same standards to
12 all companies growing, harvesting, handling,
13 processing, selling and shipping leafy greens
14 across the U.S. and in countries that export
15 leaf greens to the U.S.

16 JUDGE HILLSON: Okay. Thank you
17 for your testimony. I will receive your
18 written statement as Exhibit 32.

19 (Whereupon, the above-referred to
20 document was admitted into
21 evidence as Exhibit No. 32.)

22 JUDGE HILLSON: I'm going to ask

1 Mr. Resnick if he has any direct before I hand
2 it over to the panel?

3 MR. RESNICK: Not at this time.

4 JUDGE HILLSON: Okay.

5 MR. RESNICK: I'm sorry, Your
6 Honor. There's just one question.

7 JUDGE HILLSON: This is just
8 direct now.

9 MR. WILKINSON: Yes, just a couple
10 of questions, Your Honor.

11 BY MR. WILKINSON:

12 Q Has it been your experience that
13 the buyer requirements became stricter after
14 the 2006 outbreak of E. coli in spinach?

15 A Yes.

16 Q And in your opinion, are these
17 stricter buyer standards in result of the
18 outbreak or are they the result of the
19 California Leafy Green Marketing Agreement as
20 contended by some of the opponents?

21 A I'd say they were in response to
22 the outbreak and it's really brand protection

1 and product liability that's driving that
2 response.

3 Q Thank you.

4 A You're welcome.

5 JUDGE HILLSON: Okay. I'm going
6 to ask the panel if they have questions of
7 this witness. Ms. Schmaedick, do you want to
8 go first?

9 CROSS EXAMINATION

10 BY MS. SCHMAEDICK:

11 Q Melissa Schmaedick, USDA, good
12 morning.

13 A Good morning.

14 Q Thank you for your testimony.

15 A You're welcome.

16 Q So as you stated in your
17 testimony, you've had quite a long history and
18 experience within the leafy green industry, is
19 that correct?

20 A Yes.

21 Q And that's primarily as a grower?

22 A Yes, I grew up -- my father was a

1 farmer, my brother and my brother-in-law
2 currently still farm in the leafy greens
3 industry here.

4 Q And then currently you work for a
5 handler/shipper?

6 A Correct.

7 Q Okay. So in your experience as a
8 grower, a handler and a shipper, is there a
9 correlation between quality of a product and
10 the lack of contamination in that product?

11 A Absolutely, yes.

12 Q And just to clarify, did you see
13 private buyer standards prior to the
14 California Leafy Green Marketing Agreement?

15 A Yes.

16 Q You mentioned that your company
17 sources product from a number of different
18 producers, is that correct?

19 A That's correct.

20 Q Are any of those producers
21 considered small producer entities under the
22 SBA definition?

1 A Yes, we have one that meets that.

2 Q And was that particular business
3 able to adapt to the requirements that evolved
4 in response to food safety issues?

5 A Yes, they actually employed me as
6 a consultant to help them establish their food
7 safety program, which was much economical than
8 hiring me or somebody else fulltime and they
9 now only utilize my services on an as-needed
10 basis and they maintain their food safety
11 program pretty much with the grower's
12 attention and time.

13 Q What were some of the things that
14 that particular grower needed to do in order
15 to become compliant, different things within
16 their operation?

17 A Actually, have their own written
18 GAP program, review the various GAP programs
19 because they grow for other handlers, review
20 those other GAPs and make sure that they were
21 consistent with their own GAP not in conflict,
22 set up their irrigation water testing program,

1 conduct risk-assessments on their own ranches,
2 make sure that they had adequate sanitary
3 facilities for their employees, set up an
4 employee health and hygiene training program
5 under their GAPs and conduct regular trainings
6 on health and hygiene. Those are some
7 examples.

8 Q And you stated that you were the
9 primary consultant that assisted that firm
10 through that process?

11 A Yes.

12 Q In your testimony you mentioned
13 that you support the Intertox calculations of
14 a \$25 to \$50 cost per acre range, is that
15 reflective --

16 A Yes.

17 Q -- of the maintenance cost or is
18 that -- does that include the cost of becoming
19 compliant as well?

20 A Metz is in a unique position
21 because, as I stated in my testimony, all of
22 our growers also grow for other handlers, so

1 it was our understanding that they build on
2 per-acre basis their food safety costs to the
3 various handlers that they were contracting
4 with to grow leafy greens, so our share was in
5 the \$25 to \$50 range.

6 It was initially higher in 2007,
7 we saw somewhat of a drop in 2008 and now it's
8 basically holding right at about that range.

9 Q I'm assuming that you have read
10 the draft proposal?

11 A Yes.

12 Q In your opinion, the development
13 of the Administrative Committee, the Technical
14 Review Board, the Marketing Board, the zones,
15 is there a mechanism for representation of
16 diversity in what is being proposed?

17 A Yes. It's my understanding that
18 there is a nomination process that ultimately
19 comes before the Secretary for approval, the
20 Secretary of the USDA for approval. And so I
21 feel that's a transparent policy and yes, I
22 would say that it does allow for diversity.

1 Q In your opinion, can environmental
2 conservation practices and food safety
3 practices co-exist on a farm?

4 A I believe so. After listening to
5 testimony yesterday, you know, I understand
6 that some people's belief systems may not
7 enable them to look at scientific data and
8 accept that data for what it is if it doesn't
9 -- if it's not in line with their belief
10 system, so I'm not sure if we're going to --
11 how quickly we'll be able to achieve that.

12 But the short answer is yes, and I
13 think one of the tools for that is working
14 with the buyers who have, many of them, an
15 understanding of what sustainability should
16 look like and I think that's a tool that we
17 can use not only as an industry, but with the
18 USDA to try and reach that goal of co-
19 management.

20 Q On the first page of your
21 testimony you state that Metz Fresh has
22 growing and harvesting operations both in

1 Salinas and in -- Salinas, California and in
2 Yuma, Arizona growing regions. My question
3 relates to the term region, and the proposed
4 definition for zone.

5 Have you been here over the course
6 past few days of hearing?

7 A Yesterday and then today.

8 Q Okay. So my question for you
9 based on your experience in working with
10 growers and also as a handler, can you
11 describe what that term region might mean as
12 opposed to zone?

13 A Well for us it's a collective term
14 for, for example, the Salinas growing region
15 could extend up to Watsonville, which is in
16 Santa Cruz County, Hollister and San Juan
17 which is San Benito County and then all the
18 way south to San Ardo, which is toward the
19 southern end of Monterey County.

20 Yuma could include the Yuma Valley
21 as far south as Summerton and San Louis and
22 then going out east to Tacna and Texas Hill,

1 but we don't refer to each individual
2 community, so to speak, we just say the Yuma
3 region, the Salinas region.

4 Q Are there differences in
5 production practices or growing environments?
6 What causes regions to be different?

7 A Well, absolutely from everything
8 from weather and soil type to water source. Up
9 here in the Salinas Valley you have a
10 combination of groundwater wells, the
11 Castroville Sea Water Intrusion Project, the
12 San Louis Water or state water that delivers
13 over in the San Juan and Hollister area.

14 And then when you go south to Yuma
15 it's water delivered by Welton-Mohawk or the
16 Yuma County Water Users Association, which is
17 all surface water and canals.

18 Q Now, Yuma, Arizona that's pretty
19 close to the boarder between Arizona and
20 California, is that correct?

21 A Correct.

22 Q And if I understand the proposed

1 zones, California and Arizona are in two
2 different zones, is that correct?

3 A That's correct.

4 Q Is it possible that a growing
5 region might cross over between two zones?

6 A It could. Metz Fresh does not
7 have operations in the California desert in
8 the winter months, but many of our
9 competitors do where they're in El Centro,
10 Raleigh, the Imperial and they may have their
11 shipping and/or processing facilities in the
12 Yuma area and they're basically harvesting and
13 then trucking product across the border into
14 Yuma.

15 Q So based on that information, what
16 is your understanding of the purpose of the
17 definition of the zone in the proposal?

18 A From what I understand it's in the
19 area in which the Leafy Green Marketing
20 Agreement, the national would be applied and
21 then how the representatives would be chosen
22 would be from those respective zones.

1 Q Okay. So in your opinion does
2 zone apply to an interpretation of the growing
3 or handling environments specifically or is it
4 an administrative type of definition?

5 A I'm not sure.

6 Q Okay. Would you limit the
7 definition of region to county lines or would
8 you try to limit the definition of a region by
9 maybe an environmental description? Do you
10 have any suggestions on that?

11 A I think it's probably best if you
12 are in the course of your hearings asking this
13 question of the individual handlers in the
14 region because they specifically are going to
15 be able to help you identify whether it's a
16 county line or an environmental factor.

17 I mean you heard a lot of
18 testimony yesterday regarding the Central
19 Coast region here and its viable eco systems
20 and the Salinas River Corridor, et cetera, but
21 there are also rivers and creeks and streams
22 throughout the state of California and other

1 growing regions.

2 So I don't think we want to define
3 it by watershed, we don't want to define it by
4 county lines specifically, but more
5 appropriately when there is a season of
6 production and harvest how -- what that
7 geographic region is where that product is
8 sourced from.

9 Q So it could be defined by a number
10 of different factors --

11 A Yes.

12 Q -- depending on the location or
13 the -- depending on the region, which is
14 redundant. So thank you.

15 A You're welcome.

16 Q On the last page of your statement
17 you state, "We can build on the existing
18 foundation USDA has with its QTV and GAP and
19 GHP audit verification programs for the
20 development of the National LGMA." Does that,
21 in this statement are you saying that USDA
22 currently has audit verification programs?

1 A Yes. And those can extend from
2 through processing and shipping facilities.

3 Q Do you happen to know what types
4 of products those programs might cover?

5 A Well, for our specific purposes it
6 would be the fresh leafy greens, we don't look
7 beyond that I have to admit because that's all
8 we produce.

9 Q Okay. And QTV, can you tell me
10 what that stands for?

11 A Quality Through Verification.

12 Q Can you describe in general terms
13 what that program is about?

14 A The USDA has the program set up to
15 where you can actually monitor the GAPs and
16 the Good Handling Practices and/or the GMPs
17 and HACCP depending on if it's a growing, a
18 harvesting, a processing or shipping facility.

19 Q So is it a system-based program?

20 A Yes.

21 Q Are you aware of the relationship,
22 the working relationship between USDA and FDA

1 under the GAP and GHP audit verification
2 programs?

3 A Not until just recently.

4 Q Thank you that's all I have.

5 A You're welcome.

6 JUDGE HILLSON: Other questions
7 from the panel? Yes, Ms. Deskins.

8 MS. DESKINS: I have a couple
9 questions.

10 BY MS. DESKINS:

11 Q Sharlene Deskins, USDA. Ms. Mills
12 I just wanted to clarify, you work for Metz
13 Fresh, is that correct?

14 A Yes.

15 Q Are you testifying on behalf of
16 them today?

17 A Yes.

18 Q Okay. And also according to your
19 testimony Metz Fresh is located in what would
20 be two zones under the agreement?

21 A That's correct.

22 Q In your understanding of the

1 agreement in terms of voting for the
2 committee, do you know which zone you would be
3 in?

4 A Probably the California, the zone
5 with California.

6 Q And would that be because most of
7 your production is in -- would be within that
8 zone?

9 A That's correct. We operate here
10 from generally the 1st of April through about
11 the week of Thanksgiving and then we
12 transition to the Yuma growing region. So
13 there's just a little bit more production up
14 here than down there.

15 Q Okay. If your production changed
16 so that most of it was in Arizona, would you
17 then switch to a different zone under the
18 agreement?

19 A I'd have to defer to our
20 President, Andrew Cumming for that decision.

21 Q The other question I had was in
22 terms of -- you said your family was in the

1 business of growing leafy greens, are you a
2 grower of leafy greens?

3 A Not personally, no.

4 Q Another question I had was you
5 used the term spring mix, are you familiar
6 with that term's use in the agreement?

7 A Yes.

8 Q Can you tell us what your
9 understanding of the definition of that term
10 is?

11 A Well I looked at the list and it
12 didn't include some of the components that our
13 spring mix includes, but it is basically a lot
14 of the baby lettuces and we have, for example,
15 red romaine, green romaine, different chards,
16 mizunas, and mustards, mustard ingredients,
17 components that we put in our spring mix.

18 Q Forgive me I'm not familiar with
19 leafy greens, when you say baby lettuces,
20 those are still the same things that are
21 listed in the definition of the agreement,
22 they're just an immature version of that, is

1 that correct?

2 A Correct. We plant them, they are
3 actually specific seeds though, they're not
4 just -- they're not immature for the larger
5 plant, it is a seed that is planted
6 specifically to be harvested as a baby green.

7 Q Okay. So it's grown to be a
8 miniature of a -- there's one version that's
9 a miniature and one version that's a large
10 version?

11 A Correct. So under lettuces, some
12 of those same items could also be grown as the
13 spring mix components.

14 Q Okay. On page 2 you testified
15 about USDA programs, can you just tell us
16 which programs you're referring to?

17 A The QTV, GAP and GMP programs.

18 Q Okay. You also, on that same
19 page, you refer to a commodity specific
20 guidelines for reduction in harvest of lettuce
21 and leafy greens metrics. Can you just give
22 us a little more information about what that

1 is, what the source of it is and where it can
2 be found?

3 A That can be found under the
4 California Leafy Greens website and also under
5 the Western Growers website. And it is the
6 audit metrics or the standards that you've
7 heard referred to repeatedly in testimony by
8 both opposition and proponent witnesses.

9 It was developed through industry
10 academia with some involvement near the end of
11 the or the culmination of the metrics from
12 environmental and resource agencies.

13 Q Now is it a document that's
14 produced by the California Leafy Green
15 Agreement or is it just on their webpage?

16 A No. It's a document that was
17 produced and then adopted or accepted by the,
18 and I'd have to look to Scott, was it --
19 accepted by the California Leafy Greens
20 Advisory Board and that is the audit standards
21 that the growers and handlers are held
22 accountable to.

1 Q Okay. Thank you.

2 A You're welcome.

3 JUDGE HILLSON: Ms. Carter?

4 BY MS. CARTER:

5 Q Good morning. Antoinette Carter
6 with USDA. On page 4 of your prepared
7 statement, you recommend that an educational
8 requirement be included in the proposed
9 National Marketing Agreement. Could you
10 explain why you feel that is a necessary
11 component to be added?

12 A We've heard significant amount of
13 testimony about buyer requirements that exceed
14 the existing metrics about conflicts on farm
15 that the growers are put in because of these
16 buyer requirements that have had negative
17 impacts on environmental resources.

18 And beyond that, we also know that
19 the small local organic growers have expressed
20 a need and concern for help with education on
21 GAPs or GHPs or even GMPs. So, my experience
22 with Central Coast Water Quality Preservation,

1 Inc., included outreach to growers and
2 landowners for the condition -- the
3 conditional irrigated agricultural waiver for
4 discharges of irrigated water from
5 agricultural lands.

6 And there was a 15 hour
7 educational requirement for all growers, they
8 either had to complete that themselves or have
9 someone that was employed by them or someone
10 that they could show had a vested interest in
11 their business, consultant, pest control
12 advisor, et cetera, complete that program or
13 those hours as part of their conditional AG
14 waiver.

15 And I saw the success and
16 increased understanding that went hand-in-hand
17 with this educational outreach that was
18 conducted, but there was involvement from the
19 natural resources conservation service, the
20 California Department of Fish and Game, the
21 University of California Cooperative Extension
22 and many others to make it possible.

1 And so it didn't just deal with
2 water quality, but they also got into
3 protections on wildlife and habitat and even
4 then, back in 2005, there was some mention of
5 food safety. So I think that this is a good
6 model for what could be done here at a
7 national level.

8 Q Thank you.

9 A You're welcome.

10 JUDGE HILLSON: Ms. Schmaedick?

11 BY MS. SCHMAEDICK:

12 Q Melissa Schmaedick, USDA. Are you
13 prepared to talk about some of the sections
14 within the proposal that relate to handler
15 compliance? Would you be willing to answer
16 questions on those sections?

17 A When you say handler compliance,
18 you mean with standards?

19 Q Within the proposal I'm speaking
20 to, for example, Section 970.83, are you
21 familiar with that section?

22 A Oh, yes.

1 Q So have you read through that
2 proposed language?

3 A Yes.

4 Q And are you -- what, in your
5 opinion, is the proposed language clear and
6 appropriate?

7 A Yes.

8 Q Can you explain to me what would
9 happen if a handler, such as Metz Fresh,
10 failed an audit or if one of their source
11 producers failed an audit?

12 A At the very worst, depending on
13 the severity of the infraction, you could be
14 decertified.

15 Q As a handler, do you feel that
16 it's important to have the ability to request
17 an administrative review of an audit if you
18 feel that it's incorrect?

19 A Yes.

20 Q Do you feel that USDA Inspection
21 Service is an appropriate organization to
22 conduct the audit verifications?

1 A Yes.

2 Q Are you aware of their services in
3 general?

4 A Yes.

5 Q And are you confident in their
6 training and consistency in application of
7 their practices?

8 A Yes, but I would still want to
9 include them if there was an educational
10 requirement in the training.

11 Q In the case of a serious breach of
12 GAP or GHP compliance, do you feel it's
13 appropriate that inspectors should notify, for
14 example, the FDA or other appropriate health
15 officials?

16 A Yes. And I think it's in Section
17 6, well 970.83 Subsection 6(b) it allows for
18 that or provides for that.

19 Q So do you agree that that's a good
20 provision?

21 A Yes.

22 Q Are you able to speak to the

1 sections regarding becoming a signatory
2 handler, excuse me, specifically 970.97,
3 additional parties?

4 A Yes.

5 Q Can you explain to me your
6 understanding of that section?

7 A From what I understand is
8 initially when -- if the program and when it's
9 implemented, if there are handlers that don't
10 sign up at that point in time there's still a
11 provision that they can join at a later date
12 and they're still bound by all those
13 provisions.

14 Q As a handler, do you feel that
15 that is a fair practice or provision to
16 include?

17 A Yes.

18 Q Under 970.98 withdraw, do you
19 understand that section?

20 A Yes.

21 Q Can you explain that?

22 A If the handler wants to

1 withdrawal, they can obtain a release from the
2 USDA if they want to withdrawal from the
3 National LGMA and that's provided that they
4 don't have a violation against them. So the
5 way I interpret that is if somebody knows
6 they've done something wrong and they have an
7 audit, they can't just contact USDA and say I
8 want to withdrawal without having to suffer
9 the penalties or the infractions, the
10 consequences.

11 Q And do you feel that the request
12 to withdraw, does that need to be in a written
13 form? How would that request be made?

14 A From the handler that wishes to
15 withdraw?

16 Q Yes.

17 A Absolutely. I think it should
18 have to be written documentation whether it's
19 an electronic e-mail or fax or letter.

20 Q That's all my questions, thank
21 you.

22 A Thank you.

1 JUDGE HILLSON: Anything else from
2 the panel? Staff?

3 BY MS. DASH:

4 Q Suzanne Dash. How do you think
5 the California Leafy Green Marketing Agreement
6 has helped to increase consumer confidence?

7 A There was a survey conducted by
8 the California Leafy Green Marketing Agreement
9 and I apologize, I missed Scott Horsfall's
10 testimony so I don't know if he included
11 information on the survey.

12 But consumers were surveyed by an
13 independent third party and once the -- they
14 indicated that they had some confidence that
15 had increased following the 2006 outbreak, but
16 once the California LGMA program was explained
17 to them, they indicated a favorable opinion of
18 the program and increased confidence in leafy
19 greens grown in California in accordance with
20 the program.

21 Q Thank you, that was my only
22 question.

1 A You're welcome.

2 JUDGE HILLSON: Anything else from
3 the panel? Mr. English do you have any
4 questions for this witness?

5 MR. ENGLISH: No, Your Honor.

6 JUDGE HILLSON: Anyone out in the
7 audience have any questions? Any redirect?
8 Thank you very much for your testimony Ms.
9 Mills.

10 THE WITNESS: You're welcome.

11 JUDGE HILLSON: You may step down.
12 It's 10:00 this is a logical time for the
13 morning break. What?

14 MR. RESNICK: We just have one
15 little procedural question. Attached with Ms.
16 Mills statement was a fact sheet.

17 JUDGE HILLSON: I already have it
18 as attached. I can mark it 32A if you prefer.
19 It's relative to Exhibit 32.

20 MR. RESNICK: That's fine.

21 JUDGE HILLSON: So 32 has been
22 received in evidence.

1 (Whereupon, the above-referred to
2 document was marked for
3 identification and received into
4 evidence as Exhibit No. 32.)

5 MR. RESNICK: Thank you.

6 JUDGE HILLSON: When we come back
7 from our break I think Mr. English said he had
8 one witness that needed to get out this
9 morning, is that what you were referring to?

10 MR. ENGLISH: Two actually.

11 JUDGE HILLSON: Okay. There's
12 only so many hours in a day, I can't help
13 that. And secondly I'll just repeat the call
14 that I've made every day around this time,
15 that if there's anybody that's not on the
16 witness list of either the Proponent or the
17 Opponents and who wants to testify today, you
18 need to come up and let me know who you are so
19 I can work you in the schedule. That's it.

20 Take a 15 minute break, come back
21 at 10:15.

22 (Whereupon, the foregoing matter

1 went off the record at 10:03 a.m.
2 and went back on the record at
3 10:15 a.m.)

4 JUDGE HILLSON: As is not
5 uncommon, people came up to me during the
6 break and said they had to testify today. So
7 my plan right now is to let Mr. English call
8 Mr. Runsten and Mr. Hinerfeld and then I have
9 two other witnesses, Mr. Robins and Ms. North
10 who also indicated that they needed to testify
11 before we break for lunch.

12 So are those your last two
13 witnesses or do you have any others?

14 MR. ENGLISH: I have one who can
15 go last today and there's one who I'm not
16 sponsoring, but who I knew was going to be
17 here, or thought was going to be here who's on
18 your list from Cal Davis.

19 JUDGE HILLSON: Okay. And I have
20 another witness, Ms. Hardesty who just said
21 she could testify some time today. She's also
22 here on her own.

1 MR. RESNICK: Your Honor, the
2 problem we're running in to is that we also
3 have a couple of individuals, been here since
4 yesterday, didn't get on because we
5 accommodated Mr. English and others and they
6 also are in the position they have to go this
7 morning as well.

8 JUDGE HILLSON: This morning or
9 today?

10 MR. RESNICK: The ones that can go
11 today we've put them off until later today and
12 those, anyone who can testify later in the day
13 we've asked to testify.

14 JUDGE HILLSON: How many do you
15 have that has to testify this morning?

16 MR. RESNICK: At least Drew
17 McDonald, Victor Tognazzini and Diane
18 Wetherington and she will be very brief, but
19 it's just --

20 JUDGE HILLSON: So we're talking
21 about having seven witnesses before lunch.

22 MR. ENGLISH: I guess it just

1 depends on cross examination.

2 JUDGE HILLSON: Talk faster and we
3 might eat lunch a little later. We will
4 define the definition of morning in order to
5 get these people out before lunch.

6 MR. RESNICK: If that's what's
7 necessary.

8 JUDGE HILLSON: I mean, you know,
9 I have a goal of getting this done today, but
10 that goal is becoming a little less realistic
11 I think. I'm hoping that if we don't finish
12 today, we can get out by like noon tomorrow.
13 But just hope everyone keeps that in
14 consideration in terms of how fast they talk,
15 how many questions they want to ask.

16 We want to develop the record
17 fully, but let's just move on with that. I'm
18 going to go with those four witnesses and then
19 you can call yours and we'll just hope things
20 move along quickly, we just might eat lunch
21 later.

22 Your other morning witnesses,

1 we're going to let some of it -- everyone has
2 to testify in the morning basically.

3 MR. RESNICK: Well, Your Honor, I
4 think we need to just fully develop who
5 prefers to go this morning because it's
6 convenient and because they're here and those
7 who have to go this morning --

8 JUDGE HILLSON: Two people told me
9 they have appointments and they can only be
10 here between 11:00 and 1:00 and that was Mr.
11 Robins and Ms. North.

12 MR. RESNICK: Right. And
13 Ms. Wetherington, she has a flight. So, I
14 mean she truly --

15 JUDGE HILLSON: Well
16 Ms. Wetherington's going to be -- she's
17 already testified, she's just going to testify
18 as one small point.

19 MR. RESNICK: Very briefly to
20 enter into the record some issues that were
21 requested and asked of her --

22 JUDGE HILLSON: All right. Well,

1 let's let Mr. Runsten testify then we'll have
2 Ms. Wetherington recalled to do her brief --

3 MR. RESNICK: Perhaps if we go
4 back and forth, if that --

5 JUDGE HILLSON: We'll just do what
6 we can.

7 MR. RESNICK: Thank you, Your
8 Honor.

9 MR. ENGLISH: And just to be
10 clear, you know, Mr. Runsten again has been
11 here since 8:30 on Tuesday. I know everything
12 and I know you, Mr. Resnick, I know you've
13 been very accommodating I appreciate it.

14 The other person that we had John
15 Hinerfeld was, you know, we asked for a
16 hearing in the Pacific Northwest, the
17 Department was very accommodating by adding
18 some other proceedings in other locations, but
19 not the Pacific Northwest.

20 And so he is from Oregon and so
21 that's why he's here, but if we do -- I agree
22 with if we do every other one so that Mr.

1 Runsten goes and then Ms. Wetherington goes
2 and then he can go, that's fine. And I'll do
3 my part to move forward.

4 JUDGE HILLSON: Okay. All right.
5 So Mr. Runsten, now that you're sitting here
6 I might as well swear you in first.

7 WHEREUPON,

8 DAVID RUNSTEN

9 was called for examination by Counsel for the
10 National Organic Coalition, having been first
11 duly sworn, assumed the witness stand, was
12 examined and testified as follows:

13 JUDGE HILLSON: And I notice you
14 have both a written statement and an
15 attachment document.

16 MR. ENGLISH: Actually, there's
17 two attachments in a way, Your Honor. I
18 wanted to point that out. There's an
19 attachment to the written statement. I leave
20 it up to you how you want to number these
21 things.

22 JUDGE HILLSON: I don't know --

1 MR. ENGLISH: There's a written
2 statement, there's an attachment that's
3 stapled to the written statement and then
4 there's a separate paper from his
5 organization.

6 JUDGE HILLSON: Okay. Well I'm
7 going to mark the written statement as Exhibit
8 33, the attachment to the written statement,
9 which is --

10 MR. ENGLISH: It's three pages,
11 technically three page document front on back
12 and then the table.

13 JUDGE HILLSON: And I'll mark that
14 as 33a and I'll mark this really long article,
15 the CAFF Guide to Proposed Food Safety
16 Regulations, that's C-A-F-F as 33b, how's
17 that?

18 (Whereupon, the above-referred to
19 documents were marked as Exhibit
20 Nos. 33, 33a and 33b for
21 identification.)

22 MR. ENGLISH: Fine.

1 JUDGE HILLSON: You want to go
2 ahead with your statement?

3 MR. ENGLISH: Let me ask one
4 question.

5 JUDGE HILLSON: Go ahead.

6 DIRECT EXAMINATION

7 BY MR. ENGLISH:

8 Q Well actually two questions; 33b
9 is a paper written by your organization?

10 A Yes, that's correct.

11 Q And you've reviewed it?

12 A Yes, I worked on it with Dan
13 Cohen, who's the principal author.

14 Q Even though he's the principal
15 offer you've worked on it yourself?

16 A Yes, that's correct.

17 Q And you'll describe 33a in your
18 testimony?

19 A Yes, I will.

20 Q Why don't you proceed with your
21 testimony.

22 A Do I need to spell my name?

1 JUDGE HILLSON: Oh, yes I forgot
2 about that. Go ahead, why don't you do that.

3 THE WITNESS: My name is David
4 Runsten, D-A-V-I-D R-U-N-S-T-E-N, I'm the
5 Director of Policy and Programs at the
6 Community Alliance with
7 Family Farmers otherwise known as CAFF here in
8 California.

9 To head off some questions,
10 perhaps I'll say that CAFF is a membership
11 organization, it has about 2,500 members about
12 1,000 of those are farmers, family farmers
13 here. It was formed in 1983. It was
14 originally called the California Association
15 of Family Farmers, merged with another
16 organization in `93 and it's since been called
17 The Community Alliance with Family Farmers.

18 It's a 501-C3 corporation. It's
19 also a small handler and we do handle some
20 leafy greens to what's called the California
21 Grower's Collaborative and so that I suppose
22 gives us some different standing here.

1 We are not signatories to the
2 California LGMA. The Board of Directors has
3 considered this issue a number of times.
4 Mr. Giclas kindly invited us to join the
5 proponent group for this National LGMA and the
6 Board voted not to.

7 My testimony here was developed in
8 collaboration with the Board's policy
9 committee and CAFF's position has been very
10 consistent over the years, which is
11 represented by the testimony I'm going to
12 give. And I'm an agricultural economist, not
13 a farmer. My father was a farmer. So, there.

14 CAFF does not agree with the
15 approach of the produce industry that food
16 safety should be dealt with on a crop specific
17 basis. This proposed National Leafy Green
18 Marketing Agreement starts us down the road of
19 one set of rules for greens, another for
20 melons, another for tomatoes, and so on, all
21 overseen by different groups making their own
22 rules and determinations of risk.

1 Our members include dozens of
2 farmers who grow leafy greens; melons,
3 tomatoes, and other crops on their farms. Some
4 of the more diversified farms that supply
5 Community Supported Agriculture networks with
6 weekly boxes grow as many as 100 different
7 crops in the course of a year.

8 Any such farm that is not quite
9 small will also sell wholesale and so
10 potentially become subject to multiple rules
11 and auditing requirements, possibly
12 contradictory, promulgated by agreements like
13 this one, creating an unfair burden on such
14 farms.

15 This would be particularly
16 burdensome for small farms that include animal
17 production or
18 that try to integrate farming practices with
19 protective environmental or ecological
20 practices due to the biases against such
21 practices that have developed among food
22 safety professionals and their metrics.

1 Furthermore, many of the small
2 vegetable growers in California are immigrants
3 and minorities who often market to their own
4 communities but who also want to sell to
5 wholesale markets.

6 Asian immigrants in the Central
7 Valley growing for the San Francisco and Los
8 Angeles Asian markets are an example.
9 Creating onerous and costly requirements is
10 the wrong way to help them succeed as farmers
11 or to ensure the safety of their food.

12 CAFF has always supported an
13 effort to develop a set of basic food safety
14 practices, such as monitoring prior land use
15 and activities on adjacent land, periodically
16 testing water sources, or having farm workers
17 wash their hands after using the toilet, that
18 would be applicable to all
19 farms growing produce.

20 We believe that specialized rules
21 to control risks for special markets such as
22 the fresh-cut processing industry, should be

1 confined to farms producing for those markets.

2 In reading this proposal for a
3 National LGMA it is apparent that it is
4 written to serve the interests of the fresh
5 cut professing industry. As we have suggested
6 repeatedly over the last few years, the scope
7 of any agreement like this should be limited
8 to that industry.

9 Back in 2007, CAFF requested data
10 through the Freedom of Information Act from
11 the Food and Drug Administration on incidents
12 of E. coli O157:H7 in leafy greens that had
13 led to multiple illnesses or deaths.

14 They provided us with information
15 from 1993 onwards. They told us that until
16 late 1999, the agency did not distinguish
17 between fresh-cut leafy greens and whole head
18 or bunched leafy greens.

19 We constructed a table of these
20 incidents from the FDA data, and I have
21 attached that table here for your information.
22 We continued trying to complete and update

1 this table through the fall of 2008, using
2 information from a variety of sources as
3 investigations and lawsuits proceeded. I have
4 attached this table here.

5 What the table shows is that since
6 late 1999, all of the E. coli O157:H7
7 outbreaks where people actually were ill,
8 related to spinach and lettuce that created
9 serious illness were linked to fresh-cut
10 products in sealed bags.

11 The fresh-cut industry has a food
12 safety problem and they are anxious to keep
13 pathogens out of their bags. Any potential
14 risk is unacceptable to them. I say let them
15 do whatever they think they need to do, as
16 long as they respect the environment.

17 But they should not be able to
18 force every farmer in America who grows
19 cabbage or lettuce to have to abide by the
20 same metrics. As the table also shows, the
21 sources of the outbreaks have been
22 concentrated in certain places, and focusing

1 on those defined geographical areas would make
2 more sense than involving the whole country.

3 I have also attached an additional
4 table of other incidents with greens and herbs
5 that the FDA provided in 2007. Though there
6 was an incident with illnesses from salmonella
7 on lettuce in 2004, and people often use such
8 an incident to argue that all leafy greens are
9 dangerous, in fact most recalls are not
10 associated with illness, many are from false
11 positive tests at some distant point weeks
12 after the product was shipped, and
13 contamination could have occurred at any point
14 in the marketing chain.

15 Leafy greens are not a crop, not a
16 species, not even a group of species in one
17 genera. They are a marketing category defined
18 only by the imagination of processors who
19 include various products in processed salad
20 bags or mixes, whether called spring mixes or
21 other labels.

22 Because of a broader definition of

1 initial species in the proposed National
2 Agreement, the leafy greens definition has
3 metastasized beyond what was covered in the
4 state Agreement to a longer and still
5 open-ended list.

6 It appears that any farmers
7 growing any of the undefined species that
8 could be included in some future salad mix, or
9 called a leafy green, may find themselves
10 subject to the Agreement's metrics, even if
11 they are not growing for fresh-cut processing.

12 Mustards, for example, which were
13 specifically excluded from the California
14 LGMA, could easily be included in the federal
15 Agreement. Cabbages are specifically included,
16 presumably therefore incorporating farmers who
17 grow for processing into sauerkraut or for
18 Asian-American markets.

19 It looks like any crop with a
20 potential for fresh-cut use could come under
21 the authority of this Agreement, in fact this
22 is exactly what Mr. Giclas said in his

1 testimony.

2 This seems unacceptable unless the
3 Agreement is limited to leafy greens for the
4 purpose of fresh-cut use. If the National
5 LGMA were just for fresh-cut processing, then
6 all of the leafy greens growers who do not
7 produce for this market would immediately fall
8 outside of the metrics that will inevitably be
9 dictated by the processors.

10 This would remove much of the
11 opposition to a National LGMA at least on the
12 part of farmers. The processing industry has
13 resisted this arrangement, since they do not
14 want their processed product singled out.

15 They also like having all leafy
16 greens grown under similar food safety
17 metrics, allowing them to buy or reject fields
18 depending on market demand. This is also
19 convenient for the largest growers.

20 A voluntary National Fresh-Cut
21 Leafy Greens Agreement could be designed to
22 have uniform metrics for all production, fresh

1 and processed, by the growers involved in the
2 processing industry.

3 Although a set of on-farm metrics is not
4 a part of the proposal, should this NLGMA be
5 approved, those metrics will have the greatest
6 impact on farmers who have not been a part of
7 the core leafy greens processing industry.

8 CAFF has three main concerns about
9 such metrics. One, the proposed governance
10 structure is heavily weighted toward
11 processors and handlers. The board in this
12 proposal is called the National Leafy Green
13 Vegetable Administrative Committee and its
14 membership is defined in Section 970.40.

15 Out of 23 members there are: 13 handlers
16 four of these must be processors, six farmers
17 a majority of which must be solely producers
18 so two could be producer/handlers; and a
19 retail representative, a food service
20 representative, a public member, and an
21 importer.

22 Farmers, who have been the most

1 impacted by metrics in the past, have a
2 maximum of 6 out of 23 seats on the board and
3 a minimum of 4 out of 23, if 2 farmer/handlers
4 are seated. Handlers have an absolute majority
5 under any circumstances, 13 of 23.

6 Further increasing handler
7 control, "Once selected and appointed by the
8 Secretary, the producer and handler members
9 shall nominate the retail, food service,
10 importer and public members and alternate
11 members, subject to final selection and
12 appointment by the Secretary," Section 970.43.

13 In this process the handlers have
14 a super majority of at least 13 out of 19 in
15 the preliminary board, possibly 15 of 19. If
16 there were to be a difference between handler
17 interests and farmer interests, the handlers
18 have complete control.

