

UNITED STATES OF AMERICA
DEPARTMENT OF AGRICULTURE
OFFICE OF ADMINISTRATIVE LAW JUDGES

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IN RE: : Docket Nos.:
 : :
 : A0-FV-09-0138
HEARING ON PROPOSED :
PROMULGATION OF A NATIONAL: AMS-FV-09-0029

MARKETING AGREEMENT FOR :
LEAFY GREEN VEGETABLES : FV09-970-1
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Yuma Civic Center
1440 Desert Hills Drive
Yuma Room
Yuma, Arizona

Wednesday, October 14, 2009

8:38 a.m.

BEFORE:

MARC R. HILLSON

Chief Administrative Law Judge

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

2 JUDGE HILLSON: Good morning.

3 It's October 15th, 2009 and we're in Yuma,
4 Arizona. This is the fifth location and the
5 eighth day of hearing in the Leafy Green
6 Vegetables Handled in the United States Rule-
7 making Hearing on a Proposed Marketing
8 Agreement, Docket No. A0-FV-09-0138, AMS-FV-
9 09-0029, FV09-970-1.

10 And my name is Marc Hillson. I'm
11 the Chief Administrative Law Judge of the
12 United States Department of Agriculture and
13 I'm here to conduct the hearing. I'm not the
14 person that's going to be deciding the matter,
15 but I'm just here to make sure that testimony
16 and exhibits come in in an orderly fashion and
17 that things don't get out of hand, if that
18 ever happens.

19 One thing I'd like to do, first of
20 all, is to remind people to put their cell
21 phones on vibrate or turn them off so that we
22 don't have any interruptions.

1 Just a few words about the way the
2 hearing is conducted. We're here for two
3 days. The people have agreed generally that
4 the Proponents are going to be put on their
5 witnesses today and that people who have
6 concerns or are opposed to the proposal will
7 put on their witnesses tomorrow.

8 However, anyone who wants to
9 testify can testify and if people are here
10 today who aren't part of the Proponents'
11 schedule who only can testify today, they need
12 to come talk to me. I'll take a morning break
13 in about an hour and a half or so and those
14 people can give me their names and I'll try to
15 find a way to work them in today.

16 Another thing is that all
17 testimony is under oath and anyone who
18 testifies is subject to examination by the
19 USDA panel, by any interested party who's in
20 this room, any interested person, as well as
21 the Proponents' panel.

22 And just also -- since this is a

1 continuation of a hearing, this is not -- and
2 not the start of a hearing, I've asked the
3 reporter and I'll just say it again on the
4 record to make sure that the pagination of the
5 transcript is -- picks up where the hearing in
6 Denver left off so that -- and I'll note also
7 for the record that the last exhibit I
8 received in Denver was Exhibit 76. The first
9 exhibit that I'll be receiving today is
10 Exhibit 77.

11 One other thing that the rules
12 require is that people who are here in a
13 representational capacity identify themselves
14 for the record, so I'm going to ask once again
15 for the USDA panel to identify themselves,
16 please.

17 MR. HILL: Yes. Brian Hill,
18 Office of the General Counsel, USDA.

19 MS. CARTER: Antoinette Carter,
20 Marketing Order Administration Branch,
21 Agricultural Marketing Service, USDA.

22 MS. SCHMAEDICK: Melissa

1 Schmaedick, USDA.

2 MR. SOUZA: Anthony Souza, USDA,
3 Fresh Products Branch.

4 MS. DASH: Suzanne Dash, USDA,
5 AMS.

6 JUDGE HILLSON: Proponents' side.

7 MR. RESNICK: Jason Resnick,
8 Western Growers and counsel for the Proponent
9 group.

10 MR. GICLAS: Hank Giclas, Western
11 Growers.

12 MR. HORSFALL: Scott Horsfall, the
13 California Leafy Greens Marketing Agreement.

14 JUDGE HILLSON: And if there's
15 anyone in the audience here in a
16 representational organizational capacity, if
17 they could come to the mike and introduce
18 themselves, please.

19 Okay. Seeing --

20 MR. CULLINGS: Casey Cullings here
21 on behalf of the Arizona Leafy Green Marketing
22 Agreement.

1 JUDGE HILLSON: Can you spell the
2 last name, sir.

3 MR. CULLINGS: C-u-l-l-i-n-g-s.

4 JUDGE HILLSON: Thank you. Okay.
5 Anyone else who wants to identify themselves
6 at this point?

7 If during the -- as the day goes
8 on, if people from -- particularly from the
9 audience have questions, they need to make
10 sure to identify themselves. Actually,
11 everyone who asks a question, even if -- I
12 know everyone's name by now in the panel,
13 obviously, but they still need to identify
14 themselves for the record before they ask a
15 question.

16 Does anyone have any other
17 business before we start hearing our
18 witnesses?

19 Okay. Well, then Mr. Resnick,
20 pursuant to agreements, I'll turn it over to
21 you. You may call your first witness.

22 MR. RESNICK: Thank you, Your

1 Honor. The Proponent group will call a panel
2 of three witnesses -- Alex Jack, Jack Vessey,
3 and Larry Cox.

4 JUDGE HILLSON: Are there any
5 written statements from these gentlemen, Mr.
6 Resnick?

7 MR. RESNICK: There are written
8 statements.

9 JUDGE HILLSON: Okay. I'm going
10 to mark the written statement of Alex Jack as
11 Exhibit 77 and I'm going to mark the written
12 statement of Jack Vessey as Exhibit 78.

13 (Exhibits 77 and 78 were
14 marked for identifi-
15 cation.)

16 JUDGE HILLSON: The way we've been
17 doing it with panels is I'll basically take
18 you one at a time first and have -- I'll swear
19 you in, have you read your written statement.
20 Or in the case of Mr. Cox, I guess you're
21 going to just make an oral statement.

22 MR. COX: That's correct.

1 JUDGE HILLSON: So I'll swear you
2 each in separately. You can make your
3 statement. And then after the three have made
4 your statements, I'll turn it over to the
5 panel for questioning and they can ask you
6 questions individually or as a group.

7 So, Mr. Jack, will you please
8 raise your right hand.

9 Whereupon,

10 ALEX JACK
11 having first been duly sworn, was called as a
12 witness and testified as follows; to wit:

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

16 MR. JACK: My name is Alex Jack,
17 A-l-e-x, J-a-c-k.

18 JUDGE HILLSON: And you have a
19 statement you want to read; is that correct,
20 sir?

21 MR. JACK: Yes, I do.

22 JUDGE HILLSON: Why don't you go

1 right ahead and read it.

2 TESTIMONY

3 MR. JACK: Good morning. My name
4 is Alex Jack and I represent Jack Brothers,
5 Inc. I am currently the third generation in
6 the Jack family to farm. I am the president
7 of our family farm, which is located in
8 Brawley, California.

9 Our family farm, Jack Brothers, is
10 100 percent behind the National Leafy Greens
11 Marketing Agreement. We treat all of our
12 vegetable crops with the same intensity and
13 cleanliness as our leafy greens. Our food
14 safety program costs have ranged from a high
15 the first year of \$40 per acre to an estimated
16 cost this year of \$32 per acre. As farmers,
17 you are constantly looking to trim costs and
18 increase production, and paying these extra
19 costs are not enjoyable but necessary. We
20 view the cost of food safety as "insurance."
21 Nobody likes to pay his or her insurance bill,
22 but you're sure glad to have it when disaster

1 strikes. Disaster in this instance is a
2 product recall on one of your own products,
3 which may have inadvertently become
4 contaminated. A modern-day product recall can
5 easily surpass \$1 million.

6 What has happened to our industry
7 on several occasions is a grower or shipper of
8 a particular commodity may have a product
9 recall and the actions from one grower send
10 shock waves to all growers of that particular
11 commodity. If consumers hear of contamination
12 in product "A" from shipper "B," all they hear
13 is, Don't eat product "A," regardless of what
14 state or even what country it comes from.

15 Each growing region has their own
16 ideas -- I'm sorry -- each growing area has
17 their own areas of concern. It could be their
18 water source, wild animals, or varmints. No
19 matter the area of concern, each grower must
20 have a plan to substantially reduce the threat
21 of product contamination. We not only owe it
22 to our families and ourselves but to all

1 consumers of America's vital food chain.

2 Thank you.

3 JUDGE HILLSON: Okay. I'm going
4 to receive Exhibit 77 into evidence.

5 (Exhibit 77 was
6 received.)

7 JUDGE HILLSON: And, Mr. Vessey,
8 please raise your right hand.

9 Whereupon,

10 JACK VESSEY

11 having first been duly sworn, was called as a
12 witness and testified as follows; to wit:

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

15 MR. VESSEY: Jack Vessey,
16 J-a-c-k, V-e-s-s-e-y.

17 JUDGE HILLSON: Okay. You may
18 read your statement.

19 TESTIMONY

20 MR. VESSEY: Thank you, sir. Good
21 morning. My name is Jack Vessey. I am the
22 fourth generation and vice president of Vessey

1 & Company, Inc., a large leafy green grower
2 and a small leafy green handler. We are
3 located in California's Imperial Valley. We
4 currently grow 6,000 acres of conventionally
5 grown leafy greens, consisting of the
6 following: iceberg lettuce, romaine lettuce,
7 leaf lettuce, spinach, spring mix, and
8 cabbage. And we also grow 500 acres of
9 organically grown leafy greens.

10 Our organically grown product is
11 audited the same as our conventionally grown
12 product. We find that there's not a
13 difference in these audits and it applies to
14 both with ease.

15 We've been members of the
16 California Leafy Greens Marketing Agreement
17 since its inception. I have served on the
18 board since that time as well.

19 My testimony is in support of the
20 National Leafy Greens Marketing Agreement.

21 Prior to September of 2006, I
22 believe that we had a sufficient food safety

1 program. But after the events of 2006, I
2 became concerned. When the leafy greens
3 industry of California decided that something
4 had to be done to raise the bar on food
5 safety, I was in full support of the effort,
6 hoping that this may be the tool that would
7 make me feel more confident in our in-house
8 program, and it has. Having regular and
9 random audits performed by the California
10 Department of Food and Agriculture adds
11 another layer of safety on our farm.

12 Even though I believe that we are
13 doing an excellent job that includes the
14 California LGMA and third party audits, some
15 buyers are still concerned. Due to this
16 concern, many have mandated their suppliers to
17 audits that they have invented. This in turn
18 has made it very difficult and time-consuming
19 for my staff. It seems as we are doing audits
20 weekly, if not daily at times. With the
21 possible advent of a National Leafy Greens
22 Marketing Agreement, it is my hope that some

1 of these buyers with different audits may
2 accept a national program's audit as
3 sufficient.

4 I have learned that there are some
5 who are concerned that a national program will
6 have much difficulty in accommodating the
7 differences in different growing areas. I
8 have seen firsthand how the California LGMA
9 has made differences in growing areas work.
10 The Imperial Valley and Salinas Valley are
11 about as different as it can get. One is a
12 desert valley and the other a coastal valley,
13 yet it seems that the current California LGMA
14 audit checklist is working in both areas.

15 I can understand that there may be
16 individuals who may be concerned with cost, as
17 I was when the California LGMA was in its
18 infancy. I have found my investment to be
19 well worth it. And if for some reason the
20 California LGMA went away tomorrow, I would
21 still be using the same audit checklist. The
22 audits would just be done by a third party or

1 in-house. But I do believe that having USDA-
2 trained inspectors performing the audits gives
3 the audit more credibility to the buyers.

4 Also in regards to cost, I have reviewed the
5 business case study financials. I believe
6 that my costs are consistent with what was
7 presented by that study.

8 I believe with the advent of a
9 national program, buyers will be more open to
10 a standardized audit, will be less likely to
11 be detrimentally impacted by the safety
12 performance of another grower and consumers
13 will have more confidence in buying leafy
14 greens.

15 I would like to state for the
16 record that Vessey & Company, Inc. supports
17 the National Leafy Green Marketing Agreement.

18 Thank you.

19 JUDGE HILLSON: Okay, Mr. Vessey.
20 I'm going to receive your written statement as
21 Exhibit 78.

22 //

1 (Exhibit 78 was
2 received.)

3 JUDGE HILLSON: And, Mr. Cox, I'll
4 swear you in.
5 Whereupon,

6 LARRY COX
7 having first been duly sworn, was called as a
8 witness and testified as follows; to wit:

9 JUDGE HILLSON: Could you please
10 state your name and spell it for the record.

11 MR. COX: Larry Cox,
12 L-a-r-r-y, C-o-x.

13 JUDGE HILLSON: And you just want
14 to make a statement?

15 MR. COX: Right.

16 JUDGE HILLSON: Please proceed.

17 TESTIMONY

18 MR. COX: My name is Larry Cox.
19 I'm a second generation farmer in Imperial
20 Valley. My family used to farm up in the
21 Tustin area and in the Long Beach -- Lakewood
22 area near Long Beach and I asked my dad when

1 he left from Long Beach if he could look
2 farther north in Ventura where the weather was
3 a little cooler and the summers can be pretty
4 hot in Imperial Valley. He said that the
5 ground was too expensive up there, so here we
6 are in Imperial Valley.

7 I've been in the lettuce business
8 since 1982 and have had some partners in
9 Salinas and one partner in Salinas in 1996
10 said we needed to start a HACCP program. And
11 I said, What is that? And, you know, the
12 Hazard Analysis Critical Control Program. And
13 I said, We don't -- we don't need no stinkin'
14 HACCP program. And I -- you know, I said,
15 Look, we haven't had any problems. We don't
16 have any problems. Why would I want -- and he
17 said it was gonna cost 60- to \$90,000 to
18 implement a HACCP program. And I'm like, Are
19 you kidding me? And I kicked and screamed and
20 fought and said -- and they said, Look, you
21 know, our customers are demanding this and we
22 need to do this. And, you know, they -- my

1 partners won out and so we implemented a HACCP
2 program at our operation in Imperial Valley
3 and Salinas and also we farm in Mexico.

4 And after about six months, I
5 started reviewing some of the data from the
6 HACCP program and I'm look, Well, how come our
7 chlorine levels spiked to this and how come
8 this is over here? And I -- gathering all the
9 data and reviewing the data, I started to
10 realize how important that HACCP program was
11 and it -- you know, it allowed us to manage
12 things better.

13 And I read a report from some guys
14 in Oregon that were successful and they said
15 that they did very fine accounting, and they
16 said that which is measured can be managed.
17 And I have become a strong proponent for data-
18 gathering and management and analysis and it's
19 difficult -- I'm also on the Leafy Greens
20 board with Jack, and to come back to Imperial
21 Valley, where I don't believe there has been
22 a verified E. coli positive contamination

1 issue for the last 20-some years. I sit on
2 the Vegetable Growers board, and to sit there
3 with my fellow farmers on the Vegetable
4 Growers board and they said, Why should we do
5 this? Why do we have to do this? This is --
6 you know, this doesn't make sense. And they
7 had the same -- a lot of them had the same
8 mindset a few years ago that I had in 1996 and
9 I -- I told one of my fellow workers, I said,
10 Look, I said, if your wife is angry at you for
11 a non-valid reason, do you still have a
12 problem? And the guy said, Yeah, I still have
13 a problem. I said, Yeah, I said, our
14 customers after the 2006 E. coli outbreak in
15 spinach, our customers lost confidence in our
16 ability to provide a clean, safe food supply.
17 And I said, We've got to regain that
18 confidence back and also anything that we can
19 reasonably do to reduce or minimize food
20 illnesses, I said, is, you know, a valid and
21 worthwhile cause.

22 There's no way, I believe, that we

1 are going to be able to guarantee a 100
2 percent safe food supply. There will be food-
3 borne illnesses either from the field issues
4 or handling issues, but we need to do what we
5 can to reinstill confidence in the food supply
6 and, you know, until we get a hundred percent
7 safe kill step, we've got to do what we can.
8 And I would -- my goal is that we get to the
9 point of like the airline industry where
10 people know the planes are going to crash but
11 they have a reasonable confidence if they get
12 on a plane that it can get from Point A to
13 Point B with a minimum of danger. And it's my
14 goal and I think it's the industry's goal to
15 get to that point with our food supply.

16 And so I do support the National
17 Agreement. I'm a libertarian by nature. I
18 don't like people telling me what to do. I
19 don't like the Government getting involved in
20 my business. I don't like paying taxes -- I'm
21 going to get on a soapbox here. Help me out.
22 And to be honest, I've lost confidence in the

1 ability of our state legislature in California
2 and our national Government to solve any
3 problems of substance. And I don't like
4 paying taxes, you know, for money that, you
5 know -- that I don't believe they're good
6 stewards of.

7 But that being said, as an
8 industry and as a society, I think we need to
9 do what we can and if -- whether it's, you
10 know, the E. coli outbreak in the spinach, you
11 know, whether -- people didn't care that it
12 came from a certain ranch. They just said,
13 Hey, we're not going to eat spinach and we are
14 all painted with the same brush. And so, you
15 know, what my neighbor does affects me and
16 what I do affects my neighbor, so I would hope
17 that with a national program, that we can make
18 it to where it's not too onerous on small
19 farms and that we can make it to where it's
20 effective and verifiable.

21 I talked to my partners in
22 Salinas. My passion is growing the crop. I

1 spend as much time as I can out in the fields
2 and as little time as I have to in my office.
3 We've got -- our sales office is in Salinas
4 and I called my partner yesterday and he said
5 he -- he says that he thinks between the
6 testing on the product and the HACCP program
7 that we have, from the time it's -- prior to
8 harvest, it's close to 16 cents a box on
9 average for our costs on food safety, and I
10 figure that our on-farm cost is probably close
11 -- between 35 and \$50 an acre, depending on
12 the location and the acreage of the field
13 because, you know, we have fixed costs on some
14 of those things.

15 So I don't know whether or not
16 we're going to have a change in the national
17 program, how it would change things. It
18 depends on how it's -- you know, if it's
19 comparable to the California program or the
20 Arizona program, I don't see there would be a
21 huge change in things, but I can't say that
22 until I see the final draft of the national

1 program.

2 So that pretty much covers what I
3 had to say.

4 JUDGE HILLSON: Thank you. Mr.
5 Resnick, do you have any further direct before
6 I turn it over to the panel?

7 MR. RESNICK: Not at this time,
8 Your Honor.

9 JUDGE HILLSON: Okay. Does the
10 USDA panel have questions of these witnesses?

11 Ms. Schmaedick?

12 MS. SCHMAEDICK: Good morning.

13 MR. JACK: Good morning.

14 MS. SCHMAEDICK: Can everybody
15 hear me or should I pull this closer?

16 MR. JACK: Yes.

17 MS. SCHMAEDICK: Is that better?

18 Okay. Is that better?

19 ALL: Yes.

20 MS. SCHMAEDICK: Okay. So this is
21 Melissa Schmaedick with USDA. Good morning
22 and thank you, all three of you, for your

1 testimony. I guess I'm just going to -- some
2 of my questions will be directed to
3 individuals and some of them will be just sort
4 of for the three of you in general, so feel
5 free to add something if you feel compelled to
6 do so.

7 I just wanted to clarify, Mr. Alex
8 Jack, you are a grower; is that correct?

9 MR. JACK: Yes. I am just a
10 grower, not a shipper.

11 MS. SCHMAEDICK: Okay. So you're
12 not involved in any handling functions?

13 MR. JACK: No, but I'm a part
14 owner in the crops. And so everything that's
15 -- none of my ranch -- if there's a recall,
16 it's going to affect me. So even though I'm
17 not the manager of the harvest company or the
18 sales, I, you know, am very concerned in what
19 goes on there.

20 MS. SCHMAEDICK: And currently do
21 you deliver your product to more than one
22 shipper, or do you just work primarily with

1 one entity?

2 MR. JACK: No. I grow for four
3 different shippers.

4 MS. SCHMAEDICK: And the -- do you
5 have requirements from those different
6 shippers in terms of the type of certification
7 that's required or systems you need to have in
8 place?

9 MR. JACK: Yes. Everyone is
10 pretty much on the same page. I present my
11 program to all four of them and I tell them
12 what we're doing on our ranch and they're all
13 in agreement. They may have little comments
14 here or there about mainly just paper trails,
15 but our program is pretty universal. We just
16 -- we run a really clean ranch and so we
17 really haven't had any problems having four
18 different shippers.

19 MS. SCHMAEDICK: And in your
20 testimony, you did not state whether or not
21 you were a large or small grower business.
22 Are you familiar with --

1 MR. JACK: Yes. Based on your
2 guidelines or the guidelines, I'm a large
3 grower.

4 MS. SCHMAEDICK: Okay. And when
5 did you put in place your food safety
6 practices, your good ag. practices?

7 MR. JACK: Well, on paper it
8 started about three years ago. But, in
9 reality, it started just when I farmed under
10 my dad basically. It was just -- he was very
11 clean and, you know, we made progress in some
12 areas like something simple, like they used to
13 stop and eat lunch in the field where now they
14 eat outside of the field, so there's been, you
15 know, some small changes. But as far as just
16 having a clean ranch and things like that, it
17 started, you know, 25 years ago.

18 MS. SCHMAEDICK: So based on your
19 experience, are good agricultural practices
20 something that you have naturally been doing
21 as part of your -- as part of your business
22 operation?

1 MR. JACK: Yeah, and I think part
2 of that, I was born to a mother that was
3 completely paralyzed by polio and we just ate
4 very healthy at our home. And so maybe I was
5 partly conscious from that. I'm sure it had
6 a big part to do with it 'cause my dad would
7 bring home food a lot and -- just because of
8 my mother's health and being very frail, we
9 just -- we've always eaten very healthy and I
10 think that's always been a mindset kind of in
11 our food preparation, in the growing of our
12 food and the way we live our lives.

13 MS. SCHMAEDICK: So as a -- as
14 your buyers started developing standards and
15 placing certain requirements on you and your
16 product, that -- the transition to meet those
17 requirements, did it involve a huge change in
18 what you were doing, or was it -- can you
19 explain?

20 MR. JACK: No, not that much.
21 Like one example would be, you know, the
22 moving of livestock. If you happen to live

1 around a farmhouse, some things I've been
2 quite upset about. We have a couple ranch
3 houses that some of our workers live in and
4 they have dogs and the dogs would roam free
5 and we've either had to put up fences or put
6 the dogs on leashes, which I'm not a big fan
7 of but it's just something we have to do.

8 So there's been some things, but a
9 lot of it's been just communication with our
10 neighbors. We may have a neighbor that's
11 pasturing livestock on an alfalfa field and so
12 we'll go to him and say, Hey, would you mind,
13 you know, putting your fence a little further
14 into your property line because, you know, we
15 need so many feet, you know, of clear space
16 and food safety and our neighbors have been --
17 even though they're not in the produce
18 industry, are very understanding and have been
19 working with us. So there's been some
20 changes, but it's -- most of it has been just
21 communication and paper trail that's been the
22 big change.

1 MS. SCHMAEDICK: And how long have
2 you been aware of the drafting of the proposed
3 national program?

4 MR. JACK: Since its inception,
5 but I'm guessing -- what? -- it's been a year
6 and a half or so. You know, they started the
7 California Leafy Green and then the national
8 part I think, you know, there was talk of it
9 a year and a half, two years ago.

10 MS. SCHMAEDICK: So you've been
11 aware of its development then?

12 MR. JACK: Yes.

13 MS. SCHMAEDICK: Have you had an
14 opportunity to get information on the proposal
15 as it was developing over that time?

16 MR. JACK: I'm on the board of
17 directors in Imperial Valley Vegetable
18 Growers. I'm actually the president right
19 now. But Larry and Jack are on that board and
20 so every meeting we have them give us an
21 update of what's going on and what
22 developments and then we'll give our feedback

1 to the two of them and discuss it and some
2 ideas they take back to their board, Leafy
3 Green board, but Larry and Jack have done a
4 very good job of keeping us informed of the
5 discussions and the direction that they want
6 to go.

7 MS. SCHMAEDICK: So are you
8 familiar with the proposed zones under the
9 program?

10 MR. JACK: The zones as far as
11 regions?

12 MS. SCHMAEDICK: Under the
13 proposed program, the United States is divided
14 into five different zones.

15 MR. JACK: Right, the different
16 regions, yes.

17 MS. SCHMAEDICK: What is your
18 opinion on those zones in terms of the
19 administrative function that they would play
20 in providing a basis for representation on the
21 administrative committee?

22 MR. JACK: Based on what I know, I

1 would say it's not enough zones. California
2 could probably use five zones all of its own.
3 Every area is so different. We get our water
4 from the Colorado River, which obviously
5 starts in Colorado. It travels close to 7,000
6 miles. There's many farming areas that farm.
7 And when they're done with their water, they
8 put it back in Colorado River. And so we have
9 that issue in Imperial Valley. Yuma does also
10 and Salinas where it's well water and they
11 have saltwater intrusion and different things
12 like that. So I think California needs five
13 all by itself.

14 MS. SCHMAEDICK: So in your --
15 based on your statement, are you -- is it your
16 impression that zones and region mean the same
17 thing?

18 MR. JACK: Yeah.

19 MS. SCHMAEDICK: Okay. Okay.

20 Thank you, --

21 MR. JACK: Thank you.

22 MS. SCHMAEDICK: -- Mr. Jack and

1 I'd like to ask some questions of Mr. Jack
2 Vessey.

3 MR. VESSEY: Yes, ma'am.

4 MS. SCHMAEDICK: So, Mr. Vessey,
5 you indicated that you're a large grower and
6 a small handler; is that correct?

7 MR. VESSEY: Correct.

8 MS. SCHMAEDICK: So in terms of
9 your handling business or your handling
10 operation, do you only handle product that you
11 grow?

12 MR. VESSEY: Correct.

13 MS. SCHMAEDICK: And in terms of a
14 grower, does your product go to other handlers
15 then?

16 MR. VESSEY: Currently, my product
17 goes to approximately 18 leafy green
18 signatories at this time and approximately 20
19 to 25, maybe -- excuse me -- eight more
20 receivers, first handlers, if you will, after
21 those that are signatories.

22 MS. SCHMAEDICK: Uh-huh. Can you

1 explain to me what the term "first handler"
2 means that you just used?

3 MR. VESSEY: Well, the term "first
4 handler," to me, I mean, even in our own
5 industry sometimes we talk about what is
6 exactly the first handler. And sometimes in
7 my mind, it's the person whose name is on the
8 box, if you will, I might consider the first
9 handler, whoever label it's under before it's
10 shipped.

11 MS. SCHMAEDICK: Okay. You also
12 mentioned that you produce a product called
13 spring mix.

14 MR. VESSEY: Correct.

15 MS. SCHMAEDICK: Can you explain
16 to me what spring mix means for you?

17 MR. VESSEY: Well, you might have
18 call it baby lettuces, mustards, chards, be
19 different types of lettuces and those mustards
20 and chards mixed in a spring mix salad, if you
21 will.

22 MS. SCHMAEDICK: And are all of

1 the -- the items that are included in your
2 definition of spring mix, are they captured
3 under the definition of leafy greens in the
4 proposal?

5 MR. VESSEY: I believe the
6 lettuces are and I'm not sure about the other
7 ones, but I know that the way we audit
8 everything and those lettuces being in that
9 field, everything's audited to LGMA metrics.

10 MS. SCHMAEDICK: Okay. You also
11 mentioned that you grow some organic product.

12 MR. VESSEY: Correct.

13 MS. SCHMAEDICK: And I'm assuming
14 that's certified organic under the National
15 Organic Program?

16 MR. VESSEY: Correct.

17 MS. SCHMAEDICK: Is there any
18 difference in the way you approach good
19 agricultural practices in your organic fields
20 versus your conventional fields?

21 MR. VESSEY: No. They are treated
22 the same.

1 MS. SCHMAEDICK: Are there any
2 requirements that you are asked to follow that
3 would contradict what you are asked to do
4 under the National Organic Program?

5 MR. VESSEY: To my knowledge, no.

6 MS. SCHMAEDICK: In your
7 statement, you referred to a business case
8 study. It's on page two of your statement,
9 the second paragraph. It's the second-to-the-
10 last sentence. Can you tell me which business
11 case study you're referring to?

12 MR. VESSEY: There was a study
13 done I believe by Intertox and I know there
14 was a study done that I got asked questions on
15 and they wanted to see what the cost would be,
16 and I reviewed that and it was very similar to
17 the costs that I currently have on my ranch
18 right now with regards to food safety and what
19 a national program would cost versus what I'm
20 doing now is very similar.

21 MS. SCHMAEDICK: So you've had a
22 chance to review that and you find that the

1 costs are in line with what you've
2 experienced?

3 MR. VESSEY: Correct.

4 MS. SCHMAEDICK: And you also
5 state that you found your investment to be
6 well worth it. Can you tell me about what
7 your investment was?

8 MR. VESSEY: The investment on my
9 ranch is full-time food safety manager, water
10 testing, the documentation, the time spent --
11 time spent doing audits. As Alex mentioned
12 and Larry mentioned, I mean, it's well worth
13 the investment. We want to provide a safe
14 food source. And as I mentioned in my
15 testimony, prior to 2006 I thought we were
16 doing a pretty good job and I believe still to
17 this day we were, but to have the LGMA
18 inspectors out there and we were -- we were
19 previous still having third party audits, but
20 to have the Government audits come in and look
21 at what we're doing and use their audit
22 checklist, I guess you can say I sleep better

1 at night.

2 MS. SCHMAEDICK: That leads me
3 into my next question. You state that having
4 USDA-trained inspectors performing audits
5 gives the audit more credibility to buyers.
6 Can you explain to me your -- that statement
7 and why there might be a difference between
8 USDA-trained and others?

9 MR. VESSEY: Sure. Yeah. I mean,
10 if you look at any type of survey or, you
11 know, who's the most trusted person or -- you
12 know, it always comes to the farmer. Who's
13 the most mistrusted -- I don't want to hurt
14 anybody's whatever they're doing -- lawyers --
15 you know, there was a study that I read and,
16 you know, I'm not exactly sure what it was
17 but, I mean, many studies they always mention,
18 you know, whether it be a third party or a
19 Government audit, who would they -- which one
20 would they trust more and it always comes back
21 a higher percentage they would trust a
22 Government audit versus a private audit.

1 MS. SCHMAEDICK: And in your
2 experience in working with USDA-trained
3 auditors, have you found the audits to be
4 consistent?

5 MR. VESSEY: Yes, especially now
6 with the audit checklist that we currently go
7 through. I mean, there's no way not to be
8 consistent. I mean, they're yes/no questions
9 basically. They basically go through these
10 when they're out there in the office or in the
11 branch going through these questions. So not
12 really any discrepancies no matter what
13 inspector you get.

14 MS. SCHMAEDICK: Uh-huh. And how
15 long have you been aware of the draft proposal
16 for a national program?

17 MR. VESSEY: I'm not -- you know,
18 I'm not exactly sure when the exact draft
19 started, but I know there's been conversation
20 -- even as the California LGMA was getting put
21 together, I know there was talk of a national
22 program and getting the draft together and

1 going through this process -- I was going to
2 say three years ago the process and the talk
3 was there and then I know the draft started at
4 least a year ago. People started working on
5 the draft together.

6 MS. SCHMAEDICK: Uh-huh. Would
7 you say that the information shared about the
8 draft as it were -- as it was being developed,
9 was it available to you?

10 MR. VESSEY: Yeah. I had it --
11 well, through my -- being on the board of
12 LGMA, I know that we looked through the draft
13 and, you know, people discussed it and, you
14 know, I think it's very similar to LGMA, to be
15 honest, and, you know, now you can go to AMS
16 website, USDA website, pull it up and review
17 it.

18 MS. SCHMAEDICK: And in your
19 opinion, what is the benefit of having a
20 national program?

21 MR. VESSEY: One of -- as I
22 mentioned in my written testimony, you know,

1 we are audited it seems weekly if not daily at
2 times. And I go back to the buyer-mandated
3 programs. I've been saying it for three years
4 now. It takes us a lot of time and effort to
5 go through a series of questions that are
6 similar, but then we get into what we call
7 some of these other different metrics that are
8 asking for different things than the LGMA. My
9 hope, has been for the last three years, that
10 we could get some type of standardized audit.
11 And I'd hope with the national program that
12 some of these buyer-mandated programs might be
13 able to say, you know, instead of coming to my
14 ranch and auditing basically the same stuff
15 that was audited a week before, they might
16 say, Do you have your current NLGMA
17 certificate? Yes, I was audited last week.
18 Here it is. I would hope that would suffice
19 in the future and then that's one of the
20 reasons I'm very excited and I hope that the
21 national program can move forward.

22 MS. SCHMAEDICK: Would that impact

1 any costs that you experience with audits?

2 MR. VESSEY: Yeah. I believe that
3 there's an opportunity for me to have -- cost
4 per acre would be less on my food safety
5 program possibly 'cause I wouldn't have so
6 much audits. When I say daily, I mean, we've
7 got one person that walks in at 8:00 in the
8 morning and says, I want to do an audit. Do
9 an audit. The next day, another person walks
10 in to basically do the same exact thing. And
11 my -- what I would hope is that with the
12 national program, as I said, with these
13 inspectors coming and people buying into the
14 program, if you will, that a National Leafy
15 Green Marketing Association -- or, excuse
16 me -- Agreement certificate would suffice for
17 that audit.

18 MS. SCHMAEDICK: One of the
19 comments that we have had over the course of
20 past hearing locations is that the -- the
21 metrics that are used for California might not
22 be applicable to different growing areas

1 within the country. What is your opinion on
2 that?

3 MR. VESSEY: Well, again, as I
4 stated in my written testimony, I mean, if you
5 look at the Imperial Valley versus Salinas,
6 California, they sure are different yet that
7 audit seems to work.

8 And also in the -- in the 970
9 here, it does mention how -- I mean, this is
10 going to -- when you get together with these
11 committees, they're going to try to make it
12 work for each region. I mean, nothing's set
13 in stone at this point in regards to metrics.
14 Will the California work everywhere
15 specifically? Maybe not, but I think there's
16 -- it's allowed here that there might be some
17 different areas that we can change some of the
18 metrics to make them work for that area.

19 MS. SCHMAEDICK: Based on your
20 understanding of the proposal, is it the
21 intent to allow for regional differences and
22 consideration of how metrics might be adapted

1 for those differences?

2 MR. VESSEY: If I recall in the
3 reading of the 970, I believe there was
4 something in there in regards to regional
5 differences or I read it somewhere, spoke to
6 somebody about regional differences being
7 accounted for.

8 But also, again, I want to point
9 out that, I mean, the California Leafy Green
10 Marketing Agreement, Salinas and Imperial
11 Valley are totally different, but you go
12 through this audit checklist and it works.

13 MS. SCHMAEDICK: You mentioned
14 that you have numerous audits and some of them
15 are we'll say buyer-specific audits.

16 MR. VESSEY: Uh-huh.

17 MS. SCHMAEDICK: Do you believe
18 that some of those buyer-specific audits and
19 what they're requiring are based on
20 scientifically-founded reasons?

21 MR. VESSEY: No. My opinion, some
22 -- I mean, if the leafy greens, for instance,

1 400 feet -- I think some people say, Well,
2 that's 400. We're going to be a mile 'cause
3 that's better. I don't think it's scientific.
4 I think, in my opinion that, you know, some of
5 them, you know -- these audits, maybe a little
6 job justification at times.

7 MS. SCHMAEDICK: And in your
8 opinion would the proposed national program be
9 a vehicle that would include scientific -- a
10 review of scientific justification for the
11 metrics?

12 MR. VESSEY: Yes, just as the
13 LGMA. I mean, we got it down to risk-based
14 and scientific-based as best we can and
15 there's currently studies on certain areas,
16 depending on, you know, the regions of what
17 needs to be looked at in regards to
18 scientific-based metrics.

19 MS. SCHMAEDICK: Okay. Thank you.

20 MR. VESSEY: Thank you.

21 MS. SCHMAEDICK: That's all my
22 questions for you. Mr. Cox, good morning.

1 MR. COX: Yes.

2 MS. SCHMAEDICK: You mentioned
3 that in 1996, you started a HACCP program.

4 MR. COX: Yes.

5 MS. SCHMAEDICK: And if I remember
6 your statement correctly, you found that that
7 program has been beneficial? Is that correct?

8 MR. COX: Yes.

9 MS. SCHMAEDICK: And did you say
10 that it costs 60- to \$90,000 to implement?

11 MR. COX: That's correct.

12 MS. SCHMAEDICK: What was included
13 in those costs or in that cost range?

14 MR. COX: We had an outside
15 service come in and do an audit of our
16 operations both in Imperial Valley and Mexico
17 and they gave a written assessment of what we
18 -- how we needed to, you know, monitor things
19 and then we ended up having to add staff and,
20 you know, testing mechanisms to monitor those,
21 you know -- the criteria that they set up for
22 the HACCP program.

1 MS. SCHMAEDICK: And I'm sorry. I
2 don't recall it. Are you a large grower or a
3 small grower by SBA definitions?

4 MR. COX: Well, if I remember
5 right, they defined it by gross revenues and
6 it depends on the price of our commodities.
7 Things are bad in that we're all small growers
8 but, no, I usually qualify as a large grower.

9 MS. SCHMAEDICK: Okay. And it
10 also is defined by your receipts for leafy
11 greens.

12 MR. COX: Yes.

13 MS. SCHMAEDICK: So if you have a
14 diversified farm, we would ask you to look
15 just at your leafy greens portion.

16 MR. COX: Yes, still qualify as a
17 large grower for leafy greens.

18 MS. SCHMAEDICK: Okay. So in
19 terms of actual costs of implementing the
20 HACCP program, setting aside the study, the
21 consulting that you had done, what were the
22 expenses involved with that?

1 MR. COX: Setting aside the costs
2 of just the -- state the question again.

3 MS. SCHMAEDICK: You mentioned
4 that you had someone come in and do an
5 assessment.

6 MR. COX: Yes.

7 MS. SCHMAEDICK: And I'm assuming
8 that person was in a consulting role?

9 MR. COX: Yes.

10 MS. SCHMAEDICK: So if you took
11 out the cost of the consultant and you just
12 looked at the cost of changes that you made in
13 your operations, do you have an idea what
14 those costs were?

15 MR. COX: You know, it would just
16 be kind of a guess. I would -- I would say
17 that it would probably -- and then you have
18 ongoing costs. So if you're just talking
19 about -- you know, you're talking about apart
20 from the 60- to \$90,000 or what component of
21 the 60- or \$90,000 was apart from the --

22 MS. SCHMAEDICK: What component of

1 the 60- to 90- was your start-up costs for
2 your HACCP program?

3 MR. COX: Pretty much just the
4 start-up costs were -- I would imagine about
5 \$60,000.

6 MS. SCHMAEDICK: Okay. You
7 mentioned a report from Oregon. Can you
8 identify that report?

9 MR. COX: Actually, it wasn't
10 really a report. It was just an article in a
11 farm magazine. There were a couple brothers
12 who had a diversified operation and they took
13 on trucking and they took on -- and they had
14 been successful in areas where others hadn't
15 and it just -- they were talking about, you
16 know, they measured the fuel consumption for
17 each truck and they really measured every
18 aspect of their business to where they
19 could -- you know, they knew what was going on
20 and what their actual costs were.

21 And that's where I read the
22 phrase, you know, "That which is measured can

1 be managed."

2 MS. SCHMAEDICK: And do you have a
3 copy of that report by any chance?

4 MR. COX: No.

5 MS. SCHMAEDICK: No? Okay. I
6 want to go back to the discussion of the HACCP
7 program. In the proposed program, there are
8 a couple of terms that are used. "Control
9 point" is one of them and "critical limit" is
10 the other. Can you explain to me what your
11 understanding of those two terms are?

12 MR. COX: No.

13 MS. SCHMAEDICK: Okay.

14 MR. COX: No, not without looking
15 at, you know, what the definition is, you
16 know, of control point --

17 MS. SCHMAEDICK: Okay.

18 MR. COX: -- or was it control
19 limit?

20 MS. SCHMAEDICK: So do you have a
21 copy of the proposed language in front of you?

22 MR. COX: I do.

1 MS. SCHMAEDICK: Okay. If you
2 look at --

3 MR. COX: You're looking at
4 critical limit on the page of definitions?

5 MS. SCHMAEDICK: Critical limit,
6 yes, 970.4.

7 MR. COX: Yes.

8 MS. SCHMAEDICK: And then process
9 control, 970.22.

10 MR. COX: Okay. If you want to
11 look at 970.4, the critical limit -- okay. Do
12 you want some examples? I mean, like an
13 example would be in our irrigation water,
14 we've set some, you know, some parameters
15 there for coliform numbers and that's, you
16 know -- so you've got some -- if it exceeds --
17 you know, if you test it and you exceed a
18 certain number, then you have a certain
19 protocol that you have to do to either retest
20 or take, you know, mitigation steps to -- to
21 deal with that, you know, that number.

22 MS. SCHMAEDICK: And 970.22,

1 process control, can you explain that to me
2 and how that works on your farm?

3 MR. COX: Okay. I think that
4 would be like -- in our harvesting operation,
5 you know, we say, Okay, you will not have any
6 -- you know, there will be no food or, you
7 know, no consuming the food inside the
8 harvesting area. So, you know, at lunch
9 break, everybody moves outside the field to
10 consume lunch. You know, and if you see
11 somebody sitting on a bed that's been
12 harvested, even though it's been harvested,
13 you're not going to go back in there and say,
14 Hey, look, you know, you need to be outside
15 the field area when you're consuming food.
16 And then, you know, everybody has to, you
17 know, adhere to that.

18 MS. SCHMAEDICK: In your
19 statement, you talked about consumer
20 confidence.

21 MR. COX: Uh-huh.

22 MS. SCHMAEDICK: Would you say --

1 in your opinion, is there a relationship
2 between the quality of a product and the
3 absence of contamination?

4 MR. COX: Yes. I mean, I think
5 part of quality is the absence of
6 contamination. I don't know if you're talking
7 about physical appearance or just the total
8 definition of quality.

9 MS. SCHMAEDICK: Is -- under the
10 proposed program, there's a proposal for
11 traceability. What function would
12 traceability play in the event of a
13 contamination and trying to maintain consumer
14 confidence?

15 MR. COX: I think it's absolutely
16 critical. We've got some new demands being
17 placed on us from some of our retail customers
18 that want to have every single package
19 traceable and we're -- you know, we're now
20 looking at so how do we -- how do we -- you
21 know, for every carton of lettuce that we
22 produce -- right now, we put -- every single

1 carton has got a tag on it that tells the
2 block that it's produced in, the commodity,
3 what -- the block it's produced in, the
4 grower, and the Julian date, so we're able to
5 trace every single box but not every single
6 piece of fruit or vegetable is traceable. And
7 it really helps.

8 And we do, you know, fire drills
9 and simulated recalls periodically. We'll
10 have somebody -- you know, we'll actually have
11 some of our customers on the East Coast call
12 our office and say, Hey, I've got a problem
13 with a certain deal. I need to get the
14 information. And we'll have our office or our
15 ranch get all the information together and
16 then say, Okay, this was -- you know, we were
17 only doing a drill here but checking to see,
18 you know, how our system worked and whether it
19 worked or not.

20 But -- and it's going to be
21 extremely onerous and I don't know how we're
22 going to -- how we're going to get to the

1 point of being able to, you know, you know,
2 have each individual bag of -- you know, let's
3 say you're going to wrap lettuce and to sit
4 there and say, Yeah, I've got to have a
5 different label or a different wrapper for
6 each shipped block of lettuce is gonna be, you
7 know, we'll have to come up with some sort of
8 portable printing mechanism and that's going
9 to be -- I have no idea how we're going to get
10 there. But the closer you can get to it,
11 within reason -- I mean, you don't want to get
12 to the point where it's costing you \$15 per
13 head to be able to, you know, okay, yeah, we
14 got it traceable but nobody can afford to buy
15 it. So I think the system we have in place
16 now is good and what we can do within reason
17 is going to be better.

18 MS. SCHMAEDICK: I believe that
19 concludes my questions. Thank you.

20 JUDGE HILLSON: Anyone else on the
21 panel? Ms. Carter?

22 MS. CARTER: Good morning.

1 Antoinette Carter with USDA. My first
2 question is to Mr. Jack.

3 MR. JACK: Yes.

4 MS. CARTER: You indicated --
5 talked a little bit about your growing
6 operation. Can you tell us what products you
7 grow specifically that -- leafy green
8 vegetables that you grow?

9 MR. JACK: Iceberg lettuce,
10 romaine lettuce, red leaf, green leaf, those
11 commodities.

12 MS. CARTER: And in terms of acres
13 of production, about how many acres do you --
14 do you grow?

15 MR. JACK: We grow about close to
16 2,000 acres of leafy green commodities.

17 MS. CARTER: Okay. Thank you. My
18 next question is for Mr. Vessey.

19 MR. VESSEY: Yes, ma'am.

20 MS. CARTER: This is just a
21 follow-up question from Ms. Schmaedick's
22 question. You mentioned that the Imperial

1 Valley and Salinas Valley are very different
2 in terms of growing areas. Can you explain a
3 little bit more about how they're different?

4 MR. VESSEY: Okay. Well, one's a
5 desert and one's in a coastal valley with
6 hills on both sides and provides flat, level,
7 and more rolling hills in Salinas Valley, use
8 more well water in Salinas Valley. We have an
9 open canal system that's gravity-fed. Those
10 would be the main reasons. The weather's a
11 little different. The people are a lot
12 different, too.

13 Those are the main reasons.

14 MS. CARTER: Okay. Thank you.
15 And do you -- you mentioned that the current
16 California Leafy Green Marketing Agreement
17 audit checklist works for both of those areas
18 although they are different. In your opinion,
19 and based on your experience, why do you think
20 that is so?

21 MR. VESSEY: Well, I mean, when
22 they take into account the water system, they

1 take into account both water systems -- if you
2 go through the list of questions -- I don't
3 want to go through every one, but there's
4 nothing that really -- of those different
5 areas that sets them apart in regards to
6 growing a leafy green. They do account for
7 the different water sources. I know in the
8 metrics themselves, they account for the land
9 and slopes. But they work well with both of
10 them. They take into account both locations.

11 MS. CARTER: Okay. Thank you.
12 And my last questions are for Mr. Cox. You
13 indicated that you're in the lettuce business.
14 Are there other leafy green vegetables that
15 you grow or --

16 MR. COX: Yes. I grow iceberg
17 lettuce, romaine, green leaf, red leaf also.

18 MS. CARTER: You also indicated
19 that you have operations in Mexico, Imperial
20 Valley, and Salinas?

21 MR. COX: That's correct.

22 MS. CARTER: Can you explain or

1 can you tell us why do you think -- what's the
2 value -- this proposal would cover imported
3 products. In your opinion, why do you think
4 that's a valuable component?

5 MR. COX: You know, I've got mixed
6 emotions on that and, like I said, I don't
7 like people telling me what to do, but in our
8 -- I'll just give you an example. In our
9 farming operation in -- I started working in
10 Mexico in 1991. I believe NAFTA had already
11 passed and I was afraid that we couldn't
12 compete, and so I said, Well, I'll go down
13 there and find out. And so we set up an
14 operation in 1991. I could fill you with all
15 kinds of stories. It's been an adventure.
16 But several years ago, there was an E. coli
17 outbreak, I believe it was Ojos Negros area in
18 the mountains south of San Diego. And like I
19 said, our onion demand just fell apart big
20 time and found out that there were some guys,
21 you know, using some basically contaminated
22 water for washing their onions.

1 And so after that time, USDA and
2 the Mexican branch Senecita came into every
3 packing shed and they said, Look, you know,
4 you guys are going to have to step it up and
5 they put some onerous restrictions on us and
6 after going through some of the packing sheds
7 down there, you know, there were some things
8 that were not being done properly and, you
9 know, contamination doesn't matter whether it
10 comes from, like I said, whether it comes from
11 a field in Imperial Valley, a field in Salinas
12 Valley, Juanacatlan down by Mexico City,
13 Mexicali, you know. It all -- it affects the
14 consumer and the industry the same way.

15 And as -- you know, if I'm not
16 mistaken, I think we imported almost, you
17 know, as many vegetables as we exported last
18 year in this country and there's going to be
19 more and more vegetables imported with the
20 price of labor and what have you, I believe.
21 And so I believe that we need to have the same
22 consideration for product that's imported both

1 on pesticide, herbicide residues and food
2 safety issues as we expect from our own
3 farmers here.

4 MS. CARTER: Okay. Thank you.
5 That's all I have.

6 JUDGE HILLSON: Any other
7 panelists? Ms. Dash?

8 MS. DASH: Suzanne Dash. Mr. Cox,
9 you talked about your HACCP program and Mr.
10 Jack and Mr. Vessey had talked about their
11 food safety program. Is there a difference
12 between a food safety program and the HACCP
13 program?

14 MR. COX: I don't believe so. I
15 just used the term HACCP program because that
16 was -- you know, that was the term that was
17 put to me at that time. They can be
18 synonymous. Just the HACCP program is just,
19 you know, okay, this is what we're looking at
20 -- the Hazard Analysis Control Point Program.
21 And the food safety program, I don't really
22 know -- you know, I think they can be a little

1 bit more broad but, to me, they can be
2 synonymous.

3 MS. DASH: Mr. Vessey and Mr.
4 Jack, would you agree with what he said?

5 MR. JACK: Yes. I just think that
6 was, you know, the primary name that came up
7 at the time. And then, you know, with a lot
8 of things, whether it's a product or whatever,
9 you come up with a catchy phrase and food
10 safety sounds a lot better to the public than
11 a haz-mat program. It's --

12 MR. VESSEY: I believe, you know,
13 HACCP years ago was based -- when it first
14 came about, a lot of the HACCP programs were
15 designed for packing sheds, coolers. It
16 wasn't really designed for the field. You
17 could make a program tailor-made for that.
18 And I guess you'd say a HACCP program's more
19 tailor-made with a consultant. They come and
20 really look at those control points and it was
21 different ten years ago. Again, it was more
22 of a packing shed and not a field point in my

1 opinion. And a food safety program, they can
2 be synonymous now. But it depends on how it's
3 laid out. I mean, each person's HACCP program
4 may be different.

5 MS. DASH: Thank you. That's all
6 I have.

7 JUDGE HILLSON: Anything else?
8 Mr. Souza?

9 MR. SOUZA: Thank you. Anthony
10 Souza, USDA, good morning.

11 ALL: Good morning.

12 MR. SOUZA: I'd like to follow up
13 a little bit on Ms. Dash's question in regards
14 to HACCP, Mr. Cox. You stated in 1996 you
15 started a HACCP program. What does HACCP
16 stand for?

17 MR. COX: I believe it's Hazard
18 Analysis Critical Control Point or Program.

19 MR. SOUZA: In a HACCP program, a
20 Hazard Analysis Critical Control Point, is
21 there a kill step generally associated with
22 that type of program?

1 MR. COX: Depends if you're
2 talking -- because we had a pretty broad
3 program. I mean, there were areas that were
4 kill -- not -- we don't really have a -- we
5 don't have a verifiable kill step but we
6 did -- we would monitor chlorine levels, we
7 would monitor, you know, washing the things,
8 cleanliness, but as far as a verifiable kill
9 step, no.

10 MR. SOUZA: With that being said,
11 would it be more accurate to state that you
12 have a HACCP-based program rather than a HACCP
13 program, a program that's based off of HACCP
14 but may not be a HACCP program?

15 MR. COX: I would -- that would be
16 accurate.

17 MR. SOUZA: You also stated in
18 your verbal testimony that you do grow in
19 Imperial, Salinas, and Mexico. What would be
20 the advantage under a national program for you
21 in these three areas?

22 MR. COX: I don't actually -- I

1 don't grow the product personally in Salinas.
2 We have contract growers with our operation up
3 there. But I oversee the growing in Imperial
4 Valley and I oversee the growing in Mexicali.
5 Those are our farming operations that we
6 control and own.

7 But to answer your -- your
8 question was what would be the advantages of
9 a national program to those -- to these three
10 areas?

11 MR. SOUZA: Correct.

12 MR. COX: It depends -- I mean, as
13 far as a national program, I don't -- it
14 depends on how it's tailored, but there's not
15 really a whole lot of -- I don't know if there
16 would be much advantage over the current
17 program that I have in place in California
18 because we implement a lot of the same stuff
19 in Mexico. We -- we've got more people
20 running around in Mexico than I -- you know,
21 who's that? Who's that? Those are part of
22 our food safety program, you know. We need

1 all those people? And it is very expensive
2 and very onerous, but I don't -- I don't know
3 that there would be an advantage to a national
4 program over what we have now.

5 MR. SOUZA: You had a phrase "That
6 can be measured can be managed." In that type
7 of program, is elimination a possibility as
8 far as human pathogens go? -- the ability to
9 eliminate human pathogens?

10 MR. COX: Yeah. I mean, I think
11 everybody would love to have a safe kill step.
12 You know, we did some research on radiation
13 several years ago. We were exporting broccoli
14 to Japan and I -- I was in Japan talking to
15 some of our buyers and they were talking about
16 bugs and we had several loads rejected because
17 of a live aphid, I believe it was, and I made
18 the mistake of talking about irradiating
19 broccoli in Japan and I kind of forgot about,
20 you know, the radiation issue. They were a
21 little bit sensitive to radiation, so --
22 rightfully so.

1 And so, I mean, as far -- we would
2 love to have a safe kill step.

3 MR. SOUZA: But one is not being
4 used currently in your program?

5 MR. COX: That's correct.

6 MR. SOUZA: You're using
7 procedures to reduce or manage the risks?

8 MR. COX: That's correct.

9 MR. SOUZA: In a food safety
10 program or a HACCP program, would you see a
11 voluntary recall being a breaking down of the
12 system or the system working?

13 MR. COX: No. I think that's the
14 system working. Any -- like I said, we've got
15 -- you know, we're still at the point to where
16 we, you know -- precaution rules. And if
17 you've got any kind of question out there,
18 hey, you're better off getting that product
19 called back until you know -- the last thing
20 you want to do is presuppose, okay, this is a
21 false test or something like that. You don't
22 want to get -- we need to err on the side of

1 caution.

2 MR. SOUZA: I've got a question
3 for all three of you and if we could start
4 with Mr. Vessey and work our way. We heard
5 different costs from all three of you in what
6 the -- your food safety program runs. Are
7 those costs based off of the California or the
8 Arizona leafy green programs that you have in
9 place or are those costs included on the
10 stricter standards that are being applied by
11 other third party -- other buyers?

12 MR. VESSEY: I'm not sure I
13 mentioned a per-acre cost, but a little
14 information on that. If I was just under the
15 LGMA, my costs would be possibly half of what
16 I use on the other metrics or the other
17 mandated policies or audits.

18 MR. SOUZA: Thank you. Mr. Jack.

19 MR. JACK: It's like growing
20 costs. When -- like Larry and I get together
21 every year and go over growing costs. We have
22 different things and different categories.

1 Like I bought a vehicle for the food safety
2 person. I might depreciate it in three years.
3 Larry might depreciate it in five years. You
4 know, new computers that are being
5 depreciated. So there is -- there's different
6 ways just accounting practices where you could
7 change your costs. We may have the same
8 start-up costs, but how you depreciate them
9 and how you expense 'em out could make a
10 difference on a person being \$25 an acre or
11 \$32 an acre.

12 We dropped ours about eight
13 dollars an acre over a three-year period just
14 because of some depreciation things run out
15 and streamlining some areas, so there's -- I
16 could easily see a 20 percent difference
17 between growers just because of the way they
18 manage their books.

19 MR. SOUZA: Thank you. Mr. Cox?

20 MR. COX: Now, if you ask us about
21 our yields, we may inflate our yields a little
22 bit when we're talking to each other, but not

1 our costs. The -- yeah. We basically got,
2 you know, the leafy greens at a base and then
3 we go above and beyond that for individual
4 customers that we supply, so it's included
5 both, but there definitely is a cost on top of
6 leafy greens for the food safety that we do.

7 MR. SOUZA: So the costs you
8 mentioned in your oral statement of 35 to 50,
9 that would be all-inclusive of other third
10 party audits as well?

11 MR. COX: Yes.

12 MR. SOUZA: Thank you. I had a
13 question. In your statement, Mr. Vessey, you
14 -- on the first paragraph, you state that you
15 also grow 500 acres of organically grown leafy
16 greens?

17 MR. VESSEY: Correct.

18 MR. SOUZA: Is that under the
19 National Organic Program?

20 MR. VESSEY: Yes, I believe so.

21 MR. SOUZA: In your opinion as an
22 organic grower and as a conventional grower,

1 do you think that it would be possible for a
2 food safety program to be included in the
3 National Organic Program and have it audited
4 that way?

5 MR. VESSEY: I'm sure it would be
6 possible but, in my opinion, just add another
7 audit in regards to I'm doing currently the
8 same audit for the product, be it organic or
9 conventional.

10 MR. SOUZA: Mr. Jack, in your
11 statement, you discuss about it's your opinion
12 that the National Leafy Green Marketing
13 Agreement would be a good insurance for your
14 company.