19 The handlers also control the
20 choice of the four at-large representatives.
21 Effectively they have control of at least 17
22 out of 23 seats, possibly 19 out of 23. Having

1 the board, rather than the Secretary, nominate
2 and choose the at-large representatives,
3 including the sole public member who could
4 conceivably represent consumer interests,
5 means that these members could represent
6 handler interests more than their alleged
7 interest groups.

8 This is very much a handler and
9 handler-manufacturer controlled administrative
10 structure and is not appropriate to an
11 Agreement that could affect so many farmers.

12 The same control issues apply to
13 the membership of the crucial Technical Review
14 Board, which designs audit metrics and may
15 have other tasks. Every zone representative
16 and zone-based food safety scientist, which
17 are only from land grant colleges, are chosen
18 by the committee's producers and handlers from
19 each zone.

20 However, within each zone, there
21 is at least a two-thirds majority of handlers.
22 Hence handlers control the choice of all 10

1 elected members of the Technical Review Board.
2 The remaining 4 members are chosen by the
3 Secretary, the EPA administrator, and the FDA
4 Commissioner, note that this adds up to 14,
5 not the stated 13 members.

6 If there are conflicts between
7 handler objectives and the objectives
8 represented by the public agencies, handler
9 interests have at least a 70 percent majority
10 on the Technical Review Board. Again, from
11 our point of view this is not sufficiently
12 balanced to dispel the notion that the USDA is
13 authorizing collusion among non-farm
14 companies.

15 Growers who are not also handlers
16 have been disempowered by the California LGMA
17 and by the buyers around the food safety
18 issue. Growers' concerns about excessive
19 water testing, capricious
20 auditors, or false-positive pathogen tests
21 have gone largely unaddressed.

22 CAFF was specifically asked to

1 speak out by a number of Salinas area growers
2 because they feared that in speaking publicly
3 they would lose their markets.

4 The USDA should not underestimate
5 the degree of control being exercised over
6 these growers and should seek to balance
7 interests if it goes ahead with a marketing
8 agreement. Make growers real partners in the
9 design of the Agreement and give them more
10 than token representation.

11 Though the proposal holds out the
12 possibility that the metrics might vary,
13 science-based, scalable, and regionally
14 appropriate, we are skeptical of this
15 possibility because we have not seen this in
16 practice, whether from the FDA, the California
17 LGMA, or private buyers, no one has offered
18 various sets of metrics, there's always one
19 set of metrics.

20 Mr. Giclas, in his testimony said
21 that they embraced diversity in the metrics
22 but also wanted one national set of food

1 safety rules, these seem to us to be
2 contradictory goals.

3 It is never a good idea for one
4 segment of an industry, in this case fresh-cut
5 handlers, to have complete authority over
6 determining what the science is, as well as
7 the required response measures, especially
8 since definitive scientific results are often
9 lacking in the area of food safety.

10 The scientific panel should be
11 truly independent and reviewed for conflicts
12 of interest, such as conducting research with
13 funds from the industry.

14 In terms of scalability, we do not
15 understand how paperwork requirements or the
16 cost of water testing or other basic expenses
17 associated with on-farm metrics might be
18 scalable. But if this marketing agreement is
19 approved, then devising basic metrics for less
20 risky situations would be crucial unless it
21 was strictly fresh-cut agreement, in which
22 case there probably could be uniform metrics

1 for the farmers involved.

2 And who would determine what is
3 risky? Many of the buyers have stated that
4 they have zero risk tolerance, which is absurd
5 but which seems to drive ever more extreme
6 metrics.

7 Finally, one of the most
8 distressing aspects of the California LGMA was
9 its legitimation of clean fields metrics for
10 farmers. Not only did these metrics encourage
11 the buyers' more extreme super metrics, but
12 they also had a spillover effect in other
13 crops, even those not eaten raw, such as
14 potatoes, artichokes, and Brussels sprouts.

15 After 20 years of planting
16 hedgerows and other conservation measures on
17 farms, CAFF, our organization, finds itself in
18 direct conflict with food safety auditors who
19 say that "food safety trumps the environment."

20 Anyone who doubts that there are
21 still super metrics being used need only drive
22 down the Salinas Valley looking at the rodent

1 traps, which are not a part of the LGMA.

2 If the USDA goes ahead with this
3 Agreement, we believe that the use of the
4 official certification mark as described in
5 section 970.44 should be licensed only to
6 signatories who actually utilize the USDA
7 auditors and the Agreement's metrics and not
8 to firms that pretend that their super metrics
9 are somehow better or safer.

10 This is the only way that a
11 National LGMA could reign in these
12 environmentally destructive super metrics
13 promulgated by unlicensed private auditing
14 companies. And this is the greatest request
15 of the farmers in this region to us.

16 CAFF has argued for some time that
17 the California LGMA and the proposed National
18 LGMA are not good ideas because they use the
19 Marketing Acts for purposes for which they
20 were never intended and because the boards
21 overseeing marketing agreements and orders are
22 inevitably skewed towards the largest firms.

1 One need only look at the Almond
2 Board and its rule requiring fumigation of all
3 almonds, something prompted by salmonella
4 incidents at the largest almond producer.
5 Many of the smallest almond growers didn't
6 even learn of the rule until it was finalized,
7 and some of the organic growers who were
8 selling raw almonds have seen their markets
9 destroyed.

10 A bigger problem with this whole
11 approach is the focus on tomatoes or leafy
12 greens or almonds as if all producers of these
13 crops were equally risky.

14 Metrics that might be appropriate
15 to the large commercial operations with entire
16 fields of one crop destined to be processed
17 and to sit in a bag for weeks are
18 inappropriate for smaller, more diversified
19 producers who are supplying a local wholesale
20 market.

21 Moreover, the smaller producers
22 have not been identified as having the same

1 degree of food safety problems as the
2 fresh-cut industry. As Bill Marler, the food
3 safety attorney, has said, "In 16 years of
4 handling nearly every major foodborne illness
5 outbreak in America, I can tell you I've never
6 had a case where it's been linked to a
7 farmer's market.

8 If the small and local producers
9 are doing something right why aren't we trying
10 to learn from them? That is the irony of this
11 discussion, because the food safety problems
12 in leafy greens have been concentrated among
13 the very largest operations. Thank you.

14 BY MR. ENGLISH:

15 Q In your testimony, Mr. Runsten,
16 you referenced the attached table. The
17 attached table is what we marked before your
18 testimony as Exhibit 33a, what is stapled to
19 your statement, correct?

20 A Yes, that's correct.

21 Q And I note on the first page of
22 Exhibit 33a under fresh-cut in bags a number

1 of asterisks and the explanation of the
2 asterisks appears on what is page 2 of Exhibit
3 33a, correct that you don't -- nobody knows,
4 it's unknown in that instance what the source
5 was, whether it was fresh or cut?

6 A That's what the FDA told us. They
7 told us they didn't keep very good records in
8 the `90s and they don't really know whether it
9 was whole or fresh-cut.

10 Q I just wanted to link the
11 asterisks on one page to the explanation on
12 the next page. Your Honor, that concludes the
13 direct. I move the admission of 33, 33a and
14 33b.

15 JUDGE HILLSON: Okay. I will
16 receive 33, 33a and 33b into evidence.

17 (Whereupon, the above-referred to
18 documents were admitted into
19 evidence as Exhibit No. 33, 33a
20 and 33b.)

21 JUDGE HILLSON: And I will ask the
22 panel if they have questions of this witness.

1 CROSS EXAMINATION

2 MS. SCHMAEDICK: Melissa
3 Schmaedick, USDA. Thank you for your
4 testimony and I do not have any questions.

5 MS. DESKINS: I had some
6 questions.

7 JUDGE HILLSON: Anyone else? Go
8 ahead.

9 BY MS. DESKINS:

10 Q Sharlene Deskins. I just wanted
11 to clarify some terms you used. You used the
12 term whole or fresh-cut, what did you mean by
13 the term whole?

14 A I mean bunched essentially or
15 heads of lettuce, you know, but not cut up,
16 not chopped up, not prepared essentially
17 processed in some way or another.

18 Q Okay. And just do I understand
19 this, when you say prepared or processed that
20 means that say a head of lettuce is just cut
21 up?

22 A Yes, I'm referring to cutting up

1 of vegetables, yes.

2 Q Okay. And I also wanted to
3 understand, in your testimony with regards to
4 the definition of leafy greens you kind of
5 recommended, if I understand, a change that it
6 be limited just to leafy greens that are for
7 fresh-cut use?

8 A That's what I'm recommending, yes.

9 Q Okay. So the definition would be
10 the same except that anything that would go
11 for process wouldn't, under what you're
12 proposing wouldn't be under this definition?

13 A Yes. The processing, the crops
14 grown for processing would be what the
15 agreement would cover, that's what I'm
16 proposing.

17 Q Okay. And then you also said you
18 had a concern about how the certification mark
19 under the agreement would be used?

20 A Yes.

21 Q Okay. Are you proposing that it
22 only be used by signatories of the agreement

1 that are in compliance with the very audits
2 that are discussed in the agreement?

3 A Yes. But what I'm saying is that
4 if people create these super metrics that
5 we've heard discussed here, right, that they
6 wouldn't be eligible to use this mark.

7 Q Okay. So --

8 A They would have to actually agree
9 to use the program that had been agreed on by
10 the signatories to this agreement.

11 Q Okay. So what you're saying is if
12 someone signs on to it, then they can't agree
13 to do super metrics, is that what you're
14 talking about?

15 A I mean, as they pointed out,
16 people always have the private right to write
17 whatever they want into a contract, right, but
18 in order to -- what I'm proposing is that in
19 order to utilize the government seal, they
20 would have to agree only to use the metrics
21 that had been agreed on in this agreement.

22 Q Okay. And not to use any other

1 metrics?

2 A That's right.

3 Q Thank you, that's all the
4 questions I had.

5 JUDGE HILLSON: Anything else from
6 the panel? Okay, Ms. Dash.

7 BY MS. DASH:

8 Q Suzanne Dash. You may have heard
9 this, but the Small Business Administration
10 definition of a small farm is gross receipts
11 of less than \$750,000 per year, would you
12 consider most of your members small farmers?

13 A Most of our members?

14 Q Yes.

15 A It's very hard for me to answer
16 that, I don't have any data on their actual
17 sales. But we have members who are very large
18 farmers and members who are very small
19 farmers. Some of our members grow 10,000
20 acres of leafy greens, some of them grow half
21 an acre.

22 Q Okay. Thank you. That's all I

1 have.

2 JUDGE HILLSON: Anything else from
3 the panel? How about the Proponents, do you
4 have any questions of this witness?
5 Mr. Giclas, you can go first.

6 BY MR. GICLAS:

7 Q Hank Giclas, Western Growers.
8 Mr. Runsten, thank you for your testimony. I
9 have a couple questions about the premise of
10 bagged salads that you're advancing here. Do
11 you know where contamination occurs within the
12 supply chain?

13 A No.

14 Q Is it possible that that
15 contamination occurs on the farm?

16 A Yes.

17 Q Is there any possibility for small
18 farms to supply large processors?

19 A It's conceivable.

20 Q Do you know if it happens?

21 A I don't. I don't know that.

22 Q Do small farms that supply

1 processors also potentially supply raw product
2 to the marketplace?

3 A I'm sure that farms of all sizes
4 supply both process and raw product.

5 Q So it's fair to say that a farm
6 can have part of its field going to a
7 processing operation and part of its field
8 going to the marketplace?

9 A Yes, that's fair.

10 Q The September 2006,
11 August/September 2006 or excuse me, November
12 2006 outbreak that occurred in the San Joaquin
13 Valley, do you know whether that was some raw
14 product or fresh-cut product that was
15 delivered to a processor?

16 A I'm not familiar with that
17 particular incident. The one in Lemoore?

18 Q Taco John's?

19 A Yes. Right. My understanding was
20 that it has been processed before it was
21 delivered to Taco John.

22 Q Do you know who processed -- do

1 you know what the farm sold? Was it a raw
2 product or did the farm actually process the
3 product?

4 A I don't know the answer to that.

5 Q Okay. Thank you.

6 JUDGE HILLSON: Anything else from
7 the proponents? Do you have any redirect?

8 MR. ENGLISH: No, Your Honor.

9 JUDGE HILLSON: Thank you very
10 much Mr. Runsten for testifying. I'm going to
11 let you recall Ms. Wetherington right now.

12 MR. RESNICK: Thank you, Your
13 Honor. Proponent group will call Diane
14 Wetherington. Is there any order -- are you
15 giving, Judge the documents in any particular
16 order to mark them?

17 JUDGE HILLSON: If she did then,
18 then she probably has a problem because they
19 just got mixed up. She's handing me --
20 Ms. Wetherington's handing me five documents
21 I should have.

22 THE WITNESS: Yes.

1 JUDGE HILLSON: Handed me five
2 documents. And we've got to figure out how to
3 mark them. Just give me a second here.
4 Should these be in A, B, C, D, E as far as you
5 guys are concerned?

6 MR. WILKINSON: Yes, Your Honor.
7 And I would propose we start with the
8 statement, which appears to be the largest
9 document. Robert Wilkinson on behalf of
10 Western Growers.

11 JUDGE HILLSON: I'm just going to
12 mark -- we're just talking about marking,
13 you'll I hope get one. So what -- the biggest
14 document, the one that says My name is Diane
15 Wetherington, that would be 34A, is that what
16 you're suggesting?

17 MR. WILKINSON: Correct.
18 (Whereupon, the above-referred to
19 document was marked as Exhibit No.
20 34a for identification.)

21 JUDGE HILLSON: Okay. And do you
22 have any preference for B, C, D and E?

1 MR. WILKINSON: Just that the
2 handler and the producer documents,
3 questionnaires go together.

4 JUDGE HILLSON: So you want me to
5 put the two producer ones and the two handler
6 ones together. I mean, I don't know what
7 matters.

8 MR. WILKINSON: How about
9 producers farmer's market, handlers farmer's
10 market and then producer and then handler.

11 JUDGE HILLSON: Okay. So I'm
12 going to mark the document that says Producer
13 Questionnaire Farmers Market as 34b. I'm
14 going to mark the one that says Handler
15 Questionnaire Farmers Market as 34c. let me
16 make sure 34 is the right number, yes it is.

17 I'm going to mark the one that
18 says Producers Questionnaire as 34d and
19 finally the one that's the Handler
20 Questionnaire, I'm going to mark that as 34e.

21 (Whereupon, the above-referred to
22 documents were marked as Exhibit

1 Nos. 34b through 34e for
2 identification.)

3 JUDGE HILLSON: Can't they
4 distribution themselves, Ms. Wetherington you
5 can just come over and testify, you don't have
6 a copy for yourself?

7 (Off mic comments.)

8 JUDGE HILLSON: All right. You're
9 already sworn in, so you can read another
10 statement or --

11 THE WITNESS: I have no statement,
12 I just wanted to enter into the record the
13 exhibits.

14 JUDGE HILLSON: Okay. Why don't
15 you tell us what they are.

16 THE WITNESS: Okay. The first
17 document is a corrected version of my
18 statement, testimony the other day and the
19 second set of documents are the questionnaires
20 that we use in our surveys that are ongoing
21 that were requested.

22 MR. WILKINSON: If I may, Your

1 Honor, can I ask the witness to refer to them
2 by exhibit number and letter.

3 THE WITNESS: I wasn't --

4 JUDGE HILLSON: She might not --
5 okay, 34a was your corrected statement; 34b is
6 Producer Questionnaire Farmer's Market.

7 THE WITNESS: Okay. So the
8 questionnaire's, 34b, as you said farmer's
9 market.

10 JUDGE HILLSON: And 34c is the
11 Handler Questionnaire Farmer's Market, 34d is
12 the producer questionnaire, farmer's --
13 regular producer questionnaire and 34e is the
14 handler questionnaire. Other than providing
15 them, do you have anything else you want to
16 say about these documents?

17 THE WITNESS: No, I do not.

18 JUDGE HILLSON: So you were just
19 providing them because they were requested
20 basically by people here?

21 THE WITNESS: Correct.

22 MR. RESNICK: Correct. And if

1 there's any questions, the witness is prepared
2 to answer them, otherwise.

3 JUDGE HILLSON: Are there any new
4 questions? You just wanted them for your
5 information as part of the -- so I'm going to
6 admit exhibits 34a through 34e into the
7 record.

8 (Whereupon, the above-referred to
9 documents were admitted into
10 evidence as Exhibit Nos. 34a
11 through 34e.)

12 MR. RESNICK: Thank you, Your
13 Honor. I just ask Ms. Wetherington to just
14 for the record, identify what the corrections
15 to the 34a were.

16 THE WITNESS: There were several
17 table numbers that were incorrect. There was
18 a duplicate table in the document that was
19 removed. We added two references in the
20 document, one was to the Blue Book. We
21 corrected the headings on what is now -- what
22 are now tables 13, 14, 15 and 16.

1 And we also added a comment that
2 this is considered preliminary because we are
3 conducting the surveys throughout the country
4 and we plan to come back before the end of the
5 hearings with the final results and the
6 methodology.

7 JUDGE HILLSON: Any questions?

8 Thank you very much. You may step down.

9 They're all admitted, it's all received.

10 Let's see, who should we call next now. We

11 have some competing --

12 MR. ENGLISH: There's an agreement

13 of, you know, an alternating, so we'd like to

14 have --

15 JUDGE HILLSON: Patterston?

16 Hinerfeld? I'm marking Mr. Hinerfeld's

17 statement as Exhibit 35.

18 (Whereupon, the above-referred to

19 document was marked as Exhibit No.

20 35 for identification.)

21 JUDGE HILLSON: Please raise your

22 right hand.

1 WHEREUPON,
2 JOSH HINERFELD
3 was called for examination, having been first
4 duly sworn, assumed the witness stand, was
5 examined and testified as follows:

6 JUDGE HILLSON: Could you please
7 state your name and spell it for the record?

8 THE WITNESS: My name is Josh
9 Hinerfeld. J-O-S-H H-I-N-E-R-F-E-L-D.

10 JUDGE HILLSON: Did you have any
11 preliminary questions or did you want him to
12 read his statement?

13 MR. ENGLISH: He can proceed.

14 JUDGE HILLSON: You may proceed,
15 sir.

16 DIRECT EXAMINATION

17 THE WITNESS: Good morning, my
18 name is Josh Hinerfeld and I am the CEO of
19 Organically Grown Company.

20 Organically Grown Company
21 distributes a broad range of fresh, certified
22 organic produce primarily to retail accounts

1 in Oregon and Washington. We source produce
2 from over 300 suppliers that range in size
3 from a few acres to operators that operate in
4 multiple states.

5 Approximately one-third of our
6 sales are derived from product that is grown
7 in the Pacific Northwest. Twenty growers own
8 a majority of our company. Employees own the
9 balance. Three of the eight members of our
10 board of directors are growers, who live and
11 farm in Oregon.

12 Not surprisingly we have
13 considerable empathy for our growers. We
14 don't confuse empathy for pity. The
15 inconvenient truth for our industry is that we
16 have a food safety problem, both real and
17 perceived.

18 We expect all of our suppliers to
19 take concrete measures to mitigate the risks
20 of pathogen outbreaks. To do otherwise, would
21 be morally and financially irresponsible.

22 Another inconvenient truth is that

1 our nation's food supply is becoming
2 increasingly insecure. Lengthening supply
3 chains, climate change, peak oil, water supply
4 issues, and the reduction of farmland are
5 increasing the risk of future supply
6 disruptions. Supporting the viability of a
7 decentralized network of farms around the
8 country will help buffer future supply
9 disruptions.

10 Here's the rub, a small or
11 medium-sized leafy green grower situated in
12 the Pacific Northwest can't achieve the
13 efficiencies of a leafy green grower in the
14 Salinas Valley due to the lack of scale as
15 well as the Northwest's shorter production
16 season.

17 Yet, a number of these growers in
18 the Pacific Northwest have overcome difficult
19 odds, by serving a growing segment of the
20 market that is seeking fresh, locally-grown
21 products. The growth of farmers markets,
22 CSAs, and promotions featuring regionally

1 produced foods by grocery retailers is
2 affirmation of this trend.

3 JUDGE HILLSON: Why don't you tell
4 us what CSAs stands for.

5 THE WITNESS: CSA stands for
6 Consumer Supported Agriculture.

7 JUDGE HILLSON: Thank you.

8 THE WITNESS: Just because a
9 farmer is known and respected by his clientele
10 provides absolutely no guarantee or assurance
11 that farm operates in a pathogen-free zone.

12 Everyone engaged in the
13 production, harvesting, processing,
14 distribution and sale of produce has an
15 individual and shared responsibility of coming
16 up with an answer to the following question,
17 "What are you doing to insure that the food
18 you sell is safe?"

19 Until recently, our company didn't
20 have a satisfactory answer to that question.
21 So, we started researching steps that we could
22 take to identify and mitigate risks in our

1 supply chain. Our research indicated that our
2 growers are all over the continuum of food
3 safety preparedness.

4 Some growers in the Pacific
5 Northwest lack a basic understanding of
6 pathogens, the critical control points in
7 their operations and the steps they can take
8 to control them. Many are confused about how
9 to proceed given the proliferation of food
10 safety auditing protocols and retail-driven
11 mandates.

12 Our management team concluded that
13 we needed to act on two fronts simultaneously,
14 one, grower education and two, risk
15 management.

16 On November 5th, Organically Grown
17 company, Oregon Tilth and Washington State
18 University are co-sponsoring the first of a
19 two-part symposium on food safety to educate
20 Pacific Northwest organic produce growers
21 about pathogens, food safety critical control
22 points on the farm and resources to help

1 growers implement pre-harvest and post-harvest
2 food safety regimens.

3 In addition, we are in the process
4 of hiring a food safety technical advisory
5 firm to do a risk assessment of our supply
6 chain, recommend a single food safety protocol
7 that is steeped in science, scalable, and
8 harmonious with organic agricultural
9 production practices, and develop an action
10 plan that will guide our food safety efforts.
11 We want to do the right thing and we want to
12 do it the right way.

13 So, why does Organically Grown
14 Company object to the adoption of the national
15 leafy green marketing agreement? Here are our
16 three primary
17 concerns, first, we don't see how adoption of
18 this agreement will stem the proliferation of
19 food safety auditing protocols.

20 I want to look our growers in the
21 eye and tell them that compliance with one
22 government-mandated protocol will not only

1 satisfy the needs of our customers, but also
2 all regulators. This would eliminate a lot of
3 speculation, administrative burden and expense
4 for growers, handlers, distributors and
5 retailers.

6 Second, we are concerned, and I'm
7 going to reference this, the California Leafy
8 Green Marketing Agreement leaves too much up
9 for interpretation with respect to measures
10 that ought to be taken to mitigate intrusion
11 of, quote "animals of significant risk," end
12 quote.

13 As the San Francisco Chronicle
14 reported on July 13, 2009, farmers are
15 destroying wildlife habitat, riparian zones,
16 and vegetative barriers in the name of food
17 safety. How would a national leafy green
18 marketing agreement prevent industry-mandated
19 super metrics?

20 Third, we are concerned that leafy
21 greens marketing agreement is being exploited
22 for the purposes of achieving a dubious

1 marketing advantage. Food safety should be a
2 sine qua non, not a cynical marketing gambit.

3 In closing, I ask you to consider
4 two questions as you assess whether or not to
5 adopt a national leafy green marketing
6 agreement. First, will it help make our food
7 supply safe over the long haul? Second, is
8 this the right means toward this end?

9 In my opinion, the answer should
10 be no to both questions. I would like to see
11 the Federal Government adopt a single food
12 safety protocol that is scientifically
13 validated, risk-based, while preserving farm
14 diversity, environmental protection and
15 consumer choice. Thank you.

16 JUDGE HILLSON: Mr. English?

17 BY MR. ENGLISH:

18 Q I have one. You asked one of my
19 questions. But since I had to look it up for
20 myself, you used the term on your first page,
21 peak oil, could you for this record define the
22 term peak oil?

1 A I'm going to give you my lay
2 interpretation which is that essentially that
3 the amount of oil that this being produced in
4 both discovering the undiscovered reserves in
5 the world have reached the point of
6 diminishing returns.

7 And so we're arriving at the point
8 if we haven't done so already where most of
9 the -- we're going to have diminishing
10 incremental increases in production over time.

11 Q Okay. And whatever economic
12 impacts result from that --

13 A And the end resulting impact of
14 higher fuel costs and other distortions.

15 MR. ENGLISH: That's all I have.
16 The witness is available for examination. I
17 move the admission of Exhibit 35.

18 JUDGE HILLSON: Exhibit 35 is
19 received into evidence.

20 (Whereupon, the above-referred to
21 document was admitted into
22 evidence as Exhibit No. 35.)

1 JUDGE HILLSON: And I will ask the
2 USDA panel if they have questions of
3 Mr. Hinerfeld.

4 MS. SCHMAEDICK: Melissa
5 Schmaedick, USDA, I do not have any questions.
6 Thank you.

7 JUDGE HILLSON: Anyone else on the
8 panel have questions? I don't see any
9 reaction. How about the Proponents, do you
10 have any questions of this witness?

11 MR. WILKINSON: Robert Wilkinson
12 on behalf of Western Growers, Your Honor.

13 CROSS EXAMINATION

14 BY MR. WILKINSON:

15 Q Mr. Hinerfeld, I gather your
16 knowledge of the California Leafy Green
17 Marketing Agreement is limited to the San
18 Francisco Chronicle article?

19 A I'm sorry, could you rephrase that
20 questions?

21 Q Your knowledge of the California
22 Leafy Green Marketing Agreement is limited to

1 the San Francisco Chronicle argument --
2 article, correct?

3 A I have actually read the
4 California Leafy Green Marketing Agreement.
5 I actually have my copy here with me.

6 Q Okay. Well in regard to its
7 application, your knowledge is limited to that
8 article?

9 A Actually, I have actually took
10 several of my buyers and we actually spent all
11 day with a major fresh-cut producer here back
12 in July, we actually went through the whole
13 food safety protocol on the farm, pre-harvest,
14 post-harvest as well as they educated us about
15 how they're applying the agreement. So the
16 answer to your question is no.

17 JUDGE HILLSON: So the answer to
18 your question is no.

19 BY MR. WILKINSON:

20 Q No. I understand.

21 A I tried for the long-winded
22 answer.

1 Q And do you know that handler's
2 position on leafy green -- the California
3 Leafy Green Marketing Agreement?

4 A I'm not sure I understand your
5 question.

6 Q Do you know whether they support
7 the agreement?

8 A Yes, they are signatories.

9 Q Okay. Then you would like to see
10 a single food safety protocol that's
11 scientifically validated risk-base while
12 preserving farm diversity, environmental
13 protection and consumer choice. Can you point
14 to me anywhere in the proposed marketing
15 agreement that would prohibit that?

16 A I saw nothing in the proposed
17 agreement that would prohibit that.

18 Q Thank you.

19 JUDGE HILLSON: Any other
20 questions? Thank you for your testimony, you
21 may step down.

22 THE WITNESS: Thank you.

1 JUDGE HILLSON: Mr. Robins told me
2 he had a doctor's appointment in a little
3 while. So I'm going to let -- and he doesn't
4 have a written statement, he's one of the guys
5 who walked in so I think he'll be pretty quick
6 and then I'll turn it over to you for a few
7 more witnesses.

8 MR. RESNICK: Thank you, Your
9 Honor.

10 JUDGE HILLSON: So Mr. Robins, you
11 want to testify? Please raise your right
12 hand.

13 WHEREUPON,

14 PAUL ROBINS

15 was called for examination by Counsel for the
16 National Organic Coalition, having been first
17 duly sworn, assumed the witness stand, was
18 examined and testified as follows:

19 JUDGE HILLSON: Could you please
20 state your name and spell it for us?

21 THE WITNESS: My name is Paul
22 Robins, P-A-U-L R-O-B-I-N-S.

1 JUDGE HILLSON: Okay. I'm correct
2 that you don't have a written statement, is
3 that correct?

4 THE WITNESS: That's correct.
5 Though I scratched down some notes here.

6 JUDGE HILLSON: You may --

7 THE WITNESS: I won't make you
8 read them.

9 JUDGE HILLSON: You can testify
10 then, please.

11 DIRECT EXAMINATION

12 THE WITNESS: All right. Thank
13 you. I am with -- thanks for this opportunity
14 by the way. I am with the Resource
15 Conservation District of Monterey County, I
16 serve as the Executive Director and I don't
17 have a whole lot to say. I wanted to just
18 provide some information as reference as you
19 move ahead.

20 The Resource Conservation District
21 works closely the USDA Natural Resources
22 Conservation Service and other partners to

1 assist growers and others with voluntary
2 conservation projects on the lands they
3 manage. That covers everything from nutrient
4 management to wildlife habitat improvements.

5 Part of this work necessarily
6 involves assisting them with overcoming
7 hindrances to that work, so that's issues such
8 as cost, technical information, regulatory
9 conflicts and more recently co-managing for
10 food safety and environmental issues.

11 In dealing with the latter, the
12 Resource Conservation District has conducted
13 two surveys and developed a literature review
14 between 2007 and 2009 to document the
15 environmental and financial impacts that
16 farmers are experiencing as well as the nature
17 and sources of the pressure that farmers are
18 experiencing related to food safety and
19 conservation co-management.

20 Indeed, there have been
21 significant changes in conservation
22 implementation and maintenance since the 2006

1 outbreak, as I'm sure you've heard of already,
2 and consistency in the metrics in terms of
3 private versus LGMA and their interpretation
4 on the farm by the auditors are identified
5 through survey responses as significant stress
6 points for growers.

7 So, my two requests for folks as
8 you move ahead with the NLGMA in preparation
9 is one, please incorporate consideration for
10 conservation environmental needs as
11 regulations for -- I'm sorry, for conservation
12 environmental needs or regulations for which
13 growers must also manage in the agreement.

14 And two, while allowing for
15 flexibility, please stress consistency for
16 evaluator application of the results and
17 metrics. If there's any means to discourage
18 conflicts with proprietary food safety
19 programs, please do.

20 We will have the most recent
21 survey results report posted on our website
22 for your reference hopefully within a week.

1 Our website is down. That website is
2 www.rcdmonterey.org. That's all I've got.

3 JUDGE HILLSON: Thank you. I've
4 got to see if -- does the panel have any
5 questions of this witness? Go ahead
6 Ms. Schmaedick.

7 CROSS EXAMINATION

8 BY MS. SCHMAEDICK:

9 Q Melissa Schmaedick, USDA. Good
10 morning Mr. Robins, is that correct?

11 A Good morning. Yes.

12 Q Did you state that you are
13 representing the Resource Conservation
14 District of Monterey?

15 A County, yes.

16 Q Monterey County. So your
17 statement is on behalf of that organization?

18 A Yes.

19 Q Okay. And the surveys that you
20 spoke to as well as the literature review, are
21 those documents -- you said that one would be
22 available later in the week?

1 A Yes. The second survey report
2 will be available. The first survey, what's
3 available is actually a peer-reviewed article
4 that was based on the results. That's also on
5 the website.

6 Q The website that you read into the
7 record?

8 A Yes.

9 Q Okay. I have no further
10 questions. Thank you.

11 JUDGE HILLSON: Thank you.
12 Anything else from the USDA panel? Ms.
13 Deskins?

14 BY MS. DESKINS:

15 Q I just wanted to clarify the
16 organization you work for, is that a
17 governmental unit?

18 A We are a special district, locally
19 appointed by the Board of Supervisors of
20 Monterey County.

21 Q Thank you.

22 JUDGE HILLSON: Anything else?

1 Anything from the Proponents? Any questions
2 Proponents?

3 MR. RESNICK: No questions, Your
4 Honor.

5 JUDGE HILLSON: Okay.
6 Mr. English?

7 MR. ENGLISH: If I may approach
8 the witness, I want to show him an exhibit and
9 see if he can identify it as one of those
10 surveys for the record.

11 JUDGE HILLSON: You may approach.

12 BY MR. ENGLISH:

13 Q I'm showing him Exhibit 23,
14 handler/grower survey reconciling food safety
15 and environmental protection. May I approach?

16 JUDGE HILLSON: You may approach,
17 yes.

18 THE WITNESS: Yes, that's the
19 survey that was produced in 2007.

20 BY MR. ENGLISH:

21 Q And that is what you're updating
22 that would be available for --

1 A The second survey that was done
2 was not so much -- it is built off of that,
3 but the data can't be compared.

4 Q Okay. But nonetheless, you
5 referenced two surveys --

6 A Yes.

7 Q -- one is the survey that's yet to
8 come when your website's up and the second one
9 is what's Exhibit 23?

10 A Yes.

11 Q Thank you.

12 JUDGE HILLSON: Thank you.

13 MR. HORSFALL: Could I ask --

14 JUDGE HILLSON: Go ahead Mr.

15 Horsfall.

16 BY MR. HORSFALL:

17 Q This arises out of that. My name
18 is Scott Horsfall. In what ways is the new
19 survey substantively different than from the
20 other?

21 A The new survey focused on what the
22 stressors stress points are, the growers are

1 experiencing specifically what is making the
2 ability to manage for both food safety and
3 conservation a challenge for them in terms of
4 where -- who they sell to and size of
5 operation.

6 Q Okay. Thank you.

7 JUDGE HILLSON: Anything else for
8 this witness? Thank you Mr. Robins, you may
9 step down. Thanks for coming on by.

10 MS. MILLS: Your Honor?

11 JUDGE HILLSON: Oh, I'm sorry you
12 have a question? Please identify yourself
13 again. I know who you are, but you can
14 identify yourself again.

15 BY MS. MILLS:

16 Q Laura Guidici Mills with Metz
17 Fresh. And if I could ask you Mr. Robins, is
18 your organization governed by a Board of
19 Directors?

20 A Yes.

21 Q And what is the makeup of that
22 Board of Directors?

1 A They are locally -- they're land
2 owners primarily involved in agriculture
3 appointed by the Board of Supervisors.

4 Q Thank you. And when this 2009
5 growers' survey was proposed, were there any
6 concerns from the grower community about
7 responding to the survey?

8 A Yes, significant concerns that the
9 information could be potentially damning to
10 them because it's sensitive and we had a long
11 process of going back and forth to make sure
12 that this was something that came out with as
13 balanced information as possible.

14 Q Can you describe that process
15 please?

16 A Sure. One, we developed a
17 technical advisory committee that was members
18 of the growing community as well as Western
19 Growers and grower/shippers and other sort of
20 processing-based organizations along with
21 representative from the conservation community
22 and environmental community.

1 And that involved one, making sure
2 that we kept the survey focused on what the
3 goal was, which was determining the stress
4 points on growers and keeping it focused on
5 that. And two, very careful vetting of the
6 survey questions and where answers to those
7 survey questions could lead in terms of
8 information if it was truly what we were
9 looking for.

10 Q Thank you. And my last question
11 is, how was that survey funded?

12 A The survey was funded through a
13 grant from I guess ultimately -- originally
14 was a few charitable trusts funding Georgetown
15 University's produce safety project, which
16 funded the Nature Conservancy to do a,
17 actually a larger report and as information
18 for that, a grant went to the RCD from Nature
19 Conservancy for the survey itself.

20 Q Thank you. That's all.

21 JUDGE HILLSON: Thank you. Any
22 further questions? No. Okay. You may step

1 down, thank you very much once again. Now,
2 I'm going to let -- I know Ms. North wants to
3 testify too, but there were a few other
4 witnesses that also have to get out that were
5 on the list a little bit earlier that I need
6 to give priority to, so I'm going to let the
7 Proponent's call a couple of witnesses now.

8 MR. RESNICK: Thank you, Your
9 Honor. The Proponent group calls Drew
10 McDonald.

11 JUDGE HILLSON: I am marking Mr.
12 McDonald's statement as Exhibit 36.

13 (Whereupon, the above-referred to
14 document was marked as Exhibit No.
15 36 for identification.)

16 JUDGE HILLSON: Please raise your
17 right hand.

18 WHEREUPON,

19 DREW MCDONALD

20 was called for examination by Counsel for the
21 Proponent, having been first duly sworn,
22 assumed the witness stand, was examined and

1 testified as follows:

2 JUDGE HILLSON: Could you please
3 state your name and spell it for the record?

4 THE WITNESS: Drew McDonald, D-R-
5 E-W M--C-D-O-N-A-L-D. I also have a CDROM of
6 the testimony. So do I give that to USDA?