15 Could you explain a little bit
16 further on what you mean by that?

17 MR. JACK: Well, not only for my
18 company; I think for everybody. It's -- it's
19 -- if everyone has standards they have to
20 meet, then the chance of a recall on a product
21 is lessened. And as we mentioned before,
22 if -- if some grower -- it could be in Mexico

1 or New York -- has a problem with iceberg
2 lettuce, it doesn't affect just that grower or
3 just that shipper; it affects everybody. So
4 if everyone's standards have to -- if
5 everyone's ranch is more sanitary, the chance
6 of contamination is eliminated so, to me,
7 that's the insurance that I'm talking about.
8 It's spending money on a daily basis that we
9 can afford so we don't have to have the
10 catastrophe down the road that could easily
11 cost us a million dollars.

12 MR. SOUZA: Thank you. No further
13 questions.

14 JUDGE HILLSON: Anything else from
15 the panel? Mr. Hill.

16 MR. HILL: Brian Hill, Office of
17 the General Counsel. I just have a couple of
18 questions for you, Mr. Vessey.

19 MR. VESSEY: Yes, sir.

20 MR. HILL: You testified that
21 because of buyer concerns, you are forced to
22 do multiple audits, third party audits. Have

1 you discussed this with buyers?

2 MR. VESSEY: No. Most of my
3 shippers won't let me talk to 'em -- no. No.
4 I'm not in a position to talk to the buyers.
5 I'm basically -- my small handling deal, I
6 just sell cabbage and that's it. But on the
7 other commodities, I'm a partner and a
8 marketer, if you will, from Salinas, for
9 instance, that -- you know, I just have to
10 stay on the farm. I'm not allowed to talk to
11 the buyers.

12 MR. HILL: So you've talked to the
13 suppliers?

14 MR. VESSEY: Yes. I have numerous
15 times. Yes.

16 MR. HILL: And how did those
17 conversations generally go?

18 MR. VESSEY: I believe it is
19 "Pound sand" maybe is what I'm told.

20 MR. HILL: The reason I'm asking
21 is you've testified essentially that you
22 believe that a national program may help in

1 that you might be able to have one audit.

2 MR. VESSEY: Uh-huh.

3 MR. HILL: What is that belief
4 based upon?

5 MR. VESSEY: Well, I just believe
6 it. I mean, I've said that numerous times in
7 our own LGMA meetings about we need to get out
8 there and really push that this metrics is
9 answering their questions.

10 And some of these requirements is
11 -- in my opinion, I mean, some of it could be
12 job justification. I don't expect someone to
13 walk into the VP of produce at a large
14 retailer and hand him the LGMA audit checklist
15 and go, Look, you don't need my department
16 anymore. Here it is. I don't see that
17 happening. But maybe with a national program,
18 maybe that VP of purchasing will say, Hey, why
19 do we need to do all these other things and
20 have this whole department when all we need is
21 this checklist? And they're certified by USDA
22 inspector.

1 MR. HILL: Okay. That's all I
2 have. Thank you.

3 JUDGE HILLSON: Okay. Do we have
4 any questions from parties in front of me in
5 the audience, any interested parties? Any
6 redirect? -- oh, you need to come up and
7 identify yourself and then ask your question,
8 sir.

9 MR. WARSHAWER: Steve Warshawer,
10 Beneficial Farm.

11 JUDGE HILLSON: Could you spell
12 your last name, sir.

13 MR. WARSHAWER: W-a-r-s-h-a-w-e-r.

14 JUDGE HILLSON: Go ahead. Ask
15 your question.

16 MR. WARSHAWER: Little bit of
17 follow-up for you, Mr. Vessey. Have you had
18 any assurance that buyers will accept the
19 National Leafy Greens Marketing Agreement in
20 lieu of their private audits?

21 MR. VESSEY: No. I do not have
22 that assurance.

1 MR. WARSHAWER: Would you be
2 interested in a program that could assure some
3 degree of buyer acceptance?

4 MR. VESSEY: I'd be interested.

5 MR. WARSHAWER: And what would you
6 think of a program where Government trains and
7 certifies auditors rather than conducting the
8 audit process as another way to perhaps induce
9 the reduction of external audit requirements?

10 MR. VESSEY: I think that would be
11 the right path but, again, if you recall the
12 surveys I spoke about -- and I can't cite one,
13 but if you go back and look at who people
14 trust more and a lot of times it comes back
15 they trust not just Government-trained but a
16 Government auditor versus a Government-trained
17 auditor.

18 MR. WARSHAWER: Uh-huh. So your
19 focus there is on the trust issue?

20 MR. VESSEY: Yeah.

21 MR. WARSHAWER: And the acceptance
22 of the audit?

1 MR. VESSEY: Correct.

2 MR. WARSHAWER: And for Mr. Cox,
3 since you experienced foreign equivalency
4 aspect in the food safety inspection, I wonder
5 if you could see a similar equivalency between
6 Government and a private program; in other
7 words, with your Mexico operation, it's not
8 USDA inspectors; it's someone else. So you've
9 got direct experience of that equivalency.

10 How -- could you imagine any other
11 application of that equivalency concept that
12 could help reduce audit duplication or audit
13 requirements here in the U.S.?

14 MR. COX: Yeah. I could.
15 Hopefully somewhere down the road, we'll be
16 able to get to that point.

17 MR. WARSHAWER: Same -- similar
18 question to what I asked Mr. Vessey. Could
19 the Government certify or credit a private
20 program in the U.S. with comparable results to
21 what you've seen in a foreign equivalency?

22 MR. COX: I think -- you know, I

1 believe that some of the private parties that
2 we have, you know, doing testing now are every
3 -- you know, they're competent, they're
4 qualified, they're consistent, and I think
5 that the quality of their work is every bit as
6 good as what the USDA inspectors do. It's
7 just a question of confidence of our buyers
8 and I would -- you know, if you get to the
9 point of the buyers and the public having
10 confidence in that from a private party, then,
11 yeah, no problem.

12 MR. WARSHAWER: Thank you.

13 JUDGE HILLSON: Anything else from
14 the audience? Do you have any redirect, Mr.
15 Resnick?

16 MR. RESNICK: None.

17 JUDGE HILLSON: Mr. Giclas.

18 MR. GICLAS: Hank Giclas, Western
19 Growers. I have a question for Mr. Cox. You
20 talked about your Mexican operation. And
21 you're also involved in the California
22 Marketing Agreement. Is your Mexican

1 operation eligible for audits under the
2 California Marketing Agreement Program?

3 MR. COX: I don't know the answer
4 to that.

5 MR. GICLAS: Okay. Well, let me
6 ask this. Would you agree that a
7 consolidation of audits is, you know, a
8 principal goal for industry or a reduction in
9 audits?

10 MR. COX: I wouldn't say that's a
11 principal goal. No.

12 MR. GICLAS: Okay. If a national
13 agreement was implemented and, you know,
14 metrics were developed in a collaborative
15 process as outlined and there was, you know,
16 some buyer acceptance, if you will -- well,
17 let me rephrase that. Do you believe that
18 there would be potential for buyer acceptance
19 of that?

20 MR. COX: Yes, definitely

21 MR. GICLAS: Okay. I wanted to
22 ask also Mr. Vessey a question. Based on your

1 experience with the California Marketing
2 Agreement, are you aware of any buyers that
3 only require the California Marketing
4 Agreement Program?

5 MR. VESSEY: Different buyers or
6 marketers? There are some marketers, but in
7 regards to buying trade, again, I'm not
8 necessarily -- yeah, there are some buyers who
9 do accept it. On my cabbage side, I know that
10 some do accept just the Leafy Green Marketing
11 Agreement.

12 MR. GICLAS: Okay. And at the
13 board level, have there been discussions about
14 whether that trend is increasing or
15 decreasing, I mean, whether there's sort of a
16 movement towards some recognition of the
17 California program; do you know?

18 MR. VESSEY: Yes. I believe there
19 are numerous people coming on board and seeing
20 that this will suffice for their audit
21 program.

22 MR. GICLAS: So do you see that

1 same potential existing with a national
2 program?

3 MR. VESSEY: Yes, I do.

4 MR. GICLAS: Okay. Thank you. I
5 don't have any other questions.

6 JUDGE HILLSON: How about you, Mr.
7 Resnick?

8 MR. RESNICK: Thank you, Your
9 Honor. Jason Resnick, Western Growers. I --
10 if there were to be a food-borne outbreak in
11 the eastern United States, for example, would
12 that -- and that's a food-borne illness in
13 leafy greens -- would that affect your
14 business? And that's for the whole panel.
15 We'll just go across.

16 MR. VESSEY: Yes, it was.

17 MR. JACK: Part of my statement
18 was that absolutely it affects us.

19 MR. COX: No question it affects
20 us.

21 MR. RESNICK: Do you believe that
22 a National Leafy Green Marketing Agreement

1 would level the playing field for leafy green
2 producers and handlers and processors around
3 the country?

4 MR. VESSEY: Level the playing
5 field is one thing, but I -- it's not -- to
6 me, it's not about leveling the playing field.
7 It's more or less if I have a counterpart
8 growing cabbage in south Texas and I'm sure,
9 you know, a majority of these guys have a
10 great food safety program, there might be one
11 person out there that isn't testing water or
12 isn't doing certain things on this metrics
13 that if there's an issue because they didn't
14 have this checklist, it's gonna affect me
15 greatly.

16 MR. JACK: I would just concur
17 with what Jack said.

18 MR. COX: I don't know that it
19 would necessarily level the playing field, but
20 the main concern is basically food safety.

21 MR. RESNICK: So if I understand
22 your answer, are you saying it wouldn't

1 necessarily level the playing field but raise
2 the bar on food safety across the country?

3 MR. JACK: In my mind, what it is
4 -- and I don't care if you're talking about
5 drunk drivers on the road or growing
6 produce -- there's always the bottom one
7 percent that messes it up for everyone else,
8 and I think what this does, it takes the
9 bottom one percent and either raises 'em up to
10 where they should be or it puts 'em out of
11 business.

12 MR. VESSEY: Concur.

13 MR. COX: Like I said,
14 education -- I didn't think we had a problem
15 and sometimes -- we may not still have but,
16 you know, I've gone from a point of being, for
17 lack of a better term, dragging my feet or
18 being obstructionist on this thing like, We
19 don't need to do this, we don't need to do
20 this. Now I find myself like, Ooh, what about
21 that? Or, Ooh, maybe we ought to do this.
22 And it's amazing to have -- you know, when we

1 had -- you know, wearing mandatory seatbelt
2 laws. I don't want to wear my seatbelt. You
3 can't -- now if I drive 500 feet without my
4 seatbelt, I'm like, I'm naked. I'd better put
5 my seatbelt -- and it's --

6 MR. JACK: Still naked.

7 MR. COX: Thank you, Alex. But,
8 yeah, that's the kind of thing -- and, you
9 know, smoking -- you know, banning smoking in
10 restaurants. You know, now if I go -- you
11 know, if I go to Mexico and they're smoking in
12 the restaurant, I'm like, Ooh, and all this
13 kind of stuff. And the same thing with this
14 food safety. Now I'm -- it's -- I'm onboard.
15 It's a mindset and it's -- I'm proactive
16 rather than reactive and obstructionist. And
17 I'm hoping that we can get, you know, the rest
18 of -- I'd like to get the rest of the nation
19 growers looking at, well, what about this over
20 here that they just took for granted and just
21 having that mindset of what can we do to have
22 a more consistent, cleaner, safer food supply.

1 MR. RESNICK: Thank you. I have
2 no further questions at this time.

3 JUDGE HILLSON: Anything else?

4 MR. GICLAS: I have one.

5 JUDGE HILLSON: Go ahead, Mr.
6 Giclas.

7 MR. GICLAS: Okay. This is Hank
8 Giclas, Western Growers. And maybe this is
9 just for the panel as opposed to directing it
10 to one person. But we haven't talked about
11 this yet.

12 Is it your understanding that the
13 National Marketing Agreement is a voluntary
14 mechanism?

15 MR. VESSEY: Yes.

16 MR. GICLAS: So -- thank you, Mr.
17 Vessey.

18 MR. COX: Do you want the rest of
19 us to answer that?

20 MR. GICLAS: No. I just wanted to
21 establish that. But I would like your opinion
22 on this. You know, based on the line of

1 questioning from Mr. Resnick and the fact that
2 this is voluntary, my question is, you know,
3 how do you see a voluntary program like this
4 lifting or raising the industry across the
5 country?

6 MR. COX: There are lots of things
7 that are voluntary but it depends on your
8 relationship with -- you know, relationship
9 with your buyers and also industry standards
10 and your peer group. You know, if all of my
11 friends were helping their wives do dishes at
12 night and I'm not, it can be voluntary. But
13 the price that I might pay for not
14 volunteering is going to be pretty high. That
15 may not be a good analogy.

16 And, by the way, I do help do
17 dishes. But like I said, yeah, and that's --
18 the pressure from the -- not the pressure, the
19 encouragement from peers and industry, it can
20 be voluntary but it may not be profitable or
21 wise to opt out of the program.

22 MR. JACK: May I add to that? In

1 society, there's all types of people. There's
2 people that want to go buy from a street
3 vendor and have no problem with it, you know,
4 the food's not kept as cold. And then
5 there's, you know, people in the middle and
6 people that want to go to just the high-end
7 chain stores because they know that the extra
8 care has been taken care of. And, to me, I
9 think that's probably always gonna happen.
10 But when -- when the people that want a -- in
11 today's world, where there's so much
12 communication and bad news travels very
13 quickly and I think we just need to learn to
14 stay away from that. It just -- bad news
15 kills our industry and it takes us about eight
16 months to recover.

17 So by raising the bar on our food
18 quality, it also doesn't stop with just the
19 grower. The handlers -- you know, you go in
20 the grocery stores and you see everyone, you
21 know, squeezing the Charmin and, you know,
22 there's lots of hands on it and I think that

1 needs to change.

2 So I think this is a good step to
3 get our act together, but I don't think it
4 stops here. I think it's got to go to the
5 grocery stores. There's -- with food safety
6 in mind, going to the grocery store in the
7 produce section, stand in a corner and watch
8 how many people handle food and put it back.
9 And there's a lot of correction that needs to
10 be done in this industry to -- if we're going
11 to try to do our best to eliminate, you know,
12 food problems, E. coli, salmonella, and so on.

13 MR. GICLAS: Thank you.

14 MR. VESSEY: Hank, on your
15 questioning, you know, voluntary program, you
16 know, I see -- it should be voluntary and,
17 like you said, there's people that want to
18 sell to different people and I think there
19 might be, you know -- but in the interest of
20 food safety, I would hope that people would
21 say, You know, I should sign up for this so I
22 can make sure I'm doing the right thing.

1 But we all know there's, you know,
2 back East, Midwest, there's truck farms and
3 someone might supply their local town. They
4 might go to a farmer's market once a week,
5 that I hope in the interest of food safety
6 they would sign up, but it is voluntary again.
7 They may not need to. They may be able to
8 look at a metrics and do it and not have to be
9 certified because their buyers are not asking
10 them to do it. So I think it is important it
11 be voluntary, but, again, it's to who we sell
12 to and what our buyers or partners mandate us
13 to do.

14 MR. GICLAS: Thank you.

15 JUDGE HILLSON: Mr. Warshawer, do
16 you have another question?

17 MR. WARSHAWER Steve Warshawer
18 again. Mr. Vessey, quick question on the
19 auditing public versus private and public
20 perception. You are aware that the National
21 Organic Program is inspected and audited by
22 private auditors that are audited in

1 compliance with the national program?

2 MR. VESSEY: Yeah.

3 MR. WARSHAWER: Do you have any
4 comments on public confidence in the organic
5 program given its 20 percent annual growth
6 rate in consumer --

7 MR. VESSEY: Personally, I don't
8 have an issue. I mean, I currently use a
9 third party auditor just to double-check my
10 product, double-check what we're doing besides
11 the LGMA. I don't have a problem with it. I
12 think there's always a place for the private
13 versus public sector. My concern is what my
14 buyers want, what the consumers want in the
15 end from those buyers. That's what I have to
16 do.

17 If that's gonna work and the
18 buyers have confidence in that, I've got no
19 problem.

20 MR. WARSHAWER: And I just want to
21 point out that in the case of organic, it
22 actually is certified and accredited private

1 auditors and the public is voting, if you
2 will, on that audit capacity by continued and
3 increasing preference to purchasing organic
4 foods.

5 MR. VESSEY: No. If it works, it
6 works.

7 JUDGE HILLSON: Do you have any
8 other questions?

9 MR. RESNICK: I was just asking if
10 that was a question.

11 JUDGE HILLSON: He stuck a little
12 question mark on it at the end. I was going
13 to say the same thing myself. I mean, I know
14 he's going to be testifying tomorrow anyway.
15 So -- okay.

16 Mr. Souza, you have a question?

17 MR. SOUZA: Yes. Thank you. Good
18 morning. Anthony Souza, USDA. Quick follow-
19 up for Mr. Vessey. Under the National Organic
20 Program, you are using an accredited auditor
21 for your program?

22 MR. VESSEY: Correct.

1 MR. SOUZA: Under that system, if
2 you become dissatisfied with the accreditation
3 body or the accredited auditor, can you move
4 to a different auditor? Can you bring
5 somebody else in?

6 MR. VESSEY: Yes.

7 MR. SOUZA: Has that been a case
8 in your dealings in your career on the
9 National Organic Program?

10 MR. VESSEY: Yes, it has.

11 MR. SOUZA: Why did you change?

12 MR. VESSEY: Do you want the long
13 story or short story? I was using an
14 accredited third party and when we asked them
15 that we needed -- it was a yearly audit,
16 yearly inspection, say there's something we
17 plant in August and we harvest say in -- or
18 say we plant in September and we want to start
19 harvesting in mid-November or December, they
20 wouldn't send their auditor so that I'd have
21 to call -- constantly call every day and say,
22 We're getting ready to harvest this product

1 and you haven't even been here. That happened
2 two years in a row. And so I said, That's
3 enough, and I got a different -- another third
4 party.

5 MR. SOUZA: Under the current
6 California Leafy Green, have you had any of
7 the same type of issues with that auditing
8 organization?

9 MR. VESSEY: No, not at all. And
10 I'd like to point out that in my previous
11 organic certifier, I talked to the VP and this
12 and that and they really didn't care. And I
13 did have one issue when the LGMA first started
14 and I was able to make a phone call and it got
15 rectified right away. Any other question on
16 that?

17 MR. SOUZA: In the -- do you have
18 any experience yourself or from different
19 people within the organic community on whether
20 or not -- an opinion on whether or not the
21 quality of the certified auditor varies
22 amongst the different companies that they work

1 for?

2 MR. VESSEY: I couldn't speak for
3 a neighbor. I don't know what their opinion
4 is. But I had the situation where the quality
5 was different. And now the current body we're
6 at, they're on top. It makes me feel more
7 comfortable. They're on top of it and do the
8 things that need to be done.

9 MR. SOUZA: Would it be fair to
10 say that that individual company or individual
11 auditor that you had issues with is still out
12 there auditing for the National Organic
13 Program?

14 MR. VESSEY: Yes.

15 MR. SOUZA: Thank you. No further
16 questions.

17 JUDGE HILLSON: Is there anything
18 else from the panel, USDA panel? Anything
19 else from anyone? Okay.

20 Thank you, gentlemen. You may
21 step down.

22 MR. VESSEY: Thank you.

1 (The witnesses were excused.)

2 JUDGE HILLSON: You know, it's
3 already ten o'clock and I like to have one
4 morning break, so I guess this is a logical
5 time to do it. Let's take ten. And anyone
6 who is not on Mr. Resnick's list to testify
7 today who wants to testify today or has to
8 testify today needs to come over and talk to
9 me for a minute. We'll be back in ten
10 minutes. Off the record.

11 (Recess from 10:05 a.m., until
12 10:17 a.m.)

13 JUDGE HILLSON: And, Mr. Resnick,
14 you may call your next witness.

15 MR. RESNICK: Thank you, Your
16 Honor. The Proponent group calls Casey
17 Cullings.

18 JUDGE HILLSON: Okay. And I'm
19 going to -- I have a document here that I'm
20 going to mark as Exhibit 79 which is the
21 written testimony of Mr. Cullings.

22 //

1 (Exhibit 79 was marked
2 for identification.)

3 JUDGE HILLSON: Please have a
4 seat. Please raise your right hand.
5 Whereupon,

6 CASEY CULLINGS
7 having first been duly sworn, was called as a
8 witness and testified as follows; to wit:

9 JUDGE HILLSON: Okay. Could you
10 please state your name and spell it for the
11 record.

12 MR. CULLINGS: My name is Casey
13 Cullings, C-a-s-e-y, C-u-l-l-i-n-g-s.

14 JUDGE HILLSON: And you have a
15 statement you want to read, sir?

16 MR. CULLINGS: Yes.

17 TESTIMONY

18 MR. CULLINGS: I am an Assistant
19 Attorney General with the Arizona Attorney
20 General's Office located at 1275 West
21 Washington Street, Phoenix, Arizona 95007. I
22 provide legal counsel to the Arizona Leafy

1 Green Marketing Committee and am here today to
2 testify on behalf of that committee. The
3 Arizona Leafy Green Marketing Committee
4 administers the Arizona Leafy Green Products
5 Shipper Marketing Agreement established around
6 September 2007 and is located at 1688 West
7 Adams, Phoenix, Arizona 85007. For
8 convenience, I'll refer to the Arizona Leafy
9 Green Marketing Committee as the Arizona
10 Marketing Committee.

11 The Arizona Marketing Committee
12 supports the establishment of a National Leafy
13 Green Marketing Agreement and joined the
14 Proponent group on September 29th, 2009. If
15 a National Leafy Green Marketing Agreement is
16 established, the Arizona Marketing Committee
17 believes that it is in the best interests of
18 leafy green vegetable handlers, the future
19 National Marketing Committee, and USDA to
20 start with an agreement that is clear,
21 concise, and understandable, and that
22 accurately expresses the Proponents' intent.

1 For this reason, the purpose of my testimony
2 is to address language in the proposed
3 national agreement that the Arizona Marketing
4 Committee recommends changes to. These
5 proposed changes were previously submitted to
6 Hank Giclas of Western Growers, who then
7 circulated them to representatives of the
8 Proponent group. Mr. Giclas has informed me
9 that the Proponent group supports these
10 proposed changes.

11 The written version of my
12 testimony illustrates the recommended changes
13 to the language by striking through text to be
14 deleted and by capitalizing and underlining
15 text to be added. It also contains a clean
16 version of how those sections of the proposed
17 agreement would read if the Arizona Marketing
18 Committee's recommendations were adopted.

19 The Arizona Marketing Committee
20 recommends substantive changes to the proposed
21 national agreement as follows:

22 Section 970.9 offers a single

1 definition for good agricultural practices, or
2 GAP, and good handling practices, or GHP.

3 While GAP and GHP are similar, they are not
4 identical. The proposed national agreement
5 itself illustrates this since growers are
6 subject to GAP audits and handlers are subject
7 to GHP audits. Since GAP and GHP do not have
8 identical definitions, the Arizona Marketing
9 Committee recommends that they be defined
10 separately in the agreement. The Arizona
11 Marketing Committee also believes that the
12 definitions of GAP and GHP should replicate
13 USDA's common understanding of those terms and
14 should not include a reference to the
15 Association of Food and Drug Officials model
16 codes. The Association of Food and Drug
17 Officials model codes are a useful source for
18 developing the actual audit metrics and should
19 instead be referenced in Section 970.67 which
20 deals with establishing the audit metrics
21 rather than in the definition of GAP and GHP.
22 The Arizona Marketing Committee proposes the

1 following new definitions of GAP and GHP,
2 while acknowledging that USDA is best suited
3 to provide accurate definitions of these
4 terms.

5 Good agricultural practices refer
6 to environmental and operational conditions
7 necessary for the production of safe,
8 wholesome fruits and vegetables as outlined in
9 parts 1 (Farm Review), 2 (Field Harvest &
10 Field Packing Activities), and 5 (Traceback)
11 of the current U.S. Food and Drug
12 Administration (FDA) "Guide to Minimize
13 Microbial Food Safety Hazards for Fresh Fruits
14 and Vegetables" guidance document and any
15 other revised or modified versions thereof or
16 any other FDA document approved as a
17 replacement thereof and as approved by the
18 Secretary.

19 Good handling practices (GHP)
20 refer to general practices to reduce microbial
21 food safety hazards as outlined in parts 3
22 (House Packing Facility), 4 (Storage and

1 Transportation), and 5 (Traceback) of the
2 current FDA "Guide to Minimize Microbial Food
3 Safety Hazards for Fresh Fruits and
4 Vegetables" guidance document or any other
5 revised or modified versions thereof and any
6 other FDA document approved as a replacement
7 thereof and as approved by the Secretary.

8 The Arizona Marketing Committee
9 believes that Section 970.65 as written is
10 problematic and contrary to the desires of the
11 Proponents. It currently says no signatory
12 shall handle leafy green vegetables unless
13 verified by an official audit from the
14 Inspection Service. Literally taken, this
15 means a handler who signs up for the agreement
16 must not handle -- that is, must cease
17 operations until it has been verified by
18 official audit and the agreement provides no
19 mechanism for a handler to be verified by an
20 official audit before sign-up. In fact, when
21 the first handlers sign up, the National
22 Committee will not have been formed yet and

1 there will be no approved audit metrics yet
2 and thus no way to verify the signatories.
3 Under the California and Arizona Marketing
4 Agreements, after audit metrics were adopted,
5 original signatories were subjected to
6 informational audits and then subsequently
7 subject to official audits. Signatories were
8 permitted to handle during that entire period.
9 The Arizona Marketing Committee believes that
10 the Proponents' intention for the National
11 Agreement is similar, but the current language
12 does not accomplish that. Additionally, the
13 current language would also force a signatory
14 that has committed a flagrant violation of the
15 audit metrics, as that term is understood
16 under the California and Arizona Agreements,
17 to cease handling; that is, cease operations
18 until the signatory corrects the problem to
19 the satisfaction of the National Committee and
20 the Inspection Service. Again, the Arizona
21 Marketing Committee does not believe that is
22 the intent of the Proponents. The Proponents'

1 intent is to subject the signatory, in
2 violation, to a loss of certification, not a
3 loss of the right to conduct business.
4 Accordingly, the Arizona Marketing Committee
5 recommends the following replacement language
6 to bind signatories to the requirements of the
7 agreement and leave to other sections and
8 future rules established by the National
9 Committee the issues of penalties for
10 noncompliance: "Signatures shall comply with
11 the requirements of this agreement, including
12 any adopted rules and regulations."

13 The Arizona Marketing Committee
14 recommends additions to Section 970.67 to
15 clarify that the audit metrics do not simply
16 equal GAP, GHP, and GMP, but instead consist
17 of a combination of GAP, GHP, GMP, the AFDO
18 model code, and other resources as selected by
19 the Committee. In other words, as the
20 Proponents have stated during the hearing,
21 GAP, GHP, and GMP will serve as a template
22 from which the audit metrics will be

1 established. The Arizona Marketing Committee
2 also recommends the omission of some
3 unnecessary language from this section.

4 It is recommended that the opening
5 sentence read, "The Committee shall adopt,
6 with the approval of the Secretary, after
7 notice and comment, audit metrics after
8 consultation with the Technical Review Board"
9 to match Section 970.49(c). At the beginning
10 of paragraph (a), the following sentence
11 should be inserted: "GAP audit metrics should
12 be based on GAP, the Association of Food and
13 Drug Officials (AFDO), current 'Model Code of
14 Practice for Fresh Produce at the Farm and
15 Packing House,' commodity specific guidelines
16 developed by USDA in conjunction with FDA, and
17 specific recommendations from scientific and
18 academic resources." Also, the phrase "of
19 process controls" should be inserted after
20 "GAP audit metrics shall include
21 verification." The citation to Section 970.9
22 should be changed to say the word "GAP." It

1 is also recommended to delete three instances
2 of the word "and" and to replace the commas
3 with semicolons for better clarity and
4 readability.

5 It is also recommended to insert
6 two new paragraphs between paragraphs (a) and
7 (b) which read:

8 "GHP audit netrics. GHP audit
9 metrics shall be based on GHP, the Association
10 of Food and Drug Officials (AFDO) current
11 'Model Code of Practice for Fresh Produce at
12 the Farm and Packing House,' commodity
13 specific guidelines developed by USDA in
14 conjunction with FDA, and specific
15 recommendations from scientific and academic
16 resources."

17 "GMP audit metrics. GMP audit
18 metrics shall be based on GMP, commodity
19 specific guidelines developed by USDA in
20 conjunction with FDA, and specific
21 recommendations from scientific and academic
22 sources."

1 Current paragraph (b) would then
2 be relabeled as paragraph (d) and begin as
3 follows: "GHP and GMP audit metrics shall
4 include verification of process controls
5 related but not limited to ..."

6 In subparagraph (iv), the
7 citations to Sections 970.9 and 970.10 should
8 be replaced with the words "GHP and GMP."

9 The Arizona Marketing Committee
10 recommends relabeling the remaining paragraphs
11 and shortening them as follows:

12 (e) Critical limits for process
13 controls for each of the quality factors
14 identified in the audit metrics shall be
15 prescribed by USDA in consultation with FDA.
16 Critical limits shall be based on sound
17 scientific practices and shall incorporate the
18 Committee's recommendations with regard to
19 industry production, harvest, and handling
20 technologies.

21 (f) The audit metrics may
22 accommodate differences in production and

1 handling environments of different regions and
2 different leafy green vegetable products.

3 (g) The Committee may revise the
4 audit metrics at any time, with the approval
5 of the Secretary after notice and comment,
6 after consultation with the Technical Review
7 Board.

8 (h) The Committee shall review
9 the audit metrics a minimum of once every
10 three years to ensure that they continually
11 reflect the best industry practices,
12 scientific information, and industry
13 knowledge.

14 In Section 970.69, paragraph (a),
15 the word "will" should be changed to "shall"
16 in two instances, the word "who" should be
17 changed to "that" and the phrase "shall use
18 the mark" should be omitted.

19 The Arizona Marketing Committee
20 recommends simplifying paragraph (b) to: "The
21 Committee may license signatories to affix the
22 official certification mark to bills of lading

1 or manifests or to use the mark in other ways
2 recommended by the Committee and approved by
3 the Secretary to carry out the purposes of
4 this agreement." It also recommends adding
5 the paragraph (c) reading: "A signatory's
6 compliance with this agreement is a condition
7 precedent and subsequent to the signatory's
8 entitlement to use the mark. A signatory
9 shall not use the mark until it has
10 demonstrated compliance with the audit metrics
11 through a verification audit. The Committee
12 may suspend or revoke a signatory's license to
13 use the mark for noncompliance with the
14 agreement, including adopted rules and
15 regulations."

16 Notably, these recommended changes
17 clarify that a new signatory cannot use the
18 mark until it has had its first verification
19 audit, and this relates to the proposed change
20 to Section 970.65 regarding signatories.

21 The Arizona Marketing Committee
22 recommends renumbering Section 970.83,

1 Compliance, to Section 970.73, so that it
2 falls under the heading "Duties and
3 Responsibilities of Signatories" rather than
4 "Reports and Records." It also recommends
5 omitting the current paragraphs (a)(1)-(6)
6 because they are mostly redundant of each
7 other and are already covered by Sections
8 970.65, 970.66, and 970.80. The opening
9 sentence of the section should also be
10 substantially revised to make it more clear
11 and be labeled as a new paragraph (a) as
12 follows: "The Committee and its authorized
13 representatives shall oversee signatories'
14 compliance with this agreement. In
15 conjunction with USDA, the Committee shall
16 establish rules setting out penalties and
17 required remedial action for signatories that
18 are out of compliance with the requirements of
19 this agreement. Penalties may include
20 withdrawal of audit services and the privilege
21 to use the official certification mark."

22 Paragraph (b) should have a period

1 at the end. Finally, the Arizona Marketing
2 Committee recommends adding a new paragraph
3 (d) to make it clear that a signatory can
4 appeal decertification decisions or other
5 penalties. It recommends the paragraph to
6 read: "A signatory may appeal a penalty
7 assessed pursuant to subsection (a) according
8 to rules and procedures established by the
9 Committee."

10 The Arizona Marketing Committee is
11 concerned with the requirements for withdrawal
12 under Section 970.98. Currently, the proposed
13 agreement says a signatory that is still a
14 handler can only withdraw if it is not in
15 violation of the agreement. This means that
16 if a signatory has not paid its assessment, it
17 must continue as a signatory and accrue
18 additional assessments for at least another
19 year. It also means if a signatory is not in
20 compliance with the audit metrics, it must
21 also remain a signatory even if it doesn't
22 want to. On the unpaid assessment issue, the

1 agreement should provide that unpaid
2 assessments are still required to be paid even
3 if a handler ceases to be a signatory, but it
4 is not necessary to force that handler to
5 continue as a signatory. On noncompliance
6 with audit metrics, whether the out-of-
7 compliance handler continues as a signatory or
8 not, it cannot use the certification mark, so
9 there is questionable justification for
10 forcing that handler to remain a signatory.

11 The Arizona Marketing Committee
12 agrees that an orderly withdrawal from
13 agreement by signatories is necessary for
14 planning and budgeting purposes and
15 accordingly recommends strengthening this
16 section by requiring notice of withdrawal at
17 least 30 days prior to the start of a new
18 fiscal year so that the National Committee can
19 account for those withdrawals in budgeting for
20 the subsequent year.

21 The Arizona Marketing Committee
22 recommends the following replacement language

1 for this section:

2 (a) A signatory may withdraw from
3 this agreement by either:

4 (i) Filing a written request for
5 withdrawal for the subsequent crop year with
6 the Committee at least 30 days prior to the
7 start of the subsequent crop year, or

8 (ii) Filing a written notice with
9 the Committee stating that the signatory
10 ceases to be a handler of leafy green
11 vegetables or products.

12 (b) A signatory's withdrawal does
13 not relieve the signatory of the obligation to
14 pay assessments or charges due.

15 (c) A signatory that withdraws
16 shall not use the official certification mark.

17 I will now describe small
18 grammatical and other very minor changes that
19 the Arizona Marketing Committee recommends.

20 In Section 970.2 where it says
21 "throughout the growing, harvesting, packing,
22 operation and transportation," the Committee

1 recommends "throughout the growing,
2 harvesting, packing, and transportation
3 operations." The Committee also recommends
4 removing the citations to Sections 970.9,
5 970.10, and 970.14 as unnecessary.
6 Additionally, the Committee believes the
7 reference to Sections 970.9 and 970.10 are
8 inaccurate since those sections define GAP,
9 GHP, and GMP. And while GAP, GHP, and GMP are
10 intended to form the template for the audit
11 metrics, they are not necessarily identical to
12 the audit metrics, and the audit verification
13 described in Section 970.2 is intended to
14 verify compliance with the actual audit
15 metrics.

16 Section 970.19 defines "person" as
17 including an individual or entity. Therefore,
18 the Arizona Marketing Committee recommends
19 using the word "person" in Sections 970.3 and
20 970.6. So 970.3 should begin "Broker means a
21 person who coordinates," and Section 970.6
22 should begin "Food service distributor means

1 a person who provides." Also in Section
2 970.3, the phrase "leafy green vegetable
3 retail" should be "leafy green vegetables for
4 retail."

5 In Section 970.10, for more
6 clarity and precision it should begin "Good
7 manufacturing practices (GMP) means FDA
8 regulations located at 21 CFR ^U 110, which
9 describe ..."

10 In Section 970.21, the phrase
11 "process does not apply to retailer" should be
12 "process does not apply to a retailer."

13 In Section 970.45, it says there
14 will be a 13-member board but then it
15 enumerates 14 members, so the number 13 should
16 be replaced with the number 14.

17 In Section 970.48, paragraph (a),
18 the use of the word "full" in the first
19 sentence, as in "full Committee," is confusing
20 and should be omitted. If the full Committee
21 were present, then there would automatically
22 be several members present from each zone.

1 The apparent intent is to make sure that if,
2 for example, only 12 of the 23 members of the
3 Committee attend a meeting, that a quorum
4 cannot be established unless among the 12
5 there is at least one member from each zone.
6 Again, dropping the word "full" in this
7 instance makes the sentence clearer.

8 In the second sentence of
9 paragraph (a), however, the Arizona Marketing
10 Committee recommends inserting the word "full"
11 before "Committee." It is the Proponents'
12 intent that two thirds of the entire 23-member
13 Committee approve certain actions as opposed
14 to two thirds of a quorum, and adding the word
15 "full" makes that intent clear. It is also
16 recommended to switch the conjunction "and" to
17 "or," as well as to add a semicolon after
18 "assessment rates."

19 In paragraph (d), it is presently
20 unclear how a Committee member participating
21 in a meeting by telephone must vote if all the
22 other members are present at the meeting in

1 person. The Arizona Marketing Committee
2 recommends altering the language so that it
3 says "provided that if an assembled meeting is
4 held, all members present shall cast votes in
5 person." This would clarify that a member
6 participating by phone would always promptly
7 confirm his vote in writing, regardless of
8 whether the other members were present in
9 person or also participating by phone.

10 In Section 970.49, paragraph (c),
11 it is recommended to end the sentence after
12 "audit metrics," which would drop the cross-
13 references. The Arizona Marketing Committee
14 does not believe it makes sense to say the
15 national Committee shall adopt audit metrics
16 to administer GAP, GHP, or GMP, which are
17 Sections 970.9 and 970.10, nor does it make
18 sense to say the Committee shall adopt audit
19 metrics to administer the audit metrics, which
20 is Section 970.67. While the reference to
21 Section 970.66 is correct, it is unnecessary
22 to state.

1 In Section 970.50, the Arizona
2 Marketing Committee recommends adding a
3 paragraph (j) reading "to submit a budget to
4 the Secretary for each fiscal year" to make
5 clear that the national Committee has a
6 responsibility to adopt a budget.

7 In Section 970.55, the phrase "the
8 Committee is authorized to incur such expenses
9 ... likely to be incurred by it" is not
10 helpful. A better choice of words would be
11 "the Committee is authorized to incur such
12 expenses as ... are necessary and proper."

13 In Section 970.57, paragraph (a),
14 "fiscal periods" should be replaced with
15 "fiscal years" since fiscal year is defined in
16 the agreement and fiscal period is not. In
17 paragraph (b), the word "refunds" should just
18 be "funds."

19 In Section 970.58, the word
20 "Committee" should be capitalized the two
21 times it appears.

22 Section 970.66 is wordy,

1 redundant, and a little confusing. The
2 Arizona Marketing Committee recommends the
3 following replacement language to make the
4 section more clear, concise, and
5 understandable:

6 "(a) GAP audits. Signatories
7 shall ensure that any leafy green vegetables
8 handled by their operation were grown by
9 producers, foreign or domestic, that have been
10 subject to GAP verification audits. Such
11 audits shall verify that the producers' leafy
12 green vegetables are produced under auditable
13 conditions that meet the GAP audit metrics.

14 (b) GHP and GMP audits.

15 (1) Signatories shall be subject
16 to GHP and GMP verification audits as
17 applicable. Such audits shall verify that the
18 signatories operate under auditable conditions
19 that meet GHP and GMP audit metrics.

20 (2) Signatories shall not handle
21 leafy green vegetables from handlers, foreign
22 or domestic, that have not been subject to GHP

1 and GMP verification audits as applicable.

2 (c) The Inspection Service or an
3 authorized designee shall conduct all GAP and
4 GHP audits under this agreement, and shall
5 certify handlers and producers as meeting the
6 GAP and GHP audit metrics. The Inspection
7 Service, the FDA, or an authorized designee
8 shall conduct all GMP audits under this
9 agreement, and shall certify handlers as
10 meeting the GMP audit metrics.

11 (d) Audits shall be conducted on
12 a regular schedule that ensures every handler
13 is audited during their corresponding
14 production season. In addition, random
15 unannounced audits of handlers and associated
16 producers shall be performed during the
17 production season in each zone."

18 This proposed language also
19 clarifies that audits are based on the audit
20 metrics adopted by the national Committee and
21 not simply on GAP, GHP, or GMP.

22 In Section 970.70, the Arizona

1 Marketing Committee recommends two changes.
2 First, the title should be changed to
3 "Administrative Review of Audits" since this
4 section strictly applies to what could be
5 called administrative appeals of findings by
6 the Inspection Service during an audit and
7 does not encompass any administrative appeal
8 of findings by the national Committee or the
9 Secretary. Second, the section should be
10 rewritten for clarity and conciseness and to
11 use more proper regulatory language as
12 follows: "A signatory or any financially
13 interested person may request an
14 administrative review of a verification audit
15 if it believes a material error was made by
16 the Inspection Service. Administrative
17 reviews shall be conducted in accordance with
18 USDA audit verification procedures. The
19 person requesting the review shall pay the
20 cost of the review. The review results shall
21 be issued to the person making the request."

22 In Section 970.75, the word "and"

1 appearing before "development projects" should
2 be removed. Also, the section should refer to
3 funds collected pursuant to Sections 970.56
4 and Section 970.58. Section 970.58 allows the
5 Committee to receive voluntary contributions
6 for research and promotion.

7 In Section 970.85, the phrase
8 "subsequent crop year leafy green vegetables"
9 should be simply "subsequent crop years."

10 In conclusion, the Arizona
11 Marketing Committee offers these recommended
12 revisions to the proposed National Marketing
13 Agreement in order to clarify the terms of the
14 agreement and to better fulfill the intent of
15 the Proponents. The Arizona Marketing
16 Committee expresses hope that these
17 recommendations will be incorporated into the
18 agreement.

19 JUDGE HILLSON: Okay. Thank you,
20 Mr. Cullings. I'm going to receive your
21 written testimony into evidence as Exhibit 79.

22 //

1 (Exhibit 79 was
2 received.)

3 JUDGE HILLSON: I'm going to ask
4 Mr. Resnick if he has any further direct at
5 this point.

6 MR. RESNICK: Not at this time,
7 Your Honor.

8 JUDGE HILLSON: Then I will ask
9 the USDA panel for their questions. Ms.
10 Schmaedick.

11 MS. SCHMAEDICK: Melissa
12 Schmaedick, USDA. Good morning, Mr. Cullings.

13 MR. CULLINGS: Good morning.

14 JUDGE HILLSON: So my first
15 question is are you available tomorrow for
16 questioning? My concern is there's quite a
17 bit of information and having only seen it for
18 the first time, I may have further questions
19 and -- so are you available at a later point
20 if we have further questions?

21 MR. CULLINGS: I'm located in
22 Phoenix. I can make myself available. I was

1 not planning on being here tomorrow. But if
2 that's necessary, I can be here.

3 MS. SCHMAEDICK: Okay. So, first
4 of all, thank you for your testimony. And I'd
5 like to start with page two where you're
6 recommending changes to Section 970.9. And
7 you referenced the FDA "Guide to Minimize
8 Microbial Food Safety Hazards for Fresh Fruits
9 and Vegetables" or any other revised or
10 modified versions thereof or any other FDA
11 document approved. Would that language allow
12 for the consideration of, for example, the FDA
13 commodity specific guidelines that are
14 currently being drafted?

15 MR. CULLINGS: I believe the
16 intent is to have -- if that were to be
17 included, would be included under 970.67 I
18 believe is the number where there's a list of
19 documents or references that the national
20 Committee could use in developing the actual
21 metrics. Here, this is just a definition of
22 GAP and GHP and the feeling is that the

1 definition should be limited to what GAP and
2 GHP actually are.

3 MS. SCHMAEDICK: Okay. On page
4 three, if I understand your statement
5 correctly, the concern is that if this program
6 were implemented, there could potentially be
7 a situation where regulation were in effect
8 and there would not be a, for lack of a better
9 word, a phase-in or transition period to allow
10 handlers and growers to become certified in
11 compliance with the program; is that correct?

12 MR. CULLINGS: That's the concern
13 with the current language. That's not the
14 intent of the Proponents and certainly not the
15 desire of the Arizona Marketing Committee, and
16 that's why I proposed alternative language to
17 that.

18 MS. SCHMAEDICK: Is it the intent
19 that if the program were implemented and
20 metrics were developed and implemented, at
21 that point would the language as it's
22 currently written under 970.65 be appropriate?

1 MR. CULLINGS: There would still
2 be a concern with handlers who -- after that
3 point who were initially verified and began
4 under the program later, if they were found to
5 have some sort of violation, under the current
6 language here, that would threaten their
7 ability, I believe, to -- that the way the
8 language is written here that's -- threaten
9 their ability to continue to do business.

10 It says "No signatory shall handle
11 leafy green vegetables unless verified as
12 meeting ..." and so if it comes to a point
13 where they're no longer verified, that would
14 be problematic for that company as far as
15 continuing to handle. The intent is, at least
16 with the Arizona Agreement and with the
17 California Agreement, somebody who falls out
18 of favor or lacks -- no longer is meeting the
19 standard at a time -- we want that person
20 obviously to meet the standard but, in the
21 meantime, to be decertified or, in other
22 words, no longer be able to use the

1 certification mark, have information out there
2 to the public to potential buyers that this
3 person is currently in decertified status, you
4 know, they're not able to use the mark, so
5 people are aware of that but not to tell them
6 that they can't handle any more -- that they
7 actually have to shut their doors until they
8 fix the problem.

9 MS. SCHMAEDICK: Are there
10 situations where the noncompliance issue might
11 behoove having that handler cease operations
12 until the problem is corrected?

13 MR. CULLINGS: I -- conceivably,
14 the handler itself may want to do that.
15 Perhaps conceivably FDA might require that.
16 But as far as -- as it pertains to the
17 marketing agreement, having some provision to
18 require that, I don't know if there's any
19 intent for that or not. I don't know if
20 there's -- I just can't answer that question.

21 MS. SCHMAEDICK: On page four of
22 your testimony, you made a reference to the

1 Association of Food and Drug Officials -- AFDO
2 is the acronym -- Model Code of Practice for
3 Fresh Produce at the Farm and Packing House.

4 Do you have a copy of the Model
5 Codes?

6 MR. CULLINGS: No, I do not.

7 MS. SCHMAEDICK: Can you provide a
8 reference for where they might be found?

9 MR. CULLINGS: I cannot. That
10 language there is taken from -- it was
11 actually just moved from Section 970.9 in the
12 current agreement to this Section 970.67.

13 MS. SCHMAEDICK: Uh-huh.

14 MR. CULLINGS: So it wasn't the
15 intent to add something new by including that.
16 It was just moving it to a different section
17 where we felt it was more appropriate, it fit
18 more appropriately.

19 MS. SCHMAEDICK: Okay.

20 MR. CULLINGS: But I do not know
21 where to locate a copy of that.

22 MS. SCHMAEDICK: Okay. Would it

1 be possible for the Proponent group to
2 consider submitting a copy of that at some
3 point?

4 MR. RESNICK: We can do that.
5 Yes.

6 MS. SCHMAEDICK: Also on page
7 four, you said that the commodity specific
8 guidelines developed by USDA in conjunction
9 with FDA specific -- and specific
10 recommendations from scientific and academic
11 sources. Is it the intent that input would be
12 sought by other Government agencies, or is
13 that not the intent?

14 MR. CULLINGS: I can't speak for
15 the Proponent group as a whole on that. It
16 seems reasonable that that would occur, but I
17 don't know. Again, that language -- that
18 particular phrasing was already in the
19 section.

20 MS. SCHMAEDICK: The language that
21 you recommend for I believe it's 970.9 and
22 970.10 and then you have some paragraphs that

1 you wanted to relabel, (e), (f), and (g) from
2 the bottom of page four, --

3 MR. CULLINGS: That's referring to
4 Section 970.67.

5 MS. SCHMAEDICK: 67 -- okay. I'm
6 sorry. I'm looking at paragraph (e). It
7 says, "Critical limits shall be based on sound
8 scientific practices and shall incorporate the
9 Committee's recommendations with regard to
10 industry production, harvest, and handling
11 technologies." Does that sentence point to
12 the Committee's need to confer with the
13 Technical Review Board?

14 MR. CULLINGS: I would say it
15 definitely relates to it. Throughout the
16 agreement -- well, I shouldn't say throughout,
17 but there's certainly parts of the agreement
18 that refer to the fact -- that refer to the
19 Technical Review Board and the need to
20 communicate with that and the Technical Review
21 Board's role in advising on what metrics would
22 be appropriate to adopt, and this sentence I

1 believe does relate to that as well.

2 MS. SCHMAEDICK: On paragraph (h),
3 top of page five, "The Committee shall review
4 the audit metrics a minimum of once every
5 three years to ensure that they continually
6 reflect the best industry practices,
7 scientific information, and industry
8 knowledge," do you foresee the need to review
9 the audit metrics more than once every three
10 years?

11 MR. CULLINGS: I personally don't
12 have an opinion on that.

13 MS. SCHMAEDICK: But if -- would
14 it be prudent to add flexibility to allow that
15 review to happen more frequently if that were
16 necessary?

17 MR. CULLINGS: Well, I believe the
18 flexibility is already there in the language.
19 A minimal once every three years certainly
20 doesn't prevent it from happening more often
21 than once every three years.

22 MS. SCHMAEDICK: Okay. Thank you.

1 On page eight of your testimony, you state
2 that the -- that you're recommending the
3 renumbering of 970.83 to 970.73.

4 MR. CULLINGS: Yes.

5 MS. SCHMAEDICK: And then the
6 paragraph following that, you say paragraph
7 (b) should -- I'm sorry -- adding a new
8 paragraph (d) to make it clear that a
9 signatory can appeal decertification decisions
10 or the penalties. My confusion is that we --
11 in the -- in the current proposal, we see a
12 proposed 970.70 which is called
13 "Administrative Review" which you touch upon
14 later, so how is that proposed new paragraph
15 (d) not redundant of 970.70?

16 MR. CULLINGS: There's two
17 processes that I envision that can be subject
18 to appeal. First, there's the actual audit
19 and perhaps a handler disagrees with one of
20 the audit findings and wants to appeal that.
21 That would occur under 970.70 where the
22 Inspection Service itself would use their

1 process, USDA would use its process for
2 reviewing and deciding whether or not that was
3 actually violation of the metrics or not.
4 Apart from that, you have the situation where,
5 yes, it has been agreed that there's a
6 violation or they've gone through the appeal
7 on a violation, lost, and now they're at a
8 stage where they're subject to some sort of
9 penalty by the national Committee. And
10 there's different -- there's yet to be
11 established what those penalties will be.
12 Envision that the Committee will have
13 different sorts of penalties, depending on the
14 seriousness of the violation, how many times
15 maybe somebody has violated in the past, and
16 perhaps you'll have a handler who has a
17 violation and the national Committee decides
18 on a certain penalty for that violation and
19 then the handler disagrees with the penalty
20 and thinks that the penalty should be less.
21 In this new section (d) to 970 -- new
22 paragraph (d) to 970.69 would allow the

1 handler to appeal the penalty as opposed to
2 the actual violation.

3 MS. SCHMAEDICK: So to -- if I
4 understand you correctly, 970.70 addresses the
5 type of compliance actions that would be a
6 result of the Inspection Service's portion of
7 the audit, if you will, and your new paragraph
8 (d) as proposed would reflect the actions of
9 the compliance staff of the Committee?

10 MR. CULLINGS: Yes.

11 MS. SCHMAEDICK: Okay. On page 14
12 of your testimony, the very first paragraph,
13 I'll just read the sentence and then I'll ask
14 you the question. "The apparent intent is to
15 make sure that if, for example, only 12 of the
16 23 members of the Committee attend a meeting,
17 that a quorum cannot be established unless
18 among the 12 there is at least one member from
19 each zone."

20 Why -- why is that important to
21 the Proponent group?

22 MR. CULLINGS: Well, my

1 understanding is -- I don't think I'm the best
2 person to answer that question, but there's
3 different zones and they want to make sure
4 there's representation from each zone at the
5 meetings. And so based on how the Committee,
6 the 23-member Committee is set up, it's
7 possible to have a quorum present and have an
8 entire zone unrepresented at that meeting.
9 And so the -- the current language as well as
10 the revised language that's proposed both
11 would account -- would make sure that in order
12 to have an official meeting, that at least one
13 person from each zone was present.

14 MS. SCHMAEDICK: So would it be
15 fair to state that the intent of the Proponent
16 group is to ensure that there is
17 representation of the entire production area
18 at each meeting, all zones included?

19 MR. CULLINGS: I think that's
20 fair.

21 MS. SCHMAEDICK: In the second
22 paragraph, the second sentence reads, "It is

1 the Proponents' intent that two thirds of the
2 entire 23-member Committee approve certain
3 actions as opposed to two thirds of a quorum."

4 Why is this recommendation being
5 made? Why are certain actions requiring a
6 higher number of votes?

7 MR. CULLINGS: My understanding is
8 -- again, this is -- I don't know that I'm the
9 best person to answer this question -- but
10 from talking with members of the Proponent
11 group that have told me about this, my
12 understanding is, is that for setting the
13 assessment rate, for example, is one of the
14 items, that they want to make sure there's a
15 broad consensus of everyone on the Committee
16 as far as establishing that. So on a 23-
17 member committee, you're looking at 16 votes,
18 approximately, in order to pass something like
19 that as opposed to getting a minimum quorum of
20 12 people and then two thirds of that would
21 only be eight people to -- 16 out of 23 is a
22 much better representation than eight out of

1 23. And so I think on the more significant
2 issues that are gonna affect everyone, that
3 they wanted the broader vote.

4 MS. SCHMAEDICK: And is it the
5 intent that in that super majority requirement
6 that each zone is also represented?

7 MR. CULLINGS: Well, I would say
8 yes because you can't have any meeting of the
9 Committee without each zone being represented.
10 But if your question is does at least one
11 person from each zone have to vote in the
12 affirmative, there's nothing in the agreement
13 that says that.

14 MS. SCHMAEDICK: Okay. Thank you.
15 In the third paragraph, you mention a
16 situation where there might be an assembled
17 meeting yet one person might be attending that
18 meeting by phone. They might be conferenced
19 in. Did I understand that correctly?

20 MR. CULLINGS: Yes.

21 MS. SCHMAEDICK: Could there
22 conceivably be a situation where

1 videoconferencing is used?

2 MR. CULLINGS: Yes. The agreement
3 provides for videoconferencing. It also
4 currently provides for if everyone is on the
5 phone or if everyone's present, but it wasn't
6 clear what would happen if some of the people
7 were present and some were on the phone, and
8 that's why proposed a slight revision to that
9 section to make that more clear what would
10 happen.

11 MS. SCHMAEDICK: What might cause
12 the need for some people to participate by
13 phone or video rather than in person?

14 MR. CULLINGS: Well, with a 23-
15 member committee and a national Committee at
16 that, obviously to participate in person would
17 require many people to fly to locations and
18 people might just not have the time to do
19 that, especially -- I know from experience on
20 the Arizona Committee, sometimes the Committee
21 meeting is very short and it's on a very
22 simple matter but it's something that does

1 require a vote. And so it doesn't make
2 economic sense to have everyone fly in for a
3 meeting or even travel by car several hours
4 for a meeting that's going to last 15 minutes.
5 And in those situations, having people
6 participate by phone is preferable.

7 MS. SCHMAEDICK: So that would
8 result in potentially some cost savings and
9 might increase the participation rate in
10 meetings?

11 MR. CULLINGS: Yes.

12 MS. SCHMAEDICK: And you also
13 state that it's important for anyone
14 participating by phone or perhaps video
15 conference to promptly confirm their vote in
16 writing. Do you mean writing via a faxed
17 signed statement or an e-mail? Would both be
18 considered valid?

19 MR. CULLINGS: Well, under the
20 language of the agreement, it just says in
21 writing. It doesn't specify. If I were on
22 the Committee, certainly a letter, whether

1 it's by fax or by mail, would work. Whether
2 e-mail would work I would imagine would be a
3 policy decision of the Committee, whether they
4 wanted to accept that or not.

5 MS. SCHMAEDICK: And in a
6 situation of videoconference where the person
7 participating is actually visible, would they
8 be required to also submit a written vote or
9 would their presence -- their virtual presence
10 be enough?

11 MR. CULLINGS: According to the
12 language of the agreement, their visual
13 presence is enough. They do not need to
14 submit a written vote.

15 MS. SCHMAEDICK: On page 16 of
16 your statement, you -- you reference Section
17 970.55 and some alternate language. You
18 state, "The Committee is authorized to incur
19 such expenses as ... are necessary and
20 proper." Can you explain what you mean by
21 "proper"?

22 MR. CULLINGS: That would be

1 authorized under the agreement or relating to
2 the agreement.

3 MS. SCHMAEDICK: For example,
4 travel expenses?

5 MR. CULLINGS: Yes, if you're
6 referring to travel expenses for people to
7 attend a Committee meeting, if that's -- I
8 actually can't recall whether that's something
9 specifically spelled out in the agreement or
10 not, but unless it's prohibited, certainly
11 that would be something that would be
12 considered.