7 JUDGE HILLSON: Yes. Just make
8 sure you do it when you're done testifying and
9 you have a written statement you want to read?

10 THE WITNESS: I do.

11 JUDGE HILLSON: Please go right
12 ahead then.

13 DIRECT EXAMINATION

14 THE WITNESS: Good morning
15 everyone. My name is Drew McDonald and I am
16 Vice President of National Quality Systems for
17 Taylor Farms in Salinas California. Thank you
18 for allowing me the opportunity to testify
19 today.

20 I have held my present position in
21 -- my current position in the industry --
22 excuse me let me start over.

1 I've held my present position for
2 the past six years and have been in the
3 industry for the last 15 years. Taylor Farms
4 is the world's largest salad and fresh cut
5 vegetable processor with processing plants
6 operating in seven states and Mexico.

7 We source approximately 800 acres
8 per week of leafy green vegetables through our
9 valued network of local, independent,
10 family-run farms who supply conventionally and
11 organically-grown produce to us.

12 Our source of leafy green
13 vegetables extends across more than 13 states
14 including California, Arizona, Oregon,
15 Washington, Colorado, New Mexico, Michigan,
16 New Jersey, and Florida as well as from
17 outside of the country in Canada and Mexico.

18 We provide fresh, healthy products
19 to 100 million Americans each week to provide
20 enjoyment and promote healthy lifestyles. I
21 oversee all aspects of our quality activities
22 which include the food safety programs for our

1 suppliers, which are our growers and our
2 processing operations.

3 As a participant in California's
4 Leafy Greens Marketing Agreement for the last
5 three years, I have seen this program in
6 action. The California LGMA has resulted in
7 a new focus on food safety in which we as
8 handlers abide by best practices that are
9 consistent, specific, measurable and
10 verifiable in the field.

11 Historically, without these
12 standards, we are dependent on the safety
13 practices of all other growers and shippers in
14 the county, state and beyond. Outbreaks such
15 as the E. coli outbreak in September 2006,
16 affect the entire industry.

17 That particular outbreak shut the
18 entire industry down. We destroyed crops and
19 experienced financial loss when consumers lost
20 confidence in the safety of our product. To
21 this day there are still customers who have
22 permanently removed spinach from their menu

1 offering.

2 Customers lost confidence in the
3 safety of spinach and leafy greens across the
4 entire system. We were all looking for
5 something that could provide confidence in our
6 supply once again.

7 The leafy green marketing
8 agreements governing leafy greens in Arizona
9 and California respectively assisted us in
10 doing just that. While they are voluntary
11 programs; the requirements of those agreements
12 are mandatory for all handlers and shippers.

13 Signatories undergo regular and
14 random audits conducted by their state's
15 department of agriculture based on specific
16 good agricultural practices that are both
17 protective and practical. Participation is
18 renewed on an annual basis and those enrolled
19 handlers agree to purchase only leaf greens
20 grown in accordance to the accepted good
21 agricultural practices.

22 As a signatory to the California

1 Leafy Greens Agreement, we believe we are less
2 likely to be detrimentally impacted by the
3 safety performance of another grower or
4 shipper.

5 We also believe that we are
6 effectively minimizing the potential for
7 contamination and that the state LGMA
8 positions the industry to engage directly with
9 FDA and state public health officials to
10 facilitate the rapid identification and
11 mitigation of any contamination as well as to
12 refine the program with an eye towards
13 continual improvement.

14 These refinement activities and
15 efforts towards continual improvement have
16 established an unprecedented collaborative
17 effort between industry, academia, and
18 regulatory agencies. On page 4 that's a
19 correction, I apologize I said industry twice.
20 It should say regulatory agencies at the end.

21 Moreover, the marketing agreement
22 represents the culmination of over a decade of

1 industry effort to improve food safety. The
2 fresh produce industry has been at the
3 forefront of developing comprehensive food
4 safety programs for many years.

5 Based on some of the testimonies
6 this week that I've heard, it's probably
7 important to note and maybe surprising to some
8 that for almost all segments of the food
9 industry and most regulatory -- the food
10 industry most regulatory guidelines and
11 eventual mandated regulation is based on,
12 derived, or otherwise developed from industry
13 best practices.

14 In fact, with the produce -- with
15 produce the first Food Safety Guidelines for
16 the Fresh-Cut Produce Industry were published
17 in 1992, and then recently updated by FDA in
18 September -- excuse me, February of 2008.

19 The industry also developed Good
20 Agricultural Practices in the mid-1990s to
21 minimize on-farm microbiological food safety
22 risks for fruit and vegetables, and worked

1 closely with FDA as the agency published its
2 overarching GAP documents in 1998.

3 Incidentally in the earlier
4 testimony where I think the question was asked
5 about HEB and Wal-Mart, I think the answer was
6 something to the effect that that's when GAP
7 started, it's much earlier than that. And HEB
8 stands for Harry E. Bud, the founder of a
9 large, great company in the Texas area.

10 Anyway, just prior to the spinach
11 outbreak in 2006 the industry had worked with
12 scientists from government, academia and
13 industry to develop extensive
14 commodity-specific guidelines for tomatoes,
15 melons, sprouts, and leafy greens.

16 These were of course based on the
17 original published GAPs. It was the leafy
18 greens commodity specific guidelines that
19 served as the foundation for the Good
20 Agricultural Practices standards that were
21 accepted by the California/Arizona marketing
22 agreements.

1 This process, underway today,
2 reflects yet another step in the evolution
3 towards useful and meaningful contribution to
4 regulation development efforts as well having
5 the ability to incorporate existing guidelines
6 or regulation issued by FDA or other
7 regulatory bodies.

8 In the discussion of regulation
9 the topic of mandated food safety standards
10 often comes up, and I've heard that this week
11 a couple of times.

12 There is often a gap in the
13 discussion between having mandated standards
14 and the method of ensuring compliance with
15 those standards. The LGMA and the proposed
16 National Marketing Agreement serves as a
17 method to ensure compliance with standards
18 through state inspections and audits by
19 government personnel.

20 On top of this, the LGMA
21 specifically has also added the ability to
22 quickly get information that was previously

1 not gathered and/or not uniform throughout the
2 industry, which is valuable to trace back as
3 well as information in the event of a food
4 safety incident. These include ranch/farm
5 lists, SPS, water testing, et cetera.

6 The implementation of the
7 California and Arizona Leafy Green Marketing
8 Agreements has provided our buyers with a
9 science-based food safety programs.

10 They now know the full scope of
11 what we look for, test and monitor when
12 implementing food safety programs and can have
13 confidence that our efforts are consistently
14 and constantly verified by state government
15 inspectors.

16 While some buyers still have
17 unique requirements, the marketing agreement
18 has fostered consistency in safety
19 requirements. With approximately 90 percent of
20 all leafy greens already being covered by the
21 California and Arizona LGMA, the
22 implementation of a national marketing

1 agreement should bring about nominal
2 incremental costs for both growers selling to
3 handlers and handlers who are signatories of
4 those states' agreements.

5 Involvement in a national program
6 could be financially beneficial with improved
7 buyer and consumer confidence. I do not
8 expect our costs to increase significantly
9 under the national agreement since we have
10 already made the necessary investments to
11 comply with the Arizona and California Leafy
12 Greens Marketing Agreements.

13 The addition of a national
14 agreement will not result in additional
15 personnel, capital or testing costs. The
16 greater cost is if we do not have this.

17 One of our greatest challenges
18 today is the lack of a consistent and
19 agreed-upon standard for food safety audits.
20 Without that government endorsed standard,
21 different customers demand different food
22 safety audits which are burdensome to our

1 company and our growers actually for that
2 matter.

3 Today, the produce industry faces
4 multiple, redundant audits, which in most
5 cases are not interchangeably acceptable to
6 different buyers. Most buyers will only
7 accept the results and certification of
8 certain certification bodies, thus leading to
9 a proliferation of different audits for
10 different buyers.

11 In some cases, the same auditor
12 will visit a facility multiple times to
13 perform different audits to verify compliance
14 with different and potentially conflicting
15 standards.

16 In addition, inconsistencies in
17 audit standards among the different
18 certification bodies have created frustration
19 and confusion, have unnecessarily increased
20 operational costs, and may create an obstacle
21 to training in food safety practices.

22 On top of this, in response to the

1 spinach outbreak specifically some suppliers
2 and buyers set out to create their own
3 standards. I hate to even bring up the topic
4 of super-metrics, it tends to be quite
5 contentious and probably more emotionally
6 driven, which has been part of the discussion
7 over the last few days, but it was the lack of
8 a consistent approach that resulted in these
9 drastic and potentially environmentally
10 damaging actions.

11 To date, every effort to create a
12 harmonized set of produce standards has only
13 added another set of standards to the list.
14 The only approach that has the ability
15 increase consumer confidence as well as drive
16 towards a standardized audit through
17 government sponsored inspection and
18 verification is a National Leafy Green
19 Marketing Agreement.

20 We have seen strong evidence of
21 this acceptance in our California, Arizona
22 experience with all of our customers as well

1 as the entire country of Canada who requires
2 LGMA compliance. Furthermore, in the last
3 year there has been a movement represented by
4 several major buyers to not only accept the
5 LGMA but to only accept it.

6 Additionally, standardizing the
7 requirements through marketing agreement --
8 through a marketing agreement has the
9 potential to impact costs positively. It is
10 important to note that a cost benefit analysis
11 is often a difficult calculation when it comes
12 to food safety.

13 Often food safety programs are
14 like insurance and especially with produce
15 there's not a single intervention factor that
16 accomplishes that end goal of safer food.
17 However the goal that everyone can agree upon
18 is the safest food possible.

19 Most often the best measure or the
20 only practical measurement for safer food is
21 evidence of compliance.

22 The various produce industry food

1 safety certification programs range in cost
2 just from the auditor and certification fees
3 alone, from a few hundred dollars per audit,
4 generally by the not-for-profit organizations
5 to tens of thousands of dollars, generally by
6 the more complex certification bodies you hear
7 about, kind of the European models, SQF or
8 ISO.

9 Yet, we do not have evidence that
10 the increased costs of some of these audits
11 result in better evidence of compliance with
12 standards or better evidence of safer food.
13 The tremendous range in audit fees has had a
14 significant impact on the ability of
15 particularly small business to participate.

16 Without a marketing agreement, the
17 increased attention on food safety across the
18 supply chain will result in exorbitant and
19 audit fees we fear that many growers would be
20 financially challenged to comply with for
21 these requirements.

22 I have examined the business case

1 study financials as a larger processor or
2 handler and find them to be representative of
3 the costs we have incurred and may incur.

4 As described above we have growers
5 in our system that farm throughout North
6 America. Our growers outside of
7 California/Arizona represent farming
8 operations that range from 10 acres a week to
9 300 acres per week. Their growing seasons
10 range from three months of a year to year
11 round.

12 Our experience with the
13 California/Arizona Leafy Greens Marketing
14 Agreement has been positive and we would
15 expect the same kind of experience nationally.
16 This national agreement will bring the same
17 standards to all companies growing, packing,
18 or selling leafy greens across the U.S.

19 This is a huge leap forward for
20 product safety. With national standards in
21 place, industry buyers can now see the issues
22 on food safety much more clearly and thus

1 address these issues with a consistent and
2 cost-effective direction or planning.

3 I can say with direct experience
4 that we, as well as most of our customers,
5 require that the standards are met no matter
6 where the products are sourced from.

7 Currently all of the leafy greens
8 vegetables that enter our system regardless of
9 where they are produced or regardless of the
10 size of the operation are comporting with the
11 standards of the California Marketing
12 agreement without significant difficulty.

13 There are, of course, different
14 regional or regional differences that require
15 slight modification, such as areas that
16 require rainfall or use rainfall for their
17 irrigation.

18 Clearly a useful and appropriate
19 reference point is the California/Arizona
20 model but a key point is that while this is
21 currently required for us in California and
22 Arizona as a major supplier to national and

1 international chains it is expected that our
2 national -- as a national company, we follow
3 the strictest set of food safety rules at all
4 of our facilities.

5 A national program will actually
6 promote greater access to growers outside of
7 California and Arizona. We have had the
8 chance to talk to about half of our growers
9 outside of the California/Arizona supply who
10 represent greater than 80 percent of our
11 supply and the are in support of the LGMA.

12 We would therefore like to go on
13 record as supporting the National Leafy Green
14 Marketing Agreement, which should bring
15 standardization across the country to our
16 industry that will improve all aspects and
17 phases of growing, handling, processing and
18 shipping, thereby allowing consumers, the
19 final end users, confidence and trust in these
20 nutritious products.

21 This we believe will facilitate
22 enhanced marketability of our products.

1 JUDGE HILLSON: Do you have any
2 further direct? Go ahead Mr. Resnick.

3 MR. HORSFALL: I have a --

4 JUDGE HILLSON: Go ahead Mr.
5 Horsfall.

6 BY MR. HORSFALL:

7 Q Scott Horsfall. Thank you for
8 your testimony Mr. McDonald. We've heard
9 testimony the last couple of days from people
10 who claim that LGMA auditors are instructing
11 handlers and growers to remove riparian area
12 or buffers of vegetation.

13 You've had a lot of LGMA audits,
14 have any LGMA auditors ever instructed or
15 advised or suggested that you remove
16 vegetative buffers or riparian areas?

17 A I'm not aware of that. In fact, I
18 would say no. If that did come up, it's
19 something that we would, you know, have an
20 issue with, so I'm not aware of that coming up
21 at all.

22 Q Thank you.

1 JUDGE HILLSON: Any further
2 direct?

3 BY MR. WILKINSON:

4 Q Robert Wilkinson for Western
5 Growers. Your Honor, I'd like to address some
6 of the apparent reasoning of some of the
7 witnesses we've heard. Before the outbreak of
8 E. coli in 2006, there were already buyer
9 specifications, were there not?

10 A Yes, there were.

11 Q And after that outbreak the buyers
12 specifications became more stringent, correct?

13 A Yes. Typically what happened is
14 you had buyers who had never really asked or
15 looked at where their supply was coming from
16 and then you had buyers that for a long time
17 had great food safety programs and we worked
18 very closely with them.

19 We're primarily a food service
20 supplier so a lot of the brands that we work
21 with have a whole program where they're
22 working closely with us as kind of their brand

1 protection.

2 So what happened is those buyers
3 simply kind of reinforced their programs with
4 us, but these kind of new buyers entering it
5 had never, in most cases, stepped foot in a
6 field and were reading newspapers and, you
7 know, hearing about cows and hearing about
8 deer and hearing about all these things.

9 And so they started writing
10 literally from their desk at home, you know,
11 the types of standards. And for the most
12 part, you know, we were successful and many of
13 our customers or fellow suppliers that I'm
14 aware of were successful, especially using the
15 Leafy Green Marketing Agreement as a tool to
16 show them, you know, this is -- these are the
17 kinds of standards.

18 At the end of the day, it's, you
19 know, the Good Agriculture Practices have been
20 established through guidelines, so it's a
21 matter of refining those guidelines.

22 Q And these requirements that were

1 written from their desktops, these are the so-
2 called super metrics, correct?

3 A You know, I did put the term super
4 metrics in my testimony, I don't like that
5 term. I don't know exactly what it is, but it
6 seems to be kind of a term of art. I would
7 say yes, those are kind of the knee-jerk
8 uninformed type of metrics written, yes.

9 Q Now, the California LGMA came into
10 existence after the 2006 E. coli outbreak as
11 well, correct?

12 A Correct.

13 Q But that doesn't mean that the
14 California LGMA causes the super metrics just
15 because they fall into that chronology does
16 it?

17 A No. In fact, it's kind of an
18 opportunity to point out, we have a term we
19 liked to use which is produce time, our --
20 when we have product in the ground and we're
21 working with our farmers and our growers, we
22 really can't wait.

1 When the spinach outbreak
2 occurred, many of us had product literally
3 sitting in the ground that we could not
4 harvest and this was across the country in
5 every single state and it was essentially shut
6 down.

7 Even when the FDA changed the
8 language on the alerts over the ensuing weeks,
9 even in other areas that didn't have -- that
10 had product, but not in California or Salinas
11 Valley, et cetera, that product was lost. So
12 we were scrambling to essentially rescue our
13 industry.

14 So at that -- in that time, there
15 were people scrambling because we're all on
16 produce time, even our buyers, and they were
17 trying to come up with ways to get that
18 product and be comfortable and have
19 confidence, especially to their management,
20 that everything that could possibly be done is
21 being done.

22 And so at the same time, these

1 other things were happening, absolutely. The
2 metrics themselves that were accepted or
3 developed by the industry and accepted by the
4 marketing agreement were not the super
5 metrics.

6 Q Now I understand that you
7 encourage buyers to accept the LGMA metrics.

8 A Absolutely. It represents a very
9 practical, consistent approach and often it's
10 really a matter of educating, and as I gave an
11 example, there is the buyers that have never
12 really understood and we've done this with
13 consumers and their surveys about really
14 understanding where their product comes from,
15 and the same holds true for buyers in many
16 cases where it's a matter of showing them.

17 And sometimes when you show them
18 information, they don't -- they're not
19 familiar with the process. So we get them out
20 in the fields, we, you know, the LGMA has done
21 a great job, we've brought regulators out.

22 In fact, just yesterday I was in

1 the field with a group of regulators, FDA and
2 USDA and Canadian Food inspection Agency and
3 it's educating them on what the leafy greens
4 are all about. So absolutely, I encourage
5 acceptance of it.

6 Q In doing that, have you found that
7 fewer buyers require these super metrics?

8 A Over three years that we've had in
9 play, there's, you know a couple examples of,
10 I'm going to call them kind of ad-hoc buying
11 groups that have come together. Many of those
12 have dissolved and to the point where yes, the
13 number of audits and the redundant and
14 extraneous type of requirements have been
15 reduced. Absolutely.

16 Q That's all I have. Thank you very
17 much.

18 JUDGE HILLSON: Any more direct
19 here? Go ahead Mr. Resnick.

20 BY MR. RESNICK:

21 Q Thank you, Your Honor. Jason
22 Resnick. Just a point of clarification, your

1 written testimony says "While they are
2 voluntary programs and requirements of those
3 agreements are mandatory for all signatory
4 handler/shippers" in your oral testimony you
5 omitted the word signatory. Did you mean to
6 say signatory?

7 A I meant to say signatory. I was
8 reading fast, just because as I was reading I
9 realized my testimony was quite long. I
10 apologize for that.

11 Q Thank you.

12 A What is written is what is was
13 intended, except for that one correction on
14 page 4 where I said industry twice.

15 Q Thank you. That's all.

16 JUDGE HILLSON: Mr. Giclas?

17 THE WITNESS: Good pick up though.

18 Thank you.

19 BY MR. GICLAS:

20 Q Hank Giclas for the Proponent
21 group Western Growers. Mr. McDonald you just
22 said that there were several ad-hoc buyer

1 groups that kind of dissolved. Was one of
2 those groups the Food Safety Leadership
3 Council?

4 A Yes. The Food Safety Leadership
5 Council I would include in that group. Yes.

6 Q And the Food Safety Leadership
7 Council had essentially, for lack of a better
8 term, super metrics that they were originally
9 proposing?

10 A Correct. And I, you know, I'm on
11 record so I have to be careful. I mean, these
12 are our customers and our buyers and they're
13 ultimate goal is serving their end customer
14 and they're our customer and the intentions
15 and the desires and their need, you know, to
16 increase confidence, you know, was admirable
17 and in a good way they brought many of us into
18 the discussion, a little too late, but they did
19 bring us into the discussion.

20 So, that was very positive, so I
21 can't criticize their efforts. But the end
22 result are some of the metrics that came out

1 were indicative of the kinds of things we've
2 heard about, yes.

3 Q And their disavowal, their step
4 back, if you will, from these super metrics,
5 you credit that to the implementation of the
6 California marketing agreement?

7 A Absolutely and I was part of the
8 those discussions as well as others that we
9 brought into it including growers and other
10 handlers to really again, it was an example of
11 educating exactly the point behind the LGMA
12 and the metrics themselves, the basis for it
13 in terms of the FDA's guide to minimize
14 microbial hazards. It was all part of that
15 discussion.

16 But I would absolutely credit it
17 because many of them went from having these
18 alternate standards to accepting Leafy Green
19 Marketing Agreement standards as the standards
20 for leafy greens.

21 Q Thank you.

22 JUDGE HILLSON: I'll turn it over

1 to the USDA panel.

2 CROSS EXAMINATION

3 BY MS. SCHMAEDICK:

4 Q Melissa Schmaedick, USDA. Good
5 morning Mr. McDonald.

6 A Good morning.

7 Q Thank you for your testimony. So
8 in your statement you say that you are with
9 the company Taylor Farms, but that company is
10 a processor?

11 A Yes, we are a fresh-cut processor.

12 Q Does that company do any growing
13 of its own or do you source from outside
14 producers?

15 A No, we don't do any growing of our
16 own, we're essentially buying produce. The
17 name Taylor Farms is, you know, it's the name,
18 we don't necessarily have farms, but we have
19 our partner farmers that are part of our
20 program.

21 Q There are a number of
22 organizations that have been identified as

1 part of the Proponent group supporting this
2 proposal. Is your company part of that group?

3 A Yes, Taylor Farms is part of it.

4 Q And have you been involved with
5 the discussions and drafting process of the
6 proposal?

7 A I wouldn't say the drafting of it
8 but I've been aware of it and I've been asked
9 questions and input on a lot of the pieces.
10 So from that standpoint, yes.

11 Q So would you be prepared to answer
12 some questions about language of specific
13 sections in the proposed agreement?

14 A Yes. Absolutely. I mean I've
15 read it, I'm familiar with it and I can
16 probably talk about some of the intent behind
17 it or how I would see it applied to us if
18 that's helpful.

19 Q Okay. I'm specifically interested
20 in your -- the business that you conduct with
21 product from Mexico. They proposed agreement
22 discusses the possibility of having audit

1 verifications conducted on farms producing
2 product outside of the United States that
3 provide product to signatory handlers of the
4 agreement.

5 Would you see your company
6 potentially being in that role if this were
7 implemented?

8 A Yes. I'm just trying to find the
9 language where I looked at that exactly on two
10 different handlers. But yes, as a general
11 statement or answer, yes, that's my
12 understanding.

13 Q Okay. So as a handler that would
14 potentially be in a position of importing
15 product that needed to be GAP certified or GHP
16 certified, are you aware of the inspection
17 fees that would apply in that scenario?

18 A Yes, and I'm just trying to find
19 the section and maybe could speed it up for
20 me, where it talks about principal handler
21 versus or exactly that.

22 Q Well there are a number of

1 sections throughout the proposal, so at this
2 point I'm just sort of speaking conceptually.

3 A But yes, so my understanding is
4 that in our role we would be responsible for
5 having audits conducted by our suppliers in
6 Mexico. That's, when I read it, that's my
7 understanding from asking questions as well.

8 Q And are you comfortable with the
9 way that that language is being proposed?

10 A As written, and I can't find it
11 right now, but as written, yes, that's
12 absolutely consistent and it would be my
13 expectation, yes.

14 MR. WILKINSON: I believe I can
15 point it out if that would assist.

16 MS. SCHMAEDICK: Thank you.

17 JUDGE HILLSON: Could you identify
18 yourself when you talk like that, please.

19 MR. WILKINSON: Yes. Robert
20 Wilkinson on behalf of Western Growers. And
21 I apologize, Your Honor. I believe the
22 section is 970.56 subdivision C.

1 JUDGE HILLSON: Back to you Ms.
2 Schmaedick.

3 MS. SCHMAEDICK: Thank you.

4 THE WITNESS: Yes, that's it.

5 BY MS. SCHMAEDICK:

6 Q Now you stated that you have been
7 present for the past couple of days of this
8 hearing, so you've -- is that correct?

9 A I've been in and out. So I've
10 seen a lot of it.

11 Q Okay. There have been questions
12 raised as to the development of metrics for
13 producing or handling areas that are outside
14 of the United States. Do you have an idea of
15 how that process might be applied to those
16 foreign areas, the development of metrics for
17 foreign areas?

18 A Well for us, I can speak from
19 direct experience. As stated in my testimony,
20 we currently require and apply the standards
21 no matter where the product's growing from or
22 growing.

1 A statement I use within our
2 company and with customers is the lettuce
3 doesn't know where it's growing. So it
4 doesn't matter where it's from, you need to
5 have these programs in place.

6 So, there's different regional,
7 you know, challenges and aspects you need to
8 work through, but for us, we currently manage
9 it down in Mexico. In fact, having U.S.
10 auditors going down to Mexico is a desirable
11 thing for us. Does that answer it?

12 Q Yes, thank you. There have been a
13 lot of questions about the term region, based
14 on your experience in handling product from
15 various states across the country as well as
16 from Mexico, can you speak to what that term
17 region means and how it is -- how it would be
18 important in the development of metrics?

19 A Region probably, and I've heard a
20 lot of those discussions, the zone questions
21 and I'm familiar with the zone descriptions in
22 970.28 and they make sense to me. I

1 understand kind of the logic. It's almost as
2 if, and I mean -- I don't mean this tongue-in-
3 cheek I mean this sort of in real terms, a lot
4 of times the zones and regions are really more
5 of almost a cultural thing.

6 So for example, Arizona and
7 California growing areas, Imperial Valley and
8 Yuma but up against each other pretty closely,
9 but when you talk to a grower, and I'll talk
10 about that, farmer versus grower, a grower,
11 you know, they're adamantly Arizona or they're
12 adamantly California and so you get into some
13 of this.

14 If you're in Texas and you talk
15 about California practices, you know, they
16 have certain, you know, opinions and
17 different, you know, there's a regionality to
18 it, a cultural regionality almost more than
19 anything. Just like when you look at the term
20 ranch versus farm, you cross the Mississippi
21 and you see a lot more ranches on the western
22 side, you see farms on the eastern side.

1 So these zones become important
2 more on a cultural side in sort of describing
3 and terminology. That's where I see these
4 zones making a lot of sense from a terminology
5 standpoint.

6 And we ran into that with Arizona
7 marketing agreement from just a terminology
8 and definition standpoint. What is a term
9 used in California may be different -- may be
10 exactly the same thing in Arizona, but the
11 term for it may be different.

12 So those regionalities have kind
13 of implications from just a language and
14 cultural aspect. And my understanding in the
15 language on 970.28 is, you know, other such
16 subdivisions and, you know, that there may be
17 other definitions that come up out of this.

18 I call it kind of like the dinner
19 conversation where you got to put something
20 down that makes sense and make a decision and
21 then you start hearing why those sort of
22 decisions about where to go to dinner don't

1 make sense. So it's, to me it makes sense the
2 way it's written, but I would see some nuances
3 being developed from there.

4 Q Can you give some examples of
5 production practices that might differ on a
6 regional basis? You mentioned Arizona and
7 California, for example, is there a difference
8 in the way they draw their water or irrigate
9 their lands? I mean, can you --

10 A Yes. The real simple definitions
11 and I've had the privilege of, you know,
12 traveling around the country and visiting all
13 of our growers as well as all over the world.
14 The major differences are of course, based on
15 soil and we've heard that a couple of times in
16 testimony, based on the irrigation methods and
17 based on topography, things like that.

18 But specifically, a good example
19 is if you -- when we try to take the leafy
20 greens kind of standards in the approach of
21 California and look at other states, which we
22 do, you have to take into account some of

1 these regional differences.

2 One that always jumps out to me is
3 when you go up to Michigan and you look at
4 leafy greens operation there and you say, okay
5 I need monthly water testing, you know, that's
6 part of our requirement or whatever that
7 frequency, and they look at you thinking, well
8 what I am I going to test because I just -- it
9 rains, we have a muck soil here and that's our
10 irrigation for the year.

11 So it doesn't make sense to have
12 those kinds of frequencies of testing. When
13 you look at some of the growing practices and
14 machinery and how they move equipment around,
15 those are some of the nuances that, you know,
16 are important when you look at the regional
17 differences, especially the development that
18 you're going to see some regional nuances.

19 We're a good example where we have
20 one food safety program for all our supply, so
21 it is possible to do despite the regional
22 differences.

1 Q So you have, if I understand what
2 you just said, you have one safety standard,
3 but based on the region there might be
4 different ways in which that standard is met.

5 A Exactly.

6 Q Okay. But the standard is still
7 being met?

8 A The standard is still being met.

9 Q Are regions necessarily bound by
10 county lines or any type of definable
11 barriers?

12 A I mean from my understanding, the
13 zones as listed right now, you know, are state
14 zones, but from a growing region standpoint,
15 again, it doesn't, you know, you have a desert
16 growing region in California/Arizona, there is
17 a line in the sand, but again from a product
18 standpoint, the lettuce doesn't know where it
19 is.

20 If you look at Colorado growing on
21 the high plateau, 6,000 feet, that's one type
22 of growing. And that may be actually more

1 similar to region down in Mexico. But from
2 just a geographical region, it's its own
3 region from a growing standpoint.

4 So, it's not necessarily a line in
5 the sand, it's more about kind of that
6 location and where it is.

7 Q Thank you. On page 2 of your
8 testimony you state that your company sources
9 from approximately 800 acres per week of leafy
10 greens or leafy green vegetables through your
11 valued network of local, independent, family-
12 run farms who supply conventional and
13 organically grown produce.

14 Do any of those farms fit in the
15 SBA definition of small production business?

16 A I don't -- I can't answer that
17 with 100 percent certainty, but I could say
18 that a couple of them that are in the lower
19 acreage, the 10 and also kind of how they tell
20 me about their business, I would say
21 absolutely.

22 But I can't say officially they

1 do. But from my understanding of their
2 business, they would, yes. They're very small
3 operations.

4 Q And I apologize, I didn't ask if
5 you knew what the SBA definition threshold was
6 for a --

7 A I think it's \$750,000 or something
8 like that.

9 Q Yes.

10 A Yes. For sure, they would. I
11 don't know how many of them though.

12 Q And have you worked with these
13 smaller producers over the course of, let's
14 see, the past six years?

15 A Absolutely. In fact, that's been
16 kind of the fun part, probably one of the more
17 enjoyable parts of my job because these are a
18 lot of, you know, local farmers that have not
19 been exposed to some of the larger operations;
20 they're small family operations, husband and
21 wife and a brother.

22 And what they hear about what they

1 have to do and sometimes when demands from
2 buyers that they may be servicing locally or
3 on a wholesale level or farmer's market, their
4 disconnected even from the requirements and
5 those buyers are not understanding where that
6 product's coming from.

7 So some of these super metric
8 tendencies, and again I'm sorry to use that
9 term, have come up even in the local areas in
10 some of the other regions outside of
11 California. And it's been enjoyable to go and
12 kind of educate them on, you know, when they
13 see something like you need to have a food
14 safety plan and they're being told they need
15 to use this \$3,000 a day auditor come in and
16 look at this.

17 You know, we say timeout. You
18 know, one of the things we do is we work with
19 our growers, our partners to kind of simplify
20 things.

21 At the end of the day if a grower
22 or farmer on the other side of the Mississippi

1 is in his field every day, which he typically
2 is, and we just would ask that he's looking
3 for certain things as part of his program.

4 When we explain that to him, and
5 that's all we want and when you do see
6 something documented, it simplifies it for
7 him. So, they've definitely been exposed to
8 it and it's been an education process.

9 And this is why I would be excited
10 about the marketing agreement because it gives
11 us a chance to simplify that and not burden
12 them with these ridiculous audits and
13 duplicative requirements that are already
14 happening, but even going to happen more. Did
15 I answer the question?

16 Q Yes, you did. So the expression
17 scalable, the term scalable has been used
18 throughout the last couple of days, the
19 example that you just gave of finding an
20 alternative method for a smaller producer to
21 meet some of these standards, is that an
22 example of how these might be scalable?

1 A A scalable, an example of
2 scalability in this context is that let's say
3 you look at, and again we don't know what the
4 requirements are going to be exactly, but if
5 you look at the FDA guide and use that as kind
6 of a template and what most of us have as far
7 as our requirements, you're going to want to
8 have a food safety plan.

9 Okay. And in a food safety plan,
10 you know, who's my contact, who do I call if
11 I have a question and then vice-versa who does
12 he call if he has a question. And it's
13 actually very simple with a small operation
14 because you have the farmer and that's it.

15 So I just need a phone number and
16 I need it written on a piece of paper and
17 that's your food safety plan, and then how are
18 you going to respond to certain things. If
19 we're -- so it's actually quite easy on the
20 small side, the scalability when you get to
21 the large operation is more complicated.

22 When we've looked at, from a

1 documentation standpoint, if you simplify it
2 to the intent of what's being required, it's
3 small for a small farmer and it's large for a
4 larger farmer. It's scalable.

5 Q Thank you. And these smaller
6 businesses that you've worked with, were there
7 costs involved with making some of these
8 adjustments that you talk about in their
9 development of a food safety plan?

10 A Yes. There's definitely costs and
11 depending on, you know, it's an interesting
12 question to answer. We tend to go in with our
13 farmers and especially on the local side which
14 has become, obviously a critical and important
15 topic and focus for a lot of our buyers to
16 have local produce.

17 We go in and we have a selection
18 process. We look for the ones that are doing
19 the right things, have knowledge of their
20 operation, are, you know, good growers,
21 they're producing a high quality product.

22 And typically when you find a

1 grower like that and there's, you know, more
2 than those than not, you're already finding
3 someone that has a lot of these programs in
4 place. And from a small -- on the small side
5 we kind of have our own internal little poll
6 that we did because of this testimony.

7 You know, when we look at our
8 small farmers, the number one cost for them
9 have been the audit costs. They're not adding
10 extra labor, they're not adding, you know, a
11 lot of new infrastructure to accomplish what
12 we're requiring. It may be a little more work
13 or instead of, you know, just remembering
14 things, we're just requiring documentation a
15 little bit more than they're used to.

16 So it is a little more work, but
17 the audit costs and the test costs are the
18 incremental increases.

19 And the audit costs are by far,
20 the highest expense for them. For a farmer
21 that is doing 10 acres a week that has to do
22 \$3,000 audit, you know, to meet some annual

1 requirement, that's more valuable and not
2 putting out too much economic information, but
3 that could be more valuable than a single crop
4 or several crops. So it's out of whack.

5 From a medium farmer standpoint,
6 the audit costs are there and then the labor
7 becomes a little bit more. On the larger
8 farmer, the biggest cost from our internal
9 poll is the labor. Because of the size of
10 their operation they have more people that
11 they have to spread out and kind of do more
12 work.

13 So small farmers, audit costs are
14 the single biggest driver and then larger tend
15 to be kind of more on the labor side.

16 Q Now under the proposed program how
17 would audit costs, the cost of audits for GAPs
18 be paid for, under the proposed national
19 program?

20 A Well, it's handler-based program
21 so, and jump in if I misspeak.

22 JUDGE HILLSON: They don't get to

1 jump in. You just answer the question.

2 THE WITNESS: Oh they don't, okay.

3 They get to ask the question, sorry. My

4 understanding is that it's handler driven.

5 That's actually the thing I like about it the

6 most is that it puts all the onerous on the

7 handler, the person acquiring the product in

8 all the different language behind handlers.

9 So we're responsible for ensuring

10 that the supply we're getting meets the

11 requirements. So the cost, the overall cost

12 eventually comes to us, from an audit

13 specifically there's fees, the assessment fees

14 that pay for those audit costs.

15 So in a way, and I talked about it

16 in my testimony, that is -- it actually

17 relieves burden on the grower from these

18 ridiculously unscalable costs of the audits

19 they currently have to do.

20 BY MS. SCHMAEDICK:

21 Q Do you happen to know if that was

22 the intent of the Proponent group in the

1 process of developing the proposal?

2 A I don't know if it's the intent.
3 I would say it follows the very positive
4 aspect of the design of the California
5 marketing agreement. So maybe in that sense
6 it's the intent. You know, if I had input on
7 it, I would say that is a strong driving
8 factor and very appealing.

9 Q Thank you. On page 6 of your
10 testimony you mention that one of the benefits
11 of the LGMA, and I just want to clarify
12 that's, I believe it's the state program that
13 you're speaking to, is the ability to quickly
14 get information.