13 MS. SCHMAEDICK: Okay. On page 18
14 of your statement, in your proposed revised
15 language for 970.66, paragraph (b)(2),
16 "Signatories shall not handle leafy green
17 vegetables," is that -- does that limit --
18 does that address just the whole vegetable or
19 would it also include vegetables that had been
20 chopped and passed from one handler to
21 another? So does it cover products as well?

22 MR. CULLINGS: Well, the intent is

1 to include both and it references back to just
2 the definitions of leafy green vegetable in
3 970.15.

4 MS. SCHMAEDICK: Okay. And then
5 further on in paragraph (b)(2), you say,
6 "Signatories shall not handle leafy green
7 vegetables from handlers, foreign or
8 domestic." Are you -- is that statement
9 intended to indicate that foreign handlers
10 could be signatories?

11 MR. CULLINGS: No. The -- under
12 the current language that was in the Federal
13 Register, the -- it referred to the fact that
14 handlers had to make sure whether the -- the
15 vegetables were produced in America or came
16 from different country, that those things --
17 that those products would have to be audited,
18 and so this is just a rephrasing and
19 shortening of that.

20 MS. SCHMAEDICK: So if I
21 understand correctly, the signatory handler
22 would be a U.S. handler, could be a first

1 handler or a second handler, but regardless of
2 where that -- where the product that that
3 handler is handling comes from, it needs to
4 meet the provisions of the agreement; is that
5 correct?

6 MR. CULLINGS: Yes.

7 MS. SCHMAEDICK: Okay. And just
8 for clarification, under (c) -- I'm sorry --
9 under paragraph (b) -- no, under paragraph
10 (d), is the intent to have at least one audit
11 per year, a minimum of one audit per
12 production season as you state?

13 MR. CULLINGS: Yes. I believe so.

14 MS. SCHMAEDICK: Those are all the
15 questions I have at this time. Thank you.

16 JUDGE HILLSON: Are there any
17 other questions from the USDA panel? Mr.
18 Souza.

19 MR. SOUZA: Thank you. Good
20 morning. Anthony Souza, USDA. One question
21 in regards to -- on page four, under the
22 discussion of GMP audit metrics, "GMP audit

1 metrics shall be based on GMP's commodity
2 specific guidelines developed by USDA in
3 conjunction with FDA and special
4 recommendations from the scientific or
5 academic source."

6 Then under 970.66, it discusses
7 the GMP -- the Inspection Service, the FDA, or
8 authorized designee shall conduct all GMPs.
9 Is it the Proponents' intent to have FDA
10 and/or USDA to meet the -- to check for
11 verification of the GMPs? And, if so, would
12 they be using the same metrics or standards?

13 MR. CULLINGS: I'll answer your
14 question the best I personally know. The
15 standards, regardless of who inspected, would
16 be the same. As far as who inspected, my
17 understanding is both organizations would have
18 authority to inspect. Whether the Proponent
19 Group has a preference or an idea of whether
20 the USDA would conduct all inspections where
21 possible or if they didn't care, I -- I don't
22 know.

1 MR. SOUZA: Also under the same
2 section, 970.66, Audit Verifications,
3 discusses the audits shall be conducted on a
4 regular schedule that ensures every handler is
5 audited, and then it talks about random
6 unannounced audits. Is it the intent that GMP
7 audits have an unannounced component to that
8 audit as well?

9 MR. CULLINGS: The language would
10 provide for that. I do not know whether the
11 Proponent group intended that or not.

12 MR. SOUZA: One last question. On
13 page four, under "The Arizona Marketing
14 Committee recommends labeling the remaining
15 paragraphs and shortening them as follows" and
16 then it starts off with (e), (f), and then
17 goes to (g), under section (g) there, it talks
18 about the Committee may revise the audit
19 metrics at any time with the approval of the
20 Secretary and notice and comments after
21 consultation with the Technical Review Board.

22 Ms. Schmaedick asked you a little

1 earlier if that was the same intent under (e)
2 and, for clarification, under the critical
3 limit process in here, it states that, "Each
4 of the quality factors identified in the audit
5 metrics shall be prescribed by USDA in
6 consultation with FDA." Is it the intent of
7 the Proponent group that the Technical Review
8 Board play a role in this? And, if so, what
9 role would that be?

10 MR. CULLINGS: I got lost in
11 there, but -- role doing what?

12 MR. SOUZA: In section -- if the
13 audit metrics is gonna be revised, the
14 Technical Review Board is consulted. And
15 under the critical limits here for the process
16 controls for each of the quality factors, it
17 says that the metrics "shall be prescribed by
18 USDA in consultation with FDA and then
19 critical limits shall be based on sound
20 scientific practices and shall incorporate
21 Committee's recommendations."

22 The Committee recommendations, is

1 that in conjunction with consultation of the
2 Technical Review Board? Is that the intent,
3 do you believe?

4 MR. CULLINGS: The language here
5 has the same effect, legal effect, I believe,
6 as the current language in the proposed
7 agreement, just making it more clear and
8 shortening it. I am not certain whether the
9 Proponents -- whether that's their intent or
10 not. But certainly the language as written
11 would provide for that.

12 MR. SOUZA: Okay. Thank you.

13 JUDGE HILLSON: Anything else from
14 the USDA panel? I don't see anything. Any
15 other interested persons have questions of Mr.
16 Cullings? Come on up, Mr. Warshawer.

17 MR. WARSHAWER: Steve Warshawer.
18 Mr. Cullings, when did the Arizona Leafy
19 Greens Marketing Agreement become aware of the
20 proposed national program?

21 MR. CULLINGS: I guess it depends
22 on what you mean by "become aware." From the

1 beginning of the Arizona Marketing Committee's
2 existence, there's been talk about a possible
3 national agreement. As far as when we became
4 aware that a proposal had actually been
5 submitted to USDA, I believe that would have
6 been mid- to late June or early July. I don't
7 know the exact date.

8 MR. WARSHAWER: And why did the
9 ALGMA not join the Proponents until 9/29?

10 MR. CULLINGS: Well, one reason is
11 is obviously the Committee -- the Arizona
12 Marketing Committee has to meet to discuss
13 things and to vote on whether or not to join.
14 And so there was the issue of getting meetings
15 together and discussing things. Also, before
16 joining, they wanted to review the actual
17 language of the proposed agreement and
18 understand what it meant and decide whether or
19 not it was something that they supported.
20 They certainly have always supported the idea
21 of a national agreement but wanted to have
22 more specifics on the actual proposal before

1 they became a proponent.

2 MR. WARSHAWER: And is it true
3 that many Arizona Leafy Green Market Agreement
4 members are also Cal members?

5 MR. CULLINGS: Yes.

6 MR. WARSHAWER: And how many -- do
7 you know how many are members of both?

8 MR. CULLINGS: I believe there are
9 35 members of the Arizona Marketing Agreement,
10 signatories, and I believe 32 of those are
11 also members -- signatory to the California
12 Agreement.

13 MR. WARSHAWER: And can you
14 comment on how it's worked for the two
15 agreements to reconcile different metrics or
16 recommendations on metrics from the technical
17 committees of the two separate marketing
18 agreements?

19 MR. CULLINGS: The two technical
20 committees -- initially, there was some
21 attempts to try to have some overlap there.
22 It was difficult in getting people to

1 participate. But as far as -- so part of the
2 answer to your question is the two technical
3 committees themselves between Arizona and
4 California I think have limited discussions,
5 if at all at this point, with each other.
6 However, both those technical boards refer
7 things to the main committees and those main
8 committees are -- the Arizona Marketing
9 Committee is informed about what's going on in
10 California, the metrics that have been adopted
11 there, changes that have been made. They're
12 briefed on that. They discuss those issues,
13 decide whether or not to adopt those in
14 Arizona as well if they think those make
15 sense. And my understanding is the reverse is
16 true. Things that occur in Arizona are
17 brought back to California for discussion
18 there as well.

19 MR. WARSHAWER: Thank you.

20 JUDGE HILLSON: Any redirect, Mr.
21 Resnick?

22 MR. RESNICK: Briefly, Your Honor.

1 Jason Resnick for the Proponent group. Thank
2 you very much for your testimony today. Have
3 you considered whether your recommendations
4 will have any fiscal impact on the signatories
5 to the agreement?

6 MR. CULLINGS: I've not considered
7 that directly, although -- and the reason why
8 is the recommendations themselves, other than
9 maybe the granting appeals right for the
10 penalties, which would -- which if the appeal
11 was granted in favor of the handler would have
12 a positive economic impact, I would think, on
13 the handler, the proposed language is intended
14 to clarify the original intent, not to
15 drastically rewrite the agreement. So I
16 believe as a general matter, the economic
17 impact would be roughly the same, if not
18 exactly the same, as under the -- the impact
19 of the current proposed agreement.

20 MR. RESNICK: And in addition to
21 clarifying the appeal rights, do you consider
22 any of the changes you've made to be

1 substantive, or are they all clarifying and
2 technical amendments?

3 MR. CULLINGS: I guess it depends
4 on how you define "substantive." If --
5 they're not substantive changes I believe as
6 far as making a substantial difference in what
7 was intended, but I do believe in some
8 respects the clarification is -- the actual
9 wording used is much different than the
10 original language because it needed a great
11 deal of clarification.

12 MR. RESNICK: And so in your
13 opinion, the proposed revisions make the
14 agreement more clear and understandable to
15 people reading the agreement?

16 MR. CULLINGS: Yes, and hopefully
17 especially to the future national Committee
18 that is charged with actually carrying it out.

19 MR. RESNICK: Thank you. I have
20 no further questions.

21 JUDGE HILLSON: Anything else?
22 Mr. Horsfall.

1 MR. HORSFALL: Yes. Scott
2 Horsfall with the California Leafy Greens
3 Marketing Agreement. One quick question for
4 clarification. In your proposed language for
5 Section 970.66 under Verification Audits, it
6 would now read, "Signatories shall ensure that
7 any leafy green vegetables handled by their
8 operation are grown by producers, foreign or
9 domestic, that have been subject to GAP
10 verification audits."

11 And my question relates to those
12 words "subject to." That means that those
13 producers are or will be at some point subject
14 to a GAP verification audit but, again, not
15 that that would have to take place before they
16 could handle that product; is that correct?

17 MR. CULLINGS: That's right.
18 Under the -- not just this language but all
19 the proposed changes, at all times a signatory
20 handler would be able to handle. That
21 would -- the right to handle -- the agreement
22 itself would never take that away.

1 MR. HORSFALL: Thank you. And you
2 said early on in your testimony that these
3 suggestions have been submitted throughout the
4 Proponent group?

5 MR. CULLINGS: That's what I've
6 been told. Yes.

7 MR. HORSFALL: And you're aware
8 that several of us on the Proponent group have
9 indicated that we're -- we look at these as
10 positive suggestions?

11 MR. CULLINGS: Yes. Again, that's
12 what I've been told. Yes.

13 MR. HORSFALL: Thank you.

14 JUDGE HILLSON: Anything else for
15 this witness? Back to you, Ms. Carter.

16 MS. CARTER: Antoinette Carter
17 with the USDA. I just wanted to direct your
18 attention to page ten, Section 98, Withdrawal.
19 I guess with the revisions that have been
20 suggested, just had a question regarding
21 whether or not a signatory handler that could
22 possibly be in violation of any of the

1 provisions of the agreement, would that
2 handler still be allowed to request withdrawal
3 from the agreement if they were in violation?

4 MR. CULLINGS: Under the current
5 language published in the Federal Register, I
6 believe they would not be able to request
7 withdrawal until they complied with the --
8 with the audit metrics. Under the proposed
9 revision, they would be able to request
10 withdrawal. That would become effective the
11 beginning of the following fiscal year.

12 The intent of that is -- because
13 if you have a handler who decides, for
14 whatever reason, maybe economics, that they
15 can't comply or don't want to comply with the
16 audit metrics anymore and that they're not
17 currently in compliance, that that company
18 should be able to be released, and then of
19 course they would not use the mark anymore.
20 They would not be associated with the
21 marketing agreement anymore and not derive the
22 benefits of that anymore.

1 MS. CARTER: So that handler would
2 still be responsible for assessments under the
3 agreement through that current fiscal year; is
4 that what you're saying, or am I
5 misunderstanding?

6 MR. CULLINGS: Any handler, both
7 under the current language and under my -- the
8 proposed revisions that I've offered, would be
9 responsible for assessments as long as they
10 are still a signatory.

11 MS. CARTER: Okay. Thank you.

12 JUDGE HILLSON: Is there any
13 further from the USDA panel? Ms. Schmaedick.

14 MS. SCHMAEDICK: Melissa
15 Schmaedick, USDA. On page two of your
16 statement, under the proposed definition of
17 "good agricultural practices," you refer to
18 different parts, outlined parts, in the FDA
19 guidelines. The first one is Farm Review.
20 The second one is Field Harvest & Field
21 Packing Activities. And then 5, which is
22 Traceback.

1 My question is specifically about
2 part 2, Field Harvest and Field Packing. Is
3 it your understanding under the proposed
4 agreement that the act of handling or the
5 handling function would include such
6 activities as packing in the field?

7 MR. CULLINGS: I'm not sure I'm
8 the best person to answer the distinctions
9 between where you cross the line between a
10 grower and a handler.

11 MS. SCHMAEDICK: Okay.

12 JUDGE HILLSON: Mr. Souza.

13 MR. SOUZA: Good morning. Anthony
14 Souza, USDA. Just one quick follow-up to Ms.
15 Schmaedick's question. Do you know whether
16 parts 1, 2, and 5, which are referred to in
17 here, whether that is referring to the Guide
18 to Minimize Microbial Food Safety Hazards, or
19 whether that comes off the USDA audit
20 checklist?

21 MR. CULLINGS: It comes from their
22 -- I do not have the title of the document

1 with me, but there was a 2007 document
2 published by USDA for auditors and giving them
3 instructions on how to perform the audits and
4 the different parts of the GHP and GAP audit
5 and I believe there's parts of the checklist
6 in there. I cannot recall whether the entire
7 checklist is in there or not.

8 MR. SOUZA: Could we have a copy
9 of that submitted?

10 MR. CULLINGS: We can get a copy
11 to you. Yes.

12 MR. SOUZA: Thank you.

13 JUDGE HILLSON: Anything more from
14 the USDA panel? Mr. Hill.

15 MR. HILL: Brian Hill, Office of
16 the General Counsel. My question is on
17 970.67. I see that wording has been added
18 which says "commodity specific guidelines
19 developed by USDA in conjunction with FDA."

20 Is it possible for you to tell me
21 how you envision that collaborative effort to
22 work?

1 MR. CULLINGS: Are you referring
2 to GMPs or -- I guess it's under both.

3 MR. HILL: It's under both.
4 Correct.

5 MR. RESNICK: What page? I'm
6 sorry.

7 MR. HILL: On mine, it's --

8 MR. CULLINGS: Four.

9 MR. HILL: -- page five, I
10 believe. I'm not sure.

11 MR. CULLINGS: It's four and five.
12 I believe that particular phrasing -- and I'd
13 have -- let me double-check. I believe that
14 particular phrasing was -- is in the agreement
15 as published in the Federal Register. It's
16 just in a different part and was moved here,
17 and I'm trying to locate for you where that --
18 that may have been. But as far as how that
19 would work, I -- I do not know. I'm not the
20 best person to ask.

21 MR. HILL: You also stated a
22 little bit earlier -- let me see if I can find

1 it now -- hold on one second. Well, basically
2 it says you wanted to clarify "that the audit
3 metrics do not simply equal GAP, GHP, and GMP"
4 which is why you're making some of these
5 changes.

6 My question basically is: Was any
7 consideration given to less specific wording
8 in 970.67 rather than the wording that was
9 chosen to kind of be more all-inclusive
10 instead of using the more specific language
11 that you used of "Food and Drug Officials
12 (AFDO) current 'Model Code of Practice'?"
13 What was the purpose of getting so specific?

14 MR. CULLINGS: The AFDO Code
15 was -- that was -- is currently in Section
16 970.9.

17 MR. HILL: Right.

18 MR. CULLINGS: So that was just
19 moved here. That's why -- that was already
20 used before, so we just kept it -- kept it
21 there. It seemed like that was the
22 Proponents' intent to use that, so just moved

1 it to a section thought was more appropriate.

2 From a personal level and from a
3 Arizona Marketing Committee standpoint, the --
4 this particular language here is whether we're
5 -- use some different language to make it
6 broader or more inclusive would be fine.

7 These are -- the recommendations that were
8 made here we believe are good recommendations
9 that make an improvement on the current
10 proposal. But if there's additional language
11 that's proposed to further improve, we are
12 welcome to those as well.

13 MR. HILL: Okay. So this isn't
14 meant to limit where they can get information
15 from to make these decisions?

16 MR. CULLINGS: That's correct. I
17 mean, I guess, you know, you wouldn't -- in a
18 certain way, I guess there would be limits as
19 far as, you know, scientific basis for things.
20 But as far as the source of that science, I
21 don't believe there's an intent to narrow that
22 to only a couple sources.

1 MR. HILL: Okay.

2 JUDGE HILLSON: Ms. Schmaedick.

3 MS. SCHMAEDICK: Melissa

4 Schmaedick, USDA. Just one real quick point
5 of clarification. In your opinion and based
6 on your working experience with the Proponent
7 group, is it important that any -- if any
8 metrics were to be developed, that FDA be
9 included; is -- is that sort of a major
10 underpinning of this proposal?

11 MR. CULLINGS: I have not spoken
12 with anyone from the Proponent group about how
13 they envision FDA to have a role. My
14 understanding based on just looking at the
15 documents is that FDA by their responsibility
16 has a certain role and the agreement
17 acknowledges that role, and I believe that's
18 the intent, but I am not -- I have not spoken
19 with anyone about that.

20 MS. SCHMAEDICK: Thank you.

21 JUDGE HILLSON: Anyone on the
22 panel again? And I think you had a question,

1 Mr. Warshawer.

2 MR. WARSHAWER: Steve Warshawer.

3 Quick clarifying question. Is it safe to
4 assume that with 32 of 35 Arizona signatories
5 also operating in California, that there are
6 representatives of companies operating in both
7 states that are on the Arizona committees, the
8 Arizona LGMA Committees?

9 MR. CULLINGS: If I understand
10 your question correctly, there are members of
11 the Arizona Marketing Committee that represent
12 companies that are also signatories to the
13 California agreement. Yes.

14 MR. WARSHAWER: Thanks. And on
15 the Section 970.69, Use of the Mark, when you
16 were recommending changes to use of the mark,
17 did the AZLGMA note the possibility of that
18 mark being used on consumer packaging?

19 MR. CULLINGS: With respect to the
20 national agreement, there has not -- I don't
21 know if there's been any talk of that.
22 Perhaps there has been but I don't remember.

1 There was significant talk about that
2 originally when the Arizona Marketing
3 Agreement was put together and the Marketing
4 Committee was first formed on how the mark
5 would be used, and it was decided to not put
6 it on actual product at that time, and there's
7 been no indication of changing that since that
8 time in the two years. And as this national
9 proposal is written, it would follow that same
10 policy.

11 MR. WARSHAWER: So there was no
12 discussion about the need to take steps to
13 eliminate or assure that that possibility did
14 not exist under use of the mark?

15 MR. CULLINGS: Not that I'm aware
16 of.

17 MR. WARSHAWER: Thank you.

18 JUDGE HILLSON: Okay. All right,
19 sir. Thank you very much. You may step down.

20 MR. RESNICK: May I just ask a
21 question, Your Honor?

22 JUDGE HILLSON: Oh, I thought

1 you --

2 MR. RESNICK: Jason Resnick,
3 whether USDA intends to call Mr. Cullings back
4 tomorrow?

5 JUDGE HILLSON: That's not my
6 call. I don't -- I don't issue subpoenas in
7 these cases.

8 MR. RESNICK: Just for planning
9 purposes, it would be helpful to know that.

10 JUDGE HILLSON: Everyone here is
11 voluntary.

12 MR. HILL: We would like to decide
13 that after lunch if we could, if you could
14 give us some more time to --

15 MR. RESNICK: Yeah. That's fine.

16 MR. HILL: -- digest this, please.

17 MR. RESNICK: I'm sure Mr. --

18 JUDGE HILLSON: Well, you may step
19 down at least for now.

20 MR. CULLINGS: -- Cullings can
21 arrange --

22 JUDGE HILLSON: And I have this

1 one person, Ms. Morse, who walked in. I think
2 this might be a pretty good time to take her
3 testimony and that way we'll have continuity
4 after lunch. So you want to come up, Ms.
5 Morse.

6 Thank you. And I'm going to mark
7 the document Ms. Morse gave me as Exhibit 80.

8 (Exhibit 80 was marked
9 for identification.)

10 JUDGE HILLSON: Can you please
11 raise your right hand.
12 Whereupon,

13 DENISE MORSE
14 having first been duly sworn, was called as a
15 witness and testified as follows; to wit:

16 JUDGE HILLSON: Could you please
17 state your name and spell it for the record.

18 MS. MORSE: It's -- my name is
19 Denise Morse, M-o-r-s-e. Thank you.

20 JUDGE HILLSON: Okay, Ms. Morse.
21 And you want to read your statement?

22 MS. MORSE: Yes.

1 JUDGE HILLSON: Go right ahead.

2 TESTIMONY

3 MS. MORSE: Just wanted to clarify
4 that I am definitely not an expert in this
5 area and I am coming from a consumer
6 standpoint and I thought I would add a little
7 more of a human touch to the testimony here
8 and kind of liven you up before lunch.

9 Know Your Farmer, Know Your Food
10 is a USDA initiative to promote sustainable
11 local and regional food systems that will
12 support small and mid-sized farms and ranches,
13 promote healthy communities, and protect our
14 natural resources.

15 On September 15, 2009,
16 Agricultural Secretary Tom Vilsack released a
17 video on YouTube that announced a new
18 initiative: "Know Your Farmer, Know Your
19 Food." The \$65 million program is an effort
20 to reconnect people to their food source.
21 Vilsack says, "Reconnecting consumers and
22 institutions with local producers will

1 stimulate economies in rural communities,
2 improve access to healthy, nutritious food for
3 our families, and decrease the amount of
4 resources to transport our food."

5 Jack Lemons -- Jack is the 'du
6 jour' name today -- Jack Lemons of
7 Supernatural Organics farms 40 acres in St.
8 David in Southern Arizona. He and another
9 family grow fruits and vegetables without
10 synthetic chemicals, rely on artesian wells,
11 and, when necessary, water from the nearby San
12 Pedro River.

13 Jack, along with other organic
14 farmers, bring their produce, including leafy
15 greens, to sell at local farmers' markets
16 throughout Tucson. On most occasions, the
17 produce is harvested that morning and brought
18 to market within a couple hours, retaining
19 higher nutrient value and flavor.

20 Just as Secretary Vilsack
21 predicted, Jack and other small organic farms
22 are "stimulating rural economies, improving

1 access to healthy, nutritious food, and
2 decreasing the amount of resources to
3 transport our food."

4 I know my farmer. His name is
5 Jack. And I know my food. It comes from
6 Jack's pesticide-free farm.

7 And then there's some pictures of
8 Jack's farm and the Employee of the Month.

9 Moving on to page three, under
10 "Introduction," as a supporter and consumer of
11 produce from small organic farms, I am
12 concerned with the proposed voluntary Leafy
13 Green Vegetable Agreement and how it will
14 affect local organic farmers in my community,
15 in your community, and communities across the
16 United States. I am also concerned about how
17 this agreement might conflict with USDA
18 Secretary Tom Vilsack's "Know Your Farmer,
19 Know Your Food" program.

20 Farmers' markets who are supported
21 by local farmers are a wonderful opportunity
22 to purchase recently harvested food and

1 healthy produce, and it is becoming the
2 perfect venue for getting to know your
3 neighbor and reenergizing a sense of
4 community. Knowing your farmer and knowing
5 your food perpetuates consumer confidence and
6 trust and is a stimulus for positive social
7 networking.

8 Why is the agreement being
9 proposed? I am concerned that the Leafy Green
10 Agreement proposal states in the Background
11 section that the agreement is in response to
12 the September 2006 E. coli outbreak from
13 contaminated fresh spinach that left some 200
14 people ill and approximately five people dead
15 but does not mention that the leafy green
16 industry lost millions of dollars because
17 consumer confidence in the safety of leafy
18 green vegetables plummeted.

19 A 'marketing agreement' implies
20 that one would market a product or service to
21 attract consumers who would purchase said
22 product or serve. Marketing is typically

1 synonymous with generating revenue. Isn't
2 this marketing agreement more about regaining
3 consumer confidence in the leafy green
4 vegetable market and less about the safety of
5 the general public? And I have watched some
6 of the previous testimony and I guess I am
7 kind of concerned that we haven't really
8 talked about the people that became ill. We
9 were talking more about money. So wouldn't it
10 make sense to enforce existing metrics or
11 standards to ensure public safety and let the
12 individual growers/handlers and distributors
13 develop their own marketing practices to
14 restore consumer confidence?

15 And, finally, would a
16 certification mark that requires more costly
17 regulation, a cost that would be passed on to
18 the consumer, really restore consumer
19 confidence?

20 The monetary loss omission in the
21 Background section, whether willful or not,
22 makes me wonder if this agreement is about

1 safety or is it about the \$74 million loss and
2 the possibility that growers, producers,
3 handlers could face federal criminal charges
4 with another outbreak?

5 The FBI was involved in the
6 September 2006 investigation because it
7 involved approximately 26 states, but there
8 was also speculation that it might be
9 bioterrorism. I would venture to say that the
10 probability of a worthwhile intentional food
11 poisoning target in this country would more
12 likely be the fast food or the ice cream
13 industry, not spinach and other assorted leafy
14 greens.

15 So I guess I am confused with the
16 Background section. The proposed agreement
17 appears to me to be about large companies
18 making money with the help of the USDA or the
19 United States Department of Agriculture and
20 not about safety at all.

21 Under the "Technical Review Board
22 Selection Process," I am concerned about how

1 the Technical Review Board, 970.45 in the
2 proposed rules, will be selected. Our federal
3 government has a propensity for revolving door
4 policy. The revolving door process has become
5 increasingly commonplace, to the point that
6 the boundaries of a conflict of interest have
7 become so blurry that the practices become
8 almost acceptable. Currently being proposed
9 for the board is one representative from the
10 USDA Natural Resources Conservation Service
11 appointed by the Secretary, one representative
12 from the EPA selected by the Administrator,
13 and two representatives from the FDA chosen by
14 the Commissioner.

15 How can we safeguard the Technical
16 Board selection to prevent the development of
17 audit metrics that will serve the corporate
18 interests of the leafy green industry while
19 gradually eliminating competition from the
20 small grower?

21 I am concerned that the Technical
22 Review Board will only employ science-based

1 methods of developing the audit metrics to the
2 exclusion of considering how these standards
3 will impact small farmers and the consumer
4 trust that already exists or currently exists.

5 "Previous testimony." I am
6 concerned with the testimony given on
7 September 23rd, 2009 by the representative
8 from Western Growers, a member of the
9 Proponent group, who by his own admission when
10 asked by a member of the USDA panel could see
11 the proposed Leafy Green Agreement, which is
12 voluntary right now, becoming mandatory in the
13 future. Mandatory audit metrics, as you well
14 know, cannot mandate consumers' trust and will
15 force some growers to go out of business.

16 Roger Medina, a small organic
17 grower in California who also testified on
18 September 23rd, described how the current
19 California Leafy Green Agreement, with its
20 confusing "super metrics," was already pushing
21 him to the financial limit.

22 Proposed Rules of Agreement 970.

1 Under the section "Proposed Marketing
2 Agreement," it says, "The public hearing is
3 held for the purpose of: (d) Determining the
4 economic impact of the proposed agreement on
5 the affected leafy green growers, handlers, or
6 other industry members and consumers," like
7 me.

8 As a consumer of produce grown by
9 small organic farmers, I am providing my
10 family and I the opportunity to eat food that
11 is grown without pesticides and contains a
12 higher nutrient value due to the produce being
13 brought to market within hours or a couple
14 days of the harvest.

15 If the agreement impacts small
16 growers, it could potentially impair the
17 health of my family and very likely impede my
18 freedom to choose healthy produce.

19 Prior to (d) under the Proposed
20 Marketing Agreement section is (c),
21 "Determining whether there is a need for a
22 marketing agreement for leafy green

1 vegetables."

2 As stated before, a costly
3 certification mark is not a safety guarantee
4 and, in my opinion, would not encourage
5 consumer confidence. As a consumer of organic
6 food, I have never breathed a sigh of relief
7 when I saw the USDA organic food label on a
8 product. But I do grumble as I search an
9 already very tight budget for more money to
10 pay for the label on the product.

11 Conclusion. I hope that the USDA
12 panel reconsiders why this costly agreement is
13 necessary when standards have already been
14 established in the leafy green industry and
15 that maybe, just maybe, the current metrics
16 just need to be reviewed and revised for more
17 efficient compliance.

18 If the agreement is implemented, I
19 would ask that the panel establish a code of
20 ethics to prevent the Technical Review Board
21 from participating in the revolving door
22 policy. And, lastly, I would recommend that

1 the panel look to the future and closely
2 examine the long-term effects on the economies
3 of small rural town communities throughout the
4 United States and how a mandatory leafy green
5 statute, if it came to that, would impact the
6 lives of small growers, handlers,
7 distributors, and residents of those
8 communities.

9 Respectfully submitted by Denise
10 Morse, and I live in Sahuarita, which is about
11 ten miles south of Tucson. And I do attend
12 farmers' markets and I am very concerned that
13 this could be the Trojan horse for mandatory
14 requirements that will force some of our small
15 growers and farmers' markets to go out of
16 business.

17 Thank you, and thank you for
18 allowing me to go before lunch.

19 JUDGE HILLSON: Okay. I will
20 receive your written testimony, Ms. Morse, as
21 Exhibit 80.

22 //

1 (Exhibit 80 was
2 received.)

3 JUDGE HILLSON: And I will ask the
4 USDA panel first if they have any questions.
5 Ms. Schmaedick.

6 MS. SCHMAEDICK: Melissa
7 Schmaedick, USDA, and thank you, Ms. Morse,
8 for your testimony. Thank you for coming
9 from --

10 MS. MORSE: Thank you for
11 listening.

12 MS. SCHMAEDICK: -- all the way
13 from Tucson. So I -- I do have a couple of
14 questions and I'm a little bit confused by a
15 couple of things. One is you referred to a
16 Background section. And I'm wondering if
17 you're referring to the Background section
18 under the proposed agreement in the Federal
19 Register?

20 MS. MORSE: Yes. I'm referring to
21 the Background section on the bottom right
22 corner on the first page.

1 MS. SCHMAEDICK: And does it say
2 somewhere in the Background section, does it
3 refer to 200 people being ill and five people
4 being dead?

5 MS. MORSE: That comes from the
6 reference that I put in the end of my document
7 in my testimony and that -- that is what
8 primarily concerns me is how the proposed
9 rules read and making sure that it's clear to
10 the public, because I am the public and I'm
11 not a scientist and I'm not a Proponent, and
12 I do get the Federal Register and as it reads
13 right now, we're talking about the E. coli
14 breakout and what I'm hearing today,
15 particularly with the first panel, is there
16 was just -- there's not been any mention of
17 that but mostly talking about the current
18 regulations in the metrics and the confusing
19 aspect of those and it almost sounds like to
20 me that that might be what they're talking
21 about, is -- is clarification of what
22 currently exists.

1 MS. SCHMAEDICK: So are you -- but
2 you're not saying that in the Background it
3 specifically --

4 MS. MORSE: What I'm saying in the
5 Background is I think if -- I realize this is
6 proposed rules and you're taking testimony to
7 see if there's revisions that need to occur.
8 And I think in the Background section, I think
9 it should be mentioned that this is probably
10 more an economic issue as opposed to safety
11 and health. I know that's part of it and I
12 know they go hand in hand together, but I
13 think that's what we're really talking about
14 is the impact in consumer confidence in
15 instituting a certification mark that will
16 require more costs that will be passed on to
17 me, the consumer. And I think that needs to
18 really be out front what this agreement is
19 really all about in my opinion.

20 MS. SCHMAEDICK: And this is the
21 only hearing that you've attended personally?

22 MS. MORSE: That I've attended

1 personally. Because I am a consumer, I don't
2 get paid for this. I stayed at the Motel 6.
3 And -- but I have watched some of the
4 testimony on my computer and -- not all of it,
5 but I have watched some of it and I -- I think
6 -- I think we need to hear from the consumer,
7 not necessarily all the different
8 organizations but individuals.

9 MS. SCHMAEDICK: So you're not
10 aware of the fact that maybe other consumers
11 have given testimony at the other locations?

12 MS. MORSE: Oh, I'm sure there has
13 because I know that this is something that
14 there's a lot of people that are concerned.
15 I'm not a real advocate of taking talking
16 points from other organizations or
17 individuals, you know. I'd prefer to read the
18 information and have my own opinion on how
19 it's going to affect me.

20 MS. SCHMAEDICK: Uh-huh. And so
21 you've read this proposed language?

22 MS. MORSE: Yes, I have.

1 MS. SCHMAEDICK: And can you point
2 out to me in the proposed language the areas
3 that concern you as potentially causing a
4 producer or handler that operates in a
5 farmers' market environment to go out of
6 business? Can you tell me what part of it
7 concerns you?

8 MS. MORSE: What part of it? I
9 think there's long-term effects. If you look
10 at the Technical Review Board, I'm very
11 concerned that all of the testimony that I've
12 heard so far, which I tell you it's not been
13 that much, is very technical-based and it's --
14 and it's not looking at the economic impact
15 yet, but I think that's an important component
16 on -- to differentiate -- and I know we talked
17 about in the first testimony on the first day
18 in September 23rd I believe it was, they
19 talked about a small grower being -- what was
20 it? -- gross of 750,000 or less or something
21 along that line, in that area, and I think we
22 need to -- we need to have another layer in

1 there for a small farmer such as Jack, who's
2 40 acres, and that is his -- I mean,
3 obviously, I'm the only one here from that
4 area here at this point representing that --
5 I guess in some sense -- that area that can
6 really afford to be represented. And I think
7 it's very important if this does become
8 mandatory which, like I said before, I can see
9 the Trojan horse, you know. It comes
10 voluntary and it could become mandatory, that
11 that particular group of farmers are
12 represented in a way that makes sense for them
13 so that we can support the Know Your Farmer,
14 Know Your Food proponent that -- or initiative
15 that Secretary Vilsack is proposing.

16 And I don't think it's being
17 represented at this point.

18 MS. SCHMAEDICK: So if I'm -- I'm
19 trying to understand what you're saying. You
20 don't necessarily -- in your opinion, there
21 isn't specific language that targets the small
22 grower but there's nothing that promotes them

1 as well; is that what you're saying?

2 MS. MORSE: I don't -- I don't
3 think at this point, reading through the
4 proposed rules, that there's enough
5 information to even differentiate between the
6 different types of growers, and I think that
7 needs to be clarified and that there needs --
8 and I understand that there's going to be a
9 23-member panel representing the different
10 zones and that there will be a Technical
11 Review Board. But I think that -- I don't
12 think those decisions should be made further
13 on in the process. I think they should be
14 considered now in the proposed rules of how
15 very small -- I guess micro-farmers, for lack
16 of better words, could be represented in
17 the -- in creating the existing rules right
18 now. I don't think it should be left to a
19 committee at a later time because that gets
20 shuffled under paperwork.

21 MS. SCHMAEDICK: On page four of
22 your testimony, under the heading "Previous

1 Testimony," you referred to the testimony that
2 was given by Roger Medina.

3 MS. MORSE: Yes.

4 MS. SCHMAEDICK: And you say the -
5 - his testimony described how the current
6 California Leafy Green Agreement with its
7 confusing super metrics. Can you explain to
8 me your understanding of "super metrics"?

9 MS. MORSE: I really only can base
10 it on what he was referring to in his
11 testimony and some of the testimony that was
12 given today, and that there seems to be an
13 overall standard or metric -- audit metrics
14 that all the farmers and handlers are supposed
15 to abide by but that some of the handlers and
16 distributors can arbitrarily just say, Well,
17 we want to come on board and we require this
18 particular standard to be upheld. Otherwise,
19 we won't purchase your product and bring it in
20 to whatever store or whatever venue they have
21 to sell it. And really I can honestly tell
22 you that it's limited, but it seems to be

1 confusing and it seems to be that that's where
2 we need to start is to take a look at what
3 already exists and perhaps really review it
4 and analyze it and make it easier to comply
5 with, like a recycler. Start with what you
6 have and then add if you need to.

7 I just -- I guess I'm very
8 concerned about it being passed on to the
9 smaller -- the fees for more regulation being
10 passed on to smaller farmers and consumers
11 like myself.

12 MS. SCHMAEDICK: Further on on
13 page four, under "Proposed Rules of Agreement
14 970," the last paragraph, you talk about the
15 logo, USDA organic food label, on product. My
16 question for you is: Are you familiar with
17 the history of the National Organic Program?

18 MS. MORSE: Not particularly. I
19 know that in the organic world, that in order
20 to define it or call it organic, that they do
21 need to have a USDA label. Otherwise, they
22 need to talk about it being sustainable or

1 chemical-free or pesticide-free, so that's
2 probably the extent of it as far as what I
3 know and also in regards to GMO, or
4 genetically-modified organisms of foods that
5 are grown with genetically-modified organisms,
6 you know, I understand that that is also part
7 of the USDA screening process. But -- but
8 like I said, in the testimony, it's something
9 I look at, but I also know when I see these
10 labels, it doesn't really ensure my
11 confidence. It just means that there's
12 another layer of regulation in there that I'm
13 going to pay for as a consumer, and I just
14 feel like it's -- well, that's an ethics issue
15 also.

16 MS. SCHMAEDICK: Those are all
17 the questions I have.

18 JUDGE HILLSON: Anything else from
19 the USDA panel? Mr. Souza.

20 MR. SOUZA: Anthony Souza, USDA.
21 Just one quick question. Through testimony
22 today, we've learned that the Arizona Leafy

1 Green Marketing Agreement has been in effect
2 for the past two years, I believe.

3 MS. MORSE: Uh-huh.

4 MR. SOUZA: Has that affected the
5 smaller or local farmers at all or the ability
6 to acquire any of the local produce at
7 farmers' markets or local stores or whatever?

8 MS. MORSE: As far as I -- as far
9 as I understand, the local farmers' market
10 that I attend, it has not been apparent that
11 there has been any effect at this point. But
12 discussing this with some of the small growers
13 that do attend the farmers' markets, that, you
14 know, they're straddling the line right now
15 financially and that any more regulation
16 coming into play could tip them, you know,
17 over the edge as far as being -- being able to
18 participate in -- you know, being a small
19 farmer and attending small farmers' markets.

20 MR. SOUZA: As a consumer, it
21 sounds as though you're against regulation?

22 MS. MORSE: I'm not -- that's --

1 I'm sorry that I didn't state that in the
2 beginning. At this point, as Melissa was
3 discussing, in the proposed rules, I really --
4 I don't think I'm at a point to make a
5 decision on whether I think there should be
6 more. I just -- or a national agreement. I
7 think I'm at the point right now I think that
8 there should be the hearings that are
9 occurring right now to gather information, to
10 incorporate the different comments and
11 testimony of everyone, and then another
12 release of proposed rules of what they're
13 actually looking at. But I would also -- in
14 the proposed rules, I would like to see more
15 specifics on maybe several different layers on
16 how you would regulate, you know, large
17 industry versus mid-size and then the very
18 small grower and kind of establish what those
19 guidelines are. But right now, I don't think
20 they're in the proposed rules as they exist.

21 MR. SOUZA: Thank you.

22 JUDGE HILLSON: Anything else from

1 the panel? Mr. Hill?

2 MR. HILL: Brian Hill, OGC, Office
3 of the General Counsel. You've mentioned the
4 Know Your Farmer, Know Your Food that
5 Secretary Vilsack has talked about.

6 MS. MORSE: Uh-huh.

7 MR. HILL: My question is:
8 Obviously, you know your farmer, so this is
9 voluntary. How does this voluntary program
10 affect your relationship with Jack, as you've
11 called him, I mean, marketing to you?

12 MS. MORSE: Well, I think probably
13 what you've heard from all of the different
14 hearings, there is that underlying issue of if
15 a particular grower does not have a
16 certification mark or, you know -- not
17 necessarily are all of the leafy greens bagged
18 at a farmers' market. You know, you do have
19 an opportunity sometimes to serve yourself and
20 determine how much that you're going to
21 purchase.

22 But if there is not a

1 certification mark, that that could be
2 considered second -- you know, second-class
3 leafy greens and that the potential for harm
4 is, you know, could exist if it doesn't have
5 the seal, and I think you probably have heard
6 that before. So I think that affects whether
7 or not people have confidence in that grower
8 on a first-time basis when they do attend
9 farmers' markets. It -- I think once you
10 establish that relationship with your supplier
11 or your vendor who's handling the product, you
12 can ask questions and ascertain whether you
13 feel comfortable or confident in purchasing
14 that product.

15 I don't know if that answers your
16 question. But I think it goes back to being
17 that it could be perceived as a secondary
18 product without the seal.

19 MR. HILL: Okay. And you've also
20 said that USDA mark doesn't necessarily
21 inspire you with confidence. Now, as a
22 consumer, what would inspire you with

1 confidence?

2 MS. MORSE: I think it's getting
3 to -- getting to know the product, asking
4 questions, and I realize -- you know, I live
5 in the real world, too. I realize that not
6 every family and every person has that
7 opportunity to really investigate where their
8 food comes from, but, you know, I have a
9 different -- a different look and an
10 opportunity to really examine where my food
11 comes from. And so I think, you know, USDA
12 label, yeah, I understand that there are
13 certain requirements that are required but it
14 doesn't necessarily mean that I feel confident
15 in consuming the food because I believe, you
16 know, that human error and -- is particularly
17 -- you know, with the E. coli outbreak that we
18 had, that we really don't know -- we can't
19 really ascertain exactly how that all came
20 about. So there's human error in everything.
21 Maybe USDA label, you know, guarantees a
22 little bit more, but it also guarantees more

1 cost when you have that label.

2 MR. HILL: And do you have any
3 idea of who your farmer sells to? Is he just
4 selling at these markets or is he selling to
5 bigger chains or --

6 MS. MORSE: As of right now, he
7 has a farm of 40 acres, so he sells to
8 different various farmers' markets in the
9 Tucson area and then he's out of produce,
10 which I guess is a good thing.

11 MR. HILL: All right.

12 JUDGE HILLSON: Anything else from
13 the panel? Any questions from interested --
14 oh, sorry. Ms. Dash.

15 MS. DASH: Suzanne Dash. Your
16 concern that maybe Government employee or
17 university professor who's on the technical
18 panel, because of -- they might be able to get
19 a job with somebody in the leafy green
20 industry later; is that the kind of concern
21 that you are having with revolving door?

22 MS. MORSE: The concern I have is

1 that once these types of regulations are
2 implemented, it becomes -- it goes away from
3 the public eye and, you know, I truly believe
4 that people have our best interests at heart.
5 However, in the past, I have seen in
6 several -- well, not -- at the federal level
7 but also at the state and at the county level
8 and as an elected planning board member in my
9 particular community that I came from in
10 California, I understand revolving door and
11 what that -- when it occurs, and it seems to
12 be innocent enough, is you'll have somebody
13 from a corporate situation who will come on
14 and be a part of the USDA or the FDA or the
15 EPA and then it seems like they go off of the
16 board, go back into corporate, after
17 influencing some of the projects and things
18 that could occur. So it's very subtle but it
19 happens quite a bit and I do have examples in
20 California where it does happen and it
21 influences developments and different projects
22 outside of the public eye, and that in turn

1 influences the outcome of something that
2 started off as innocent and has not remained
3 innocent and in the best support of the
4 public.

5 MS. DASH: Okay. Thank you.
6 That's all I have.

7 JUDGE HILLSON: Do we have
8 questions from out here? Ms. Mills; correct?

9 MS. MILLS: Good afternoon, Your
10 Honor, Members of the USDA panel and
11 Proponents panel. I'm Laura Mills with Metz
12 Fresh and I wanted to take this opportunity to
13 ask Ms. Morse just a few questions, please.

14 JUDGE HILLSON: Go right ahead.

15 MS. MILLS: Ms. Morse, you
16 mentioned the Know Your Farmer, Know Your Food
17 program. And that you support that program?

18 MS. MORSE: I'm not sure if I
19 support it but I know that the statement "Know
20 your farmer, know your food" is increasingly
21 important this day and age and it also is a
22 very sustainable -- it appears to be a

1 sustainable program for local economies in
2 small communities, and I have -- just getting
3 this in the Federal Register and having a life
4 also and not getting paid for any of this,
5 I've done, as you can tell, just a superficial
6 review and investigation of all these
7 different programs.

8 MS. MILLS: Okay. You mentioned
9 that there's a potential to have impacts on
10 Farmer Jack, for example, if this program were
11 to become mandatory and you understand that if
12 it's voluntary he wouldn't have to sign up.
13 But if it did become mandatory, then you're
14 concerned that those costs could drive him out
15 of business?

16 MS. MORSE: Correct. Not only
17 Jack but, like I said, there are several other
18 small farmers that bring their harvest to
19 farmers' markets and, in discussion with
20 them -- and that, you know, that is also a
21 very subjective, you know, piece of
22 information of what they're telling me but

1 that, you know, they're on the -- they're on
2 the financial edge as it is to make, you know,
3 the product available for consumers at a --
4 you know, at a cost effective, you know, price
5 and that, you know, more regulation, costly
6 regulation that they would have to implement
7 let's say if they had to test their wells
8 every month, you know, rather than testing
9 once a year or once every six months or
10 whatever is the current process, that that
11 would just really tip them over the edge and
12 they would probably need to find another way
13 to make a living.

14 MS. MILLS: As a consumer, would
15 you be willing to pay more for those products
16 if they were able to demonstrate to you that
17 the standards would increase what -- decrease
18 the risk for food-borne illnesses and
19 outbreaks or increase the safety and quality
20 of that product?

21 MS. MORSE: I don't -- I don't
22 believe that would be. If I -- you know, if

1 I feel comfortable and I have trust in the
2 product that, you know, I'm consuming already
3 just by questioning and I can go out to the
4 farm, it's only like 30 minutes from my home,
5 and witness some of the practices, that's me
6 as a consumer and that's my opinion. Now, how
7 other consumers would feel, I don't -- I don't
8 necessarily think I need another layer of
9 safety because I know that they're complying
10 with the current metrics that they're required
11 to implement; at least that's what I'm told.

12 MS. MILLS: That's what I'm
13 saying. So do you believe that every producer
14 should -- of leafy greens should comply with
15 some sort of safety standards?

16 MS. MORSE: I think -- I think so.
17 I think that's in their best interests and
18 it's in the best interests of the consumer,
19 you know, which goes alongside the safety
20 issue. And I would -- I know that there's
21 already some of those in place and I think
22 just making sure that they comply with those

1 would be adequate for me.

2 MS. MILLS: So as a consumer, how
3 would you be able to verify that they have a
4 food safety program and that they're following
5 or complying with the standards in that food
6 safety program?

7 MS. MORSE: Right now, it's -- you
8 know, it goes back to really basics of
9 talking, having a conversation with that
10 person who produces my food. And if I choose
11 to go out to their farm and take a look at how
12 those practices are being implemented, I can
13 do that. It's very subjective.

14 MS. MILLS: Thank you.

15 JUDGE HILLSON: Mr. Warshawer, do
16 you have your hand up, too?

17 MR. WARSHAWER: One. Steve
18 Warshawer again. A quick question is would
19 you be more comfortable considering the
20 proposed agreement if it was clear and
21 indisputable that its mark would not be used
22 for consumer labeling?

1 MS. MORSE: Hmm, well, let me
2 preface that by going back to what I said
3 before about, you know, really differentiating
4 between the different segments of the growers;
5 right? -- noticing that we have larger
6 growers, small growers, and micro growers, and
7 I -- ask me that question again.

8 MR. WARSHAWER: Under the -- would
9 you be more comfortable considering the
10 proposed agreement if it was clear and
11 indisputable that the mark produced for those
12 who are in conformance with the agreement will
13 not be used on consumer packaging or consumer
14 labeling?

15 MS. MORSE: I would. I would. If
16 we could really examine the economic impacts.

17 MR. WARSHAWER: Thanks.

18 JUDGE HILLSON: How about the
19 Proponents? Do you have any questions? Mr.
20 Resnick.

21 MR. RESNICK: Just a couple, Your
22 Honor. Jason Resnick for Western Growers.

1 MS. MORSE: I thought this was
2 going to be fast.

3 MR. RESNICK: Well, it will be --

4 JUDGE HILLSON: I warned you, I
5 believe -- I believe I warned you.

6 MR. RESNICK: It will be fast from
7 here on out. First of all, I want to thank
8 you very much for coming today to testify and
9 giving us your views on the proposed
10 agreement. Your views very much matter to us
11 and we appreciate it.

12 Are you aware that the National
13 LGMA proposal would not affects farmers'
14 markets in that they could not be signatories
15 to the proposed agreement?

16 MS. MORSE: I did read something
17 to that effect, but what I am concerned about
18 is the -- the suppliers of the farmers
19 markets' because, without the suppliers for
20 the small -- the small farmers, then you don't
21 have any farmers' markets.

22 MR. RESNICK: And then would you

1 also -- if I were to represent to you that the
2 suppliers to farmers' markets also would not
3 be signatories to the agreement, would that
4 assuage some of those concerns for you?

5 MS. MORSE: It would and it
6 wouldn't, but it does go back to -- I guess it
7 goes back to the seal and -- and the statement
8 that that might represent, you know, to the
9 consumer if there's a seal and there's not a
10 seal. Which product do you choose?

11 MR. RESNICK: Were you aware that
12 the National LGMA proposal does not
13 contemplate that the seal would appear on
14 consumer packaging?

15 MS. MORSE: I think I read that it
16 would.

17 MR. RESNICK: If I were to
18 represent to you that the seal would not
19 appear on consumer packaging, would that
20 assuage those concerns?

21 MS. MORSE: I would consider that.
22 I would consider that.

1 MR. RESNICK: And would you agree
2 with the notion that farmers should use good
3 agricultural practices to reduce the incidence
4 of food-borne illness?

5 MS. MORSE: I think they should
6 and I think those -- those metrics already
7 exist and I think just streamlining and taking
8 a look at what exists already, going back to
9 that, and -- and implementing an easier way to
10 comply with those current metrics would be
11 sufficient at this point.

12 MR. RESNICK: And what would you
13 say to those growers that don't adhere to
14 those good agricultural practices that you're
15 referring to?

16 MS. MORSE: Well, I guess there
17 needs to be a way to determine whether they
18 are adhering to them. I think that would be
19 my first question.

20 MR. RESNICK: I would agree with
21 that. Thank you. That concludes my
22 questions. Thank you very much.

1 JUDGE HILLSON: Anything else from
2 you gentlemen? Mr. Giclas.

3 MR. GICLAS: Yeah. Hank Giclas,
4 Western Growers. Ms. Morse, thank you for
5 your testimony today and thank you for
6 traveling all the way here to participate.

7 I just have one question. You
8 said that you read the agreement. I'm
9 curious. Did you -- is there any language in
10 the LGMA, the proposed national agreement,
11 that you could refer us to that would preclude
12 somebody from participating in both the Know
13 Your Farmer, Know Your Food program and the
14 LGMA?

15 MS. MORSE: You know, not at this
16 time but I'm concerned that if you have a Know
17 Your Farmer, Know Your Food program and --
18 excuse me -- and you implement a very costly
19 layer of regulation to a small farmer, that
20 you're conflicting with the Know Your Farmer,
21 Know Your Food because you're not gonna have
22 that opportunity to know them because they're

1 going to be out of business if they have any
2 more costly regulations or metrics that -- you
3 know, that they have to adhere to. So I think
4 it -- to me, I think the program from what
5 I've seen so far, the Know Your Farmer, Know
6 Your Food program, is an exciting program and
7 it has stimulated small economies. I can
8 testify to that in the small community of
9 Green Valley in Arizona, that it has
10 stimulated local rural economies. But I think
11 that it's -- you know, with more regulation,
12 it is gonna be difficult to sustain that
13 because it all comes down to money again and
14 so the -- I think you have to be real careful
15 that you can support both programs if you're
16 gonna have a national agreement that's
17 voluntary, that you really consider the long-
18 term effects that this could become mandatory
19 and, if it does become mandatory, how is it
20 gonna affect these small farmers' rural
21 economies three years from now, five years
22 from now, ten years from now because they are

1 a viable program and they're great for
2 community to get people involved.

3 MR. GICLAS: Okay. So, I mean,
4 would you -- what would you think about the --
5 you know, if there was an additional layer of
6 regulation or if there was mandatory
7 regulation, should those small growers, those
8 small entities, have some kind of voice or say
9 in what those regulations should look like?

10 MS. MORSE: Absolutely.
11 Absolutely. And I think when we look at the
12 different zones and the 23-member committee
13 that's going to make these decisions, that
14 there -- and I do understand that small
15 growers, you know, may not have an opportunity
16 to participate in those committee meetings
17 because of financial constraints, but I feel
18 that there needs to be some representation
19 when you're looking at the different zones and
20 the representation from those zones of that
21 other level of the -- I guess the micro-farmer
22 and having their involvement. I think that's

1 very important.

2 MR. GICLAS: So from your
3 standpoint, it would be an improvement to
4 maybe more directly recognize that in the
5 proposed agreement?

6 MS. MORSE: Correct.

7 MR. GICLAS: Are you aware of -- I
8 think it's laudable as a consumer that you're
9 tracking these kinds of things in the
10 industry. Are you aware of any other
11 initiatives or efforts that are underway
12 relating to, you know, the regulation of the
13 fruit and vegetable industry?

14 MS. MORSE: You know, just kind of
15 -- I have to admit and confess that I do get
16 the Federal Register every day and so I do
17 kind of zoom through some of the different
18 things, proposed projects that are being
19 submitted. And I -- surfacely. But, to be
20 honest with you, it takes a lot when you get
21 the Federal Register to really do a lot of
22 research and find out what exactly is going on

1 because there's always more to it than just
2 what's on the -- in the proposed rules. So I
3 am somewhat aware, but not -- not to any very
4 significant degree.

5 MR. GICLAS: Are you aware of
6 Congress's attention, if you will, on food
7 safety and --

8 MS. MORSE: Yes.

9 MR. GICLAS: -- specifically the
10 produce industry?

11 MS. MORSE: Yes, I am.

12 MR. GICLAS: Are you aware that
13 they are contemplating a national regulation
14 of the fresh produce industry?

15 MS. MORSE: I have heard something
16 to that. Yes.

17 MR. GICLAS: Are you aware that
18 FDA is -- has efforts to establish regulation
19 for the fresh produce industry?

20 MS. MORSE: Yes.

21 MR. GICLAS: Do you think or would
22 you anticipate that in the context of any of

1 that national regulation those regulations
2 would attempt to cover all growers?

3 MS. MORSE: Just off the top of my
4 head, I would -- I would imagine that the very
5 small micro-grower wouldn't be -- would not be
6 at the top of the consideration because,
7 obviously, it's not serving the majority of
8 consumers within the United States. I would
9 imagine that the focus would be more on the
10 larger grower and maybe mid-sized grower.

11 MR. GICLAS: So you think that a
12 national regulatory program would exempt
13 micro-growers?

14 MS. MORSE: No. I think it would
15 push them out.

16 MR. GICLAS: Okay. I don't have
17 any other questions.

18 JUDGE HILLSON: Mr. Resnick.

19 MR. RESNICK: Thank you. Jason
20 Resnick. Just one question to follow up on
21 Mr. Giclas' question and just to close the
22 circle. You, I assume from your responses,

1 would not support national federal regulation
2 of fresh fruits and vegetables?

3 MS. MORSE: At this point, being a
4 novice, you know, looking at all this, I would
5 like to, you know -- I would like to really
6 focus on what exists right now and making sure
7 that it's all understood and that the
8 compliance is easy for all the people that are
9 in the growing and handling issue and
10 distributing industry. I hesitate to add more
11 to what we already have if we don't know if
12 what we already have -- if it's not working,
13 we need to see if we can make it work. Sort
14 of like, you know, immigration laws. What do
15 we have? Let's enforce it.

16 MR. RESNICK: Thank you.

17 MS. MORSE: Instead of adding
18 more.

19 JUDGE HILLSON: Anything else?
20 Sir? Please identify yourself.

21 MR. BLAKE: I'm Cary Blake.
22 Simple question for you. How would you define

1 a small farmer versus a large farmer? Like
2 acreage and, if so, what would that acreage
3 be?