15 Under the proposed federal program
16 there are sections that relate directly to
17 reports and record keeping and the authority
18 for that information to be collected. Is that
19 important in your opinion?

20 A To me it's probably, you looked at
21 the top benefits of it, it's probably right up
22 there with as far as one of the biggest

1 benefits of it is standardizing the way
2 information is collected. We've all read the
3 newspaper articles as consumers or industry
4 members when you see an outbreak you hear FDA
5 or others say the traceability is so
6 difficult.

7 By having a consistent farm list,
8 having dates and water tests, SPS requirements
9 for ranch or farm location, you've actually
10 lined up information that typically takes
11 weeks if not longer to acquire. Now, it's
12 essentially at the fingertips for exactly this
13 trace-back activity in the event of a food
14 safety incident.

15 We also hear a lot of talk about,
16 oh, well, you know, from a processing side
17 versus commodity side and local farms and, you
18 know, not being associated with some of the
19 outbreaks, the difficulty is that because of
20 the trace-back that already existed in a lot
21 of fresh-cut operations, it allows those to be
22 identified much better.

1 When you look at the small farms,
2 there's not requirements for labeling, there's
3 not consistent tracking and you can use a box
4 for one that maybe says another growing on the
5 other. I mean there's a lot of
6 inconsistencies about how information flows.

7 So that's been a single important
8 factor and it's very important to the buying
9 side. And my concern is that if it, you know,
10 and we see it is if we don't have something
11 that's consistent and accepted or in place
12 across, you're going to start seeing a whole
13 miss-mash, which we're already beginning to
14 see across the board, across the system of all
15 different types of labeling. And that, again,
16 adds more burden.

17 Q There's also a section on
18 confidentiality, confidential information,
19 excuse me, and your opinion is the authority
20 to maintain confidentiality of certain
21 information, is that important?

22 A You know, absolutely. I mean in

1 the event of any incident, I mean I would say
2 all bets are off and anything that is there to
3 help in terms of public safety is fair game.
4 But from a -- the reason why confidentiality
5 is important is sometimes revealing
6 information, you know, frightens people, you
7 know, that have that information and it's
8 because of context.

9 If you look at a test result in
10 terms of interest, oh here's a test result and
11 you don't understand the context of it, that
12 could be detrimental to the operation. In
13 fact, what it does is that it discourages
14 proactive work.

15 One of the things that happens is,
16 you know, we're dealing with an outdoor
17 growing environment, it's controlled as can
18 be, but it's an uncontrolled environment. So
19 things will happen, things go wrong and you
20 want those things to be identified and you
21 want those documented and more importantly,
22 you want the corrective actions and the action

1 taken.

2 So, in a confidentiality
3 standpoint, that helps protect that context
4 and make sure that in the event that it does
5 need to be released, it's released, you know,
6 appropriately. So if someone just sees that
7 something went wrong, that's alarming. It's
8 always about the context, how was it addressed
9 that's important. And that's often difficult
10 to translate sometimes.

11 Q Can you explain to me the
12 difference between a first handler and a
13 second handler, those are terms that have been
14 used over the past couple of days?

15 A Show me, if someone can tell me
16 where it is in there and I remember, I'm
17 familiar with it and that's where I was
18 actually trying to look. My understanding is
19 maybe with Mexico we would actually be a
20 secondary handler in some cases. There's also
21 product that gets shifted between companies
22 sometimes and I think that's where it falls in

1 there.

2 I don't remember where it is
3 exactly. If I could read it, I could tell you
4 my understanding.

5 Q Well, let's see I believe the term
6 first handler comes -- is mentioned in 970.56
7 Assessments. Paragraph A.

8 A Where is the definition of a
9 second handler?

10 Q Second is -- secondary handler is
11 just a term that has been used commonly and
12 I'm trying to establish --

13 A Okay. Well my understanding is we
14 would be a handler and then we would be
15 primarily a first handler, you know, we
16 typically contract with a grower and we're the
17 first to put that in commerce or take that
18 product.

19 Often when you look at, and this
20 has been I know an issue for FDA when they
21 look at trace-back and trace-forward is
22 ownership of that product versus product flow,

1 so through the system. And so the nice thing
2 about the definitions around handlers, it kind
3 of helps try to reconcile those differences.

4 In some of our circumstances, I
5 would -- my understanding is that our
6 processing plants that are getting product
7 from us could potentially be a second handler
8 in those circumstances. So that in an audit
9 situation, they would not be subject to double
10 audits on the same program, that they would be
11 a second handler of that product that's
12 already gone through our program.

13 So I think those are some of the
14 intentions behind it. When I read it, it made
15 sense. It's trying to design language around
16 the reality of what goes on in the
17 marketplace.

18 Q Okay. You said double audits, did
19 you mean double audits or double assessments?

20 A I'm sorry, double assessments.

21 Q Okay. Thank you. Thank you,
22 that's the end of my questions.

1 JUDGE HILLSON: Anyone else on the
2 panel have questions? Ms. Staley?

3 BY MS. STALEY:

4 Q Mr. McDonald, can you tell us,
5 describe your understanding of the requirement
6 in this proposed national agreement for GMPs?

7 A I read that part and my
8 understanding is that it references -- where
9 is it here? If you could tell me where it is,
10 I can read it and --

11 Q Yes. It is 970.58.

12 A Fifty-eight? I see contributions.

13 Q Sixty-five I'm sorry.

14 A 970.65?

15 Q Yes, 970.66, paragraph B.

16 A Oh, there it is. My understanding
17 is that it's listing out all of the components
18 as terms of metrics or potential metrics that
19 are derived from the FDA guide and the
20 commodity specific guidelines. That's how I
21 think I read it.

22 Yes, that's my understanding

1 because it breaks out the areas that are
2 listed in the FDA guide or typically your
3 process steps.

4 Q So how is that different than the
5 California program that you're currently
6 participating in?

7 A My understanding is that those
8 sections are actually still, how should I say
9 this? There aren't metrics to those, all of
10 the areas that are listed. The areas are,
11 right now, under production and harvest that
12 are the metrics.

13 If you look at the background or
14 the potential industry standards that includes
15 all these other areas, just so my
16 understanding is that it potentially could
17 include those, but has not yet.

18 Q So as a processor, you talk about
19 the fact that you have 10 processing
20 facilities across the country and Mexico,
21 what's your understanding of including GMP in
22 the proposed agreement?

1 A My understanding is that it
2 potentially could be included in that, but
3 again, given the model we see with California
4 it's not yet part of that, I would understand
5 the focus is going to be starting with the
6 field.

7 Q Can you define spring mix for us?

8 A Spring mix is any -- that's a good
9 test of -- any of a variety of variety of
10 small baby lettuces and leafy greens and/or
11 herbs that comprise, you know, a number of
12 different products.

13 But there are some specific baby
14 lettuces in the leafy greens that fall under,
15 because they're consistent with other
16 ingredients that are listed for leafy greens.
17 But there's some items that are excluded and
18 some items that are very common.

19 Q Does your company, is it
20 consistent what's included in the spring mix
21 or does it change depending on which area
22 you're procuring from or time of year?

1 A It's more influenced by the
2 specification, so we may have a blend that's
3 for one customer versus another, that's the
4 main drivers. There's different actual
5 specifications for the mix. And by law, by
6 FDA, you have to label what the, you know, the
7 ingredients are so you need to include those.

8 Q Okay. You talk about industry
9 involvement in developing commodity-specific
10 guidances. Do you have any experience in
11 participating in any activities that you
12 described?

13 A Absolutely. I was involved, I
14 would say, from the earliest meetings, which
15 were not just industry, but industry and
16 buyers as well as FDA and USDA, you know,
17 cross-functional group, we're all involved.
18 That goes back, you know, prior to any
19 discussion of a marketing agreement or the
20 leafy greens program. So yes, I would say
21 I've been actively involved.

22 Q To your recollection has -- do any

1 of those groups include consumer
2 representation?

3 A I would say not necessarily
4 consistently, but I'm going to say that maybe
5 some of the meetings have. Again, it's
6 somewhat esoteric, you know, some of the
7 information.

8 So some of the, you know, the end
9 goal is important to the consumer, better,
10 safer food but it's probably not necessarily
11 the details that are, you know, written up and
12 prescribed wouldn't necessarily make sense to
13 the end consumer other than the fact that
14 we're trying to make safer food.

15 So I would say it hasn't
16 necessarily been a reason or part of the
17 meetings designed to have end users in there
18 other than the fact that we're all consumers.
19 But I know of some larger meetings where there
20 probably have been, you know, end user groups
21 present.

22 Q Thank you. That's all.

1 JUDGE HILLSON: Ms. Deskins?

2 BY MS. DESKINS:

3 Q Hello Mr. McDonald. I have a
4 couple questions for you. One, you're both an
5 importer and a handler, so under the proposed
6 agreement, would you be treated either as an
7 importer or a handler or as both, if you know?

8 A I think we would be treated as
9 both and it would be about the product that's
10 coming in. So, it's a good question, I
11 haven't -- from the importer standpoint when
12 a handler or when one of our plants as a
13 handler is receiving product from outside the
14 country, yes I guess they would fall under
15 that.

16 But again, it focuses back on the
17 raw material and we would have to make sure
18 whatever we're called, we have to have the
19 evidence of compliance. So, I think the
20 nuances would be worked out, but the end goal
21 is that that product has been verified to meet
22 the requirements.

1 Q The reason I'm asking is in terms
2 of the administrative committee of this, I'm
3 trying to understand how someone like you
4 would be represented. Would you be
5 represented by a particular zone or would you
6 be represented by the importer representative,
7 if you know?

8 A I don't know. I would hope
9 probably by both so that we would have input
10 on both sides.

11 Q Okay. Another question I had for
12 you, you said these good practices for the
13 handling of leafy greens helps to improve your
14 ability to market your product, to the buyers
15 out there? You need to say orally for the
16 record.

17 A I'm sorry, could you repeat that?

18 Q Okay. In your testimony you were
19 saying that this agreement would help in the
20 marketing of your leafy green products?

21 A Oh, yes, absolutely. We've done
22 it so far, not that we want to market food

1 safety, but it's helped provide a structure or
2 a reference point that includes, you know, a
3 government body that's overseeing or auditing,
4 inspecting a product and that -- and we've --
5 I know I've heard of a testimonies, other
6 surveys that have been done and I'm aware of
7 some done by our own customers that have shown
8 that that, you know, they trust their family
9 doctor, number one and they trust the
10 government, believe it or not, number two.

11 And that has been important to
12 share. And I've presented at meetings around
13 the country and I've really tried to hammer
14 that point home that, you know, if that's
15 marketing, you know, that's I think
16 appropriate marketing for this to remind
17 people that there is a program in place.

18 Q Another question I had for you,
19 okay, you're covered by the leafy green
20 agreements in California and Arizona, but
21 you're using those standards in the other
22 states where you're sourcing leafy greens

1 from. Yes?

2 A That's correct. And that's done
3 on our own decision as well as we have many of
4 our customers insisting on that.

5 Q Do you see this agreement then as
6 codifying for nationally what you're already
7 doing in those states?

8 A Absolutely. It will help
9 establish what we're already doing and, you
10 know, if it's codifying it then that's what it
11 is, yes.

12 Q I have no further questions, thank
13 you.

14 JUDGE HILLSON: Anyone else? Mr.
15 Souza.

16 BY MR. SOUZA:

17 Q Thank you. Tony Souza. One
18 question for you Mr. McDonald. Under 970.66,
19 Verification Audits, what is your
20 interpretation or understanding as far as your
21 company would be held to standards in Mexico
22 under B2 on the processing plant in Mexico.

1 Is it your understanding that that facility
2 would be held to audits or would it not be
3 held to audits?

4 A My understanding is that it would
5 be held to it.

6 Q Thank you.

7 JUDGE HILLSON: Anything else?
8 Ms. Dash?

9 BY MS. DASH:

10 Q Suzanne Dash. Could you tell me
11 how many farms you buy from, how many growers
12 you buy from?

13 A Growers I would put the number at
14 around, for leafy greens or total?

15 Q Leafy greens.

16 A Somewhere maybe 60. We have
17 actually a list and I anticipated that
18 question and I looked at it quickly. It's
19 around 60 total.

20 Q Okay. On page 6, you said that --

21 A I'm sorry. That's California.
22 It's probably 100 when you add Mexico and the

1 rest of the states, I'm sorry. Just to
2 clarify.

3 Q Okay. That was my question. On
4 page 6 you said that a national agreement
5 should bring about nominal incremental costs.
6 I just want to make sure I understand it. Do
7 you mean because of the growers in California
8 and Arizona who are already doing GAPs under
9 the state agreements, already have what we
10 would assume -- you're assuming similar? Is
11 that what you meant?

12 A For California, yes. And then for
13 our growers around the country that are
14 already doing things for us, it would be, you
15 know, nominal amount of cost.

16 Q Okay. So you meant both.

17 A I meant both.

18 Q Okay. On page 9 you talk about --
19 is your company a large grower/shipper?

20 A Well considering we serve 100
21 million Americans each week, I would say from
22 a processing side we would be considered a

1 large processor. From a -- we're not a grower
2 though, I wouldn't characterize it as that.

3 Q So, the cost that your talking
4 about that Taylor Farms has incurred, are you
5 talking about costs that Taylor Farms as a
6 handler has incurred or are you talking about
7 any cost that Taylor Farms has paid for your
8 growers?

9 A If our growers costs go up, then
10 our costs go up. So I just conveniently or
11 used it out of convenience to say
12 grower/shipper. I probably should have said
13 grower/shipper/handler. I mean, just kind of
14 in the continuum where were are.

15 Q And I was wondering if on page 11
16 where you talked about that you had spoken to
17 about half of your growers, would you say that
18 most of those growers were large growers or
19 what could you tell us about the growers that
20 you spoke to who are in support of the
21 agreement?

22 A I can tell you that they range

1 from 10 to 300 plus acres a week outside of
2 California and that they're from a -- the
3 majority of them are in the kind of lower end
4 of that. Does that answer it? I'm sorry.

5 Q Yes.

6 A Okay.

7 Q That's all I have.

8 JUDGE HILLSON: All set with the
9 government panel. Any questions from, do you
10 want to redirect?

11 MR. RESNICK: No redirect.

12 JUDGE HILLSON: Okay. You may
13 step down. Listen, I said I was going to
14 accommodate some people before lunch, but I
15 think that's mathematically impossible right
16 now. So unless we don't have lunch and since
17 we're going to go to 7:00 tonight I reject
18 that out of hand.

19 So, it's 20 minutes after 12,
20 we're going to take an hour for lunch and then
21 right before that the people who need to
22 testify right away, I know I have Ms. North

1 and I know you had a few folks Mr. Resnick who
2 wanted to go relatively early.

3 But there's only so many minutes
4 in the day, so we're going to take an hour for
5 lunch. Off the record.

6 (Whereupon, the foregoing matter
7 went off the record at 12:23 p.m.
8 and went back on the record at
9 1:21 p.m.)

10 JUDGE HILLSON: I don't think I
11 have accepted Mr. McDonald's testimony into
12 the record, so Exhibit 35 has been received
13 into evidence.

14 (Whereupon, the above-referred to
15 document was admitted into
16 evidence as Exhibit No. 36.)

17 JUDGE HILLSON: Mr. English had
18 asked that we receive the written testimony of
19 a person who left before testifying and I said
20 I would put that up. What was her name again
21 please?

22 MR. ENGLISH: Her name was Peggy

1 da Silva.

2 JUDGE HILLSON: Peggy da Silva.

3 MR. ENGLISH: From the Episcopal
4 Diocese. And with the understanding that
5 Ms. Deskins said that if there is no objection
6 it only comes in as an unsworn statement and
7 will be given the appropriate weight.

8 JUDGE HILLSON: Absolutely. Right
9 and the question was under those conditions is
10 there any objection to that being received?

11 MS. DESKINS: Judge Hillson, I
12 should put on the record we do object to it.

13 JUDGE HILLSON: Okay. Then it's
14 out. That's it. That was easy. I just said
15 that's the rule -- that's sort of the ground
16 rule that she could submit it as a comment
17 afterwards, any underlying facts in it though
18 are not on the record and not subject to cross
19 examination.

20 Okay. I told Ms. North who
21 promised me she had a very short testimony
22 that I would allow her to testify next. She's

1 one of the people who came in from outside.

2 So Ms. North, if you want to come on up.

3 And I'm marking Ms. North's
4 testimony or written testimony as Exhibit 37.

5 (Whereupon, the above-referred to
6 document was marked as Exhibit No.
7 37 for identification.)

8 JUDGE HILLSON: Have a seat Ms.
9 North. I think the other chair is a better
10 angle to get everybody's attention. And if
11 you'd please raise your right hand.

12 WHEREUPON,

13 JILL NORTH

14 was called for examination, having been first
15 duly sworn, assumed the witness stand, was
16 examined and testified as follows:

17 JUDGE HILLSON: Could you please
18 state your name and spell it for the record?

19 THE WITNESS: It's Jill North J-I-
20 L-L N-O-R-T-H,

21 JUDGE HILLSON: And you have a
22 piece of testimony you want to read, is that

1 correct?

2 THE WITNESS: Yes, that's correct.

3 JUDGE HILLSON: Proceed.

4 DIRECT EXAMINATION

5 THE WITNESS: I work with the
6 California Regional Water Quality Control
7 Board. We are one of nine regions within the
8 state of California and a state agency. The
9 California Regional Water Quality Control
10 Board's jurisdiction contains what is known as
11 the "nation's salad bowl", the Salinas Valley.

12 Within our region, 90 percent of
13 the nations' lettuce and leafy greens are
14 grown and shipped. After the 2006 outbreak of
15 E. Coli 0157:H7 in spinach, we saw the
16 development of the California Leafy Greens
17 Marketing Agreement and a rise in various
18 buyer and independent auditor's food safety
19 requirements that are in direct conflict with
20 our laws, regulations and policies.

21 We have seen the development of
22 super metrics that go above and beyond the

1 California Leafy Greens Marketing Agreement
2 metrics and we have seen growers interpreting
3 the California Leafy Greens Marketing
4 Agreement audit to mean that they cannot have
5 any vegetation that may harbor wildlife.

6 In response to this, many growers
7 have been removing vegetation that helps
8 protect our water quality by trapping
9 pathogens and filtering nutrients and
10 pesticides. Growers want to be good stewards
11 of the land, but are put in the awkward
12 position of choosing between selling their
13 crop or removing vegetation.

14 Some waterways are left barren,
15 with no vegetation at all in return to a
16 scorched earth policy. Removal of vegetation
17 may actually increase the threat to food
18 safety since it increases pollution transport,
19 including bacteria, from domestic animal
20 sources to farms.

21 Domestic animals, such as cows and
22 pigs pose the greatest risk to food safety,

1 not wildlife. We have also seen a reduction
2 in on-farm water reuse to the point that it
3 has virtually disappeared.

4 Farmers no longer hold and re-use
5 their water as a result of food safety
6 requirements and this can lead to increases in
7 tailwater discharges. The Water Board's
8 mission is to protect and enhance the quality
9 of the waters of the state for future
10 generations. This includes the protection of
11 streams, lakes and wetlands.

12 We have invested grant money in
13 improving water quality and promoting the
14 protection of aquatic habitat, but recently,
15 we have received reports of on-farm wetlands
16 being filled in response to food safety
17 requirements.

18 Farmers should not have to choose
19 between protecting their water resources or
20 being able to sell their crops.

21 According to a 2007 survey by the
22 Monterey County Resource Conservation

1 District, about 30 percent of farmers have
2 eliminated non-crop vegetation at the
3 suggestion of auditors and seven percent have
4 bulldozed ponds or other waterways to meet
5 auditor requirements.

6 The Monterey County Resource
7 Conservation District conducted a recent
8 follow-up survey, Paul referred to that
9 earlier, and that is due out this coming fall,
10 and as Paul mentioned will be on their website
11 later next week.

12 In conclusion, we acknowledge the
13 importance of providing safe food to
14 consumers. The National Leafy Green Marketing
15 Agreement must promote the coordination of
16 food safety and water quality and remove any
17 potential interpretations that may lead to
18 violations of water quality laws, requirements
19 and policies, and resulting enforcement
20 actions against growers.

21 We recommend that the National
22 Leafy Green Marketing Agreement require

1 cross-training of its associated auditors with
2 inspectors from appropriate environmental
3 regulatory agencies.

4 We recommend that the proposed
5 Technical Review Board include a staff member
6 from our Regional Board, the United States
7 Fish and Wildlife Service or the National
8 Marine Fisheries Service.

9 Any metrics developed as a result
10 of the National Leafy Green Marketing
11 Agreement must be based on the latest and best
12 available science. Let's help the farmers to
13 provide safe food and promote water quality.

14 And that's the end of my written
15 testimony. I had two additional
16 recommendations I'd like to recommend to help
17 to alleviate the various wayward
18 interpretations that outreach and education
19 that Laura Giudici Mills talked about earlier
20 would be a recommendation that we would make
21 to include in the, sorry, Leafy Green
22 Marketing Agreement.

1 And then also that the
2 certification be good just for those growers
3 who are following these metrics only so it
4 help to reduce the propensity of super
5 metrics. Thank you.

6 JUDGE HILLSON: Okay. Let me ask
7 the AMS panel if they have questions.
8 Ms. Schmaedick, you have a question go right
9 ahead.

10 CROSS EXAMINATION

11 BY MS. SCHMAEDICK:

12 Q Good afternoon, Melissa Schmaedick
13 from USDA. Thank you Ms. North for your
14 testimony. You're speaking on behalf of the
15 California Regional Water Quality Control
16 Board, is that correct?

17 A That's correct. Yes.

18 Q Is that a state agency?

19 A That is a state agency, that's
20 correct. The State Water Resources Control
21 Board is our parent agency.

22 Q Okay. And do they share similar

1 positions? Has that been discussed within the

2 --

3 A Yes.

4 Q -- greater organization?

5 A Yes. Johnny Gonzalez testified
6 earlier in the hearing proceedings from the
7 state board.

8 Q Okay. I am looking at your
9 statement and I'm a little bit confused. It
10 looks like it's a letter that's signed by
11 Michael Thomas?

12 A Yes, that's our Assistant
13 Executive Officer and he wanted to make sure
14 that it was on letterhead because he wanted it
15 submitted it for the record and wanted to be
16 on our letterhead.

17 Q So is this your testimony or is
18 this you're just reading his letter into the
19 record?

20 A I would be reading his letter into
21 the record.

22 Q Okay. Thank you.

1 JUDGE HILLSON: Ms. Deskins you
2 have a question?

3 MS. DESKINS: Yes. Have you
4 already received this as an exhibit in the
5 record?

6 JUDGE HILLSON: I haven't received
7 it yet, but I marked it.

8 MS. DESKINS: Okay.

9 JUDGE HILLSON: I'm about -- I was
10 about to receive it for, you know, every
11 exhibit I receive is for whatever worth the
12 Secretary decides to give it, so.

13 MS. DESKINS: I would object to it
14 since it's a statement of a person who is not
15 here.

16 THE WITNESS: Can I then, can it
17 be that I'm giving the testimony?

18 JUDGE HILLSON: If you can say
19 that it's your testimony, then it is.

20 THE WITNESS: Yes, I can say that
21 it's my testimony.

22 JUDGE HILLSON: Like, did you

1 draft this letter for -- is this your writing
2 or is this your work that he signed it?

3 THE WITNESS: This is my work,
4 yes.

5 JUDGE HILLSON: She said it is her
6 work, so -- and that he signed it, but that
7 it's her work and that it's her testimony as
8 well.

9 MS. DESKINS: But the problem is
10 since it's signed by somebody else, which
11 isn't her and she's offering it as an exhibit
12 from somebody else, it's the same problem with
13 the objection we made to the previous exhibit.
14 If that person's not here for cross
15 examination --

16 MR. ENGLISH: Charles English,
17 it's very different. I mean if the objection
18 is to the last couple lines with the
19 signature, that's one thing, but this witness,
20 Ms. North, has just said this was my work and
21 this is my testimony,.

22 JUDGE HILLSON: I agree. I'm

1 allowing it in and, you know, if the Secretary
2 has a problem with that, then he'll have to
3 sort that out later on. But she's testified
4 that it's her work and that someone else
5 signed it but that she drafted it and that
6 it's her testimony. I think that makes it her
7 testimony.

8 Are there other questions of this
9 witness on the AMS side?

10 BY MS. CARTER:

11 Q Good afternoon, Antoinette Carter,
12 USDA. I just had one question for you. The
13 recommendation regarding the incorporation of
14 an educational component as part of the
15 proposed agreement, could you explain what --
16 why that would be of value and beneficial?

17 A Yes, because that would help to
18 educate the growers on what is actually being
19 required. Sometimes there are metrics that
20 are open to interpretation and it's not the
21 meaning of the metric, but the grower will
22 take it a step further and have it mean the

1 removal of vegetation when that's not actually
2 written anywhere.

3 At least that's not in the
4 California leafy green metrics agreement at
5 all. So the education would help to alleviate
6 people's -- because growers have a fear that
7 they're not going to be able to sell their
8 produce.

9 And so what they do is go and do
10 what they think they need to do in order to
11 sell the produce and the education would just
12 help to educate them on what the rules
13 actually are and what they are being required
14 and there are no additional requirements.

15 Q Thank you.

16 JUDGE HILLSON: Anything else from
17 the panel? Anything from the Proponents?

18 BY MR. WILKINSON:

19 Q Robert Wilkinson on behalf of
20 Western Growers. Thank you very much Ms.
21 North for coming to testify. Will you come
22 back if the agreement is put into place when

1 we're promulgating the metrics?

2 A Yes, you bet.

3 Q Thank you.

4 JUDGE HILLSON: Mr. Giclas?

5 BY MR. GICLAS:

6 Q Thank you. Hank Giclas, Western
7 Growers. Thank you for your testimony Ms.
8 North. I also have a question about the
9 written testimony.

10 The second paragraph on the first
11 page, it says "According to a 2007 survey by
12 Monterey County Recourse Conservation District
13 about 30 percent of farmers have eliminated
14 non-crop vegetation," is that an accurate
15 representation of what's in the RED report?

16 A Yes, that's correct.

17 Q Thirty-percent?

18 A Thirty-percent, yes.

19 Q Was that -- that's the number of
20 growers who have actually eliminated non-crop
21 vegetation or?

22 A No, that is the number of -- the

1 percentage of the number of growers that
2 replied to the survey.

3 Q So it's not the number of growers
4 that actually removed non-crop vegetation?

5 A It's a percent of those that
6 replied to the survey and I don't know what
7 the number was, maybe a couple of hundred. So
8 it's not region-wide, no.

9 Q Do you know how many growers or
10 what the percentage of growers is, of the
11 respondents to the survey, that actually said
12 they removed non-crop vegetation?

13 A Well, if my memory serves me
14 correctly, I believe it was around 200 people
15 that responded to that survey, so it would be
16 30 percent of that. So that would be 60
17 people, 60 growers.

18 Q So you believe it's 30 percent of
19 the respondents actually removed non-crop
20 vegetation?

21 A Correct.

22 Q Okay. Thank you very much.

1 JUDGE HILLSON: Are we done with
2 this witness? Any other questions from
3 anyone? Thank you Ms. North.

4 THE WITNESS: Thank you.

5 JUDGE HILLSON: You may step down.
6 I'm thinking I'm going to turn it back over to
7 you, Mr. Resnick, to call some witnesses. I
8 know the other people that I need to
9 accommodate sometime today, Ms. Hardesty and
10 Mr. Garin I believe, but that sometime today -
11 - and whoever else that Mr. English is going
12 to call, he has Nygrens as well.

13 MR. ENGLISH: That will be it.

14 JUDGE HILLSON: Yes, as long -- I
15 just want to make sure that these people know
16 that I will get them in today, but I'm going
17 to turn it over to the Proponent's case for
18 awhile and depending on how things are going,
19 we'll --

20 MR. RESNICK: Thank you, Your
21 Honor. And I just want to state for the
22 record that one of the witnesses for the

1 Proponent group who was only available for the
2 morning had to leave and we've lost yet
3 another witness.

4 JUDGE HILLSON: I apologize for
5 the number there are in a given day, but I
6 can't help that. I am officially receiving
7 Exhibit 37 into the record.

8 (Whereupon, the above-referred to
9 document was admitted into
10 evidence as Exhibit No. 37.)

11 MR. RESNICK: No apologies
12 necessary, Your Honor, I just wanted to state
13 that for the record. Secondly, I want to just
14 let those in the gallery know, we're going --
15 we're intending to call Victor Tognazzini next
16 and then we're going to, if there's no
17 objection, have a panel of three witnesses,
18 those witnesses would be Rod Faurot, Kay
19 Filice and Doug Iwamoto.

20 JUDGE HILLSON: That would be
21 fine. They each have written statements that
22 they're going to read and then be questioned

1 all at the same --

2 MR. RESNICK: That's the intent.

3 JUDGE HILLSON: -- simultaneously?

4 That will be -- always willing to try

5 something different. I understand that it's

6 worked in other hearings, so.

7 MR. RESNICK: We'll give that a

8 shot. So at this time, we would call Victor

9 Tognazzini.

10 JUDGE HILLSON: Thank you. And

11 I'm going to mark Mr. Tognazzini's written

12 statement as Exhibit 38.

13 (Whereupon, the above-referred to

14 document was marked as Exhibit No.

15 38 for identification.)

16 JUDGE HILLSON: Please raise your

17 right hand, sir.

18 WHEREUPON,

19 VICTOR TOGNAZIZINI

20 was called for examination by Counsel for the

21 Proponent, having been first duly sworn,

22 assumed the witness stand, was examined and

1 testified as follows:

2 JUDGE HILLSON: Can you please
3 state your name and then spell it slowly for
4 the record?

5 THE WITNESS: Victor Tognazzini V-
6 I-C-T-O-R T-O-G-N-A-Z-Z-I-N-I.

7 JUDGE HILLSON: And you want to
8 read a statement into the record, is that
9 correct?

10 THE WITNESS: I beg your pardon?

11 JUDGE HILLSON: You want to read a
12 statement for the record, correct?

13 THE WITNESS: That is correct.

14 JUDGE HILLSON: Then you may
15 proceed to do so.

16 DIRECT EXAMINATION

17 THE WITNESS: Thank you. Good
18 afternoon. I crossed out good morning, I was
19 about ready to cross good afternoon and put
20 good evening. But good afternoon, and I thank
21 you for the opportunity to testify. I am
22 testifying today speaking in support of the

1 National Leafy Green Marketing Agreement.

2 My name is Victor Tognazzini, I am
3 the General Manage of Tri-Valley Vegetable
4 Harvesting and Director of Field Food Safety
5 for Gold Coast Packing and Gold Coast Farms.
6 We're a small leafy green grower/shipper,
7 processor and handler in the Santa Maria
8 Valley of California's Central Coast.

9 I have held my present position
10 for the past 12 years and have been in the
11 industry for the last 37 years. Our company
12 plants and harvests approximately 245 acres of
13 spinach annually or over 3 million pounds.

14 We are considered, based on SBA
15 definitions, a small grower/shipper, and
16 handler. In addition to the production
17 operation, we handle 1.5 million pounds of
18 leafy greens produced by independent producers
19 located in California and Arizona. I oversee
20 all harvesting, field packaging and food
21 safety programs for our company.

22 As a participant in California's

1 Leafy Greens Marketing Agreement, both an
2 Alternate member of the board and as a
3 signatory company for the last three years, I
4 have seen this program in action.

5 The California Leafy Green
6 Marketing Agreement has resulted in an
7 unprecedented focus on food safety. I know
8 that you heard this and I thought about in the
9 recognition of the time stricture that we have
10 here of leaving this out, but I think it's
11 important that we include this and that is, in
12 which we as growers and handlers abide by best
13 practices that are consistent, specific,
14 measurable and verifiable in the field.

15 Our Gold Coast companies have
16 shared with many other handlers in our
17 industry, a history of maintaining good
18 agriculture -- agricultural and good
19 management practices; however we did not, for
20 the most part, document those practices and
21 with the exception of buyer requirements, our
22 field operations were largely unaudited.

1 The very best GAP or GMP program,
2 without documentation, cannot be verified and
3 thus is not a viable program. The LGMA has
4 been able to fine tune practices for those who
5 have had established rudimentary food safety
6 programs and it has raised the bar for all
7 signatories to the agreement.

8 Historically, without uniform
9 safety requirements, we are dependent on the
10 safety practices of all other growers and
11 shippers in the county, for that matter.
12 Outbreaks such as the E. coli outbreak in
13 spinach in September 2006, affect the entire
14 industry.

15 The industry's financial losses
16 for crops destroyed as a result of the actions
17 taken by the FDA to curtail spinach sales and
18 the adjunct loss of consumer confidence in
19 leafy greens was a devastating blow to all
20 spinach growers and handlers, but small
21 operations such as ours were especially hard
22 hit. We did not share the blame, but we

1 shared the pain.

2 The leafy green marketing
3 agreements, governing fresh leafy greens in
4 Arizona and California respectively have
5 fostered a restoration in consumer confidence
6 and have materially contributed to a
7 resurgence in fiscal viability.

8 While the California and Arizona
9 programs are voluntary, the requirements of
10 the program's agreements are mandatory for all
11 signatory handlers.

12 Signatories are required to submit
13 to both scheduled and unannounced audits
14 conducted by their state's department of
15 agriculture based on specific good
16 agricultural practices that are both
17 protective and practical.

18 Participation is renewed on an
19 annual basis. Those enrolled handlers agree
20 to purchase only leafy greens grown according
21 to those specific accepted Good Agricultural
22 Practices.

1 We believe that as a signatory to
2 the California Leafy Green Agreement, we are
3 less likely to be negatively impacted by the
4 food safety performance of other growers or
5 shippers.

6 We also believe we are both
7 efficiently and effectively minimizing the
8 potential for contamination and that the state
9 LGMA's avail the industry to engage directly
10 with FDA and state public health agencies to
11 facilitate the rapid identification and
12 mitigation of any contamination, as well as to
13 provide continual improvement by refining the
14 program as new food safety strategies are
15 proven and advanced testing technologies are
16 developed.

17 The implementation of the
18 California and Arizona Leafy Green Marketing
19 Agreements provides our buyers with a science-
20 based safety program.

21 They now have a full awareness of
22 the detail encompassed in establishing and

1 implementing food safety programs and have the
2 assurance that our efforts are consistently
3 and constantly verified by state government
4 inspectors.

5 While some buyers appear to engage
6 in a food safety arms race, the marketing
7 agreements have engendered consistency
8 throughout the industry in food safety
9 requirements.

10 Because we've already made a
11 substantial investment in food safety
12 personnel, product and water testing,
13 equipment and administration and training
14 costs to comply with the California Leafy
15 Greens Marketing Agreement, I have no
16 expectation that there will be significantly
17 increased costs under the National Leafy
18 Greens Marketing Agreement.

19 I've examined the business case
20 study financials as a small grower/shipper
21 presented by Diane Wetherington of Intertox
22 and find them to be representative of the

1 costs we have incurred and may incur. I would
2 say that our costs are to the lower portion of
3 those standards -- of those costs.

4 Our experience with the California
5 Leafy Greens Marketing Agreement has been
6 positive and we clearly anticipate the same
7 kind of experience nationally. This national
8 agreement will bring the same standards to all
9 companies growing, packaging, or selling leafy
10 greens across the country.

11 A national agreement will raise
12 the food safety bar in all growing regions of
13 our country. We have long provided our nation
14 and the world with the safest, most abundant
15 and least expensive food supply in the world.
16 We have learned in the crucible of stark
17 reality that with outbreaks of food borne
18 illnesses, the term safest is a relative term.

19 We have a responsibility to ensure
20 that our growing and handling practices are
21 based on science-based standards that are
22 verified by auditing programs as set forth in

1 the California and Arizona LGMAs.

2 With national standards in place,
3 industry buyers will have more transparency on
4 food safety issues and may thus address these
5 issues with a consistent and cost-effective
6 direction or plan and consumers will be able
7 to buy with confidence the healthful and
8 nutritious leafy greens which America's
9 farmers produce.