4 MS. MORSE: Well, I think what I
5 heard on testimony on the 23rd, it was more by
6 gross income and I think that makes a
7 difference, but I think both of those
8 considerations would be looking at, you know,
9 the gross income and also the acreage that's
10 involved in that.

11 MR. BLAKE: Okay. So what would
12 be your breakdown between a small farmer and
13 large farmer?

14 MS. MORSE: I have no idea. I
15 know, having lived in California most of my
16 life, and being familiar with Imperial Valley,
17 we're talking about, you know, 6,000-acre
18 farms and I look at that -- to me, that
19 appears to be a large grower. When I look at
20 Jack Lemons who has 40 acres, I would consider
21 that a micro or a very small grower. And so
22 I'm sure there's different, you know, layers

1 in between that.

2 MR. BLAKE: Thank you.

3 JUDGE HILLSON: Well, you may step
4 down. Or did you have another question? I
5 thought you raised your hand.

6 MR. RESNICK: Oh, no. No, no.

7 JUDGE HILLSON: Okay. Then you
8 may step down, Ms. Morse.

9 MS. MORSE: Thank you, Judge, for
10 allowing me to go before lunch.

11 JUDGE HILLSON: I note that it's
12 12:25. I also note that we've heard five
13 witnesses and you have approximately a dozen
14 more on your schedule for today. So even
15 though it says the hearing's going to be from
16 8:30 to 5:00, I would suggest that we'll
17 probably be here for longer than that. How
18 much longer depends in part on you folks in
19 terms of how long you want to go. If people
20 are starting to pass out at 6:30 or 7:00 and
21 you can put -- I understand -- I was talking
22 a little bit with Mr. Warshawer that they only

1 have -- that there's only three witnesses
2 scheduled for tomorrow. So one of the things
3 you might consider is whether -- depending on
4 how late we're going is whether -- is how late
5 -- is whether you want to put off one of your
6 panels or one of your witnesses or whatever
7 for tomorrow.

8 MR. RESNICK: We would anticipate
9 doing that, Your Honor.

10 JUDGE HILLSON: Okay. Because,
11 otherwise, I'll go until -- I mean, I'll go
12 until seven o'clock if that's what we need to
13 do to -- I want to make sure everyone has a
14 chance to testify. Don't want to cut anyone
15 off. And right now, it's 12:27. I've -- it's
16 been suggested to me that there are places to
17 eat within a short driving distance, so I will
18 say we'll come back at 1:30. We're off the
19 record.

20 (Lunch recess from 12:30 p.m.,
21 until 1:30 p.m.)

22

1 AFTERNOON SESSION

2 (1:37 p.m.)

3 JUDGE HILLSON: Let me just ask
4 the USDA panel, did you make any -- did you
5 and Mr. Cullings agree or anything? Did you
6 decide whether you needed him again, or what
7 did you decide on that? You were going to
8 decide it over lunch, so I --

9 MS. SCHMAEDICK: Yeah.

10 JUDGE HILLSON: -- thought I'd
11 ask.

12 MS. SCHMAEDICK: Are we on the
13 record?

14 JUDGE HILLSON: Yeah.

15 MS. SCHMAEDICK: Okay. I believe
16 that we can ask follow-up questions of other
17 members of the Proponent group.

18 JUDGE HILLSON: Okay. That's
19 fine. All right. Mr. Resnick, you may call
20 your next witnesses.

21 MR. RESNICK: Thank you, Your
22 Honor. The Proponent group calls a panel of

1 Tom Nunes, Victor Smith, and Paul Muthart.

2 JUDGE HILLSON: And is that the
3 order you want them to testify or do you have
4 any preference?

5 MR. RESNICK: That would be fine,
6 Your Honor.

7 JUDGE HILLSON: So it's Mr. Nunes.
8 Who was second? Muthart?

9 MR. RESNICK: Vic Smith?

10 JUDGE HILLSON: Oh, Vic Smith is
11 second. Okay.

12 Let me swear you in, Mr. Nunes.
13 Please raise your right hand.
14 Whereupon,

15 TOM NUNES
16 having first been duly sworn, was called as a
17 witness and testified as follows; to wit:

18 JUDGE HILLSON: Okay. Could you
19 please state your name and spell it for the
20 record.

21 MR. NUNES: Tom Nunes, T-o-m,
22 N-u-n-e-s.

1 JUDGE HILLSON: And I'm going to
2 mark your written statement as Exhibit 81.

3 (Exhibit 81 was marked
4 for identification.)

5 JUDGE HILLSON: And you may read
6 on.

7 TESTIMONY

8 MR. NUNES: My name is Tom Nunes.
9 I am vice president of Nunes Vegetables, Inc.,
10 a large family-owned leafy greens grower-
11 shipper. I have held this position for over
12 20 years and have been in the industry for
13 over 30 years.

14 Nunes Vegetables grows and ships
15 western vegetables seasonally from the Salinas
16 Valley, Central San Joaquin Valley, Ventura
17 County, and Yuma, Arizona. Yuma is our home
18 for winter production of western vegetables.

19 We grow and ship from
20 approximately 12,000 acres of leafy greens,
21 which include iceberg lettuce, romaine
22 lettuce, and other leafy green vegetables.

1 Yuma district represents approximately one
2 third of this production.

3 Our grower base in California and
4 Arizona include 15 grower companies ranging in
5 size from a hundred acres to 5,000 acres of
6 leafy greens of which we are the largest. As
7 a participant in the California and Arizona
8 Leafy Green Marketing Agreements, I have seen
9 the programs in action. As you know, these
10 are voluntary programs. However, once you
11 join, their requirements are mandatory.
12 Signatories have numerous audits throughout
13 the growing seasons, including unannounced
14 audits, all conducted by the California
15 Department of Agriculture, with oversight from
16 the USDA. As an enrolled signatory, we agree
17 to ship only leafy greens grown according to
18 science-based good agricultural practices
19 referred to as metrics.

20 Listed are the benefits I believe
21 that California and Arizona LGMA programs have
22 brought to our company and our industry:

1 (1) The food quality verification
2 audits that reduce microbial food safety
3 hazards are uniform with other signatory
4 grower-shippers in each production district
5 and state.

6 (2) The California and Arizona
7 LGMA programs have educated the handlers and
8 have no doubt elevated the importance of a
9 safer food supply right down to the smallest
10 grower and their workforce. In my opinion, in
11 order to have a successful food safety
12 program, it must be systemic and part of the
13 culture of your company. These programs have
14 given us the tools to do so.

15 (3) The LGMA audits provide our
16 buyers with a science-based food safety
17 program that brings consistency to testing and
18 food safety requirements. This is basic in
19 educating the buyer that this is the food
20 safety program of choice.

21 (4) These verification audits
22 have enhanced the food quality of fresh leafy

1 green vegetables with consistent, stringent,
2 and science-based requirements that will
3 increase consumer confidence in leafy greens.

4 (5) The LGMA programs have given
5 its signatories and their buyers a level of
6 comfort knowing that each company has a
7 capable traceback program in place in the
8 event of recall of market withdrawal.

9 Our experience with the California
10 and Arizona programs has been a positive one.
11 It has provided our company a template to a
12 safer food supply. I believe the proposed
13 national agreement will bring the same
14 advantages to all leafy green grower-shippers
15 across the United States. Nunes Vegetables,
16 Inc. would like to go on record supporting the
17 National Leafy Greens Marketing Agreement.

18 Thank you.

19 JUDGE HILLSON: Okay, Mr. Nunes.
20 I'm going to receive your written testimony as
21 Exhibit 81. We're going to have each of the
22 panelists read their statement and then open

1 the floor for questions.

2 (Exhibit 81 was

3 received.)

4 JUDGE HILLSON: So, Mr. Smith,
5 please raise your right hand.

6 MR. SMITH: Yes, sir.

7 Whereupon,

8 VICTOR SMITH

9 having first been duly sworn, was called as a
10 witness and testified as follows; to wit:

11 JUDGE HILLSON: Okay. Could you
12 state your name for the record.

13 MR. SMITH: Yes. My name is
14 Victor Smith, S-m-i-t-h.

15 JUDGE HILLSON: Okay. And I've
16 marked your written testimony as Exhibit 82,
17 and I presume you want to read that statement?

18 MR. SMITH: Yes, sir.

19 JUDGE HILLSON: Go right ahead.

20 (Exhibit 82 was marked
21 for identification.)

22 //

1 TESTIMONY

2 MR. SMITH: Thank you. Good
3 afternoon. My name is Victor Smith. I am
4 here this afternoon to support the National
5 Leafy Greens Marketing Agreement.

6 I am the CEO and owner of Fresh
7 Innovations, LLC, JV Farms, Inc., and
8 Promotora Agricola El Toro. These are related
9 companies that specialize in the production of
10 fresh green leafy vegetables.

11 JV Farms grows over 6,000 acres of
12 iceberg lettuce, romaine, and mixed leaf
13 lettuces in the Yuma, Arizona area. Fresh
14 Innovations and Agricola El Toro produce over
15 5,000 acres of romaine lettuce, spring mix,
16 baby spinach, and other specialty fresh
17 vegetables, both conventional and organic, in
18 our operations in northern Baja, Mexico. Our
19 companies work with major handlers who are
20 signatories to the California Leafy Greens
21 Marketing Agreement and the Arizona Leafy
22 Greens Marketing Agreement. And we have been

1 participants in these state programs since
2 their inception. Our Mexico operations comply
3 completely with the LGMA standards.

4 I am also the CEO and owner of
5 Southern Colorado Farms located in Center,
6 Colorado. Our general manager of farming
7 operations, Amy Kunugi, testified in support
8 of the NLGMA at your Denver, Colorado hearing.
9 Our Colorado operations also comply completely
10 with the LGMA standards.

11 I believe you have already heard
12 numerous companies testify in support of this
13 national program and they have consistently
14 shared a common theme of food safety standards
15 that are measurable and reasonably achievable.
16 They are scientifically-based best practices
17 for our specific commodities. They were
18 developed primarily for the public's safety by
19 greatly reducing the risk of contaminated
20 produce reaching the consumer level. This is
21 a common goal sincerely shared by all
22 producers and handlers that I am aware of in

1 the California, Arizona, Colorado, and Baja
2 Mexico regions. I truly believe we are united
3 in providing our healthy and nutritious
4 products to our nation without fear of
5 contamination.

6 I would say to not have these
7 standards in place puts our category of the
8 fresh vegetable industry in great jeopardy.
9 The so-called spinach crisis of 2006 wreaked
10 havoc in our industry and caused significant
11 economic damage to our companies. Within the
12 past week, the Center for Science in the
13 Public Interest, or abbreviated to CSPI, came
14 out with their "List of the Ten Riskiest Foods
15 Regulated by the U.S. Food and Drug
16 Administration." Appearing on the top of
17 their list is leafy greens. While I
18 personally believe this was an irresponsible
19 effort to promote a specific political agenda,
20 it nevertheless continues to burden our
21 industry with a very negative image. The
22 NLGMA can be a powerful force to counter these

1 public perception issues.

2 I am certain that the LGMA program
3 followed by the producers and handlers in the
4 areas that our companies operate has
5 significantly reduced the risk of pathogen
6 contamination with our products. We have
7 raised the bar with food safety standards
8 within our industry and have united a group of
9 extremely competitive companies in a common
10 cause for safe crops to be enjoyed by our
11 consumers.

12 I would advocate that the NLGMA is
13 a logical, efficient, and timely program to
14 deal with public concerns about food safety
15 and fits very nicely with the recent
16 initiative between the USDA and the FDA. I'm
17 referring to your Chief of Fresh Products
18 Branch, Leanne Skelton, joining with the FDA
19 to work with industry sources to better share
20 food safety best practices and ideas. By
21 extending this program to a national level,
22 our industry can have more confidence that

1 other producers would participate and continue
2 to enhance public safety.

3 Our companies' costs would not
4 increase by the implementation of the NLGMA as
5 we are currently complying with all aspects of
6 this program. In reviewing the costs that we
7 have incurred over the recent years associated
8 with this program, it appears they run in the
9 range of one to two percent of our total
10 production costs. I strongly believe this is
11 a very small price to pay for the better
12 health of our industry and, more importantly,
13 for the safety of our customers.

14 In summary, our companies would
15 like to go on record as strongly supporting
16 the NLGMA as an important program for our
17 industry and our customers.

18 Thank you.

19 JUDGE HILLSON: Thank you, Mr.
20 Smith. And I'll receive your written
21 statement as Exhibit 82.

22 //

1 (Exhibit 82 was
2 received.)

3 JUDGE HILLSON: Okay. Please
4 raise your right hand.
5 Whereupon,

6 PAUL MUTHART
7 having first been duly sworn, was called as a
8 witness and testified as follows; to wit:

9 JUDGE HILLSON: Okay. And please
10 state and spell your name for the record.

11 MR. MUTHART: My name is Paul
12 Muthart, M-u-t-h-a-r-t.

13 JUDGE HILLSON: Okay. And I've
14 marked your written statement as Exhibit 83,
15 and you may proceed to read it.

16 MR. MUTHART: Thank you.

17 (Exhibit 83 was marked
18 for identification.)

19 TESTIMONY

20 MR. MUTHART: Good afternoon and
21 thank you for coming to Yuma to hear this
22 testimony.

1 I represent Pasquinelli Produce.
2 I am the general manager and an officer in
3 that company and I'm here to speak in favor of
4 the National Leafy Greens Marketing Agreement.

5 Pasquinelli Produce is a family
6 farm that has been growing winter vegetables
7 in the Yuma area for over 60 years.

8 We are currently growing
9 approximately 8,500 acres of vegetables, of
10 which 4,900 are head lettuce, 2,200 acres are
11 leaf lettuce. It is our goal to be compliant
12 with the Arizona Leafy Greens Marketing
13 Agreement.

14 I have downloaded and I've read
15 the amended draft of the National Marketing
16 Agreement. From our perspective, the last
17 point in the "Purpose" paragraph, which is
18 Section 970.31, should really be the beginning
19 point and the end goal. I'd like to quote:
20 "Improve consumer confidence in leafy green
21 vegetables."

22 That confidence will come if our

1 industry can consistently deliver a quality
2 leafy green vegetable that is safe to eat.

3 There are many participants along
4 the field-to-fork journey of a leafy green
5 vegetable. And as a grower/producer,
6 Pasquinelli is at the beginning of that
7 journey. Our contribution would be to grow a
8 quality, safe-to-eat leafy green vegetable.

9 Our interest in the proposed
10 National Leafy Greens Marketing Agreement can
11 be focused to the promulgation and
12 verification of good agricultural practices
13 that would reduce microbial food safety
14 hazards, regardless of where the leafy
15 vegetable is grown.

16 We are particularly pleased to see
17 the importance of having science be the driver
18 in our industry's efforts. And this is
19 demonstrated by the establishment of the
20 Technical Review Board to assist the Committee
21 in establishing appropriate metrics.

22 I would like to emphasize the

1 point that our primary concern is the American
2 consumer receiving a safe-to-eat leafy green
3 vegetable, regardless of where that vegetable
4 is grown or how large or how small that farm
5 is.

6 Accordingly, we're happy to see in
7 Section 970.66(a)(2) the inclusion of leafy
8 green vegetables produced in foreign
9 countries.

10 This goal of a safe food product
11 should be readily understood and embraced by
12 all who have a conscience. All of the farmers
13 that I know have such a conscience and would
14 be terribly distraught if they knew that they
15 grew a vegetable that made someone sick or,
16 worse yet, to die.

17 But there is another reason why we
18 would like to see the national agreement on
19 the role that good ag. practices play in
20 delivering safe food, and that reason has to
21 do with business. In this day and age of
22 instant and graphic communication, what

1 happens in any part of our country is quickly
2 known by the entire country. And what happens
3 in any part of our country has the potential
4 to affect all other parts of the country.

5 So by way of example, if a leafy
6 green producer in the state of New York were
7 responsible for introducing E. coli-
8 contaminated romaine lettuce into the
9 marketplace, the entire country would be
10 alerted. Based on past history, it's
11 reasonable to conclude that the consumption of
12 romaine would be diminished all across the
13 country. This would likely mean that
14 Pasquinelli's production in Yuma County would
15 be halted, even though the two growing regions
16 are miles apart.

17 Because we are growing a highly
18 perishable food, we cannot hold our crops in
19 inventory until the aforementioned New York
20 incident is properly disposed of. Discing an
21 unharvested field means that Pasquinelli
22 would suffer financial losses through no fault

1 of its own.

2 Pasquinelli could also suffer
3 financial losses from the food-borne illness
4 even if the New York incident occurred when
5 Pasquinelli is not harvesting. We have a
6 business relationship with many shippers and
7 handlers who put their product into the
8 marketplace each day of the calendar year. We
9 can imagine a situation where that New York
10 incident negatively impacts one of our
11 shipper's sales to the point of causing our
12 shipper to go out of business.

13 So, once again, Pasquinelli would
14 have a financial loss through no fault of our
15 own due to an uncollectible receivable from a
16 bankrupt shipper.

17 To summarize, Pasquinelli supports
18 the National Leafy Greens Marketing Agreement.
19 We are particularly attracted to the idea of
20 crafting guidelines for good agricultural
21 practices, so that regardless of where the
22 leafy green vegetable is grown, the risk of

1 microbial food safety hazards is reduced.

2 Thank you.

3 JUDGE HILLSON: Okay. Mr.

4 Muthart, I'll receive your written testimony
5 as Exhibit 83. And I will ask the USDA panel
6 for their questions -- of any of the panel
7 members and --

8 (Exhibit 83 was
9 received.)

10 JUDGE HILLSON: Ms. Schmaedick.

11 MS. SCHMAEDICK: Melissa
12 Schmaedick, USDA. Good afternoon. Thanks to
13 all three of you for your statements and I
14 will try to ask each of you questions
15 individually and then may follow up with some
16 questions for all three of you.

17 So I'd like to begin with Mr.
18 Nunes. So if I understand your statement
19 correctly, you have production in California
20 as well as Arizona?

21 MR. NUNES: Yes. Yes, we do.

22 MS. SCHMAEDICK: Okay. And are

1 the production areas or the regions for these
2 different producing areas different in terms
3 of the geography or the cultural practices
4 that you might use?

5 MR. NUNES: Yes, they are.

6 MS. SCHMAEDICK: Can you explain
7 some of those differences?

8 MR. NUNES: Well, as an example,
9 in the Salinas Valley, we use well water as a
10 predominant use of water. And in the Imperial
11 -- in the Yuma District, it's canal water or
12 water out of the Colorado.

13 MS. SCHMAEDICK: Uh-huh. And so
14 how -- how do you address these differences in
15 water sourcing, for example, when you meet the
16 metrics under the California or Arizona
17 program

18 MR. NUNES: How do we -- we follow
19 the GAPs for that particular area. That's how
20 we meet 'em.

21 MS. SCHMAEDICK: Okay. So is it
22 important then to have metrics that are

1 developed for specific regions, recognizing
2 that there might be differences, for example,
3 in water sourcing?

4 MR. NUNES: No -- no question,
5 yes. I believe in that and they should be
6 science-based.

7 MS. SCHMAEDICK: Okay. So I'm
8 curious. You said "Our grower base in
9 California and Arizona include 15 grower
10 companies ranging in size from 100 acres to
11 5,000 acres." So are you then receiving
12 product from 15 different growers; is that
13 what you're saying?

14 MR. NUNES: Yes, and we're
15 included in that and we are the largest of
16 that grower group. Yes. We are grower-
17 shippers. We grow and we contract with
18 growers in these different areas and we ship
19 -- we sell and ship the produce also --
20 actually, package, ship -- sell and ship the
21 product.

22 MS. SCHMAEDICK: And the companies

1 that you deal with that are on these smaller
2 end of that range that you mentioned, do you
3 happen to know if they fall within the SBA
4 definition of a small-producing company? Are
5 you familiar with that definition?

6 MR. NUNES: I'm not that familiar
7 with it. No.

8 MS. SCHMAEDICK: The definition is
9 gross receipts of less than \$750,000.

10 MR. NUNES: I'm not sure -- I'm
11 not sure about that. All I know is what we
12 contract with these various growers, and so we
13 do -- the smallest grower we have, we contract
14 a hundred acres of leafy greens with them. So
15 I can't tell you what their gross receipts
16 are.

17 MS. SCHMAEDICK: Okay. So across
18 these 15 different companies that you deal
19 with, and over the course of the
20 implementation of both the California and the
21 Arizona programs, what has been your
22 perception of their experience in coming into

1 compliance with these programs?

2 MR. NUNES: You know, with the
3 inception of the California LGMA, it wasn't an
4 easy process at the beginning, but with
5 education and with the industry pulling behind
6 this, it became very evident that these
7 growers stepped up to the plate and I think
8 we've got a very, very good program going on
9 right now. I'm talking about the California
10 and Arizona LGMA programs.

11 MS. SCHMAEDICK: Did these smaller
12 grower entities experience any different types
13 of adjustments than the larger-growing
14 entities?

15 MR. NUNES: You know, I -- I
16 didn't feel that from my perspective. I'm
17 sure there was some anxiety with regards to
18 the small ones and the bigger ones at that
19 particular time. But I think that the -- they
20 found ways to get it done. Some used
21 consultants to do it. Some used our people to
22 do it. When the LGMA was formed, we had to --

1 we had to fire personnel on the food -- for
2 the food safety side and these small growers
3 were able to come and use our resources but
4 also they would hire consultants if they
5 wanted to go on their own.

6 MS. SCHMAEDICK: Would it be
7 accurate to say that some of these operations
8 were already following good agricultural
9 practices?

10 MR. NUNES: I would --

11 MS. SCHMAEDICK: Go ahead.

12 MR. NUNES: I'm sorry. Did you
13 want to finish?

14 MS. SCHMAEDICK: No. Go ahead.

15 MR. NUNES: Okay. You know,
16 everybody had a food safety program before
17 LGMA but they were all different and I think
18 they used third party audits. These auditors
19 would come out once a year and visit your
20 ranches or visit your operations and they
21 would give you a grade. But I don't believe
22 that all the programs were uniform. And I

1 think what the LGMA did was make a uniform
2 policy here and a standard that everybody
3 would follow.

4 MS. SCHMAEDICK: You mentioned
5 that you also operate as a shipper; correct?

6 MR. NUNES: Yes.

7 MS. SCHMAEDICK: Based on your
8 understanding of the proposed agreement, who
9 would bear the financial cost of the audit at
10 the grower level?

11 MR. NUNES: Actually, the shipper
12 is bearing that cost at this particular time.
13 We own all the crops that we grow, so we
14 contract with these growers and so we bear
15 that cost.

16 MS. SCHMAEDICK: And would that
17 include, for example, water testing if that
18 was a requirement?

19 MR. NUNES: Yes.

20 MS. SCHMAEDICK: Okay. In your
21 statement, you talk about the importance of
22 consumer confidence in leafy greens.

1 MR. NUNES: Yes. Yep.

2 MS. SCHMAEDICK: Yet in earlier
3 testimony over the past several locations,
4 we've heard that the intent of the proposal is
5 to not use the mark on consumer packaging. So
6 I'm curious, in your opinion, how would this
7 program lead to consumer confidence?

8 MR. NUNES: The LGMA did a survey
9 a while back -- I think it was probably about
10 a year ago or so -- and it was put to the
11 consumer whether or not that she would regain
12 more confidence in the leafy greens that she
13 purchases if she knew that there was a program
14 in place, food safety program in place, and it
15 was pretty overwhelming the reversal. And so,
16 yeah, I do believe it, that this program will
17 provide that for us, but also since the
18 inception of the LGMA program, I don't recall
19 -- there have been market withdrawals and
20 recalls, but I don't know of any outbreak
21 that's been traced back to leafy greens in the
22 growing areas. I can't recall that.

1 And I think with that, I think you
2 do build consumer confidence.

3 MS. SCHMAEDICK: And your company,
4 does -- in the shipping part of your company,
5 do you ship product to other states across the
6 country?

7 MR. NUNES: Yes, we do.

8 MS. SCHMAEDICK: And in your
9 opinion, is the responsibility of minimizing
10 contamination in a product, does it rest only
11 on the producer or are there responsibilities
12 that carry through that field-to-fork chain?

13 MR. NUNES: I believe it should
14 carry all the way through up the market chain
15 for sure.

16 MS. SCHMAEDICK: Can you give us
17 some examples of how a shipper might be
18 responsible for minimizing contamination?
19 What types of practices would you put in
20 place?

21 MR. NUNES: Well, we're following
22 the LGMA and I'm not sure what you're asking

1 me for, but we do follow the LGMA and we feel
2 that that is -- that is sufficient. But also
3 it's an educational process.

4 As I said in my statement here, I
5 believe that a good food safety program, and
6 the LGMA provides that, it helps you develop
7 a culture within your own company.

8 Before LGMA was formed, and
9 actually before the spinach outbreak, I really
10 believe that most growers and shippers
11 believed that they were growing produce and I
12 believe there's a cultural change taking
13 place. We're producing food, and it's much
14 different. And no different than -- and we're
15 going through some of the same issues and
16 whatnot I think that the meat industry years
17 and years ago, and so we're feeling the same
18 kind of pain.

19 MS. SCHMAEDICK: And you mentioned
20 that there have been contaminations that have
21 been identified since the implementation of
22 the California and Arizona programs. Does the

1 fact that those contaminations have been
2 identified mean that there's a failure within
3 the system?

4 MR. NUNES: Oh, I believe that the
5 system is working. You know, we -- to my
6 recollection, I don't believe we've had any
7 outbreaks. We've had market withdrawals and
8 market recalls, but you have to remember some
9 of those are based on testing that the FDA has
10 done and all that testing is done at
11 warehouses, at destinations away from the
12 shipping points, and so we don't know where
13 that kind of contamination could occur. We're
14 not -- but it falls back on the grower every
15 time or the shipper.

16 MS. SCHMAEDICK: So by having a
17 traceback system in place, has that been
18 helpful to address these events as they come
19 up?

20 MR. NUNES: No question. I think
21 what it's done -- you can see what happened to
22 the spinach industry in 2006. And with these

1 market withdrawals or recalls, you're able to
2 identify the lot or the shipper, the lot,
3 you're able to get it off to marketplace
4 quickly and you just -- you don't see the
5 press because of that. It doesn't become a
6 big deal anymore.

7 You know, I -- like I said, I
8 think that recalls, like what the meat
9 industry has gone through and is going
10 through, I think recalls are going to be part
11 of our business now. I think it's gonna be
12 something we have to live -- we're gonna live
13 with.

14 MS. SCHMAEDICK: And is -- the end
15 -- is the purpose of a recall to prevent
16 illness or deaths from occurring in the
17 consumer body?

18 MR. NUNES: I would say so. Yes.

19 MS. SCHMAEDICK: So ultimately the
20 concern is the safety of the consumer?

21 MR. NUNES: No question.

22 MS. SCHMAEDICK: Thank you. Do

1 you have questions? Thank you, Mr. Nunes.

2 I have questions for Mr. Smith.

3 MR. SMITH: Yes, ma'am.

4 MS. SCHMAEDICK: So you mentioned
5 that your company -- is it the same company
6 with different names, different DBAs?

7 MR. SMITH: Ther are actually
8 three different legal entities that I
9 referenced there and then the fourth one in
10 Colorado, but they're all common ownership
11 within my family.

12 MS. SCHMAEDICK: Okay. And you
13 mentioned that part of one operation is
14 located in Mexico?

15 MR. SMITH: That's correct.

16 MS. SCHMAEDICK: And then you also
17 have some production that's organic?

18 MR. SMITH: Yes.

19 MS. SCHMAEDICK: So you have quite
20 a wealth of experience on either end of the
21 scope of conventional, organic, domestic, and
22 foreign production; is that correct?

1 MR. SMITH: Yes, and sometimes
2 unfortunately so, but yes.

3 MS. SCHMAEDICK: Okay. In your
4 opinion, are there differences in the
5 producing areas, the cultural practices, the
6 environments in which you need to operate in
7 these different states and in Mexico?

8 MR. SMITH: Yeah. There are
9 unique environmental factors. For example, in
10 Colorado, we're in a high alpine valley that's
11 7500 feet elevation. The farming that we do
12 here in the Yuma area is at 200 feet
13 elevation. As Mr. Nunes mentioned, our source
14 of irrigation water here is from the Colorado
15 River by open water conveyance systems --
16 canals. Our source of water in Colorado is
17 from well, center-pivot irrigation and wells.
18 Source of water in Mexico is open water
19 conveyance and wells. So -- so we have a
20 diversity in that.