10 I would therefore go on record as
11 supporting the National Leafy Green Marketing
12 Agreement, which I believe will bring
13 nationwide standardization to our industry,
14 which will serve to expand certain food safety
15 protocols in all aspects and phases of
16 growing, handling, processing and shipping and
17 will continue to foster consumer confidence in
18 leafy greens.

19 I would also add that I support
20 this because I am a consumer and my wife is a
21 consumer and we have five daughters and five
22 sons-in-law and they're consumers and I have

1 13 grandchildren, we have 13 grandchildren and
2 they are consumers and they're spread out
3 around this wonderful country of ours.

4 And I think that a national food
5 safety agreement such as proposed will make
6 that safer for them and for everyone else, for
7 all of our citizens. Thank you.

8 JUDGE HILLSON: Thank you. Is
9 there any other direct before I turn it over
10 to the panel? Okay. Let me ask the panel if
11 they have any questions.

12 CROSS EXAMINATION

13 BY MS. SCHMAEDICK:

14 Q USDA, Melissa Schmaedick. Good
15 afternoon Mr. Tognazzini, is that it?

16 A Yes, thank you.

17 Q Tognazzini. Okay. Good. Thank
18 you for your testimony. My first question for
19 you is, you mentioned that you're associated
20 with three different companies, Tri-Valley
21 Vegetable Harvesting, Gold Coast Packing and
22 Gold Coast Farms. Are you testifying as a

1 representative of all three businesses today?

2 A I am.

3 Q Okay. So in that capacity, are
4 you representing both producer as well as
5 handler interests?

6 A I didn't hear the first part.

7 Q Are you both a producer and a
8 handler then in those capacities?

9 A Yes, we are. And if I may, Gold
10 Coast packing is the umbrella company, Gold
11 Coast Farms and Tri-Valley Vegetable
12 Harvesting are -- it's all the same ownership,
13 it's three different functions.

14 Q Okay. And then so as a
15 grower/shipper, processor and handler you fall
16 under the SBA definition of small business
17 entity for all of those categories?

18 A For leafy greens, yes, for our
19 leafy greens we are.

20 Q Okay. Thank you. I see by your
21 statement here that you work with producers,
22 handlers and packers in two different states,

1 California and Arizona, is that correct?

2 A As far as producers, grower in
3 Arizona. And I'll just expand on that, we
4 have in our area, although we have the
5 capability of growing year round, we take the
6 time between the end of November and the first
7 of March to ensure that we have quality. We
8 have -- we're supplied with our spinach from
9 Arizona -- from a California company operating
10 in Arizona.

11 Q Based on your experience with this
12 industry, are there differences in production
13 areas in terms of cultural practices,
14 harvesting practices, handling practices?

15 A I can speak to the areas that I'm
16 familiar with and yes, there are some
17 differences. That question, I agree with the
18 answer given earlier with that same question,
19 I think there are some cultural differences.
20 I think there are also, you know, for
21 instance, we use well water for our
22 irrigation, down in the Imperial Valley and in

1 Yuma they're using canal waters.

2 So there's some differences, but
3 there is no difference in a food safety
4 standard. There may be differences in
5 environment and geography, there's not a
6 difference in the requirements for food
7 safety.

8 Q And with that statement, is it
9 important then, is it your belief that the
10 term region might be helpful in the
11 development of metrics so that they are
12 appropriate and applicable to recognizing
13 those differences?

14 A I think to a certain extent, yes.
15 Regional differences probably more in terms of
16 geography in the proposal, there's zones
17 indicated. And those zones are based, it
18 looks to me like states and those groupings of
19 states.

20 The regional differences, I think
21 the LGMA in California has addressed those and
22 the scientific panel that developed the

1 metrics that were accepted by the LGMA has
2 recognized that there are some differences in
3 some of the testing, the methods of testing,
4 but there's not a difference in those
5 requirements that go to promote food safety.

6 We aren't -- no one's given a pass
7 on anything, so yes, there are differences
8 regionally, but it does not take away from the
9 requirements for food safety.

10 Q Thank you. I'm assuming that you
11 read a copy of the proposed agreement?

12 A I did. In fact, I would stipulate
13 that I agree with all of it and I agree with,
14 certainly the speakers today on the answers
15 that were given. I didn't memorize, but I did
16 read it and understand it and agree with the
17 proposal.

18 Q Thank you. So in your opinion
19 then, is grower representation on the proposed
20 Administrative Committee, does that satisfy
21 your concerns and interests as a grower?

22 A Yes. When you look at this, and

1 if I may, I'd like to go back to September of
2 2006 we had a problem here in California as I
3 stated in my testimony. In February, February
4 28th of 2007 the first meeting -- we had the
5 first meeting of the Board, both members and
6 alternates for the Leafy Green Board.

7 By July, we had a program that has
8 proven its success, I believe. And so with
9 that, there are a lot of things in those
10 proposals that some of us had different ideas
11 on, but taken as a whole, taken in, everything
12 in context, yes, I agree with this proposal.

13 I think that there will be certain
14 things that that committee, with the approval
15 of the Secretary, things that will be -- may
16 be changed, policies, the establishment of
17 policy, those things. There may be some
18 changes, but you have to take this document as
19 a starting point and yes, I agree with those
20 things as a grower, as a processor, as a
21 handler, I agree with those.

22 Q Thank you.

1 JUDGE HILLSON: Ms. Staley?

2 BY MS. STALEY:

3 Q I'd like to talk about the audit -
4 - excuse me, Kathleen Staley. I'd like to
5 talk about the audit process. Could you walk
6 us through what typically happens today with
7 the California leafy green program and the
8 auditor comes? Explain that procedure.

9 A Certainly. The thing when I talk
10 about an audit though, there are some
11 differences as we move through the audit
12 process. The first audits, there was a great
13 deal of time devoted to the paperwork, the
14 documentation so that it could be verified.
15 The fact that going through all of
16 our records or most of our records and then
17 the -- I will continue on with what we do a
18 typical audit today, because that doesn't
19 change.

20 But as we moved forward, some of
21 those things that were established and knew
22 that we had a plan, they had seen all of those

1 things. So it's easier now to concentrate,
2 although they will come in and they will ask
3 various questions, pull out certain areas just
4 to ensure that those are -- those continue to
5 be up to date.

6 But the audit itself really starts
7 with the way that we -- that our plan is and
8 that is they want to see our field analysis,
9 what is our hazard assessment, we have a pre-
10 season, a pre-harvest and then a daily harvest
11 and they want to see those, ensure that, for
12 the, particularly for the daily.

13 They will walk the field. They
14 will look at that area to ensure that
15 something that it's not just filled out in the
16 foreman's truck. They want to look if there
17 are tracks of -- if they could see tracks,
18 they will look at the assessment form to see
19 if that was indicated.

20 So that occurs typically they will
21 look at water testing data. They will look --
22 the auditor will ask questions of various

1 members of a harvesting crew to ensure that
2 those -- that each area knows the responsible
3 area of food safety the answer from someone
4 working -- filling a tote with spinach will
5 not be the same answer as the foreman. So
6 those -- but that's tracked.

7 They will view records of
8 restrooms, there's -- a typical audit for me
9 has been between four and six hours. And so
10 it's a thorough audit and now that would be
11 for a scheduled audit.

12 For an unannounced audit, the
13 auditor will show up at the field and
14 hopefully I have enough time or a responsible
15 party has enough time to be there. But if
16 we're not, they will talk to our foreman, go
17 through a kind of a, well a shorter version of
18 the scheduled audit.

19 I'm sorry, does that answer your
20 question?

21 Q Yes, it does. And if there were
22 any problems found in the audit, what's the

1 procedure? How is that handled?

2 A We're given, of course, we know
3 immediately when it's written down. We're
4 given a debriefing following the audit and
5 then we now have everything appear on a
6 website, we're able to go to that site.

7 And then anything that we need to
8 -- if there's corrective action that's
9 required, if it hasn't been corrected on the
10 spot, we provide that corrective action
11 information and that's all done online and
12 submitted back to Leafy Greens.

13 Q And if there's an immediate food
14 safety problem, how is that handled?

15 A It depends on the seriousness of
16 it. If it's something that can be taken care
17 of, it may still appear on the record as
18 something that, it's kind of a first strike,
19 but if it's something that is egregious in
20 nature, then the auditor will notify the FDA
21 or other -- whoever is needed to -- whatever
22 the situation is and I don't want to speculate

1 on any of those things.

2 We haven't had any and do not
3 intend to have any. But there is that -- and
4 that's also in the proposed rules that there
5 will be that opportunity for, if there's
6 something that egregious, food safety -- a
7 problem with food safety that merits that,
8 then the auditor has the responsibility or the
9 requirement to make that known to the FDA.

10 Q And is there co-mingling of
11 product from different growers?

12 A In our case, we have -- we are --
13 Gold Coast Farms is the grower for Gold Coast
14 Packing. We have, when we buy from or source
15 another, which is usually just in that winter
16 period, there's not really a co-mingling, but
17 anything that's purchased has to be -- or
18 sourced by the requirement of the Leafy Green
19 Marketing Agreement has to be from another
20 handler or grower who follows those same
21 guidelines.

22 Q Thank you, that's all.

1 JUDGE HILLSON: Anything else from
2 the panel? Okay. How about anyone else in
3 the audience? Do you have any redirect?

4 MR. RESNICK: No, Your Honor.

5 JUDGE HILLSON: Okay. Thank you
6 very much, sir you may step down.

7 THE WITNESS: Thank you.

8 JUDGE HILLSON: And I will receive
9 Exhibit 38 into evidence.

10 (Whereupon, the above-referred to
11 document was admitted into
12 evidence as Exhibit No. 38.)

13 MR. RESNICK: Thank you, Your
14 Honor. At this time we'll call a panel, I'd
15 say we have two chairs, it might be --
16 witnesses are falling off of our list, I'm
17 wondering if we should reconsider calling two
18 at a time or three. Why don't we go two, I
19 think logistically it will be easier.

20 So, at this time I would call Rod
21 Faurot and Doug Iwamoto.

22 JUDGE HILLSON: You can both come

1 up. Are there any written statements
2 involved?

3 MR. RESNICK: From one Your Honor.
4 Mr. Faurot does not have a written statement.
5 Mr. Iwamoto does, is that correct?

6 MR. IWAMOTO: It's an outline.

7 JUDGE HILLSON: If you want it in
8 the record you can give it to us, if you just
9 want to testify orally it's your call. You
10 have to give one to me and you got to pass
11 them out. So I'm going to mark this as
12 Exhibit 39.

13 (Whereupon, the above-referred to
14 document was marked as Exhibit No.
15 39 for identification.)

16 JUDGE HILLSON: Which one of you
17 is going to testify first?

18 MR. FAUROT: I'd like to go first.

19 JUDGE HILLSON: Okay. I'll just
20 swear you in one at a time with the
21 understanding that the panel will ask
22 questions after they both testify just to see

1 how that works. So if you could please raise
2 your right hand.

3 WHEREUPON,

4 ROD FAUROT

5 was called for examination by Counsel for the
6 Proponent, having been first duly sworn,
7 assumed the witness stand, was examined and
8 testified as follows:

9 JUDGE HILLSON: Could you please
10 state your name and spell it for the record?

11 THE WITNESS: The name is Rod
12 Faurot R-O-D F-A-U-R-O-T.

13 JUDGE HILLSON: Okay. And is Mr.
14 Faurot going to testify just directly or do
15 you have questions you want to ask him or is
16 he just going to testify --

17 MR. RESNICK: He can testify
18 directly.

19 JUDGE HILLSON: Okay. Than you
20 may make a statement, sir.

21 DIRECT EXAMINATION

22 THE WITNESS: Okay. Name, Rod

1 Faurot again, Faurot Ranch. We've been
2 farming for 30 years now about and we started
3 into the leafy greens end of things probably
4 '89, '90.

5 Dale Coke testified yesterday, I
6 think he was the guy that started the spring
7 mix, near as I know and as near as I know we
8 were the second in line to provide that kind
9 of a product. Knock wood, we haven't had a
10 problem.

11 I am in favor of the leafy greens,
12 basic, leafy greens things going nationwide.
13 Certainly, what leafy greens has done for us
14 is make us document to a great extent what we
15 were doing all along and going nationwide I
16 think we need a level playing field.

17 One of the things that, of course,
18 you're all aware of I'm sure is what was it
19 last year when product from the Salinas Valley
20 was co-mingled with product from the mid-west
21 and, you know, they ended up with a positive
22 find and that just absolutely says you don't

1 know where it came from or where the problem
2 arose.

3 So we need standard, we need a
4 standard of some sort that is nationwide, it
5 should be worldwide, that's dreaming for sure.

6 When the metrics are designed,
7 make them as practical as we can. People that
8 are -- and in listening yesterday, I wasn't
9 hear this morning, in listening yesterday I
10 was pleased to hear people asking, you know,
11 Tom Willey and other people to participate in
12 helping to do the metrics.

13 One of the problems that I've had
14 with the current leafy greens is that
15 certainly, we're conventional growers, but
16 certainly the people that are interested in
17 the organic growing and in sustainable
18 agriculture and this kind of stuff were pretty
19 well left out of it.

20 The way the metrics are written
21 right now it becomes very difficult for people
22 that want to farm in that way and I give them

1 credit for doing it, but it makes it very
2 difficult for them.

3 Yes, one of the nice things about
4 the leafy greens metrics that we have is that
5 they're given to all of us so that we know
6 what it is we're being inspected for. When
7 the state people come around or FDA comes
8 around you don't really know that they're
9 going to be looking for. So it's nice to have
10 it written down, you know, where we're all
11 working on the same page.

12 Number of audits per year, they,
13 as the previous speaker said, it can be four
14 to six hours. They can be numerous times a
15 year. If someone is not, obviously not
16 trained to follow the rules, then yes they
17 need a whole lot of audits or inspections.

18 But for the people that are
19 following the rules, maybe there could be
20 less. One of our friends, he's a large grower
21 and he's got a number of ranches and it was
22 early in the year and I was grumping at him

1 about already having four audits this year and
2 he said, well I've had 22 so far this year and
3 I'm going to be up at 4:00 in the morning for
4 another one. So maybe something could be
5 addressed in that way.

6 Again, back to the -- when Tom
7 Willey was testifying yesterday, he was
8 talking about the use of fertilizers and this,
9 that and the other. There was -- you may be
10 aware, Richard Smith, UC Extension Service out
11 of Salinas did a test last year where soil was
12 injected with H157 E. coli and romaine lettuce
13 was grown on top of that.

14 The romaine lettuce did not pick
15 up the E. coli, which may open the -- if it
16 can be replicated, and I think he's
17 replicating it this year, if it can be shown
18 that this can be depended on could be able to
19 relieve quite a bit of the question about
20 using fertilizers.

21 For many years we used mushroom
22 compost, we just haul it in the winter time

1 when things were slow and stockpiled it and
2 they put it out in the summertime.

3 Our soils are sandy, it's really a
4 good product and now we basically can't use it
5 just because of the way the metrics are -- it
6 becomes such a headache to try to go through
7 the system. And I think it's probably one of
8 those requirements that needs to be looked at.
9 I think that's all I've got to say.

10 JUDGE HILLSON: Okay. Let me
11 swear in Mr. Iwamoto. If you would please
12 raise your right hand.

13 WHEREUPON,

14 DOUGLAS IWAMOTO

15 was called for examination by Counsel for the
16 Proponent, having been first duly sworn,
17 assumed the witness stand, was examined and
18 testified as follows:

19 JUDGE HILLSON: Why don't you grab
20 the microphone and why don't you state your
21 name and spell it for the record.

22 DIRECT EXAMINATION

1 THE WITNESS: My name is Douglas
2 Iwamoto and the last name is spelled I-W-A-M-
3 O-T-O. I'm owner of Iwamoto Farms and I'm a
4 third generation farmer. Been in the business
5 myself for 30 years plus. Located in Salinas
6 Valley on the north end of Salinas. I farm
7 approximately 500 acres a year and it is all
8 unconventional farming.

9 I do support this National Leafy
10 Green Marketing Agreement. I have a GAP
11 program for the last 10 to 12 years, but
12 starting this program since 2006 which is when
13 I was also farming spinach at that time and I
14 was little hesitant at that time.

15 But right now I'm really onboard
16 for what this program could do as far as food
17 safety in the United States. The biggest
18 burden I had to start the program was the
19 cost.

20 Being a small farmer, which I'm
21 considered, the enormous cost for starting a
22 program and at that time in 2006, I would say

1 everybody was running around like a chicken
2 with their head cut off.

3 We didn't know what to do,
4 everybody was -- all the different handlers
5 that were coming to me were telling me
6 different stories of how to get things
7 accomplished.

8 But since then, things have
9 started to move rather easily and the
10 documentation that is a nightmare to get
11 started, especially in our industry. Most of
12 the people working for us are uneducated or
13 have minor education. It is hard to turn them
14 around to something new, just like having a
15 new child.

16 The burden after the first year
17 again was to get the handlers onboard trying
18 to be equally knowledgeable of what they want. As
19 Rod had said right now, when you have
20 inspections, people coming over, each one
21 interprets things a little bit different and
22 they all have their ideas of how to accomplish

1 something.

2 The interpretation, as time goes
3 on, the interpretation of the agreement in
4 California seems to be smoothing out quite a
5 bit. So if it goes nationally, they have that
6 exercise that was already performed to really
7 have a smoother agreement coming out.

8 Nationally being on the same
9 playing field is important. A year or so ago
10 I did go to Kentucky, did look at their
11 farming operations there and it is
12 overwhelmingly -- we're at a disadvantage of
13 cost, especially on the food safety side when
14 they have -- some of them have GAP programs,
15 but we're way in front of them as far as food
16 safety. And it puts us at a little
17 uncompetitive edge on that sort.

18 Every year, I think this agreement
19 should be like a living agreement because
20 every year that you fix the regulations and
21 make it better it actually will lower our
22 operating costs.

1 There is a short-term cost impact
2 on when you first start the program. If the
3 person that had -- the lady who had spoke from
4 the resource board about having an educational
5 program, that educational program shouldn't be
6 just for the farmers, it should also go to the
7 handlers and getting them on the same page.

8 So when they come out and they're
9 doing the inspections, they're telling --
10 everybody's speaking from the same playing
11 field of what they want. This year I've had
12 12 inspections and every inspector that comes
13 out has a little bit different thinking on
14 what they want.

15 And I just take that as a
16 standard, but I also tell them, hey each one
17 of the inspectors that come out they really
18 need to get on the same page and playing field
19 of what everybody wants.

20 It is important that this
21 agreement is not just developed and not looked
22 at every year to make the changes for the

1 following year and make sure that that is
2 important, that it goes out to everybody that
3 changes are being made to streamline it to
4 make it better.

5 It's like raising a child, when
6 you first start out and you have a child, you
7 want that child to get educated, to get better
8 as they grow up. And that is what I'm looking
9 at in this national agreement.

10 JUDGE HILLSON: Thank you. Did
11 you have any further direct of these two
12 gentlemen before I pass it over to the panel?

13 MR. RESNICK: Briefly, Your Honor.

14 BY MR. WILKINSON:

15 Q Robert Wilkinson, Your Honor, for
16 Western Growers. Just briefly for both
17 witnesses. They've testified about audits and
18 inspections and I was wondering are those a
19 combination of audits under the Leafy Green
20 Marketing Agreement and private audits or are
21 they all one or the other?

22 A For me it was --

1 JUDGE HILLSON: Please put the
2 microphone in front of you.

3 THE WITNESS: For me it was leafy
4 greens, state and FDA.

5 BY MR. WILKINSON:

6 Q Thank you.

7 A For me, it was a combination.

8 Q Thank you. That's all I have.

9 JUDGE HILLSON: Let me pass it
10 over to the panel. Does the panel have
11 questions of either of these gentlemen? If
12 you have a specific question, please let them
13 know who you're talking to please.

14 CROSS EXAMINATION

15 BY MS. SCHMAEDICK:

16 Q Melissa Schmaedick, USDA. Good
17 afternoon, thank you for your testimonies. I
18 just want to make sure I have the
19 pronunciation correct, it's Mr. Faurot?

20 A Close enough.

21 Q And Mr. Iwamoto?

22 A That's correct.

1 Q Okay. Thank you. So I'll start
2 with my questions for Mr. Faurot. Are you
3 familiar with the SBA definition of a small
4 producer business?

5 A The definition that I have for
6 that is if you have gross sales of less than
7 \$750,000 and we have -- our sales -- we've
8 only got 100 acres. Area wise we're small,
9 but we do have better than \$750,000 worth of
10 gross sales.

11 Q Are you growing other products
12 other than leafy greens?

13 A Yes. Leafy greens are about 40
14 percent of our products.

15 Q Are you able to estimate what
16 percentage of your gross sales come from leafy
17 greens specifically?

18 A I would guess it's less than it is
19 for the other products. We do a lot of root
20 crops. We do speciality vegetables is what we
21 do and lots of baby carrots, various colors
22 and fennel and so forth and so on. Probably

1 I'd guess about 30, 40 percent is leafy
2 greens.

3 Q And if you looked at just that
4 gross income would you qualify as a small
5 grower?

6 A As far as leafy greens are
7 concerned, no probably not.

8 Q Okay. Thank you. You mentioned
9 in your statement that when you started your
10 GAP program, your food safety program -- no
11 this is --

12 A For me?

13 Q Yes, for you. You mentioned that
14 you were documenting what you were already
15 doing.

16 A To a great extent. To a great
17 extent. We weren't documenting it, but yes,
18 certainly there's more detail -- there's a
19 whole lot more paperwork and so forth. But a
20 lot of what leafy greens is asking us to do,
21 we were already doing, but not documenting.

22 Q So were there significant costs

1 attached to your adjustment to meeting the
2 requirements of the program?

3 A Yes. There are some certainly.
4 Just, you know, the idea of having to inspect
5 the fields and document what you see,
6 including dog tracks and things like this,
7 that yes, there's an expense that way.
8 There's an expense in record keeping, that
9 sort of thing. Not overwhelming.

10 Q In your business, do you feel that
11 these costs are outweighed by the benefits
12 that you received from being a participant in
13 the program?

14 A Yes, I think so. I think so.
15 Certainly just knowing that you're following
16 a good program is worth quite a bit.

17 Q And assuming that if this proposed
18 agreement were to be implemented, would you
19 anticipate that the same types of cost and
20 benefits would result for you?

21 A Well I would guess so from what
22 I've read in the proposal, it would depend on

1 how the metrics are written.

2 Q Have you read the proposed
3 language in its entirety?

4 A Not in its entirety. I have gone
5 through it, but not in detail. I've gone
6 clear through it, but I skimmed it pretty
7 much. In fact I just started reading it this
8 afternoon when it was here, so yes, I haven't
9 digested it all.

10 Q Were you aware of its development?
11 Were you aware that there was a Proponent
12 group that was working on drafting a national
13 program?

14 A Yes, I knew there was one.

15 Q And are you comfortable then in
16 general with all of the sections and the
17 proposed program in its entirety?

18 A Yes. You know, again it seems to
19 be following pretty much what the California
20 leafy greens has been doing and again, it gets
21 back to how the metrics are written.

22 Q And I believe you mentioned that

1 you had traveled to another state, was it out
2 east?

3 A No. No. Well I have, but no what
4 I was referring to was a positive that was
5 found in Canada I think this was last year
6 where some product from the Salinas Valley was
7 shipped back to the mid-west and intermixed,
8 as I understand it with some product that was
9 grown in Ohio and then got shipped up to
10 Canada.

11 And it was the Canadian people, as
12 I understand it, that, you know, ran the test
13 that came up with the positive. Never heard
14 anymore of it. I don't know whether it was a
15 false positive or not.

16 Q But is it fair to say that in your
17 opinion having a national program might help
18 address some of those -- I believe you used
19 the word level the playing field?

20 A Yes, certainly it would do that.
21 The other thing if we're looking at
22 traceability and there's a question of how

1 traceable things are going to be in any event,
2 but certainly if we're intermixing product
3 from different areas where one is under one
4 standard and the other one is under some other
5 one or not at all, then you're trying to find
6 out where an infection came from, you are not
7 going to.

8 Q Okay. Thank you. That concludes
9 my questions for Mr. Faurot. I have some
10 questions for Mr. Iwamoto. Good afternoon.

11 A Good afternoon.

12 Q And I apologize in advance if I
13 ask questions that may be redundant, because
14 now I'm getting testimonies a little bit
15 confused here.

16 A It's not a problem.

17 Q Are you familiar with the SBA
18 definition of small producer business?

19 A Yes. I am, but I'm just like
20 right over the amount they said, the revenues
21 have to be \$750,000 I am over that. One of
22 the few years was in 2006 because I did take

1 a hit on spinach and I did fall below that
2 because of a tremendous loss for that.

3 Q Do you grow other items in
4 addition to leafy green vegetables?

5 A This year, no. It's all.

6 Q Okay. You mentioned in your
7 statement that you started a GAP program,
8 maybe 10 or 12 years ago?

9 A Yes. Back at that time with the
10 handler that I was doing business with, it was
11 coming out and you could see that that was the
12 way that the good practices that we needed to
13 do were important.

14 One of the things, my wife happens
15 to work -- was working for a spice company at
16 that time and she does the learning and
17 development side of the -- for that
18 corporation and she made me realize what it
19 was to have a program in place to be able to
20 verify what you're doing to make sure
21 basically, as she told me, is to keep me out
22 of trouble, so.

1 Q So for you and your business, the
2 idea of Good Agricultural Practices is not
3 something new?

4 A For me, no. I mean, for some of
5 my newer workers to bring them in, especially
6 after the LGMA was started after 2006 and 2007
7 it was a real awakening for those employees.
8 That was a real hard push to get them onboard
9 so things would flow real evenly through the
10 operation.

11 Q And have you also read the
12 proposed language in the --

13 A I have. I have and I do agree
14 with it. Like I said before is that it should
15 be a living document and it needs to always be
16 refined on what it has. I think it's a good
17 start. I think there's probably improvements
18 along the way.

19 Q Okay. Thank you. That concludes
20 my questions.

21 JUDGE HILLSON: Do other panelists
22 have questions of these two witnesses? Any

1 questions from Mr. English or the audience?

2 I see not, you don't have to get up. No

3 redirect?

4 MR. RESNICK: No.

5 JUDGE HILLSON: Thank you both for

6 testifying. I will receive Exhibit 39, which

7 is what Mr. Iwamoto's outline of his

8 testimony, I will receive that into evidence.

9 (Whereupon, the above-referred to

10 document was admitted into

11 evidence as Exhibit No. 39.)

12 JUDGE HILLSON: And you may call

13 your next witness. I just want to -- when we

14 have our break at about, whenever it is around

15 3:30, at that point I'm going to allow, when

16 we come back from the break, that's when I'm

17 going to allow Ms. Hardesty and Mr. Garin I

18 think his name is to testify, because they

19 both had a need to.

20 They're here on a day trip

21 basically, so we'll take a break. But for

22 now, let's do your next witness.

1 MR. RESNICK: Thank you, Your
2 Honor. Our next witness is Ken Stearns.

3 JUDGE HILLSON: I'm marking Mr.
4 Stearn's written statement as Exhibit 40.

5 (Whereupon, the above-referred to
6 document was marked as Exhibit No.
7 40 for identification.)

8 JUDGE HILLSON: Would you please
9 raise your right hand.

10 WHEREUPON,

11 KEN STEARNS

12 was called for examination by Counsel for the
13 Proponent, having been first duly sworn,
14 assumed the witness stand, was examined and
15 testified as follows:

16 JUDGE HILLSON: Okay. And if you
17 could please first pull the microphone a
18 little closer to you if you would and state
19 your name and spell it for the record.

20 THE WITNESS: My name is Ken
21 Stearns K-E-N S-T-E-A-R-N-S.

22 JUDGE HILLSON: Okay. You have a

1 written statement you want to read?

2 THE WITNESS: Yes, sir.

3 JUDGE HILLSON: Proceed please.

4 DIRECT EXAMINATION

5 THE WITNESS: My name is Ken

6 Stearns. I'm the Food Safety Director for

7 D'Arrigo Brothers of California. I have been

8 working at D'Arrigo since May, 2007.

9 Additionally, I have been in charge of

10 managing food safety programs in California

11 since 1997.

12 Overall, I have worked in the AG

13 industry in California since 1982. I am an ASQ

14 Certified Quality Auditor. 1998, ASQ Certified

15 HACCP auditor, 2000 and have passed ISO-9000

16 Lead Assessor training. I have also worked

17 with the California Certified Organic Farmers

18 group and organically certified a small

19 mushroom farm in the central coast.

20 Our company farms over 10,000

21 acres of leafy greens in the Salinas Valley as

22 well as over 5,000 acres in Arizona. We have

1 nearly 1,800 employees harvesting our various
2 crops. Our company was an original signatory
3 to the California Leafy Greens Marketing
4 Agreement. We whole heartedly support the
5 LGMA and expansion of the program to a
6 national level.

7 Currently, our food safety program
8 is based on the California and Arizona Leafy
9 Greens Marketing agreements. We also have a
10 HACCP program for our company that starts at
11 the soil preparation in the field and ends
12 when the finished product is placed in a
13 refrigerated trailer for the market.

14 Our ranches and crews are also
15 audited for Good Agricultural Practices by an
16 outside third party auditing group,
17 Primuslabs.com.

18 Over the last 25 years, I have
19 been involved in implementing in a variety of
20 quality assurance and food safety programs in
21 the agricultural industry such as GAPs, GMPs,
22 HACCP, benchmarking, Total Quality Systems,

1 and -9000, as well as developing hybrids of
2 these programs for previous employers.

3 In my experience, focusing
4 primarily on Good Agricultural Practices and
5 Good Manufacturing Practices are the programs
6 that have worked best for the farmer.

7 When Quality Control and Quality
8 Assurance Programs like TQM and ISO-9000 were
9 tried as a methodology on a farm, these
10 programs failed, mostly in part because it was
11 these -- it was found that these programs
12 required following established, generic
13 standards, basically one size fits all.

14 These programs are designed for a
15 manufacturing process, not an environmentally
16 driven process. We've gotten pressure from
17 buyers to participate in ISO-9000 based
18 programs such as SQF, GFSI and Global Gap
19 quality assurance/food safety programs.

20 I've reviewed these programs based
21 on QA/AC programs -- I've reviewed these
22 manufacturing based QA/QCI programs and again

1 see the same program structure and inherent
2 problems and philosophies of the programs I
3 had to work with.

4 They are costly to establish as
5 these programs require specialized training by
6 outside entities, development of a
7 documentation nightmare to meet the multitude
8 of sections to the program, many of which are
9 not targeting food safety, but rather
10 manufacturing commitment, and probably most
11 important, the inability of these programs to
12 effectively interact and change with the
13 industry involved.

14 In comparison, the LGMA is a vital
15 program with active committees that interact
16 directly with the USDA, CDFA, and academia to
17 address issues to the metrics or simply meet
18 to consider the most recent findings in
19 science or concerns of the government.

20 So let's get down to basics, does
21 being a participant in the LGMA make our
22 products safer than any other food safety

1 programs? Do we really need it? Is it cost
2 effective? Does it force farmers to destroy
3 riparian areas?

4 Our company follows LGMA standards
5 in all our commodities, not only leafy greens.
6 The required in-depth reviews of the LGMA
7 focus points plus the multiple, extensive
8 audits in our leafy green products during the
9 growing season definitely make our products
10 safer.

11 Again, it is a science-based,
12 commodity specific and it identifies
13 establishes and addresses specific concerns
14 identified for leafy greens. What other
15 program can currently make this statement? Do
16 we really need it?

17 I see what the alternatives are
18 and do not know of a single one that addresses
19 the most probable food safety issues to leafy
20 greens to the depth of the LGMA standards. It
21 gives customers and consumers confidence in
22 our products.

1 We can readily explain exactly
2 what we are doing in an understandable way to
3 the common person. Is it cost effective?

4 Yes. I've looked at the costs of several QA
5 based programs and know they could double our
6 current food safety administration costs.

7 Our customers can compare our
8 program to over 130 leafy greens growers in
9 California alone. We are already are
10 following and paying for one common food
11 safety program so acceptance on a national
12 level may eliminate redundant costs occurred
13 in external third party audits.

14 Does the LGMA force us to destroy
15 riparian areas, wetlands and fence out
16 migrating frogs? No. These issues are
17 customer driven. What must be understood is
18 that today, retailer and food service
19 companies have not waited to see what food
20 safety certifying body the grower will choose.

21 For a majority of farmers, that
22 choice is being made for them by forcing the

1 farmers to select from a group -- from a list
2 of auditing groups following their own take on
3 what food safety items need to be addressed.

4 These private, external third
5 party groups will bend their programs under
6 the pressures of the retailer and food service
7 groups that accept them. This is not how a
8 food safety program should work.

9 If we do not see the National
10 Leafy Greens Marketing Agreement on that list
11 in the near future, what will we see?

12 Personally, I haven't seen a better program
13 offered and cannot imagine what an improved
14 program could be -- could actually be.

15 The LGMA is a legitimate program
16 that addressed the dynamics of a changing an
17 evolving environment in food safety. It has
18 a proven track record of success. It is the
19 best solution for these times, it makes sense,
20 it works, we need it nationally. Thank you.

21 JUDGE HILLSON: Thank you. Mr.
22 Resnick, do you have any -- you or the panel

1 have any further direct of Mr. Stearns?

2 BY MR. RESNICK:

3 Q Yes. Just one question of the
4 10,000 acres of leafy green lettuce you grow
5 in Salinas and 5,000 in Yuma, how much of that
6 is for the fresh-cut market compared to the
7 fresh market.

8 A We're all fresh-cut. We do not
9 supply the processors.

10 Q It's all -- none of it goes to
11 processors?

12 A None.

13 Q Okay. Thank you.

14 A Well let me put it this way, a
15 processor is made by some of our products by
16 contract and use it for their purposes, but we
17 do not cut them.

18 Q Okay. Thank you. I have nothing
19 further.

20 JUDGE HILLSON: Let me pass it
21 over to the panel. Any questions for
22 Mr. Stearns?

1 CROSS EXAMINATION

2 BY MS. SCHMAEDICK:

3 Q Melissa Schmaedick, USDA. Thank
4 you for your testimony and good afternoon, Mr.
5 Stearns

6 A Good afternoon.

7 Q Have you been present for most of
8 today's discussions?

9 A Yes. For today, yes.

10 Q Are you aware of the discussions,
11 questions that have been asked of other
12 witnesses on the meaning of region?

13 A What was that last part?

14 Q The meaning of region.

15 A The meeting of regents?

16 Q The term --

17 JUDGE HILLSON: The term region,
18 R-E-G-I-O-N.

19 THE WITNESS: Oh, region. Oh,
20 yes. I'm a little hearing impaired here.

21 BY MS. SCHMAEDICK:

22 Q I'm sorry, and I have a soft

1 voice. I apologize.

2 A Yes.

3 Q The reason I ask that question is
4 on the bottom of your first page of your
5 statement you state that I think you're
6 referring to the quality control and quality
7 assurance programs like TQM and ISO-9000, you
8 say that these programs are not -- "That these
9 programs are designed for a manufacturing
10 process not an environmentally driven
11 process."

12 A Right. In my opinion.

13 Q So, does environmentally driven
14 refer to --

15 A Basically I'm referring to
16 agriculture and outside type of processes.
17 There's nothing that's an indoor type of
18 process, like a manufacturing or a bagging --
19 food processing facility.

20 Q And do environment's change?

21 A Well yes it does because you have
22 more environmental controls within a facility,

1 within a building. You have a complete
2 difference in your sanitation procedures and
3 what you can control. On the outside there's
4 a little bit of difference, there's dust,
5 there's debris. It's -- you have Mother
6 Nature to be concerned with.

7 When you have these quality
8 assurance type of programs difficult to fit
9 environmental issues inside of that program
10 for corrective actions and such it's very
11 difficult if not impossible.

12 Q In your opinion does the draft
13 proposal address the concerns then?

14 A What was that last part?

15 Q In your opinion, does the draft
16 proposed agreement address the concern of
17 being able to adapt to different environments?

18 A I believe so.

19 Q Thank you. Also for the record
20 can you just clarify what ISO-9000 is?

21 A Standards are?

22 Q What that term refers to.

1 A ISO-9000 is a quality assurance-
2 based program where it's for 9000, it's based
3 on 20 different qualifications.

4 It's basically what a quality
5 assurance program does is, versus quality
6 control, quality assurance is that you look at
7 every step of the operation and you address
8 all the possibilities within those steps and
9 you utilize everything from -- you look at
10 your purchasing, you look at your
11 specifications, you look at your employee
12 training, you look at your non-conformances,
13 you look at management commitment.

14 You look at a variety of items in
15 specific order to identify, you know, what you
16 can do to your processes to maintain them and
17 to eliminate variability and improve them.

18 Q Thank you.

19 JUDGE HILLSON: Ms. Staley?

20 BY MS. STALEY:

21 Q Good afternoon, Kathleen Staley.

22 Is D'Arrigo a handler or a grower?

1 A We're a grower.

2 Q So you just grow all your own
3 crop?

4 A We grow and harvest our own
5 products.

6 Q And you sell to -- how do you sell
7 your product?

8 A We sell them to retailers, to
9 distributors, we're a packer. We pack in the
10 field, we cool them down, we put them in
11 trucks and we ship them out to market.

12 Q Okay. Thank you.

13 JUDGE HILLSON: Any other
14 questions from the panel? Go ahead Ms.
15 Carter.

16 BY MS. CARTER:

17 Q Good afternoon. Antoinette Carter
18 with USDA. I just had one question. You
19 mentioned that your company has a HACCP
20 program.

21 A Yes, it does.

22 Q How long has your company had that

1 program?

2 A I wrote the program approximately
3 a year and a half ago.

4 Q About a year and a half ago?

5 A Right.

6 Q Okay. That's it. Thank you.

7 A It's not required in our industry
8 to have a HACCP program.

9 JUDGE HILLSON: Anyone on the
10 panel? Ms. Dash, I'm sorry.

11 BY MS. DASH:

12 Q Suzanne Dash. Your company is a
13 signatory to the California agreement?

14 A Yes.

15 Q As a grower?

16 A As a grower. Did I say something
17 wrong earlier?

18 Q No. Would you consider yourself a
19 large grower or a small grower?

20 A Yes. We're a large grower.

21 Q A large grower.

22 A With the acreage we have, we're

1 very large.

2 Q Okay. Thank you. That's all I
3 have.

4 JUDGE HILLSON: Any other
5 questions? Any redirect? Okay I'm going to -
6 -

7 MR. RESNICK: Yes, there's some
8 redirect, Your Honor.

9 JUDGE HILLSON: Oh, sorry. You
10 had opposite --

11 MR. RESNICK: I'm sorry, Your
12 Honor. Generally the left hand doesn't know
13 what the right hand's doing.

14 JUDGE HILLSON: Go ahead Mr.
15 Giclas, you had a question.

16 REDIRECT EXAMINATION

17 BY MR. GICLAS:

18 Q Yes. Hank Giclas, Western
19 Growers. Mr. Stearns, you're very familiar
20 with the California agreement, correct?

21 A Yes, I believe so.

22 Q And D'Arrigo is one of the

1 founding signatories, correct?

2 A Yes, sir.

3 Q Signatories to the California
4 agreement are growers or handlers?

5 A Handlers.

6 Q And so D'Arrigo is actually signed
7 to the California Agreement as a handler.

8 A Yes, as a handler.

9 Q I'm asking the question.

10 A Well we're a grower -- let me look
11 at your terminology and let me verify it. I'm
12 not too awake after lunch here. We're a
13 producer, we're not a handler.

14 JUDGE HILLSON: Did that answer
15 the question?

16 MR. GICLAS: I'm sorry?

17 JUDGE HILLSON: Did he answer your
18 question okay?

19 MR. GICLAS: I didn't hear the
20 last part of the answer.

21 THE WITNESS: That we're a grower,
22 we're a producer.

1 MR. GICLAS: Thank you.

2 JUDGE HILLSON: Anything else?

3 Anything else? Okay. Thank you very much.

4 THE WITNESS: Okay. Thank you.

5 JUDGE HILLSON: You may step down.

6 And you may call, Mr. Resnick, you may call

7 your next witness. And I will, if I didn't

8 already, I'll receive -- I think I said that,

9 I received Exhibit 40 into evidence.

10 (Whereupon, the above-referred to

11 document was admitted into

12 evidence as Exhibit No. 40.)

13 MR. RESNICK: Thank you, Your

14 Honor, we're going to call a panel of two

15 witnesses at this time, Kay Filice and Jim

16 Bogart.

17 JUDGE HILLSON: Do they each have

18 written testimony?

19 MR. RESNICK: Yes, Your Honor.

20 JUDGE HILLSON: Can you tell me

21 who's going to go first just so I can put them

22 in the right order?

1 MR. RESNICK: Yes, ladies first.

2 JUDGE HILLSON: Be careful,
3 different century now. So I'm going to mark
4 Ms. Filice's written testimony as Exhibit 41.

5 (Whereupon, the above-referred to
6 document was marked as Exhibit No.
7 41 for identification.)

8 MR. RESNICK: And number 40 was
9 admitted into evidence?

10 JUDGE HILLSON: 40 was received
11 into evidence, that was Mr. Stearns, that was
12 received.

13 MR. RESNICK: Thank you.

14 JUDGE HILLSON: I actually did it
15 twice because I sort of lost track a little
16 bit.

17 MR. RESNICK: Thank you.

18 JUDGE HILLSON: We're good with
19 that. And I'm going to mark Mr. Bogart's
20 written testimony as Exhibit 42.

21 (Whereupon, the above-referred to
22 document was marked as Exhibit No.

1 42 for identification.)

2 JUDGE HILLSON: Let me swear you
3 in first Ms. Filice. If you would raise your
4 right hand.

5 WHEREUPON,

6 KAY FILICE

7 was called for examination by Counsel for the
8 Proponent, having been first duly sworn,
9 assumed the witness stand, was examined and
10 testified as follows:

11 JUDGE HILLSON: Okay. Could you
12 please state your name and spell it for the
13 record?

14 THE WITNESS: My name is Kay
15 Filice K-A-Y F-I-L-I-C-E.

16 JUDGE HILLSON: And you have a
17 statement you want to read?

18 THE WITNESS: I do.

19 JUDGE HILLSON: Please go ahead
20 and do so.

21 DIRECT EXAMINATION

22 THE WITNESS: As I said, my name

1 is Kay Filice. I'm the owner and operator of
2 Filice Farms, in Hollister, California. I've
3 been in the industry and in this position for
4 the last 10 years. Filice Farms contract
5 grows approximately 600 acres of romaine and
6 spinach annually for several area shippers.

7 The shippers then are responsible
8 for the harvesting, packing and marketing
9 activities. Each of these handlers is a
10 member of the Leafy Green Marketing Agreement.
11 As a grower of Leafy Greens during and since
12 the E. coli outbreak in September 2006, I've
13 been a participant in implementing the
14 California's Leafy Greens Marketing Agreement.

15 For the last three years, I've
16 watched the program develop and evolve. I've
17 seen growers and handlers work more closely
18 with each other and with scientists,
19 regulators, and researchers. The California
20 LGMA has resulted in heightened awareness,
21 increased communication and close
22 collaboration that extends to the retailers

1 and food service personnel.

2 This increased communication has
3 facilitated a better understanding what these
4 LGMA standards are, what we look for, test and
5 monitor in our food safety programs. Together
6 we have raised the bar on food safety
7 practices for our industry in the state of
8 California.

9 I will admit in the early stages
10 of the new LGMA Program, the metrics appeared
11 somewhat daunting. I was concerned about how
12 to implement the enhanced food safety
13 standards and mandatory government
14 inspections, of all the work involved, the
15 costs, mostly just all the unknowns.

16 Food safety had always been a
17 priority on our farm, with my three boys and
18 my employees usually eating the crops before
19 anybody else. However, it was obvious after
20 the E. coli incidents in 2006 that we all
21 needed to do more.

22 Most family farmers I talked to

1 also believed that these enhanced food safety
2 practices and mandatory government inspections
3 were vital to the continuing strength of our
4 industry. Continuous improvements to food
5 safety systems, based on sound science, must
6 be made in order to protect our families, our
7 employees and our consumers.

8 In my mind, one of the greatest
9 advantages of the LGMA is the ability to be
10 quickly amended and updated as new science is
11 unveiled. I am a Mom and family farmer and
12 while the increased water testing, employee
13 training and record keeping is time consuming
14 and can at time be burdensome, I have done it.

15 Just like everyone else in this
16 room, I remember what it was like when
17 consumers lost faith in our industry. The
18 Industry changed in 2006 and we had to change
19 with it, growers and handlers had to step up.

20 Yes, it takes time to make
21 changes. We all spent hours reviewing the
22 standards, attending workshops and training

1 seminars, and establishing more detailed
2 documentation systems, but we did it. It's
3 not impossible, and it was worth it.

4 I don't expect our costs to change
5 significantly under the National Leafy Greens
6 Marketing Agreement since we've already put
7 into practice the changes on our farm to
8 ensure compliance with California's LGMA.

9 We have studied our costs and I've
10 taken the time to review the financials in the
11 business case study and agree that those
12 numbers are in line with the costs we have
13 incurred.

14 A great deal of groundwork has
15 been laid, and these resources available to
16 other small growers and they can benefit other
17 small growers at little or no cost.

18 Since these enhanced food safety
19 practices have now become our normal standard
20 on our ranch, these are also being applied to
21 all of our other crops, to specialty row crops
22 as well as our tree crops. The monthly safety

1 meetings provide regular reminders of Good
2 Agricultural Practices and good hygiene for
3 our own employees.

4 And All contractors working in any
5 capacity on our ranch are also required to
6 train their employees to follow these same
7 good practices. The testing, the signage, the
8 constant vigilance benefits everyone of the
9 other crops that we grow on our farm.

10 Our experience has been positive,
11 we've made some changes, but all for the good.
12 Personally my commitment is simple, I want to
13 know that every carton that leaves Filice
14 Farms is safe whether for my own employees,
15 for my family and for yours. And I expect the
16 same from every other grower and handler in
17 every state.

18 I would therefore like to go on
19 record as supporting the National Leafy Green
20 Marketing Agreement in an effort to ensure the
21 strictest standards in food safety are being
22 applied across the board. Thank you.

1 JUDGE HILLSON: Thank you. And
2 now Mr. Bogart I'll swear you in. Turn the
3 microphone toward you. Please raise your
4 right hand.

5 WHEREUPON,

6 JAMES BOGART

7 was called for examination by Counsel for the
8 Proponent, having been first duly sworn,
9 assumed the witness stand, was examined and
10 testified as follows:

11 JUDGE HILLSON: Please state your
12 name and spell it for the record, sir.

13 THE WITNESS: James Bogart J-A-M-
14 E-S B-O-G-A-R-T.

15 JUDGE HILLSON: And you have a
16 statement you want to read, is that correct?

17 THE WITNESS: Yes.

18 JUDGE HILLSON: Go right ahead and
19 do so.

20 THE WITNESS: My name is Jim
21 Bogart, I am the President and General Counsel
22 of the Grower-Shipper Association of Central

1 California. My association represents more
2 than 300 members who span California's fertile
3 coastal region, encompassing Monterey, Santa
4 Cruz, and San Benito counties.

5 This diversity is reflected in the
6 produce grown from vegetables and wine grapes
7 to strawberries and mushrooms, more than 100
8 different crops flourish in the soil found in
9 this world-renowned coastal agricultural area,
10 including leafy greens.

11 From small, to large, vertically
12 integrated farms, the Grower-Shipper
13 Association represents the best-of-the-best in
14 the industry. The association is committed to
15 meet members' needs, providing products and
16 services developed to help their businesses
17 continue to thrive.

18 My testimony today is in support
19 of the National Leafy Greens Marketing
20 Agreement. The intent of this agreement is
21 the national standardization of requirements
22 and best practices for all phases of the Leafy

1 Greens industry and is an endeavor the Grower-
2 Shipper Association supports whole heartedly.

3 I remember the 2006 E. coli
4 outbreak in spinach like it was yesterday, and
5 remember thinking it was imperative that the
6 industry take swift action to drastically
7 mitigate the possibility of microbial
8 contamination.

9 In the fall of 2006, following the
10 announcement that spinach had been
11 contaminated with E. coli and that spinach
12 probably -- and that the spinach probably
13 originated here on the Central Coast of
14 California, the whole world was looking at us.

15 We had a swarm of media here, and
16 I was front and center. Beyond understanding
17 what had gone wrong, the question we all faced
18 was, what were we going to do next. It wasn't
19 long before California's Leafy Greens Handler
20 Marketing Agreement was in place and nearly
21 all of my member companies who handle leafy
22 green vegetables were included as signatory

1 members.

2 There was no hesitation from my
3 membership. They recognized the need to take
4 action and seize the opportunity to implement
5 the most robust food safety system, based on
6 sound science, ever attempted by a specific
7 commodity group.

8 I have seen, firsthand how
9 effective this agreement has been in
10 California, and I believe, for the betterment
11 of the entire industry and for consumers, this
12 program should be implemented on a national
13 level.

14 I have been in this industry for
15 almost 30 years, in one capacity or another,
16 and I have never seen a commodity group move
17 so swiftly and so focused on a singular issue.

18 The California LGMA has resulted
19 in a new focus on food safety in which the
20 industry has accepted best practices that are
21 consistent, specific, measurable and
22 verifiable in the field. The metrics therein

1 are sound and thorough, but these proceedings
2 are not about California or Arizona's program,
3 it's about a national agreement that, simply
4 makes sense for the industry.

5 Outbreaks such as the E. coli
6 outbreak in September 2006, affect the entire
7 industry, and microbial contamination does not
8 discriminate based on state borders.
9 Anecdotally we have heard stories about how
10 that one outbreak devastated portions of the
11 industry in other states.

12 As a commodity group, we are all
13 in this together. Heaven forbid there is
14 another major outbreak, what happens in
15 California affects Florida; what happens in
16 Ohio affects Arizona. I am not offering that
17 one size fits all.

18 To the contrary the proposed
19 agreement provides for regional differences
20 and allows for participation in the process
21 from a broad scope of stakeholders. The
22 reality is, however, food safety is not a

1 regional issue. Food safety is a national
2 issue and should be addressed as such.

3 Speaking as an industry
4 representative, who lived through the 2006 E.
5 coli outbreak right here in the center of the
6 nation's salad bowl, I just don't see any
7 other viable option than to implement a
8 National Leafy Greens Marketing Agreement.
9 Thank you.

10 JUDGE HILLSON: Do you have any
11 direct, for the direct of these two witnesses?

12 MR. RESNICK: No, Your Honor.

13 JUDGE HILLSON: In that case I'll
14 pass that on over to the panel.

15 CROSS EXAMINATION

16 BY MS. SCHMAEDICK:

17 Q This is Melissa Schmaedick with
18 USDA. Good afternoon. I'd like to start with
19 Ms. Filice, is that correct?

20 A That's correct.

21 Q And thank you for your testimony.
22 Are you familiar with the SBA definition of

1 large and small growers?

2 A I did read that, yes.

3 Q Are you comfortable identifying
4 yourself as either large or small?

5 A I am -- I would have to identify
6 myself as a large grower according to the SBA
7 definition. However, I have never thought of
8 myself as a large grower. I'm a very, very
9 small large grower if that's the case.

10 In reality, if I can expand on
11 that just a little bit, other than myself at
12 my farm I have two farming managers who are in
13 charge of all the farming operation and
14 they're a father and a son team. The father's
15 been there for 30 years, the 10 years I've
16 been there and prior to the time when my
17 husband was there and his son has been there
18 10 years.

19 So it's really the three of us
20 that take care of the whole operation. So in
21 that respect, I'm the food safety manager, I'm
22 the personnel manager, I'm the whole HR

1 department. So it's not -- it's pretty lean
2 in that respect.

3 Q And so when I asked you the
4 question about whether or not you're a large
5 or small grower, are you looking at your total
6 farm receipts or receipts that are just
7 associated with leafy green products?

8 A I'm looking at that that is
9 associated with leafy greens.

10 Q Okay. Have you read the proposed
11 agreement?

12 A I have.

13 Q Were you at all involved in the
14 drafting process of the proposed agreement?

15 A I was not.

16 Q Do you understand all of the
17 sections as they are proposed in the
18 agreement?

19 A I have read it, I haven't
20 memorized the definitions. But I understand
21 it. I think it's so similar to what I've been
22 working with, with the California leafy greens

1 that it's very clear.

2 Q Do you endorse the proposal?

3 A I do.

4 Q That is all the questions I have
5 for you. Thank you. Next question is for Mr.
6 Bogart.

7 A Yes.

8 Q Good afternoon.

9 A Good afternoon.

10 Q You're speaking on behalf of the
11 grower-shipper association?

12 A Yes.

13 Q And you state that you have 300
14 members?

15 A Yes, approximately.

16 Q Okay. Among your membership are
17 there both large and small business entities
18 according to the SBA definition.

19 A Yes, I would say there are both.

20 Q There are both, okay. And as you
21 describe your experience of adjusting to the
22 event of 2006 you mention that all of your

1 members went through the transition and
2 process of adopting the California State Leafy
3 Green Marketing Agreement, is that correct?

4 A Yes. Yes, I think I said nearly
5 all were original signatories. And I wrote
6 that or I said that to be safe. I don't know
7 of a leafy green handler that's a member or
8 grower-shipper that is not a member of
9 signatory of the California Leafy Green
10 Marketing Agreement, but I just didn't want to
11 slip up there so I said nearly all.

12 Q Okay. And have you been aware of
13 the drafting process of this agreement?

14 A Yes.

15 Q Have you read the proposal and do
16 you understand all of the sections?

17 A Yes, I read it and I believe I do
18 understand it.

19 Q Okay. So do you endorse the
20 proposal in its entirety?

21 A Yes, I do.

22 Q Okay. Thank you.

1 A Thank you.

2 JUDGE HILLSON: Are there other
3 questions from the panel for either one of the
4 two witnesses? Ms. Deskins go right ahead.

5 BY MS. DESKINS:

6 Q Sharlene Deskins, Office of
7 General Counsel. In terms of the members in
8 your organization, how many of them would be
9 growing leafy greens?

10 A Well I should be clear we have two
11 classes of members, regular members which are
12 growers, shippers, packers, processors and
13 then we have associate members which are
14 businesses or entities that are affiliated
15 with or related to agriculture like seed
16 companies and carton companies.

17 Regular members I think we are
18 just over 100, which would be classified as
19 growers, grower-shippers and I would say of
20 those 100, oh boy, the majority, certainly the
21 majority are growers, shippers or handlers of
22 leafy greens.

1 Q Okay. And in terms of the -- you
2 read the leafy green marketing or the proposed
3 one.

4 A Yes.

5 Q Okay. Does it codify what the
6 practices are now for handling leafy greens?

7 A I'm sorry I didn't catch that
8 question.

9 Q Does it codify -- does the
10 agreement serve to codify the practices now
11 for handling leafy greens?

12 A Does what as proposed --

13 Q Yes.

14 A -- codify? That the practices?

15 Q Right, because you're talking
16 about best practices in here.

17 A Right. Yes, okay. Well, I think
18 I understand your question. I mean and I
19 guess my answer would be yes, it seems to.
20 But I mean, it hasn't really been fleshed out.

21 As I read the proposal, it's kind
22 of the foundation, the framework from which

1 the detailed audit metrics and stuff will be
2 developed. But in terms of kind of
3 structurally, I would say the answer is yes.

4 Q Okay. And also your experience
5 with the California leafy green was that the
6 signatories of it, it helped to improve their
7 business, is that correct?

8 A Yes, I believe that to be the
9 case.

10 Q Do you think that would be the
11 same thing with this proposed National Leafy
12 Green Marketing Agreement?

13 A I do, yes.

14 Q I have no further questions.

15 JUDGE HILLSON: Do I have anymore
16 questions from the panel? Is there any
17 redirect for either one of these witnesses?

18 MR. RESNICK: No, Your Honor.

19 JUDGE HILLSON: Okay. Thank you
20 both for testifying you may step down.

21 THE WITNESS: Thank you.

22 JUDGE HILLSON: We can do another

1 witness.

2 MR. RESNICK: We have no witnesses
3 in the room at this time. We have more
4 witnesses coming, but they're coming a little
5 later.

6 JUDGE HILLSON: Well I suggest
7 that we -- why don't we take our break now if
8 the witnesses aren't there then we'll go on
9 to --

10 MR. ENGLISH: There are witnesses
11 here.

12 JUDGE HILLSON: I mean, I don't
13 know -- I was going to let Ms. Hardesty go
14 next, I don't know if she's a quick witness or
15 a longer witness.

16 MS. HARDESTY: I have a short
17 statement.

18 JUDGE HILLSON: Okay. Well why
19 don't we let Ms. Hardesty testify now and then
20 we'll take our break after Ms. Hardesty
21 testifies.

22 MR. RESNICK: Thank you, Your

1 Honor.

2 JUDGE HILLSON: And I should note
3 that I will receive Ms. Filice's statement as
4 Exhibit 41 and I'll receive Mr. Bogart's
5 testimony into evidence as Exhibit 42.

6 (Whereupon, the above-referred to
7 documents were admitted into
8 evidence as Exhibit Nos. 41 and
9 42.)

10 JUDGE HILLSON: And I'm going to
11 mark -- is this your statement, do you have a
12 statement and a document, is that what it is?

13 MS. HARDESTY: Yes, that's one in
14 the same.

15 JUDGE HILLSON: Okay. All right.
16 I have well it looks like a document,
17 something entitled Grower's Compliance Cost
18 for the Leafy Green Marketing Agreement and
19 other food safety programs by Shermain
20 Hardesty. And I'm going to mark that as
21 Exhibit 43.

22 (Whereupon, the above-referred to

1 document was marked as Exhibit No.
2 43 for identification.)

3 JUDGE HILLSON: If you would
4 please raise your right hand if you're ready.

5 WHEREUPON,

6 SHERMAIN HARDESTY

7 was called for examination, having been first
8 duly sworn, assumed the witness stand, was
9 examined and testified as follows:

10 JUDGE HILLSON: Okay. Could you
11 please state and spell your name for the
12 record?

13 THE WITNESS: My name is Shermain
14 Hardesty S-H-E-R-M-A-I-N last name is H-A-R-D-
15 E-S-T-Y.

16 JUDGE HILLSON: And you have a
17 statement you want to make?

18 THE WITNESS: I have an
19 introductory comment and then the rest of my
20 statement is the first page of what I just
21 distributed.

22 JUDGE HILLSON: Okay. You may

1 proceed.

2 DIRECT EXAMINATION

3 THE WITNESS: Introduction, again
4 my name is Shermain Hardesty I am a faculty
5 member at the University of California Davis.
6 I serve as the Director of the University of
7 California Small Farm Program and I'm also an
8 agricultural economist, extension economist in
9 the department of Agricultural and Resource
10 Economics.

11 I'm here as neither a proponent or
12 an opponent of the proposed National Leafy
13 Green Marketing Agreement. Rather, I am here
14 to provide an objective summary of the
15 research that I have done, that I conducted
16 with a graduate student from UC Davis, Yoko
17 Kusunose regarding the cost to leafy greens
18 growers in California to comply with food
19 safety program, including the LGMA.

20 We started our research in the
21 fall of 2007 and completed our report earlier
22 this month. We have received no outside

1 funding for this report, for our research.

2 And just to start I'd like to
3 point out a couple of corrections that we need
4 to make in the printed document. These
5 corrections have no impact on the conclusions
6 of the report.

7 On page 4 in the right-hand column
8 at the third line from the bottom of the main
9 text the line starts with producers or it says
10 the list of 192 producers and then parenthesis
11 it says 42 growers in Fresno County; 42 should
12 be changed to 38.

13 The second correction I need to
14 make is on page 5, the fourth line from the
15 bottom on the left-hand side. The line starts
16 with 49 growers of whom -- well I just wrote
17 over it so I can't tell. It should read, of
18 whom 42 indicated that Monterey County/Santa
19 Cruz County was their primary growing region.

20 Then the part 5 as Fresno County,
21 that is correct. And then it should say and
22 one as Ventura County and one did not identify

1 their location. As I said those corrections
2 have no bearing on my conclusions.

3 So I'm just going to submit as my
4 statement the summary that I've listed. Many
5 of the compliance requirements of the Leafy
6 Green Marketing Agreement and other food
7 safety programs fall upon growers to
8 implement.

9 We surveyed leafy greens growers
10 in California during 2008 and 2009 to measure
11 their compliance costs. Our key findings are,
12 growers cost for modifications made
13 specifically for LGMA compliance averaged
14 \$21,490 or \$13.60 per acre.

15 Growers reported that their
16 seasonal food safety costs rose by an average
17 of 127 percent from an average of \$24.04 per
18 acre in 2006 to \$54.63 per acre in 2007 after
19 the implementation of LGMA.

20 The sum of the average
21 modifications cost and the 2007 seasonal food
22 safety cost, which is \$68.23 per acre

1 represents almost one percent or .93 percent
2 of growers average lettuce revenues.

3 Medium size growers, and we define
4 those as with revenues in 2007 between \$1
5 million and \$10 million had the highest
6 modification cost per acre, \$18.05 followed by
7 the small size growers, which were under \$1
8 million in revenues and that was \$14.82
9 average per acre, and then lastly the large
10 size growers at \$8.29 per acre.

11 Seasonal food safety costs per
12 acre follow the same pattern with the cost for
13 medium size growers being 159 percent higher
14 than the average for the largest growers.

15 Since previous research findings
16 indicate a high degree of consolidation in the
17 U.S. grocery sector is unlikely that growers
18 have been able to obtain higher prices to
19 cover their leafy greens costs, I'm sorry, to
20 obtain higher prices for their leafy greens in
21 order to cover part of all of their increased
22 food safety compliance costs.

1 Since large-size growers have
2 significant economies of size and complying
3 with the LGMA and other food safety
4 provisions, they have the greatest capacity to
5 absorb these costs.

6 Furthermore, the large-size
7 operations tend to hire food safety
8 specialists to manage their compliance
9 programs while the owner-managers of the
10 small-size operations need to manage these
11 complex programs themselves.

12 It is essential that the
13 proliferation of public and private food
14 safety standards in the leafy greens industry
15 be addressed, while at the same time
16 recognizing that the one size fits all
17 approach does not take into account the fact
18 that leafy greens growers are a highly diverse
19 group.

20 Thank you for the opportunity to
21 share my research findings with you.

22 JUDGE HILLSON: Okay. Thank you

1 very much. And I will ask the USDA panel if
2 they have any questions of Dr. Hardesty. You
3 can go ahead Ms. Schmaedick.

4 MS. SCHMAEDICK: I do not have any
5 questions. Thank you.

6 JUDGE HILLSON: Okay. Anyone else
7 over there have any questions? Ms. Dash?

8 CROSS EXAMINATION

9 BY MS. DASH:

10 Q Suzanne Dash. Further in your
11 report does it say how many growers you
12 surveyed and how they were selected and how
13 many were large and how many were medium and
14 how many were small?

15 A Yes. We sent the survey out to
16 192 growers and we got a response rate of 25
17 percent. The total number that actually ended
18 up giving us information was 49 growers of
19 whom, let's see, we had nine that were in the
20 small category, 19 in the medium size category
21 and 15 in the large category and one that
22 didn't specify their revenue.

1 We got the names from the county
2 AG commissioner's offices for Monterey County
3 and for Fresno County. So it wasn't a state-
4 wide survey, we just selected the two
5 counties. Did I answer all your questions?

6 Q Yes. Thank you.

7 JUDGE HILLSON: Any other
8 questions from the panel? How about the
9 proponents, do you have questions for this
10 witness?

11 BY MR. WILKINSON:

12 Q Just one quick question, Your
13 Honor. You're not contending that the
14 proposed agreement requires a one size fits
15 all approach, correct?

16 A No, I am not. But I'm saying that
17 it needs -- that the proposed approach needs
18 to take into account the differences in costs
19 that seem to be occurring for the different
20 size categories.

21 Q Very good. Thank you. Thank you
22 for your testimony.

1 BY MR. HORSFALL:

2 Q I have a question. Scott Horsfall
3 with the LGMA. Ms. Hardesty, if you could
4 check table 7 in your report, it looks like,
5 and just tell me if I'm right here, that the
6 biggest component in that per acre
7 modification cost in your different
8 classifications is the cost of additional
9 fencing.

10 A Yes, that's correct.

11 Q There's a huge difference between
12 your middle -- that's correct? Do you have
13 any explanation for why you think those costs
14 would be significantly higher for a mid-size
15 grower on a per acre basis?

16 A I don't know except that perhaps
17 they have smaller ranch, you know, plots of
18 land so they've got more perimeter to be
19 fencing.

20 Q Okay. Just curious. Thank you.

21 JUDGE HILLSON: Any other
22 questions from the Proponent's panel? Any

1 other questions? Thank you very much for
2 testifying, you may step down. And I will
3 receive Exhibit 43, which was your study into
4 evidence.

5 (Whereupon, the above-referred to
6 document was admitted into
7 evidence as Exhibit No. 43.)

8 JUDGE HILLSON: Just let me go
9 over quick count now, I have Mr. Garin and Ms.
10 Nygrens, who's name I'm probably
11 mispronouncing and however many witnesses that
12 -- how many more witnesses do the Proponents
13 expect calling?

14 MR. RESNICK: I would say we have
15 three more witnesses for the rest of the day.

16 JUDGE HILLSON: And when do you
17 expect them to arrive on the premises?

18 MR. RESNICK: Approximately 3:45.

19 JUDGE HILLSON: Okay. Well here's
20 what we'll do, it's 3:25 right now,
21 approximately, let's take our 15 minute
22 afternoon break and we'll come back with Mr.

1 Garin and if your folks are here we'll go with
2 them, if not we'll let Mr. English finish up
3 the Opponent's case. Okay. So let's take 15.

4 (Whereupon, the foregoing matter
5 went off the record at 3:23 p.m.
6 and went back on the record at
7 3:41 p.m.)

8 JUDGE HILLSON: Back on the
9 record, I have one -- we have two witnesses
10 who have come in and need to testify this
11 afternoon as well.

12 So the gentleman in the blue
13 jacket whose name I already forgot, but he'll
14 tell me in a minute will testify next and then
15 after that I'll have Mr. Garin testify and
16 then we'll see where we are.

17 So come up over here, if you have
18 any exhibits to pass out or statements,
19 please, if you could give me one and make sure
20 you give them at least one. Is it two pages?
21 And this is not your statement, but an article
22 that you're referring to, right?

1 MR. DILWORTH: Yes.

2 JUDGE HILLSON: I didn't think
3 your first name was Janet.

4 MR. DILWORTH: Or Susan, no.

5 JUDGE HILLSON: Okay. And I'm
6 going to mark this as Exhibit 44.

7 (Whereupon, the above-referred to
8 document was marked as Exhibit No.
9 44 for identification.)

10 JUDGE HILLSON: And let me swear
11 you in, if you would please raise your right
12 hand.

13 WHEREUPON,

14 DAVID DILWORTH

15 was called for examination, having been first
16 duly sworn, assumed the witness stand, was
17 examined and testified as follows:

18 JUDGE HILLSON: Okay. Could you
19 please state your name and spell it for the
20 record?

21 THE WITNESS: My name is David
22 Dilworth D-A-V-I-D D-I-L-W-O-R-T-H.

1 JUDGE HILLSON: Okay. And you
2 have a statement you wish to make, is that
3 correct?

4 THE WITNESS: Yes.

5 JUDGE HILLSON: Why don't you
6 proceed.

7 DIRECT EXAMINATION

8 THE WITNESS: I'm here on behalf
9 of Helping our Peninsula's Environment. You
10 may not have heard of us, but you might have
11 heard of our work. Different division of USDA
12 recently had a program stopped when the aerial
13 spraying of untested pesticides on our town
14 was halted by HOPE's lawsuit.

15 However, we're here in a capacity
16 today to try to help all sides, particularly
17 the consumers. I want to just get you to
18 stand back for a moment and remember those
19 advertisements you might have seen recently
20 where a local chain was offering help with
21 your home.

22 And if you have a broken off

1 lightbulb what they would say is take a
2 potato, stick it on the lightbulb and you can
3 pull it off safely. Simple idea, makes a big
4 difference in safety.

5 Also another simple thing, just a
6 simple idea can make a big difference in
7 safety is you take your sponges that you use
8 to wash your dishes with and your counters,
9 get them wet, put them in a microwave for a
10 minute and steam clean the sponges.

11 The idea I'm here to present today
12 is very similar to that and I'm linking it to
13 Section 970.67B2 the handling and
14 manufacturing process. What I have here is an
15 article where they talk about how more than
16 8,500 individuals were poisoned by E. coli
17 0157 in Japan, including 6,000 children.

18 This took place before our
19 infamous 2006 incident, this was in 1996. And
20 this is an article that you have from Science
21 News and it involves research by a food
22 scientist where she found that very simple

1 materials can help make your produce
2 phenomenally free of bacteria.

3 She tested, she actually applied
4 shigella, salmonella and E. coli 0157 to the
5 test produce and she sprayed it with two
6 simple, literally things you can get at a drug
7 store, two little spray bottles.

8 One is hydrogen peroxide the other
9 one is acetic acid, commonly known as vinegar
10 and she sprayed it with one and she sprayed it
11 with the other. And if you take a look at the
12 results she got here, she said that if acetic
13 acid got rid of 100 organisms, the hydrogen
14 peroxide would get rid of 10,000.

15 But here comes the synergy, the
16 two together would get rid of 100,000. And
17 there's a second benefit besides the synergy
18 is when growers and shippers wash vegetables
19 and produce in their packing sheds, they wash
20 the stuff off, but the ingredients, whether
21 they came from the fields or whether they came
22 from packing just wash off ready to

1 recontaminate something.

2 What the food scientist, Susan
3 Summer was her name, she said what I really
4 liked about this is quote, "Is that every
5 microbe that drips off is killed."

6 I have an engineering background,
7 I used to do process engineering back in the
8 '70s and I think a system like this can not
9 just be scaled up, it could be implemented in
10 the washing process for produce, for the order
11 of low single digit thousands of dollars for
12 the capital improvement and on the order of a
13 few dollars per acre for ongoing costs.

14 I think the ultimate value is
15 going to be a huge increase in consume
16 confidence, a side benefit is it's going to
17 give the growers and shippers confidence and
18 certainly less cost, maybe even less cost than
19 going through with this agreement.

20 I have two other very minor things
21 to suggest that you strike Section 97 --
22 970.81 about the confidential information and

1 on Section 970.80 two years of keeping records
2 in this day of computerized records is
3 ridiculously small.

4 Keeping records should be 5 to 10
5 years at the least. And since they're
6 electronic, I don't see why they shouldn't be
7 kept permanently. That's all.

8 JUDGE HILLSON: Okay. Thank you.
9 Don't go away because you have to submit to
10 cross examination if there is any.

11 THE WITNESS: Of course.

12 JUDGE HILLSON: So let me ask the
13 panel first if they have any questions of Mr.
14 Dilworth. You do Ms. Schmaedick, go ahead.

15 CROSS EXAMINATION

16 BY MS. SCHMAEDICK:

17 Q This is Melissa Schmaedick with
18 USDA. Good afternoon and thank you for your
19 testimony. First of all I missed the name of
20 your organization, could you restate that?

21 A It's HOPE for short, Helping our
22 Peninsula's Environment, so I get to

1 accurately say I'm bringing you HOPE.

2 Q Okay. Thank you. I'm curious,
3 you stated that you would recommend striking
4 the section on confidentiality, why would you
5 do that?

6 A HOPE has a two-part mission. One
7 of them is protecting our environment, the
8 other part is protecting democracy.
9 Democracy, as we define it, is public
10 participation and influence on governmental
11 decisions. When the public is kept out of the
12 process of governmental decisions by records
13 being hidden or extremely difficult to obtain,
14 that's the opposite of providing public
15 participation.

16 Q Okay. Thank you.

17 JUDGE HILLSON: Anything else from
18 the panel? Ms. Deskins, you have a question?

19 BY MS. DESKINS:

20 Q Yes. Your organization, does it
21 have anybody in it who is a leafy green grower
22 or handler?

1 A No. None of the trustees, staff
2 or interns. There may be some of our
3 supporters, but none that I know of. None
4 have contacted me on this. I actually come
5 from a farming family, my great grandparents
6 settled what's apparently now called Clovis.

7 And so my grandparents also did
8 some farming in the Fresno area. So I come
9 from a farming background, but I have no
10 financial ties to anything along that line
11 now.

12 Q Okay. Also in terms of the
13 confidentiality clause, your reason for its
14 striking is because you feel it's
15 undemocratic?

16 A Correct. HOPE feels strongly that
17 unless there is overwriting considerations
18 that all information related to government
19 activities should be in the public.

20 For example, Florida has a public
21 records law that makes -- if it's still in
22 this form when I last researched it, it allows

1 everything that the government holds are
2 public records except for the home addresses
3 of the police officers.

4 Q All right. Are you familiar with
5 what's in the reports that handlers would give
6 to the committee?

7 A I am not. I've not seen a copy of
8 the report, I've read briefly the outline
9 here.

10 Q Do you understand that some of
11 that information would be proprietary
12 information?

13 A Correct. Currently it would be
14 proprietary, however let me give you an
15 example.

16 Q If I could just ask the questions,
17 if it's proprietary information are you
18 proposing that businesses should have to
19 release that to the public?

20 A When it deals with public safety,
21 HOPE feels that public health and safety
22 overrides any possible trade secrets or

1 proprietary information.

2 Q Okay. I have no further
3 questions.

4 JUDGE HILLSON: Any other
5 questions from the USDA panel? Any questions
6 from the Proponent's panel?

7 MR. RESNICK: No, Your Honor..

8 JUDGE HILLSON: Any other
9 questions? Thank you very much for testifying
10 Mr. Dilworth.

11 THE WITNESS: Thank you.

12 JUDGE HILLSON: You may step down
13 and Mr. Garin, right?

14 MR. GARIN: Yes.

15 JUDGE HILLSON: You may come up
16 and testify. Oh, and I will receive Exhibit
17 44 into evidence.

18 (Whereupon, the above-referred to
19 document was admitted into
20 evidence as Exhibit No. 44.)

21 JUDGE HILLSON: I need one and
22 they probably can share one, at least one or

1 two for the -- I don't know if Mr. English
2 wants one, I know the panel wants one. Are
3 these a couple articles, is that what these
4 are?

5 MR. GARIN: These are articles,
6 papers.

7 JUDGE HILLSON: Okay. You don't
8 have a written statement, right?

9 MR. GARIN: No.

10 JUDGE HILLSON: You're going to
11 make a statement and then you're going to talk
12 about these articles?

13 MR. GARIN: Basically, yes.

14 JUDGE HILLSON: Okay. I'm going
15 to mark this entire package as Exhibit 45.

16 (Whereupon, the above-referred to
17 document was marked as Exhibit No.
18 45 for identification.)

19 JUDGE HILLSON: Ready to go, sir?

20 MR. GARIN: Yes, I am.

21 JUDGE HILLSON: Okay. Could you
22 please raise your right hand?

1 WHEREUPON,
2 PETER GARIN
3 was called for examination, having been first
4 duly sworn, assumed the witness stand, was
5 examined and testified as follows:

6 JUDGE HILLSON: Okay. Could you
7 please state your name and spell it for the
8 record?

9 THE WITNESS: My name is Peter P-
10 E-T-E-R, Garin G-A-R-I-N.

11 JUDGE HILLSON: Okay. And Mr.
12 Garin you may make your statement.

13 DIRECT EXAMINATION

14 THE WITNESS: The first article
15 basically enlightened me a little bit. I had
16 no idea that water, of all things, in addition
17 to what they refer to electrolyzed water could
18 make a difference in terms of the sanitation
19 procedure.

20 And quite obviously as I read
21 various articles in papers such as the San
22 Francisco Chronicle, it occurred to me that

1 there obviously is going to be a need for
2 sanitation.

3 My background, my family has been
4 growing and shipping produce in California for
5 over five generations. HP Garin was one of
6 the first companies to use top icing to be
7 sent back for lettuce back east. My father
8 William Garin was instrumental in using vacuum
9 packing, used vacuum cooling as one of the
10 first companies to do so.

11 So with that in mind, I worked in
12 the fields, I worked along side the field
13 laborers, but as I grew older I became a
14 little bit more independent and I ended up
15 working in restaurants. So I'm one of the few
16 people who could tell you the seed spacing as
17 well as the proper preparation of greens,
18 leafy greens in a restaurant as well as the
19 HACCP controls relative to restaurant
20 production of salads and what have you.

21 So, my experience kind of
22 straddles many different aspects and that's

1 really what led me to come here to testify
2 today. I have no association with Western
3 Growers. I have no connection other than my
4 family does lease land that is presently
5 farmed and used by companies to grow produce.

6 That's it in a nutshell. How do
7 you figure out a way to implement a low-cost
8 practical form of sanitation? To do this only
9 in field labor to me is not looking at a
10 holistic approach to what's going on.

11 The field's need to be looked at
12 carefully and certainly after reading the
13 agreement, I feel that it's certainly a
14 positive step, however I wonder whether
15 shouldn't the FDA be looking at this more
16 closely.

17 These are scientific issues, not
18 necessarily marketing issues, but it is a
19 people problem. The people problem is
20 implementing what would be good science in a
21 realistic practical manner one I say is also
22 fair, one of the issues that I also kind of

1 wonder about is the ability for creativity.

2 There are a lot of artisan
3 producers of produce, smaller organic farms
4 that are on a much smaller basis than would be
5 normally done or normally even apply for
6 membership to Western Growers.

7 These artisan producers are the
8 people that have led us kind of, I don't want
9 to say courageously, but I suppose you might,
10 in terms of looking at our different type of
11 experiences relative to food in restaurants.
12 Alice Waters, Michael Pollan, some of these
13 characters who really have changed the way we
14 think about food and we also need to reexamine
15 our ideas about sanitation.

16 My question simply is if this
17 marketing agreement takes two to two and a
18 half years to produce, what are we doing
19 today? In my hand I'm holding a thing called
20 MyCleanse, which is developed by a company
21 that will actually be used to prevent first
22 responders from being contaminated by H1N1 and

1 various other viruses.

2 This is a material called
3 Microsyn, which is being produced up in
4 Petaluma, California and this is guaranteed to
5 kill, according to the FSA, 999 percent of
6 things such as staph, strangely enough, e-
7 Corps

8 Here's the interesting aspect of
9 this, is you can literally spray it in your
10 face and it kills the germs, the viral
11 elements, bacteria, it is manufactured today
12 here in the U.S. using this concept of
13 electrolyzed water. It could be used to wash
14 produce.

15 In the paperwork that I gave you,
16 there are some scientific articles. I have a
17 four inch three-ring binder, there is studies
18 done by the University of California Davis,
19 University of Georgia. This could be
20 implemented at any given point in time.

21 The two issues you have I think
22 that need to be looked at is one, sanitation

1 and obviously the growth of pathogens in a
2 warm environment. So refrigeration is
3 critical when shipping any sort of produce and
4 keeping it in terms of storage and you can
5 follow the produce from the seed all the way
6 through its growing period to its harvesting
7 and distribution.

8 I think you need to look at
9 sanitization from that whole aspect because E.
10 coli can even be spread by seed contamination.
11 What provisions have been made in this
12 marketing agreement? It doesn't provide for
13 that.

14 So the circumstance I would say is
15 I think it's well intentioned, I think perhaps
16 over time it will probably be implemented. I
17 would like to see the FDA more involved only
18 because this is science, not a marketing
19 issue. That's basically it.

20 JUDGE HILLSON: Okay. Thank you
21 for your testimony. Let me ask the panel if
22 they -- do you have any questions of Mr. Garin

1 whose name I keep forgetting.

2 THE WITNESS: Yes.

3 JUDGE HILLSON: Do you have any
4 questions? Ms. Schmaedick go right ahead.

5 CROSS EXAMINATION

6 BY MS. SCHMAEDICK:

7 Q Melissa Schmaedick, USDA. Thank
8 you for your testimony and for the
9 information. I'm just curious if you are here
10 representing yourself or a specific --

11 A I'm here representing myself. It
12 was a circumstance where to me, in my research
13 I had run across the use of this electrolyzed
14 water, saw the potential for it and made a
15 series of inquiries as to was this a commonly
16 accepted practice.

17 Perhaps somebody could enlighten
18 me in terms of is somebody presently using
19 this on a commercial scale to sanitize
20 produce. The fact of the matter is, they are
21 not. I have heard from several producers that
22 they are looking at it, but today is someone

1 using it? No.

2 And when I say that, is on any
3 large scale. It can be used in things such as
4 tomatoes. They are talking about using this
5 in value-added packing which would be the
6 three times washed lettuce in the bags, that
7 sort of thing.

8 And yet one of the other issues
9 that kind of unnerved me was one of the other
10 tear sheets that you have or product sheets
11 that you have in your group of papers that
12 I've given you, was one for a company that
13 makes a temperature sensitive ink.

14 Now, what were to happen if you
15 were to go to a market, look at a bag of
16 produce that had been improperly stored? You
17 could see that with this particular mark that
18 it had gotten above 51 degrees.

19 In essence, the time frame as well
20 as the temperature where a pathogen is in so
21 many words activated and going to multiple.
22 How come a grower is not using it at this

1 point? The cost, \$0.02 a bag.

2 Q Okay. Thank you.

3 JUDGE HILLSON: Do we have any
4 other questions from the USDA panel? Do we
5 have any questions from the Proponents?
6 Mr. Giclas, go right ahead.

7 BY MR. GICLAS:

8 Q Thank you. Hank Giclas, Western
9 Growers. I'm just curious, you've read the
10 marketing agreement draft?

11 A I have.

12 Q Is it your understanding that the
13 metrics or the best practices for a National
14 Leafy Green Marketing Agreement have not yet
15 been established?

16 A Not at all.

17 Q So, and is it your understanding
18 that there is a technical committee that
19 includes FDA as well as food safety experts
20 and academics that would be involved in the
21 development of those best practices --

22 A Sure. But as I believe Hank, I

1 called your office and asked you specifically
2 whether you had ever heard of electrolyzed
3 water and you said no, yet this has been used
4 in Europe for over 20 years and been used in
5 Japan for over 40 years, including various
6 studies by various universities and various
7 papers written specifically for use on leafy
8 greens and yet, you weren't aware of that.

9 And what I'm saying in so many
10 words it that we need to be doing something
11 right away as opposed to waiting for a
12 national agreement. The person, or I should
13 say the group that seems to be able to act
14 quickest on this making a recommendation would
15 be the FDA.

16 Q Okay. Thank you. But my question
17 is going to be, you're talking about several
18 technologies, maybe they're old, maybe they're
19 new, some of them are certainly new to me. I
20 don't profess to be an expert in food safety,
21 but let me ask you this question.

22 If from these new technologies as

1 they arise, you know, are seen as being
2 valuable to the industry, does the structure
3 of the current proposed marketing agreement
4 allow for them to recognize and adopt these
5 new technologies?

6 A It would. I'm not saying that it
7 doesn't.

8 Q Thank you.

9 A But what it really is, is the
10 incentive of the people to do this. I'm glad
11 the marketing agreement may be put in place
12 because it provides growers certainly with an
13 incentive. The cost of \$0.02 a bag and the
14 fact of the matter of using something like
15 electrolyzed water as a sanitation procedure
16 could actually extend the shelf life for as
17 much as a week for that same produce.

18 And yet, the growers haven't gone
19 ahead and done that. And that's why I'm a bit
20 perplexed because apparently because until the
21 threat of litigation occurred, let's just say
22 that there was perhaps a reticence on growers

1 because of any additional cost relative to
2 growing produce.

3 Q I don't have anything, thank you.

4 JUDGE HILLSON: Are there any
5 further questions? Anyone else? Thank you
6 very much for your testimony. I'll receive
7 Exhibit 45 into evidence.

8 (Whereupon, the above-referred to
9 document was admitted into
10 evidence as Exhibit No. 45.)

11 JUDGE HILLSON: And Mr. Resnick,
12 have your witnesses shown up?

13 MR. RESNICK: I'm sorry I didn't
14 hear you.

15 JUDGE HILLSON: Have your
16 witnesses appeared, the ones that weren't here
17 --

18 MR. RESNICK: Everybody's here
19 Your Honor.

20 JUDGE HILLSON: Okay. Why don't
21 you call your next witness then please.

22 MR. RESNICK: Thank you, Your

1 Honor. At this time the proponent group calls
2 John Manfre.

3 JUDGE HILLSON: Do you have -- you
4 don't have a written statement, sir I take it?

5 MR. MANFRE: No written statement.

6 JUDGE HILLSON: Okay. That's
7 fine, just collecting as they come in. If you
8 would please raise your right hand.

9 WHEREUPON,

10 JOHN MANFRE

11 was called for examination by Counsel for the
12 Proponent, having been first duly sworn,
13 assumed the witness stand, was examined and
14 testified as follows:

15 JUDGE HILLSON: Okay, Could you
16 please state your name and then spell it for
17 the record?

18 THE WITNESS: John Manfre J-O-H-N
19 M-A-N-F-R-E.

20 JUDGE HILLSON: Okay. And you
21 want to make a statement?

22 THE WITNESS: Yes, I do.

1 JUDGE HILLSON: Go right ahead and
2 do so.

3 DIRECT EXAMINATION

4 THE WITNESS: I'm John Manfre and
5 my brother and my two cousins and I are third
6 generation family farmers in California and
7 we've been in our present location in the
8 costal region here for over 80 years.

9 We have or currently grow or
10 handle most of the items covered under the
11 leafy greens through one or more of our
12 companies in many locations in California and
13 Mexico, both convention and organic. So we're
14 well versed in the challenges of growing these
15 products in these different areas.

16 We have supported leafy greens
17 since its inception and we've had -- actually
18 have had a third party testing program in
19 place on our farms for over -- since the late
20 '80s.

21 We believe the leafy greens --
22 California leafy greens provides buyers with

1 a standard set of rules for safety and is
2 based on good science. We also believe that
3 this should be done on a national level and
4 should be standardized for everyone.

5 Going forward, there's a lot of
6 talk about the cost incurred on these things.
7 Having a program in place since the late '80s,
8 we're quite versed in how much the cost of
9 food safety has been and continues to be, but
10 going forward while we do all those things
11 now, I don't expect that we're going to have
12 a lot of additional cost over and above what
13 we do today.

14 And just in summary, myself and my
15 brother and cousins would like to go on record
16 as supporting the Leafy Green Marketing
17 Agreement that should bring standards to all
18 of our industry and confidence to the
19 consumers.

20 And on a footnote, our companies
21 we own a variety of one, we're original
22 signator on California leafy greens, today

1 we're a partner in an organization that is a
2 handler of leafy greens and we would be
3 considered, most of our companies would be
4 considered large and we also are an importer,
5 which would be considered large, of the leafy
6 greens. Thank you.

7 JUDGE HILLSON: Thank you. Do you
8 have any further questions on direct of
9 Mr. Manfre?

10 MR. RESNICK: I have no questions.

11 JUDGE HILLSON: Okay. In that
12 case I'll ask the panel if they have any
13 questions of Mr. Manfre.

14 CROSS EXAMINATION

15 BY MS. SCHMAEDICK:

16 Q Melissa Schmaedick, USDA. Thank
17 you Mr. Manfre for your testimony. Could you
18 state again the name of the organization
19 you're representing today?

20 A The main company that we've been
21 for all those years is Frank Capurro & Son.

22 Q Could you --

1 A And we have a couple different
2 entities that are wholly owned by us that are
3 -- do the different phases of the business.
4 Frank Capurro & Son is a producer.

5 JUDGE HILLSON: Why don't you
6 spell Capurro.

7 THE WITNESS: C-A-P-U-R-R-O.

8 JUDGE HILLSON: Thank you.

9 BY MS. SCHMAEDICK:

10 Q And you said that that company is
11 a producer?

12 A We're growers.

13 Q A grower?

14 A Yes. And multiple locations in
15 California. We farm here on the coast and
16 desert regions and at one time or another in
17 the last all those years we farmed a little
18 bit in the central valley or otherwise too.

19 Q And you mentioned that you're also
20 a handler and an importer?

21 A We're a partner in a firm that
22 handles all the things that we produce now, or

1 the bulk of it. Yes, we are and that's a
2 large company. And we are an importer. We've
3 been farming and importing vegetables out of
4 Mexico for over 20 years.

5 Q Okay. And how familiar are you
6 with the proposed agreement? Have you --

7 A Pretty familiar with the
8 agreement. Like I said we were -- when
9 California leafy greens was being formed we
10 were one of the original groups that were
11 signed on to that and we're a member of that
12 currently because we're not a handler on those
13 items, we're a partner with another company as
14 we are part of the leafy greens group through
15 that organization.

16 Q Under the proposed agreement,
17 since you qualify as a producer, a handler and
18 an importer how would you qualify your
19 business as being -- I mean what role would
20 you participate in the agreement as? As an
21 handler, as an importer, producer or all of
22 them?

1 A Well all of them because we're
2 partners in a company that is the shipper, the
3 shipping organization that we produce for and
4 that's the handler and we're part owner of
5 that. We are farmers on our company that we
6 have for years, so we produce these products
7 and have produced these products. And then
8 another company is the importer, there's the
9 grower in Mexico.

10 Q Okay. Thank you.

11 JUDGE HILLSON: Are there any
12 other questions from the USDA panel?
13 Ms. Deskins?

14 BY MS. DESKINS:

15 Q Sharlene Deskins, USDA. I have a
16 question for you. You're familiar with the --
17 you've read this particular marketing
18 agreement, correct?

19 A Yes.

20 Q Okay. One of the definitions
21 right now covers packaged leafy greens, if
22 you're -- just if you're familiar with it.

1 A Yes.

2 Q Is it your understanding that the
3 order is meant to cover packaged leafy greens?

4 A My understanding is all the things
5 that are -- that leafy greens that are going
6 to be covered, and I believe the packaging
7 should be. But we don't do any packaging
8 ourselves of the greens.

9 Q Okay. I think you're not the
10 right person for me ask if you don't do any
11 packaging.

12 A No, we don't package it ourselves,
13 no.

14 Q Okay. Thank you.

15 JUDGE HILLSON: Anything else from
16 the USDA panel? Anything else from -- anyone
17 else in the audience? Any redirect?

18 MR. RESNICK: No, Your Honor.

19 JUDGE HILLSON: Well, speaking for
20 yourself, Mr. Giclas had his hand up.

21 MR. RESNICK: None from me.

22 JUDGE HILLSON: Go ahead Mr.

1 Giclas.

2 REDIRECT EXAMINATION

3 BY MR. GICLAS:

4 Q Hank Giclas, Western Growers. I'm
5 sorry. Mr. Manfre, you said that you produce
6 both organically and conventionally?

7 A Yes.

8 Q Your experience with the
9 California agreement, has it been difficult to
10 apply the food safety practices to the organic
11 portion of your program and the conventional
12 portion of your program?

13 A Well I think when you initially
14 get started, we -- well, like I said, we've
15 been doing a third party testing program for
16 since the late `80s so we've been in some ways
17 ahead of the curve and in fact we were doing
18 organics back in the `70s when it was way
19 ahead of the curve.

20 Our organic operation isn't as big
21 as it was, so the challenges -- there are
22 challenges there because of the size of things

1 that you have to do. When you have -- when
2 you're doing it already it was a challenge,
3 but it's not like if you started from scratch.

4 The big challenge we have,
5 candidly, is on the conventional side farming
6 in the coastal regions when you own wetlands.
7 So we've been versed in having to do all these
8 things for a long time.

9 We've incorporated into our
10 program, I don't see that it was that much
11 greater to maintain the standards for the
12 organic than it is in convention at this
13 point.

14 Q Thank you. You said the bigger
15 challenge is with the conventional program
16 growing in a coastal area because of the fact
17 that it's, you know, in the area of wetlands.
18 Have you actually had to destroy any wetlands?

19 A No. No. In fact the buffers just
20 keep getting a little bit further from the
21 wetlands. But that's more of a challenge of
22 being on the coast than it is anything else.

1 When you're farming in this region out where
2 we do, I notice a lot of the areas that we
3 farm are smaller areas as opposed to the
4 desert regions, which are larger, open areas.

5 So those have been challenges for
6 a long time, long before leafy greens and food
7 safety became vogue and all of those things.
8 We've been preserving those wetlands -- well
9 we've been in our current location for 80
10 years, so and the wetlands are still there.
11 So I'd say that we're preserving those
12 properly.

13 Q Thank you.

14 JUDGE HILLSON: Any more
15 questions? Thank you for your testimony
16 Mr. Manfre, I appreciate it. You may step
17 down. Mr. Resnick you may call your next
18 witness.

19 MR. RESNICK: Thank you, Your
20 Honor. The Proponent group calls Bob Mills.

21 JUDGE HILLSON: Give them one.
22 I'm going to mark Mr. Mills' statement as

1 Exhibit 46.

2 (Whereupon, the above-referred to
3 document was marked as Exhibit No.
4 46 for identification.)

5 JUDGE HILLSON: Would you please
6 raise your right hand, sir.

7 WHEREUPON,

8 BOB MILLS

9 was called for examination by Counsel for the
10 Proponent, having been first duly sworn,
11 assumed the witness stand, was examined and
12 testified as follows:

13 JUDGE HILLSON: Could you please
14 state your name and spell it for the record?

15 THE WITNESS: My name is Bob
16 Mills, M-I-L-L-S.

17 JUDGE HILLSON: Okay. And I
18 understand you have a statement you want to
19 read, is that correct?

20 THE WITNESS: Yes.

21 JUDGE HILLSON: Why don't you
22 proceed to do so.

1 DIRECT EXAMINATION

2 THE WITNESS: My name is Bob Mills
3 and I am the Director of Food Safety & Quality
4 Assurance with Tanimura & Antle in Salinas
5 California. Thank you for allowing me to
6 present our views in favor of the proposed
7 Nation Leafy Greens Marketing Agreement.

8 Tanimura & Antle is based in
9 Salinas, California and is a Grower/Shipper of
10 fresh produce, which includes lettuce and
11 leafy greens. The company was established in
12 1982, but the relationship between with the
13 Tanimura's and Antle's goes back three
14 generations to the 1930's.

15 Tanimura & Antle grows its lettuce
16 and leafy greens products in California and
17 Arizona. I have had the privilege of working
18 with Tanimura & Antle and in the produce
19 industry for the past three years.

20 Prior to joining the produce
21 industry, I had worked in Food Safety and
22 Quality Assurance and related scientific

1 disciplines in the restaurant industry, dairy
2 industry, canning industry, pickling industry,
3 frozen vegetable industry, and dehydrated
4 vegetable and spice industry. All together,
5 I have worked in the food industry for forty
6 years.

7 During the 1990's, the FDA, with
8 input and collaboration with industry,
9 developed and then published a set of Good
10 Agricultural Practices for the growing and
11 harvest of fresh fruits and vegetables. The
12 lettuce and leafy greens industry embraced and
13 implemented these GAP's.

14 Unfortunately, even after
15 following all FDA recommendations and
16 guidelines, the Spinach Crisis of 2006
17 occurred. In late 2006, the California
18 lettuce and leafy greens industry decided to
19 revisit the GAPS and identify where the
20 current GAPS could be improved.

21 In January 2007, an experienced
22 industry -- experienced industry and technical

1 leaders and recognized academic experts met to
2 develop a set of GAP metrics. After nearly
3 two months of discussion and meetings, of
4 which I was a part of, a set of realistic
5 metrics was developed.

6 These were risk-based and came
7 from the best scientific data available and
8 FDA recommendations. They are in full
9 compliance to the FDA GAP guidelines and yet
10 take them to the next level. They identify
11 specific growing and harvesting GAP metrics
12 for the lettuce and leafy greens.

13 The GAP metrics were developed to
14 be dynamic. As new and updated scientific
15 becomes available, they can be amended. At
16 the same time the metrics were being
17 developed, the industry created a government
18 body, the California Leafy Greens Marketing
19 Agreement, to regulate its industry. The
20 California LGMA's first action was the
21 adoption of the GAP metrics as its standard
22 for the growing of lettuce and leafy greens.

1 As a member of the California LGMA
2 Technical Committee, Tanimura & Antle and I
3 strongly supported the adoption of the GAP
4 metrics. The California LGMA then enlisted
5 the services of the USDA to develop and
6 administer an audit to measure and verify
7 member compliance with the metrics.

8 This was not easy task. As a
9 member of the group working with the USDA, we
10 spent several days clearly identifying the
11 details of the audit to ensure no metric
12 requirement was missed. The USDA in
13 Washington, D.C. reviewed this audit for
14 approval.

15 There were a couple of changes
16 required by the USDA to ensure compliance to
17 their auditing standards. These were
18 implemented and this resulted in a 24-page
19 audit.

20 USDA trained CDFA state auditors
21 perform these audits, the auditors are
22 unbiased and very effective. These audits

1 have resulted in a positive improvement in
2 growing practices from those previously
3 established under the FDA's GAP Guidance.

4 Shortly thereafter, the industry
5 created its sister body, the Arizona Leafy
6 Greens Marketing Association. The Arizona
7 LGMA adopted and implemented the same metrics
8 as the California LGMA. USDA trained auditors
9 also perform the required audits.

10 These two government bodies
11 effectively brought the majority of the
12 lettuce and leafy green industry under
13 realistic regulation for food safety.
14 However, the current LGMA regulation does not
15 apply to everyone. It only applies to those
16 members that market in California and Arizona.

17 Outside these states, only the FDA
18 GAP Guidance applies. The only way for the
19 U.S. consumer can have assurance that their
20 food is as safe as possible, no matter where
21 their lettuce and leafy greens come from, it
22 has to be grown under acceptable food safety

1 standards, applied to all handlers,
2 nationwide.

3 These standards must be science
4 and risk based and where applicable,
5 appropriately amended for the specific growing
6 region to which they are applied.

7 Lettuce and leafy greens food
8 handlers need to have the opportunity commit
9 to a set of standards that assures the public
10 and their customers of their commitment to
11 food safety. The proposed National LGMA
12 provides this opportunity.

13 JUDGE HILLSON: Thank you. Do
14 the proponents have any direct questions of
15 this witness?

16 MR. RESNICK: No, Your Honor.

17 JUDGE HILLSON: Let me pass it on
18 then to the USDA panel. Do you have questions
19 of this witness please? Ms. Schmaedick, you
20 may proceed.

21 CROSS EXAMINATION

22 BY MS. SCHMAEDICK:

1 Q USDA, Melissa Schmaedick. Good
2 afternoon Mr. Mills, thank you for your
3 testimony. I have a question on the second
4 page of your testimony, the last paragraph you
5 state that "These standards must be scientific
6 and risk based and where applicable
7 appropriately amended for the specific growing
8 region to which they are applied."

9 Can you tell us what you mean by
10 growing region?

11 A Growing region would be an area
12 that would most likely defined by its weather
13 related area. To give you an example, just in
14 our two areas, we have the Salinas growing
15 region, it is warm, sunny and allows for crops
16 to be grown planting starting in around
17 January, February at the very earliest. We
18 can start harvesting in April at the earliest.

19 By the time the end of October,
20 first part of November comes around, we've
21 gone through the growing season, the weather
22 starts getting colder and for these products

1 it's just not feasible for them to grow.

2 On the flip side, during these
3 identical months down in the Southern
4 California and the Arizona area it's quite
5 hot. You're talking temperatures in the lows
6 in the 90s, highs in the hundred and teens.
7 Totally unacceptable for growing lettuce and
8 leafy greens.

9 However, in the wintertime, the
10 temperature drops down significantly so your
11 highs are in the 60's low 70's morning low is
12 in the upper 30's lower 40's. These are
13 beautiful temperatures for the growing of
14 lettuce and leafy greens.

15 These would be considered two
16 separate growing regions because the climatic
17 conditions are different and they're not
18 together and they're significantly different
19 in the time of year.

20 Q Are there other factors that could
21 distinguish growing regions?

22 A You could potentially have an area

1 that's totally, even though it looks like it's
2 identical in the time of the growing season,
3 but it's a separate region that's definitely
4 and clearly blocked off.

5 For example, even though we don't
6 grow lettuce and leafy greens in the Oxnard
7 region of California, it is clearly delineated
8 by mountains and the city to the east of it
9 called LA where there's not much growing
10 that's done. But it's got a beautiful growing
11 region where for a portion of the time of the
12 year you can grow crops there.

13 Another real good example would be
14 the upper mid-west after the last frost is
15 gone around May 13th which is typical around
16 the Minneapolis area. You've got a region
17 that goes from there until about September
18 13th to October 1st where they have their first
19 hard freeze.

20 That would be another growing
21 region because the climatic conditions allow
22 for growing or not growing at a particular

1 time.

2 Q Thank you. Have you read and are
3 you familiar with the proposed agreement
4 language?

5 A I've read through it, yes.

6 Q Are you prepared to ask (sic) some
7 questions on some of the sections?

8 A I'll do my best.

9 Q There's a proposed definition
10 970.4, critical limit. Can you explain to us
11 what critical limit means?

12 A Critical limit means it's the
13 level or the limit that if you've set a
14 standard that above that triggers an automatic
15 response as required. Let's say for example,
16 the testing of water as it's currently under
17 the Arizona and California LGMA.

18 If the water results are less than
19 the specified limit for generic E. coli, or if
20 the rolling mean that we base this on, if the
21 results fall within that rolling mean, the
22 water is considered in compliance.

1 If you go above a single analysis
2 above that limit or the rolling mean suddenly
3 jumps above that, it goes above what we call
4 the critical limit. There is a response that
5 needs to be taken.

6 And in the case of the California
7 and Arizona LGMA, we've specified what type of
8 response a grower is required to -- or I
9 should say handler, is required to take in
10 order to either rectify that issue or if it's
11 not rectifiable, what steps they must take if
12 they make sure that the crop either does or
13 does not get into the market.

14 Q So do critical limits change with
15 different growing regions and the different
16 environments that you're producing or handling
17 in?

18 A The potential is there. I know in
19 our environments right now they don't change,
20 but having not grown in other parts of this
21 country, I couldn't tell you for sure if, say
22 for Minnesota or New Jersey or Georgia, if

1 some of their limits that we have in
2 California would be exactly a match. There
3 may be conditions there that would adjust
4 differently for them.

5 Q Based on your experience, is it
6 important to have flexibility in the proposed
7 agreement to address some of these regional
8 differences and potential differences in
9 critical limits?

10 A Could you say that again? I'm not
11 sure what you meant by that.

12 Q Okay. I'm sorry. I have a
13 tendency to have really long questions, so
14 I'll try to make it short. Is it important to
15 recognize differences in growing regions when
16 developing metrics for those growing regions?

17 A The potential is yes. I'll use an
18 example. If the metric was written, because
19 the way I understand this agreement, we'd be
20 looking at developing a set of metrics for
21 this agreement.

22 If the metrics clearly stated the

1 water shall be tested and shall not exceed
2 five, whatever, five whatever that they
3 decided that that is what they're going to
4 measure against, and they didn't specify the
5 type of water, then you've got the potential
6 that rainwater will come down and the last I
7 heard, we had very little control over what
8 rainwater was like.

9 I would say that if there's a
10 growing region that is totally dependent on
11 rainwater, they probably would have an
12 exemption or differential there that's saying
13 rainwater does not need to be tested since
14 that's your source of water.

15 But if it said that we are totally
16 getting irrigated water from a canal that's
17 coming out of a sewage pond upstream, then I
18 would say they would probably have to not only
19 have a testing going on, but they would need
20 to take a look at that pond to make sure that
21 it isn't contributing something significantly
22 different that could be detrimental to the

1 crop than another region.

2 Q Thank you. That is the end of my
3 questions.

4 JUDGE HILLSON: Okay. Do you have
5 a question Ms. Staley, go right ahead.

6 BY MS. STALEY:

7 Q I do. Good afternoon. Kathleen
8 Staley. If you could refer to 970.67, are you
9 familiar with this section?

10 A Yes.

11 Q Is there something different in
12 this section that is not part of the
13 California Leafy Green Marketing Agreement?

14 A I didn't see anything
15 significantly different at all.

16 Q If you look at paragraph B, GHP
17 and GMPs, can you explain what you understand
18 GMPs to mean?

19 A GMPs are the appropriate use of
20 hand covering, hair covering and related
21 things that may be needed in order to provide
22 the safe handling of a product in the same

1 process.

2 Q In the process?

3 A Yes.

4 Q Okay. If you go down to handling
5 and manufacturing process and look at the term
6 labeling of raw agricultural commodity, could
7 you explain to me what that term means to you?

8 A Raw agricultural commodity is a
9 commodity that comes from the ground and has
10 not received any processing such as chopping,
11 slicing, dicing or other repackaging out of
12 its native form. For example, a head of
13 lettuce that is wrapped in the field is a raw
14 agricultural commodity has changed other than
15 a piece of plastic was put on it and it was
16 put into a box and it was shipped out.

17 However, if that same head of
18 lettuce is cored in the field, taken to a
19 value-added operation and then becomes
20 subsequently chopped and made into a chopped
21 bagged product, it is now considered a
22 processed agricultural commodity, it's no

1 longer raw. It's received a secondary
2 treatment that's changed either it's form or
3 its natural state or condition.

4 Q With those type of products, is
5 there normally something, anything additional
6 the consumer would do before they would
7 consume that product?

8 A Raw agricultural commodities are
9 not considered ready-to-eat products. It is
10 expected that the consumer would properly
11 prepare that product, whether it's a whole
12 head romaine, iceberg lettuce or anything
13 related like that when they get home using
14 proper good cleaning and sanitation practices,
15 which is strongly recommended by many sites on
16 the USDA and the FDA websites.

17 If the consumer had questions I
18 know that they can go there because I've gone
19 there and they've got proper handling and
20 preparation of those products.

21 Q Thank you.

22 JUDGE HILLSON: Anything else from

1 the USDA panel? Go ahead Mr. Souza.

2 BY MR. SOUZA:

3 Q Thank you. Tony Souza. Mr.
4 Mills, question for you in your statement, the
5 very bottom of the paragraph, you stated in
6 there in January of 2007 experienced industry
7 technical leaders and recognized academia met
8 to develop a set of GAPS, were you involved in
9 that?

10 A Yes, I was.

11 Q Taking your participation in that
12 and referring to the proposed agreement, could
13 we have you take a look at 970.67c, go back to
14 the critical limits which was discussed a
15 little earlier and read that and could you
16 explain to me your interpretation of what that
17 means?

18 A You want me to read the regulation
19 first?

20 Q Yes, please.

21 A It says, "Critical limits for
22 processed controls for each of the quality

1 factors identified in the audit metrics shall
2 be prescribed by the USDA in consultation with
3 the FDA and any other federal or state
4 regulatory body administering regulations
5 impacted by this provision of this agreement."

6 "Shall incorporate committee
7 recommendations with regard to industry
8 production, harvest and handling technologies.
9 Shall be based on sound, scientific practices
10 and shall be approved by the Secretary."

11 Q Is that the process you used
12 whenever you sat down with the group back in
13 January 2007 or is that your understanding or
14 intent on -- is that your understanding of
15 your proposal? Do you agree with that?

16 A This is a similar what we did in
17 January, February of 2007. We worked together
18 both with industry, with academic, we had FDA
19 participation, we had their review of the
20 metrics that we were proposing. They came
21 back with recommendations for, against, other
22 considerations, so it was a collaborative

1 effort.

2 And so if I'm reading this the way
3 -- the way I interpret this is basically the
4 same thing as what we did back in 2007.

5 Q So you would -- you interpret this
6 as meeting with a group and developing
7 something and then presenting it after the
8 development process?

9 A Well, presenting it after and
10 during. We'd want the development process all
11 together collaborative so that we make sure
12 that all participants are involved.

13 Q Within the agreement it discusses
14 a Technical Review Board, would that be
15 involved in this process?

16 A Yes. Just like we did previously.
17 We had a technical review board that actually
18 -- when we created the LGMA, that technical
19 review board, which I was on also, we reviewed
20 those metrics. We had some discussions and
21 concerns about them. In some cases we felt
22 they were not tough enough and they were sent

1 back for review.

2 Q Thank you.

3 JUDGE HILLSON: Ms. Dash?

4 BY MS. DASH:

5 Q Suzanne Dash. If your company a
6 large grower and -- I mean, is your company a
7 grower and a handler?

8 A We are what's called a grower-
9 shipper in California and down -- and yes we
10 are a handler. It depends on your legal
11 definition, but in California we're referred
12 to as a grower-shipper.

13 Q According to the Small Business
14 Administration's threshold, would your company
15 be considered a large grower?

16 A Yes.

17 Q Would you also be considered a
18 large handler under the \$7 million threshold?

19 A Yes, we would. Yes.

20 Q Thank you. That was all I had.

21 JUDGE HILLSON: Ms. Deskins?

22 BY MS. DESKINS:

1 Q Yes, I hope you're the right
2 person to ask this. In 970.11 it talks about
3 handling and it uses the term packaged
4 products. You were asked a question and you
5 said that when the lettuce is wrapped, is that
6 considered then a packaged product?

7 A No. It's considered a wrapped
8 product. It's not packaged as on the store
9 shelf as a ready-to-eat package, it is
10 strictly with a cellophane wrap on the outside
11 of it mainly to help protect a product from
12 any additional direct physical contact.

13 It's wrapped based on customer
14 preference so that when somebody goes into the
15 store they have the choice of either looking
16 at a product that's got a wrapper on it that
17 they know that some other consumer -- because
18 people like to handle the product while
19 they're in the store.

20 And it's considered a barrier so
21 that if someone -- some parent with their
22 child and they're handing it and the child has

1 got sniffles and that, they don't transfer
2 that in the store. It's a protection in the
3 store. It's a protection in the store.

4 Q Can you tell us, if you know,
5 under this definition of handle what would be
6 an example of a packaged product?

7 A Chopped lettuce, bagged salads,
8 something that is considered, especially if
9 you read it on the outside package, we have
10 triple washed, this is ready to eat, you do
11 not have to handle it anymore, that's
12 considered a packaged item.

13 Q Okay. Thank you.

14 JUDGE HILLSON: Mr. Souza, go
15 ahead.

16 BY MR. SOUZA:

17 Q Thank you. Mr. Mills to follow up
18 on the last question, romaine hearts, bagged
19 romaine hearts, restaurant packs such as
20 those, would those be considered to be
21 packaged products in your estimation or what
22 would you consider those to be?

1 A Those would still be considered a
2 raw agricultural crop because other than --
3 they are still in tact the way they are. The
4 outer leaves have been removed, so they still
5 have the inner leaves, but they have not gone
6 through any washing, cleaning or step process
7 beyond that.

8 JUDGE HILLSON: Anything else from
9 the panel? Anything from anyone else over
10 here? How about any redirect? Mr. Giclas?

11 REDIRECT EXAMINATION

12 BY MR. GICLAS:

13 Q Thank you. Hank Giclas, Western
14 Growers. Dr. Mills, you've been present at
15 parts of this hearing before today, is that
16 correct?

17 A That's correct.

18 Q You've heard some of the previous
19 testimony about the environmental impacts of
20 the California metrics, is that correct?

21 A That's correct.

22 Q You're a member of the California

1 Leafy Greens Marketing Agreement Technical
2 Committee, is that correct?

3 A Yes.

4 Q Can you tell me, is there anything
5 in the California metrics or best practices
6 that requires or encourages the destruction of
7 habitat?

8 A There's nothing that's written in
9 there at all.

10 Q Is there anything in the
11 California metrics that requires or encourages
12 the removal of water bodies?

13 A None.

14 Q Is there anything in the
15 California metrics that requires or encourages
16 the baiting or poisoning of small animals?

17 A No, there is not.

18 Q As a member of the Leafy Green
19 Marketing Agreement Technical Committee, do
20 you get feedback on auditor performance?

21 A Yes, I do.

22 Q Have you heard that USDA trained

1 CDFA auditors are instructing growers to
2 remove habitat or drain water bodies or
3 install bait stations?

4 A I have -- personally I have been
5 with them, they have never instructed us to do
6 that, and from the people I have talked to, I
7 have never heard anyone say they have done
8 that either.

9 Q Thank you.

10 JUDGE HILLSON: Anything else?

11 MR. WILKINSON: Yes, Your Honor.

12 JUDGE HILLSON: Go right ahead.

13 BY MR. WILKINSON:

14 Q Robert Wilkinson for Western
15 Growers. Dr. Mills, can you give us your
16 educational background?

17 A I had my -- I grew up and had my
18 education at the University of Minnesota
19 undergraduate degree there in microbiology and
20 zoology, my masters degree in food technology
21 and statistics.

22 Q And do you have a Ph.D.?

1 A No, I do not.

2 Q And you went to work in the food
3 industry as you've already indicated?

4 A Yes, before, during and after.

5 Q Okay. Thank you very much.

6 JUDGE HILLSON: Anything else?

7 Okay. Thank you for testifying Mr. Mills. I
8 will receive your statement as Exhibit 46 into
9 evidence.

10 (Whereupon, the above-referred to
11 document was admitted into
12 evidence as Exhibit No. 46.)

13 JUDGE HILLSON: Do you have
14 another witness for us?

15 MR. RESNICK: We understand that
16 Mr. English has a witness he'd like to call
17 and we'd be happy to defer at this point.

18 JUDGE HILLSON: Okay.
19 Mr. English, you want to call a witness?

20 MR. ENGLISH: Bu Nygrens, spelled
21 B-U N-Y-G-R-E-N-S.

22 JUDGE HILLSON: Well I was going

1 to have her spell it anyway.

2 MR. ENGLISH: Well, I thought I'd
3 do it.

4 JUDGE HILLSON: I'm going to mark
5 Ms. Nygrens statement as Exhibit 47.

6 (Whereupon, the above-referred to
7 document was marked as Exhibit No.
8 47 for identification.)

9 MR. ENGLISH: Just for clarity, is
10 there presently a witness for the proponents?
11 Do you know?

12 MR. RESNICK: We don't have any
13 further witnesses in the room and it's
14 unlikely that anyone else is going to show up.
15 This will probably, unless you're calling
16 anyone else or there is anyone else in the
17 gallery, this will probably be the last
18 witness for Monterey.

19 MR. ENGLISH: And, Your Honor, you
20 said you marked this Exhibit 47?

21 JUDGE HILLSON: I marked this
22 Exhibit 47. Let me swear Ms. Nygrens in

1 first. Please raise your right hand.

2 WHEREUPON,

3 BU NYGRENS

4 was called for examination by Counsel for the

5 National Organic Coalition, having been first

6 duly sworn, assumed the witness stand, was

7 examined and testified as follows:

8 JUDGE HILLSON: And even though

9 Mr. English already spelled your name, how

10 about you doing it again for the record?

11 THE WITNESS: Yes. My name is Bu

12 Nygrens. First name is B-U, last name is N-Y-

13 G-R-E-N-S.

14 JUDGE HILLSON: Thank you. And

15 Mr. English, you had some preliminary

16 questions?

17 DIRECT EXAMINATION

18 BY MR. ENGLISH:

19 Q Exhibit 47, you would like to be

20 submitted as it's written, correct? You have

21 to say yes or no.

22 A Yes.

1 Q Okay. And but you propose for
2 purposes of time --

3 A I'm going to read it --

4 Q -- you've edited it somewhat based
5 upon prior testimony.

6 A Since I'm batting last, I'm going
7 to read the whole thing.

8 Q Okay. Never mind.

9 A It's pretty quick.

10 Q All right.

11 A Thank you for the opportunity to
12 comment on the Proposed Marketing Agreement
13 for Leafy Greens. My company, Veritable
14 Vegetable, is a 35 year old regional produce
15 distributor that has concerns about the
16 proposed rulemaking for several reasons.

17 We service independent retailers
18 by representing small, mid-size, and large
19 independent and family farms. We work with
20 over 800 growers, most of them directly.

21 We are an NOP certified organic
22 handler, selling and distributing fresh

1 produce throughout California, Arizona, New
2 Mexico, southern Colorado and Hawaii and I
3 omitted Nevada.

4 Our growers, our customers, our
5 business, and the environment might suffer if
6 these proposed rules were adopted nationally.

7 As a supporter of environmentally
8 sustainable, local food systems and mid-size
9 organic farmers, we strongly urge the USDA to
10 eschew one-size-fits-all requirements,
11 especially when such guidelines are not
12 evidence-based and are written by and for
13 large-scale operations.

14 We do not believe that marketing
15 orders or marketing agreements are appropriate
16 models for protecting food safety on a
17 national scale. Food safety is an important
18 issue, particularly to anyone in business in
19 our food system.

20 While producers and handlers can
21 help provide technical information and best
22 practices, the safety of our food supply can

1 not be monitored or regulated by industry
2 alone. Agreements designed for individual
3 crops or groups of commodities can not be
4 simultaneously effective unless they are part
5 of a single science-based food safety system.

6 Such a system would apply
7 appropriate regional standards considering
8 growing conditions, water quality, climate and
9 environmental quality. What will prevent any
10 market based group from designing conflicting
11 so-called safety standards and protocols in
12 the future?

13 Production and handling would be a
14 chaos, and this proposed agreement, and the
15 Leafy Green Marketing Agreement in California,
16 from which it takes its lead, is already an
17 example of such chaos.

18 To truly develop a best practices
19 food safety program, cooperation from all
20 sectors of the industry, including academia,
21 public agencies, water quality boards, USDA
22 Natural Resources Conservation Service, UC

1 Extension, and the EPA, as well as
2 distributors and farmers of all sizes, is
3 needed.

4 I want to stress cooperation. Any
5 standards, guidelines or metrics for
6 agriculture must not have unintended negative
7 environmental consequences, and does not need
8 to be in conflict with conservation and fish
9 or wildlife and habitat protection efforts.

10 We can achieve development of such
11 best practices based on sound food safety,
12 agricultural and environmental science if we
13 all work together. This process has not
14 happened with the current proposed regulations
15 although I have heard and learned today that
16 it has definitely developed over the past
17 several years.

18 To establish a board of the
19 largest processors and handlers, primarily
20 from one specific agricultural area, to
21 dictate farming practices for large and small
22 farms all over the country is inappropriate.

1 I don't see an appropriate representation of
2 diversity in the proposed board you are
3 considering.

4 We recommend an approach to
5 address food safety that is focused on the
6 pre-cut salad industry. FDA's data on E. coli
7 0157:H7 contamination shows it comes
8 predominantly from fresh-cut bagged salad
9 products, and not from traditional whole leaf
10 and greens.

11 The very term leafy greens was
12 made up just a few years ago, and was not
13 common parlance in my 32 years of experience
14 in produce, it is not clearly defined or
15 understood. Does it apply to foods that are
16 only eaten raw?

17 It seems it is a catch-all phrase
18 that is directly related to fresh cut salad
19 mixes and bagged convenience salads. Are
20 herbs and cabbages leafy greens?

21 Even if the USDA were to require
22 standardized growing practices, such standards

1 should apply only to large-scale suppliers of
2 fresh-cut bags of leafy greens, and exclude
3 whole greens and vegetables that have never
4 been implicated in an E. coli 0157:H7
5 outbreaks.

6 Veritable Vegetable sells a
7 considerable amount of retail ready salad
8 greens and bagged spinach, and other fresh-cut
9 products, and we would support such an
10 approach. Recently the Almond Board adopted
11 a problematic requirement for fumigation of
12 raw almonds without vetting the standards with
13 organic or sustainable almond producers.

14 Although it may seem like a small
15 sector of the almond industry as a whole, our
16 customers who sell raw organic almonds are now
17 buying imported almonds because fumigation is
18 only required for domestic product.

19 It was the result of a salmonella
20 outbreak in one of the largest almond
21 producers which caused a rush to create a,
22 quote, "food safety standard" to prevent

1 consumer distrust, in this case it's mandated
2 and not voluntary, and it's not reasonable.

3 Is each crop going to undergo an
4 unscientific approach without exploring
5 alternative solutions? The needs and
6 circumstances of small scale and mid-scale
7 farmers must be considered to avoid putting
8 them at an unfair competitive disadvantage.

9 For example, if the rules would
10 require expensive testing for pathogens at
11 every harvest; smaller, more diverse farms
12 that continually harvest many types of
13 vegetables throughout the season would carry
14 an untenable or economic burden.

15 To require mid-size and organic
16 farms to follow the same rules as the
17 large-scale operations that have been
18 responsible for widespread contamination is
19 discriminatory, and would endanger a vibrant
20 and thriving sector of our economy, the local,
21 organic or sustainable family farm.

22 Such farms are innovative in

1 agriculture and conservation practices, but
2 are still vulnerable economically, as all
3 independent businesses are. Our company has
4 been part of, and worked hard to establish,
5 the organic food industry since 1974. Many of
6 the growers that we work with both large and
7 small have testified in these hearings.

8 I personally remember the day when
9 one of our customers, Alice Waters, chef at
10 Chez Panisse restaurant and one of our
11 suppliers, a producer named Warren Weber, from
12 Star Route Farms, showed me mesculin mix in a
13 plastic container and asked if I thought there
14 was a market for it. This was in the early
15 '80s.

16 It was this organic innovation
17 that has rapidly grown into the spring mix we
18 all know and enjoy today. Surely farms and
19 businesses should be rewarded and respected
20 for their vision and creativity, and not
21 disregarded as too small to count.

22 Our local and national economic

1 vitality relies on small and mid-size
2 businesses, and appropriate representation at
3 the table for regulations and market
4 agreements is critical. We do business with
5 growers who have voluntarily signed on to the
6 existing LGMA.

7 However many of these growers have
8 confided they were given no choice to retain
9 business with major chains demanding
10 compliance. Smaller growers have not
11 participated for many reasons, including an
12 inability to pay the costs, fees and water
13 quality testing requirements that LGMA
14 demands.

15 As one mid-size farmer on the
16 central coast of California said to me last
17 Monday when I was preparing for these remarks,
18 he said, "What am I going to do? Aside from
19 my home ranch I have 11 other properties that
20 I lease for production. That is a total of 12
21 different water sources. How can I afford to
22 test 12 separate water sources with any

1 regularity?"

2 I have heard several growers
3 wonder how much longer they can continue to
4 produce food under the ongoing pressures of
5 suburban sprawl, rising costs of water and
6 labor, increasing regulations and now
7 marketing agreements, which do not take scale
8 into consideration.

9 Without farmers, we have no
10 product to sell or food to eat. We know many
11 growers who do business with retail chains
12 that are competing by making different food
13 safety claims, the super metrics under
14 discussion earlier this morning, claiming
15 their standards are more safe, and to have
16 bested USDA Good Agricultural Practices audit
17 protocols.

18 The proposed agreement would do
19 nothing to curb the continuing escalation of
20 multiple standards. These growers have audit
21 fatigue already.

22 Participation in multiple audit

1 schemes causes financial burden and higher
2 production costs, resulting in price hikes,
3 which ultimately are passed on to everyone in
4 the system regardless if they buy bagged
5 salads or support convenience packaging.

6 Appropriate guidelines, suitable
7 for many of the small diverse farms that we
8 deal with, have not yet been developed. We
9 urge you to take sustainable conservation
10 practices into consideration in any proposed
11 rules; wetlands protection and microbial
12 diversity in soil have been found to reduce
13 pathogens and improve water quality, thus
14 creating a safer food system and healthier
15 environment.

16 The USDA must do what it can to
17 stop this war on Nature. Thank you for your
18 consideration.

19 JUDGE HILLSON: Mr. English, do
20 you have any further questions for this
21 witness?

22 MR. ENGLISH: I just move the

1 admission of Exhibit 47, Your Honor.

2 JUDGE HILLSON: Okay. I will
3 receive Exhibit 47 into evidence.

4 (Whereupon, the above-referred to
5 document was admitted into
6 evidence as Exhibit No. 47.)

7 JUDGE HILLSON: And I will ask the
8 USDA panel if they have any questions of Ms.
9 Nygrens.

10 MS. SCHMAEDICK: This is Melissa
11 Schmaedick, I do not have any questions.
12 Thank you.

13 JUDGE HILLSON: Ms. Dash?

14 CROSS EXAMINATION

15 BY MS. DASH:

16 Q Suzanne Dash. You're a handler,
17 is that right?

18 A That's correct. And I think
19 perhaps under the definitions in the proposed
20 rules we're also a food service distributor
21 because we do sell to restaurants as well,
22 though about 80 percent of our business is to

1 retail, independent retails stores.

2 Q Would you care to identify
3 yourself as a large or small handler based on
4 the SBA definition of \$7 million per year.

5 A Large.

6 Q Thank you. And are you a member
7 of the California Leafy Greens Marketing
8 Agreement?

9 A No, we're not signatories and the
10 reason -- although I participated with Hank
11 and others during the development of the
12 metrics. We were very concerned that it would
13 exclude some smaller growers that we do a lot
14 of business with, some of whom testified over
15 the past couple of days.

16 And we didn't want to exclude --
17 if we were signatories, we had to only work
18 with other, you know, people that were in
19 compliance, so we chose not to. But we do
20 business with other signatories.

21 Q Thank you. That's all I had.

22 JUDGE HILLSON: Ms. Deskins, go

1 ahead.

2 BY MS. DESKINS:

3 Q Yes. In your testimony you said
4 that you work with over 800 growers, are all
5 of those growers of leafy green vegetables?

6 A No. That's our entire vendor pool
7 of farms. Some of them farm in cooperatives
8 together, some of them are independent farms.

9 Q Do you know how many of that
10 number would be leafy green -- well, people
11 who grow leafy greens?

12 A Not off the top of my head, no.

13 Q Also in your testimony you put a
14 question about the definition of leafy greens,
15 are you proposing a new definition of it here
16 today?

17 A Well, I'm just saying that I think
18 it's a little bit of a slippery slope. To me,
19 it seems to be driven by the bagged salad
20 industry, obviously it's in reaction to the
21 heartbreaking circumstances of 2006.

22 And if it's driven by that sector

1 of the produce industry, I think to apply it
2 to non-bagged or non-containerized or retail
3 ready or whatever you want to call it, pre-
4 cut, fresh-cut is inappropriate.

5 So it seems like the definition is
6 a little loose. There are some things listed
7 in the proposed rules, I understand that that
8 might be flexible, but it also has the caveat
9 of whatever else the Secretary might want to
10 put into that.

11 And so if there's a handler
12 preponderance on the board and they're driving
13 the Secretary to add or subtract items that
14 may come into fashion. I can think for
15 example amaranth is of somewhat unusual
16 component of some salad mix blends.

17 Suddenly amaranth is in, maybe it
18 isn't written into the rules already. It
19 seems to be a fairly dynamic definition and
20 that is of concern when it has to do with
21 growers who have multiple, you know, diverse
22 crops.

1 Q But you're not proposing that the
2 definition be changed or a different
3 definition?

4 A Well, I'm not sure that the
5 definition is really set in stone.

6 Q Okay. The other question was you
7 testified about contact with small diverse
8 farms and about their concerns. Are you aware
9 of them offering any changes or amendments to
10 the leafy green agreement?

11 A Yes. I think the climate has
12 changed. I think that many people would be
13 interested in participating in developing
14 metrics that were suitable for those farms.
15 And if the leafy green proposal is adopted
16 nationally I'm asking for all the, you know,
17 all those voices to be at the table really.

18 And I think there would be
19 participation on the part of many small
20 growers, you know, which I don't think
21 happened when Western Growers organized the
22 first metrics. And certainly, the subsequent

1 private audits have not included small growers
2 in their development of their metrics.

3 Q You're not a small grower, but
4 you're --

5 A I'm not a small grower, no.

6 Q But you're speaking on behalf of
7 some small growers?

8 A Correct. And small businesses in
9 general. I mean, yes, under the SBA
10 definition we're not small, but we're still a
11 relatively small or mid-size business on the
12 scale of the facing into the consolidation in
13 the industry at large.

14 Q Okay. And I'm just trying to
15 clear it up, you're speaking on behalf of
16 these small growers, are all of them located
17 within California?

18 A No. We source from growers
19 throughout Arizona and New Mexico, Oregon,
20 Washington, British Columbia, Mexico. We are
21 not an importer ourselves, but we handle
22 importer products.

1 Q Okay. Are you speaking then also
2 for small growers that are located in Canada
3 and Mexico?

4 A Some, yes. Ones that we do
5 business with. A lot of them have concerns
6 with this agreement.

7 Q Okay. Thank you.

8 JUDGE HILLSON: Anything else from
9 the panel? How about the proponents, do you
10 have any questions? Mr. Giclas, you can go
11 first.

12 BY MR. GICLAS:

13 Q Hank Giclas, Western Growers.
14 Ms. Nygrens, thank you very much for your
15 testimony. I just have a couple questions.
16 My first one is on the bottom page of -- on
17 the bottom of the first page of your testimony
18 you talk about, you know, to truly develop a
19 best practices food safety program,
20 cooperation from all sectors of industry and
21 then you go on to list them, you know, is
22 needed.

1 Do you think that a best practices
2 program that is collaboratively developed with
3 the right set of stakeholders, that includes
4 small growers and academics and experts, et
5 cetera, is in the best interest of the
6 industry?

7 A Yes, I do.

8 Q Thank you. I don't have any other
9 questions.

10 JUDGE HILLSON: Anything else from
11 the Proponents? Mr. Wilkinson?

12 BY MR. WILKINSON:

13 Q Thank you, Your Honor. Thank you
14 very much for your testimony today. I'm
15 looking at your statement, in the second
16 paragraph on page 1 you talk about a one-size
17 fits all requirement. Where in the proposed
18 agreement do you find that?

19 A I don't find it in the current
20 agreement. It has been part of the discourse,
21 I think, that because the original agreement
22 was driven by major handlers in California and

1 the western states, Western Growers, there was
2 concern that it didn't reach out to smaller
3 producers and handlers throughout the western
4 states originally.

5 And the metrics are not designed
6 to consider growers, for example, the multiple
7 ranch that are not contiguous. There was a
8 question earlier about why would fencing be
9 more expensive for a mid-size grower, and if
10 they have multiple ranches and you have to put
11 deer fencing around multiple ranches, that's
12 going to be a lot more expensive than around
13 one big ranch, the installation, things like
14 that. So that's the reason.

15 Q So if the small organic and
16 diverse growers were included in promulgating
17 the metrics that would assuage your concerns?

18 A That would go a long way. Yes,
19 definitely.

20 Q Okay. And you would agree with me
21 that the agreement as it's currently written,
22 doesn't have any metrics. It has -- provides

1 for a procedure to develop them, but does not
2 actually have the metrics?

3 A That's my understanding. But it
4 is being suggested that the current LMGA
5 metrics be adopted. And because of the
6 escalation by the private audits, immediately
7 around the same time, it's been a very
8 confusing situation for many of the growers to
9 differentiate what was being required by which
10 party.

11 And I think government involvement
12 would perhaps, you know, could, you know
13 there's good and bad in government involvement
14 in terms of costs for regulation and stuff
15 like that. But there definitely is a need to
16 calm the marketplace down.

17 Q Would you agree with me that
18 nowhere in this agreement does it say that the
19 California Leafy Green Marketing Agreement
20 metrics will be adopted for the national
21 agreement?

22 A I did not see it in the proposed

1 rules, no, but many of the people that have
2 testified have indicated that they are
3 signatories to the current and would recommend
4 that it be adopted by. So it's, you know,
5 can't play it both ways.

6 Q Yes, but there is a process in
7 place to come up with metrics without really
8 saying that any particular set of metrics have
9 to be adopted at the outset, correct?

10 A Correct. And that's why I'm
11 appealing to the USDA to intercede on the
12 behalf of people who may not be participating
13 at this point.

14 Q Right. And you understand that
15 ultimately the metrics will have to be
16 approved by the Secretary or the Secretary's
17 designee, correct?

18 A Yes. And I hope the Secretary
19 takes everything into consideration.

20 Q As do we, thank you. Now you made
21 one statement in your response to your
22 question or the questions from Ms. Deskins

1 about private metrics. It's not your
2 contention that the Leafy Green Marketing
3 Agreement or the Proponents are responsible
4 for the private metrics, is it?

5 A No, but I think the marketplace
6 definitely has a tendency to want to prove
7 that they're better, I mean, and that's the
8 marketing aspect and that's where partially my
9 dilemma is in terms of AMS supervising this
10 rather than FDA because it is driven by
11 marketing.

12 And so if you have retail chain
13 business or large marketing agents that want
14 to prove that they're more safe and better,
15 when they see one group of handlers
16 promulgating a set of metrics that say, you
17 know, these are safety standards we can all
18 get behind and go ahead and eat your spinach
19 again, they're going to say, no we want to be
20 even better. So it tends to foster that kind
21 of escalation.

22 Q Were you here when the witnesses

1 testified earlier that indeed one of the
2 benefits they saw to a national standards were
3 the buyers could be talked out of their
4 private metrics and be condensed that a
5 scientific-based set of metrics that have been
6 promulgated by all the stakeholders really
7 doesn't require them to come up with these
8 stricter metrics?

9 A I heard that and I certainly hope
10 it's true.

11 Q Okay. And I take it you would
12 agree with that, that that would be a good
13 outcome for you?

14 A A good outcome would have very
15 strict scientific evidence for the metrics in
16 the first place. For example, and I'm not a
17 scientist, I can only provide information that
18 I've been told, but Fish and Game in
19 California is doing research on fecal matter
20 throughout wildlife in the Salinas valley.

21 Their plan is to do 2,000 testing
22 -- 2,000 samples to see if E. coli is in

1 evidence there. They've done 800 and some
2 odd, 840 samples and of all the deer samples,
3 there's only been two that have been found to
4 have E. coli.

5 Many growers have put up very
6 expensive deer fences because of the private
7 auditors that have demanded that this is safe
8 practices. So if the metrics are developed
9 without sound science, you know, perhaps
10 reducing the shelf life on packaged salads
11 would be another opportunity to create safer
12 packaged goods if people want them.

13 There's evidence that, Dr. Charles
14 Benbrook has done research that the E. coli
15 outbreak was probably people were eating stuff
16 that was, you know, out of date or very close
17 to the expiration date. And if the date of --
18 the shelf life of those products is three
19 weeks, maybe it should be only two weeks was
20 an example.

21 So there's many different ways of
22 creating better food safety practices. I

1 think if we all work together and, you know,
2 use good science and good research we could
3 get there together.

4 Q Thank you. Now on page 2 of your
5 statement, the first full paragraph, you make
6 a statement that only fresh-cut bags of leafy
7 greens have been implicated in E. coli
8 outbreaks. Are you saying that you couldn't
9 have an E. coli outbreak in a raw product?

10 A Absolutely not. I think I used
11 the word predominately and not only. And if
12 I didn't use the word predominately, I just do
13 want to make it clear that from the
14 information I've been given, the evidence
15 shows that most of the outbreaks that have
16 caused illness have been from bagged, packaged
17 goods.

18 And believe me, we sell quite a
19 bit of that product. I mean, I understand,
20 I'm not saying that everybody should only eat
21 lettuce that they grow themselves and wash in
22 their own bathtub. But, you know, I mean, I

1 eat spring mix, I eat packaged salads.

2 I understand that consumers want a
3 choice, I just don't want -- I want to compare
4 apples to, you know, apples and not apples to
5 oranges.

6 Q In your reading of the agreement,
7 has it come to your attention that the
8 inspections for product would be on the first
9 handler and in effect the growers would not
10 have to pay for the inspections?

11 A I think that's an excellent idea.
12 I don't want -- I think unfortunately that the
13 retailers have not taken on enough of the
14 economic burden or liability for the food
15 safety issues that they want -- I mean,
16 everybody wants a safe food system, right, and
17 I understand that.

18 But I think that the burden has
19 been on the producers unnecessarily and I want
20 shift some of that responsibility to other
21 people in the food system.

22 Q So if that cost was shift to the

1 first handler, your concern on page 3, your
2 second full paragraph, the small grower with
3 11 properties, that would be resolved,
4 correct?

5 A I would hope so. I would hope
6 that the water quality testing would not be
7 the burden of any producer, personally. I
8 think that that's a -- I mean, that's my
9 personal opinion that the government should
10 take that on, that water quality is a
11 municipal and common responsibility that we
12 all share and should all take the financial
13 burden.

14 I don't think that if someone's
15 using potable water or well water that they
16 should have to be responsible for it. If it's
17 contaminated from outside, you know, a CAFO,
18 a cattle ranch down the road that shouldn't be
19 the burden of the grower in the Central
20 Valley, for example.

21 Q Even if it's a private well?

22 A I'm not really an expert on

1 testing, so I don't know the answer to that.

2 Q Thank you very much and we
3 appreciate your testimony and hope that you'll
4 be here when the metrics are promulgated.

5 JUDGE HILLSON: And Mr. Horsfall.

6 BY MR. HORSFALL:

7 Q Scott Horsfall, LGMA. I have just
8 one quick question for clarification because
9 after all the discussion I'm not sure.

10 Are you -- is your organization
11 opposing the establishment of the marketing
12 agreement and like some of the previous
13 witnesses also laying out some specific
14 criticisms, or are you concerned about the way
15 it's written and could be supported if some of
16 those changes are made?

17 A Well, I'm concerned about the
18 diversity and balance of the board as it's
19 proposed. I understand the metrics are not
20 designed yet, so it's hard to criticize
21 something that isn't written down.

22 From a process point of view,

1 it's, like another speaker earlier, is this a
2 marketing issue or is this a science issue and
3 who should be in charge of it.

4 I understand that, you know,
5 government is underfunded right, I mean there
6 are fewer and fewer inspections happening by
7 FDA and even CDFA, I mean I'm familiar locally
8 that it's -- their money is running out for
9 more and more investigation.

10 And, you know, so we're kind of up
11 against it as a country at large. We want the
12 government to make sure everything's okay, but
13 we aren't putting the money to the government
14 for the agencies that would be overseeing
15 these things. So it's a dilemma.

16 Q Are you aware that the USDA has
17 many decades of experience in all types of
18 regulatory and inspection and quality control
19 in agriculture that have nothing to do with
20 marketing, which too many people want to
21 associate with advertising and promotion?

22 A Yes.

1 Q Thank you.

2 JUDGE HILLSON: Anything else from
3 the Proponents? Anything further from the
4 USDA? Mr. English, do you have any redirect
5 of this witness?

6 MR. ENGLISH: Nothing, Your Honor.

7 JUDGE HILLSON: Okay. Thank you
8 very much for testifying and you may step
9 down. I understand Mr. English that you want
10 to unburden yourself with some paper before
11 you leave?

12 MR. ENGLISH: I think I have some
13 housekeeping matters if that's our last
14 witness, Your Honor.

15 JUDGE HILLSON: Let me just make
16 double sure. You don't have anymore witnesses
17 Mr. Resnick?

18 MR. RESNICK: We have no more
19 witnesses.

20 JUDGE HILLSON: And you don't have
21 anymore witnesses, is that correct?

22 MR. ENGLISH: I have no more

1 witnesses.

2 JUDGE HILLSON: And there's no --
3 anyone else here who's waiting to testify? I
4 see none.

5 MR. ENGLISH: Your Honor, at the
6 beginning of this proceeding I made a
7 preliminary objection and during that
8 preliminary objection I referenced some legal
9 documents or some quotations and some other
10 things.

11 I do not propose to make them as
12 exhibits, on the other hand since they are
13 likely to be briefed, I have copies of those
14 that I carry 2,400 miles and I propose not
15 taking them all back 2,400 miles.

16 And so I was going to make them
17 available. I do not propose to make them
18 exhibits. I don't -- I mean, they're not --

19 JUDGE HILLSON: Okay. Well if
20 they're not going to be exhibits, if you want
21 to give a set to the Proponents and give a set
22 to the panel.

1 MR. ENGLISH: I just wanted to be
2 clear that it's like the reference to the GAO
3 report, the reference to CRS and a couple of
4 pieces of testimony.

5 JUDGE HILLSON: That's fine.

6 MR. ENGLISH: So I will do that as
7 soon as we're finished here.

8 JUDGE HILLSON: Okay. Any other
9 housekeeping?

10 MR. ENGLISH: Yes, two other
11 housekeeping. Related to the first, and I
12 made the preliminary objection recognizing
13 that you were not going to grant it and also
14 but in the spirit having even called the
15 department ahead of time and called counsel I
16 knew sort of as a signal as a professional
17 courtesy.

18 And so similarly as my thinking
19 has evolved during this proceeding because
20 briefing only happens for everybody once, I
21 ask -- some questions came up during the
22 proceeding and I did a little bit of history

1 about the Agriculture Marketing Agreements
2 Act.

3 And so just in fairness, again, I
4 would expect that on brief there will be
5 discussion about what the purpose of the AMA
6 is, who it's supposed to protect and who
7 marketing agreements are supposed to be
8 engaged for.

9 I'm merely signaling for counsel
10 so that, you know, I don't draft a brief and
11 we all file it simultaneously and counsel for
12 the Proponents doesn't have an opportunity for
13 that.

14 MR. WILKINSON: Robert Wilkinson
15 for Western Growers. I have no problem with
16 that; however, as long as counsel recognizes
17 and the court does that we have -- we're
18 entitled to citable Legislative history as
19 well.

20 MR. ENGLISH: That's the reason
21 why --

22 JUDGE HILLSON: He's just putting

1 you on notice as to what he's going to -- one
2 of the issues he's going to address in his
3 brief.

4 MR. ENGLISH: Mr. Wilkinson,
5 that's exactly why I'm saying. I'm saying
6 that -- but if I -- yes, I'm not saying you're
7 going to signal anything, I'm just saying
8 because I'm going to do it, I'm giving you the
9 professional courtesy of telling you in
10 advance.

11 MR. WILKINSON: Thank you.

12 JUDGE HILLSON: You have one more
13 housekeeping measure I believe.

14 MR. ENGLISH: Yes. I was retained
15 only for this week in Monterey, other people
16 from my coalition that I represent will be
17 present at the other proceedings. I'm merely
18 indicating people won't be surprised, wonder
19 what happened or indicate that somehow we have
20 a lack of interest. The interest remains.

21 JUDGE HILLSON: Thank you very
22 much.

1 MR. ENGLISH: But I will miss you
2 all greatly.

3 MR. WILKINSON: And we, you.

4 JUDGE HILLSON: Any housekeeping
5 on your side Mr. Resnick?

6 MR. RESNICK: Yes. Jason Resnick.
7 A very minor one. I just wanted to just state
8 for the record that when Diane Wetherington
9 came, was recalled and introduced, her
10 corrected statement 34a, that that would
11 supersede the original Exhibit 7.

12 JUDGE HILLSON: I've already
13 turned it in, so you guys -- the AMS can take
14 care of that. I had a funny feeling about
15 that.

16 Now my understanding is that all
17 the transcripts, all the exhibits are going to
18 be posted on the AMS website, is that a fair
19 statement? Someone could answer that from the
20 panel.

21 MS. SCHMAEDICK: Melissa
22 Schmaedick, USDA. Yes, Your Honor. In fact,

1 the exhibits from the previous two days have
2 already been posted as well as the video from
3 the first day. I'm not sure about the second
4 day yet. But everything will be posted and we
5 are in the process of continuing updating
6 that.

7 JUDGE HILLSON: And the first
8 portion -- will this week's transcript be
9 posted earlier than normal relatively speaking
10 or do you just have a regular contract
11 basically, if you know? If you don't know --

12 MS. SCHMAEDICK: It's regular
13 service.

14 JUDGE HILLSON: Okay. And this is
15 the only week of the hearing that's being
16 videotaped, is that correct? The rest of the
17 hearings are not going to be taped. Is that
18 a fair assessment?

19 MS. SCHMAEDICK: Yes, that's
20 correct.

21 JUDGE HILLSON: Okay. Well I
22 guess since there are no more witnesses, this

1 will conclude the Monterey portion of this
2 rule making hearing. We'll continue the
3 hearing until September 30th in Jacksonville,
4 Florida. And let's go off the record. Thank
5 you.

6 (Whereupon, the foregoing matter
7 went off the record at 5:18 p.m.)

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