21 We have a diversity in climatic
22 conditions, how it affects particularly pest

1 pressures. In Colorado, for example, you'll
2 have extremely cold winters, so it will
3 tend -- we won't have particular nematode
4 problems in the soil. And we won't have
5 particular insect problems that may carry over
6 through winter weather that we would face down
7 here. So there are definitely different
8 environmental factors and impacts.

9 MS. SCHMAEDICK: And you say that
10 currently all of your operations comply with
11 LGMA standards. Since you operate in Arizona
12 and California, are you complying with both
13 programs, or does it depend on whatever --

14 MR. SMITH: We're basically
15 complying with -- all the companies that we
16 work with, in the definition of the act as
17 handlers or as our common terminology is
18 shippers, all the parties that we deal with in
19 all areas where we go are very large major
20 grower-shippers and handlers, so we're
21 compliant with whatever regulation, you know,
22 that -- when you say between Arizona or

1 California, probably the primary one that
2 we've dealt with over the course of time in
3 Colorado and Mexico has been the California
4 standard. And in Arizona, we're dealing with
5 the Arizona standard.

6 MS. SCHMAEDICK: Did you face any
7 particular challenges in having your
8 production in Mexico comply with the
9 California metrics?

10 MR. SMITH: Yeah. I think it's --
11 to a certain degree, it's the infrastructure
12 availability, whether it tends to be a much
13 better, you know, more money available in the
14 Yuma region and California and Arizona
15 compared to Mexico. The infrastructure for
16 the canal systems -- for example, in Mexico,
17 what we have done is -- with the program with
18 the Mexican health agencies, they'll supply us
19 the materials to do underground piping from
20 our wells, major wells, to deliver to the
21 particular fields if we'll do the
22 installation. So they're interested in saving

1 water. We are, too. But our primary interest
2 was in the food safety arena. So it's -- it's
3 a different world down there, but we have to
4 get creative and we work in different ways
5 with that.

6 MS. SCHMAEDICK: So in the
7 proposed program, the national program, would
8 you conceive that a specific set of metrics
9 would be developed for let's say the area
10 around Baja Mexico or what's your --

11 MR. SMITH: Well, I don't think
12 you can -- it doesn't matter what country
13 you're in or what region you're in when it
14 comes to water testing. You know, the metrics
15 say if you have a particular source, like
16 well, you test so often. If you have open
17 water conveyance, you test, you know, more
18 frequently. You have to live up to the same
19 standards. You know, you can't increase or
20 decrease, you know -- particularly increase,
21 you know, the amount of coliform counts or
22 whatever is part of the metrics in your water

1 testing.

2 And when you talk about buffers
3 from, you know, animals, I mean, food safety
4 was explained to me by an extremely
5 intelligent man who knew the ins and outs very
6 well but he says, You're basically dealing
7 with four w's -- water, workers, waste, and
8 wildlife. And so when you look at those
9 basics and then you get into the specific
10 metrics that relate to that -- to those common
11 categories, I don't think you differ that much
12 in any given region.

13 So it has not been a problem for
14 us to comply in the areas that we operate, be
15 it in Mexico, Colorado, or here in Arizona.

16 MS. SCHMAEDICK: But is it my
17 understanding that the actions that you take
18 or the way that you comply with the same
19 standard might differ depending on the
20 location of your production?

21 MR. SMITH: Yes. It just -- well,
22 you know, your buffer areas from animals or

1 any type of incurrence of wildlife, we'd like
2 to see consistent standardization, which it is
3 in the LGMA. You do have other customers that
4 may impose higher standards in a given area,
5 but when you talk about the water testing or
6 you talk about worker, you know, procedures
7 for harvest workers and those type of things,
8 those are the same standards and the same --
9 you're going to execute them in the same way.

10 MS. SCHMAEDICK: In your opinion,
11 is it possible to develop a national program
12 that would take into account very different
13 production regions; for example, Florida
14 versus New York, and still meet the same
15 goals?

16 MR. SMITH: Yeah. As long as the
17 goals are that you're not gonna have any
18 pathogen-contaminated produce going to the
19 marketplace and how you -- you know, I think
20 that the LGMA -- and I'm not the expert on the
21 exact metrics and regulations. We do have a
22 Food Safety Department. But I'm fairly -- you

1 know, I'm familiar with them to a certain
2 degree. You're going to -- certain
3 requirements are going to vary for what kind
4 of irrigation systems, what kind of land in a
5 pre-planting assessment, but it's going to
6 come back to some basic standards at some
7 point.

8 MS. SCHMAEDICK: Okay. Thank
9 you.

10 MR. SMITH: Thank you.

11 MS. SCHMAEDICK: Is it Mr.
12 Muthart?

13 MR. MUTHART: Muthart.

14 MS. SCHMAEDICK: Muthart. Thank
15 you. On page two of your statement, you talk
16 about the impact of communication and the
17 spread of information and how that can impact
18 businesses across the country within a common
19 industry. My question for you is: What is
20 your opinion about the movement of product
21 within the leafy green -- the national leafy
22 green industry where you have product that may

1 be grown in one state, shipped to a second
2 state, and then possibly to a third state
3 before it's distributed to consumers? Is that
4 also a concern for you?

5 MR. MUTHART: In my testimony, I
6 referred to field-to-fork and you did, too.
7 Every step along the way until the point when
8 a consumer puts that food in their mouth,
9 there's responsibility, including how the
10 grocery store or how the Taco Bell or how the
11 food service provider takes care of the
12 product. Refrigeration along the way, if
13 that's called for, and so on. So very clearly
14 until the American consumer eats that product,
15 there is responsibility all along the food
16 chain.

17 MS. SCHMAEDICK: Uh-huh. That
18 concludes my questions. Thank you.

19 JUDGE HILLSON: Any other -- go
20 ahead, Ms. Carter.

21 MS. CARTER: Antoinette Carter
22 with USDA. Just a couple of follow-up

1 questions. I guess first I'd like to -- Mr.
2 Nunes, --

3 MR. NUNES: Yes.

4 MS. CARTER: -- you mentioned that
5 your -- there are 15 grower companies that
6 supply your company --

7 MR. NUNES: Yes.

8 MS. CARTER: -- located within --
9 I guess that are based in California and
10 Arizona. Do you receive a source of supply
11 from growers outside of those states?

12 MR. NUNES: No.

13 MS. CARTER: So all of your
14 product come from growers within those states.

15 MR. NUNES: Yes.

16 MS. CARTER: Then you also, in
17 response to Ms. Schmaedick's questions, one of
18 those, mentioned that the distribution is --
19 outside of -- includes California and Arizona
20 but also to states outside of that for the
21 leafy green vegetables.

22 MR. NUNES: You're talking about

1 our distribution?

2 MS. CARTER: Yeah, your
3 distribution.

4 MR. NUNES: We ship to almost
5 every state in the country, yes.

6 MS. CARTER: So you would
7 characterize that as national distribution?

8 MR. NUNES: Yes.

9 MS. CARTER: Okay.

10 MR. NUNES: And international
11 also.

12 MS. CARTER: And international.

13 MR. NUNES: We also export.

14 MS. CARTER: Okay. And on page --
15 well, I guess on page two of your statement,
16 you referenced having a capable traceback
17 program. I guess based on your experience,
18 what -- in your opinion, what are some key or
19 critical elements that should be included in
20 any traceback program? And I guess I'm
21 directing it to you, but anyone on the panel
22 as well.

1 MR. NUNES: I would -- you have to
2 have a proper way of tracing it back so there
3 has to be some identification on the -- on the
4 particular package, okay? That's critical.
5 Also, when you ship that product, it -- the
6 information moves into a database, so in the
7 event that there is a recall or there is a
8 contamination someplace, now it's all about
9 speed. Once you're notified, you know exactly
10 what the -- the lot number was on a particular
11 package, okay, and you're able to identify
12 where that -- where the rest of that lot went
13 to. And then at that particular time, you
14 have the phone numbers in place to call those
15 customers that received that particular lot
16 and you ask them to put it in quarantine. And
17 if the consumer has already consumed it, it's
18 out in the marketplace and she has it in her
19 refrigerator, then we contact the FDA at that
20 particular time and we activate what you call
21 a voluntary recall. So it's all about
22 speed -- collecting the data and speed -- but

1 you have to have those systems in place to
2 begin with.

3 And that protects the rest of the
4 industry because it's just my recall. It's
5 not the industry's recall, which took place on
6 the spinach problem.

7 MR. SMITH: If I could expand upon
8 that --

9 JUDGE HILLSON: When we go back
10 and forth like that, if you could identify
11 yourselves each time for the record.

12 MR. SMITH: Oh, I'm sorry. Victor
13 Smith again, JV Farms, Yuma, Arizona. I think
14 you're hitting on something that really, you
15 know, may be a little bit outside the scope
16 but is extremely important in our industry but
17 it is on traceback that speed is of the
18 essence. Time is of the essence. And the
19 system that we have now, if there is an
20 outbreak, in my understanding of this, having
21 attended a couple of FDA sessions in
22 Washington, the procedure is that you're gonna

1 start out with the County Health Department.
2 And then from the County Health Department, if
3 there's enough cases and they start hitting
4 the database with Center for Disease Control,
5 then they're going to get involved. And then
6 at some point, whether to what degree, they're
7 gonna bring the FDA involved. And I think
8 that the quickest thing that -- the best
9 system that we could possibly have would be
10 one that's patterned off of the Air Safety --
11 the NTSB -- National Transportation Safety
12 Board.

13 If there's an air -- if there's
14 any kind of airline incident or any kind of
15 crash, those people are on the ground within
16 a very short period of time and they take over
17 all the cross-jurisdictional turf issues.
18 They take over the investigation immediately
19 and they find quick answers to the problem so
20 that they can deal with that if there's any
21 problems ongoing with other aircraft or
22 situations like that.

1 I think a system like that is
2 what's necessary in our industry, is to be
3 able to implement some immediate agency to
4 come in and have -- and have the authority to
5 cross all the lines of every agency and get to
6 the immediate traceback and exact source of
7 the problem.

8 MS. CARTER: Okay. Do you have
9 anything to add to that, Mr. Muthart?

10 MR. MUTHART: Pasquinelli is a
11 grower and at some point in time we lose
12 control of a piece of fruit in the hands of
13 the harvest and the shipping function. And
14 that's not unusual for there to be a pretty
15 clear line of distinction between growing and
16 handling and shipping.

17 As a grower, I think our
18 contribution from the very beginning is we
19 identify with a mapping system -- where the
20 ranches are and even say within a 20-acre
21 block or 40-acre block how many rows would
22 belong to one of our shippers and how many

1 rows would be belonging to another set of
2 shippers.

3 So as a grower, that's probably
4 our best contribution to traceability, is from
5 the very beginning have a mapping system,
6 everybody knows, you know, trace it back to
7 what -- and it ends up at a piece of dirt and
8 that's all I have.

9 MS. CARTER: Thank you.

10 JUDGE HILLSON: Anyone else from
11 the panel? Mr. Souza?

12 MR. SOUZA: Thank you. Anthony
13 Souza, USDA. I guess I'll start -- have a few
14 questions here. My first questions are for
15 Mr. Nunes. In your statement, under your
16 first -- first bullet on page -- on the first
17 page, you talk about a food quality
18 verification and the importance of having a
19 uniform program with other signatories,
20 grower-shippers in the production district and
21 state.

22 Could you elaborate a little bit

1 more on the importance of that?

2 MR. NUNES: Well, I think pre-
3 LGMA, as I said before, I -- there was no
4 uniformity to food safety programs. I think
5 most handlers and growers kind of had a
6 program in place but they were all different.
7 You know, everybody tested the water
8 differently. Everybody managed wildlife
9 differently. And so there was no continuity
10 to this.

11 And so when the LGMA came in, they
12 brought continuity to the food safety
13 programs. We developed a base -- a base for
14 it and, from that, we were able to educate our
15 -- the management of our companies, our
16 supervisors, and try to create a culture that
17 -- 'cause everybody had to follow the same
18 rules, our competitor handlers and growers.

19 And so this was no longer -- could
20 no longer become a marketing ploy. I got a
21 better food safety program than you do type of
22 thing. So from that standpoint, I think that

1 it really helped elevate and educate the
2 importance of food safety in our industry.

3 MR. SOUZA: So you believe that
4 the initiation of the California Leafy Green
5 Marketing Agreement kind of took the marketing
6 advantages out of it and put the spotlight on
7 food safety and the need for it?

8 MR. NUNES: I do.

9 MR. SOUZA: We've heard throughout
10 the testimonies the need for scientific-based
11 food safety programs. Could you give your
12 opinion on why you believe that is important
13 and is there enough scientific-based
14 information out there currently?

15 MR. NUNES: I'm not -- I'm not an
16 expert in that field so I'd probably have a
17 hard time answering that question, but it just
18 seems logical to me that science needs to be
19 brought into the equation here. If there's
20 another basis for it, I'd like to know.

21 MR. SOUZA: On your fifth bullet,
22 you discuss a little bit about traceback there

1 and you mention in the event of a recall or
2 market withdrawal. Are they one and the same
3 or could you give a definition of the two?

4 MR. NUNES: I would say a recall
5 -- my definition of a market withdrawal is
6 something that has not hit the consumer.
7 You're able to quarantine it either in your
8 own facility or in a customer's facility and
9 you withdraw it from the market. An actual
10 recall is when I believe it's gotten to the
11 consumer, it's possibly in her refrigerator or
12 it's been consumed, and at that particular
13 time the -- you involve the FDA and have a
14 voluntary public recall to -- to alert the
15 public that there could be a problem.

16 MR. SOUZA: Thank you. Mr. Smith,
17 you -- in your statement here, you've got down
18 that you're a CEO and owner of three different
19 entities here and that you operate in three
20 states and Mexico; is that correct?

21 MR. SMITH: Yes, sir. That's
22 correct.

1 MR. SOUZA: Are you -- would you
2 consider yourself under the proposed national
3 marketing order agreement to -- to be
4 producer, signatory? What would you consider
5 yourself to be under the national proposal?

6 MR. SMITH: That's a good
7 question. I'd say we'd be a producer in -- in
8 Arizona, we would be strictly a producer, in
9 Yuma. In Colorado, we would be a producer and
10 a handler in the fact that we do -- we do the
11 harvest operations and put it in a container
12 with our label and ship it to signatory
13 companies in their regional plants east of
14 Colorado. In Mexico, we would be a producer
15 and a handler according to the definition
16 because we are -- we are going the extra step
17 with packaging, harvesting, and transferring
18 it to the next level.

19 MR. SOUZA: Would it be a correct
20 statement that you are a producer, a grower in
21 both California and Arizona?

22 MR. SMITH: No. Not in California

1 -- well, I'm sorry. Yeah, I am. Here in the
2 Yuma area, we do have a growing region that's
3 right across the river in Imperial County
4 known as Bard-Winterhaven area, so technically
5 I am a grower in California, too.

6 MR. SOUZA: Under the current
7 Arizona Leafy Green Marketing Agreement, are
8 you a signatory to that agreement?

9 MR. SMITH: I am not a handler in
10 respect to the Arizona agreement. I'm a
11 producer. So, you know, I've actively
12 supported it but I don't think I -- you know,
13 I'm not the signatory. I'm not a handler.

14 MR. SOUZA: And how about your
15 operation in California?

16 MR. SMITH: Well, that's the same
17 thing. The -- it's right across the bridge
18 here from Yuma, so when I say California, it
19 would mean the Yuma, Arizona area I guess.

20 MR. SOUZA: So it would be a
21 correct statement, if I understand you
22 correctly, that you're a grower-producer who

1 is not a member or signatory of either
2 marketing agreement but you're in support of
3 the national agreement?

4 MR. SMITH: Yes. That's correct.

5 MR. SOUZA: Thank you. No
6 further questions. Thank you.

7 JUDGE HILLSON: Does anyone else
8 on the panel have questions? Ms. Dash.

9 MS. DASH: Suzanne Dash. Mr.
10 Nunes, could you say for your handling
11 operations whether your company would be a
12 large or a small operation based on SBA's
13 definition of \$7 million per year gross sales?

14 MR. NUNES: Large.

15 MS. DASH: Thank you. And, Mr.
16 Smith and Mr. Muthart, could you say as a
17 grower, do you -- do your companies meet the
18 definition of a small or a large grower based
19 on \$750,000 annual gross sales?

20 MR. SMITH: Victor Smith from JV
21 Farms. We would be a large producer.

22 MR. MUTHART: Paul Muthart.

1 Pasquinelli is large.

2 MS. DASH: Thank you. That's all

3 I have. Ms. Schmaedick.

4 MS. SCHMAEDICK: This is a

5 question to the panel in general. Do you

6 believe that it is important if the proposed

7 national program were implemented, is it

8 important to make the program accessible to

9 smaller business entities, whether they are

10 smaller producer entities or smaller handler

11 entities? Is it important to develop a

12 program that could be workable for all

13 participants within the industry, regardless

14 of their size?

15 MR. MUTHART: There's -- Paul

16 Muthart with Pasquinelli. I think the common

17 theme you've heard this morning is food safety

18 and food safety for the American consumer.

19 And to that end, whether you're big or small,

20 located in one region or another region or

21 another country, it's really irrelevant. What

22 we're after is safe food. Should this program

1 be available to small growers? Absolutely.
2 Are there inviolate types of standards, good
3 ag. practices, whether you're big or small?
4 No doubt about it. You should, should you use
5 uncomposted manure in your farm and grow leafy
6 green vegetable? No. Why? Because science
7 has determined the risk of E. coli is
8 substantial in that kind of a situation.

9 So in my opinion, this national
10 metric and good ag. practices is applicable
11 regardless, and I tried to make it a point in
12 my testimony that what happens with a small
13 grower in a different state clearly impacts
14 the whole industry.

15 MS. SCHMAEDICK: Thank you.

16 JUDGE HILLSON: Mr. Souza.

17 MR. SOUZA: Thank you. Good
18 afternoon. Anthony Souza, USDA. Question for
19 Mr. Muthart. Pasquinelli grows approximately
20 8500 acres of vegetables, 4900 acres are head
21 lettuce and 2200 are leaf. Do you consider
22 you're a grower, not a handler or a signatory

1 of the Arizona Leafy Green Marketing
2 Agreement; is that correct?

3 MR. MUTHART: I think by
4 definition we are a producer and our contracts
5 and our product goes to shippers who are
6 signatories.

7 MR. SOUZA: Could you explain a
8 little bit on how that process works?

9 MR. MUTHART: I'm not sure I
10 understand your question.

11 MR. SOUZA: From the -- you've got
12 signatories that you sell the product to

13 MR. MUTHART: Yes. That's true.

14 MR. SOUZA: You -- you contract
15 out to them when you put the -- put the seed
16 in the ground. Do you know where that product
17 is going?

18 MR. MUTHART: We don't know who
19 the consumer is but we know who the handler-
20 shipper is well in advance of planting the
21 first seed.

22 MR. SOUZA: Approximately how many

1 different signatories do you supply product
2 to, would you say?

3 MR. MUTHART: I think seven.

4 MR. SOUZA: By having a uniform
5 audit program, would that facilitate the sales
6 of your product in any way?

7 MR. MUTHART: It would facilitate
8 the administration of being a grower. And if
9 there was one standard, then the grower can
10 reduce its cost of having to meet one uniform
11 set of metrics, so there's efficiency to be
12 gained by having one standard and not seven.

13 MR. SOUZA: As a grower for seven
14 different handlers, how many different metrics
15 or audit programs are you currently operating
16 under under your company now?

17 MR. MUTHART: Seven.

18 MR. SOUZA: Seven different ones.
19 Is there much of a difference between the
20 seven?

21 MR. MUTHART: There may be one or
22 two shippers who have more stringent

1 requirements, shall we say.

2 MR. SOUZA: Does this make it a
3 little bit more difficult to move product
4 around if you have a surplus of -- let's say
5 you have a surplus of head lettuce and another
6 signatory wants that but it was grown under a
7 different set of metrics? Is there some
8 issues with that?

9 MR. MUTHART: Well, it absolutely
10 does because what we do, we do outdoors in
11 very uncontrollable situations and we really
12 would like to have flexibility of, you know,
13 if our agreement is to provide X number of
14 acres to a particular shipper and for whatever
15 reason we need to move it to a different piece
16 of ground, it does take away our flexibility.
17 But, more importantly, I think it's the
18 frustration of -- of not having generally
19 accepted scientific standard that I think that
20 we would all like to see where seven audits
21 become one standard.

22 MR. SOUZA: Thank you.

1 JUDGE HILLSON: Anyone on the
2 panel? Any questions from other interested
3 parties? Mr. Warshawer, come on up.

4 MR. WARSHAWER: Steve Warshawer.
5 Mr. Nunes, how will the consumer know that a
6 food safety program is in place under LGMA if
7 the mark is not used on consumer packaging?

8 MR. NUNES: I would -- I would say
9 that as long as we don't have the outbreaks
10 and the control over traceability, I think
11 that will -- that will help with regards to
12 consumer confidence.

13 MR. WARSHAWER: But how will
14 consumers know that the reduction in outbreaks
15 is linked to the implementation of the LGMA?

16 MR. NUNES: That's the problem.
17 They don't. You know -- you know, unless the
18 media spreads it, they don't. If there is
19 some sort of an outbreak that's not attached
20 to -- I mean, does not come back to the ranch,
21 okay, and it's someplace else -- it could be
22 in the kitchen of a fast food restaurant, okay

1 -- it still hurts our industry.

2 MR. WARSHAWER: I understand that.
3 My question is more specifically with regard
4 to building consumer confidence, how will that
5 confidence-building process be linked to the
6 successful implementation of the LGMA? Do you
7 have any thoughts on that if the LGMA is not
8 recognized as a consumer mark?

9 MR. NUNES: Well, I -- at this
10 particular -- I think the national program is
11 going to be a container mark, not a consumer
12 mark from what I understand in the agreement,
13 so the consumer's not -- is not gonna see
14 that.

15 MR. WARSHAWER: Okay. I'm not
16 seeing how -- and I'm trying to ask how you
17 see the knowledge passing from the container
18 to the consumer and validating the LGMA as the
19 source of this successful reduction in
20 outbreaks.

21 MR. NUNES: It's a difficult
22 question to answer, but I just -- like I said

1 before, it's about improving the quality of
2 our product, the reduction of microbial
3 contamination, and that in itself I think will
4 help build consumer confidence.

5 MR. WARSHAWER: Also, you
6 mentioned the implementation of the existing
7 Leafy Greens Marketing Agreements as helping
8 to eliminate what you called food safety as a
9 ploy among growers and handlers. How
10 important is it to end food safety as a ploy
11 further up the supply chain, you know, past
12 the growers and handlers?

13 MR. NUNES: That -- in my
14 estimation, that's the end game.

15 MR. WARSHAWER: And by what --
16 what assurance do you have or what confidence
17 do you have and what would be the source of
18 that confidence that the Leafy Greens
19 Marketing Agreement will accomplish that, will
20 help end food safety as a ploy further up the
21 chain?

22 MR. NUNES: I don't -- I don't

1 know if that ever will be accomplished. I
2 think there will always be those buyers that
3 are going to want us to address or to use
4 super metrics. I think that always will be
5 the case. You're not going to make McDonald's
6 change their food safety standards.

7 But I believe this -- that we need
8 to educate -- through this national program,
9 we need to educate -- we will be able to
10 educate the buy side of the business and I
11 think right now the difference could be like
12 this, but we need to make it like this, and
13 this is all about elevating the bar of food
14 safety. Okay.

15 There are those that don't adhere
16 to GAPs, okay? We need to get them on board.
17 We need to elevate it 'cause we are strong as
18 our weakest link.

19 MR. WARSHAWER: Thank you. And,
20 Mr. Smith, I have a question for you about
21 surface water testing and among the small
22 producers and advocates for small production

1 being included in this kind of metric process,
2 there's a lot of concern about the cost of
3 water testing.

4 Now, just -- since you also deal
5 with lots of -- I think you can still answer
6 this question for me. I may have misdirected
7 slightly. Could you see a water testing
8 regimen where instead of individual farms
9 testing surface water quality, a district or
10 an area was doing that testing with a certain
11 frequency so that the responsibility wouldn't
12 be farm by farm but it might attend -- that
13 surface water testing process might attend to
14 a district and then all of the farms within
15 that district would be handled by a larger
16 process that they could share the processing?

17 MR. SMITH: That's -- you know,
18 that would depend on the specific situation
19 because water testing is so important. If
20 you're going to have a contaminated source,
21 the city that I grew up in in Southern
22 Colorado with -- the city water supply was

1 contaminated with salmonella for three weeks
2 and, you know, you look at it and you say,
3 Hey, if you've got contaminated water, you
4 need to know it and you need to deal with it
5 or else you are going to sicken and possibly
6 kill people.

7 So I would just add to your point,
8 the concern with the small grower -- if we
9 talk about a ten-acre grower or a 40-acre
10 grower or a hundred-acre grower, I think the
11 important thing is that the awareness level,
12 the education level, and some type of testing
13 go on.

14 Now, I would advocate that if
15 there are county extension agents or
16 universities or community colleges that are
17 located near in an area that, you know, small
18 producers could work with, that would be, you
19 know, one form of a cooperative arrangement to
20 -- where it could help mitigate their problems
21 or help mitigate some of the uncertainty in
22 the educational curve and the documentation

1 requirements to help them understand and
2 fulfill those. So I don't think it's -- it's
3 just because I might be considered a big
4 producer and I can afford a food safety
5 department doesn't mean that this can't be
6 done. Everybody has to file a tax return in
7 this country. And whether you have to file --
8 hire a team of CPAs or you file H&R Block or
9 you get the EZ form, you know, I think you can
10 -- you can design things for the size and
11 scope and complexity of the operation you
12 have.

13 MR. WARSHAWER: But without --
14 would you say that we have to design them in
15 such a way that we don't compromise the
16 accuracy and potential value of the data?

17 MR. SMITH: The integrity cannot
18 be violated.

19 MR. WARSHAWER: So specifically
20 I'm just asking you if you can see the
21 possibility of aggregating from multiple
22 fields or multiple owners in a testing

1 protocol that reduces -- that maintains the
2 frequency but reduces the costs to those
3 individuals and still gets at that --

4 MR. SMITH: As long as it doesn't
5 violate the protocol that that specific water
6 that's going to that specific leafy green crop
7 is not contaminated according to the metrics.

8 MR. WARSHAWER: Thanks. And a
9 question about your foreign -- your experience
10 with foreign compliance, similar to what I
11 raised earlier today.

12 In your operation in Mexico,
13 you're not dealing with USDA-trained state
14 auditors. Is that correct?

15 MR. SMITH: USDA state-trained?
16 No. Not under the LGMA audit. We are dealing
17 with third party auditors that are U.S.-
18 trained.

19 MR. WARSHAWER: And are you
20 comfortable with the equivalency and the
21 quality of auditing and the adherence to the
22 standards of the metrics are equal in the case

1 of these non-federal or non-state auditors to
2 what you're experiencing here in the U.S.?

3 MR. SMITH: As long as their audit
4 procedures match what -- you know, what the
5 requirements of the LGMA are.

6 MR. WARSHAWER: Okay. And with
7 regard to organic compliance, which does not
8 relate to food safety, have -- have you had
9 any -- what has been your experience with the
10 auditing process for your organic products?
11 Have you had any concern about the compliance
12 or any need to question the auditing process
13 in the case of the auditors for the National
14 Organic Program?

15 MR. SMITH: Not from a consistency
16 of auditing, just, you know, performance. And
17 I did hear testimony this morning about, you
18 know, one company performing better than
19 another company and -- as far as service and
20 timeliness of audit. And that was a concern
21 of ours at one time, but over the last five to
22 eight years, it hasn't been a problem.

1 MR. WARSHAWER: Thank you. And,
2 Mr. Muthart, on that question of the
3 confidence-building process again, which is --
4 which has really been a theme for this panel,
5 how -- does the LGMA address system
6 functionality beyond the shipper, or does it
7 have any intention to do that?

8 MR. MUTHART: Well, I think if
9 what you're asking -- I've identified field-
10 to-fork is all the way until it gets on the
11 dining room table. If you're asking does this
12 agreement go that far, I didn't see evidence
13 of that shared responsibility of food safety.
14 I don't know if it's appropriate for this
15 document to go that far, but somewhere at the
16 USDA perhaps there is a need to educate the
17 consumer what is the safe way to prepare and
18 store food.

19 MR. WARSHAWER: And have you given
20 -- so you're -- have you given any specific
21 thought to how -- what additional steps could
22 be taken beyond the scope of the Leafy Greens

1 Marketing Agreement to help with this
2 confidence-building process; for example, USDA
3 intervention and in what form?

4 MR. MUTHART: No, I haven't.

5 MR. WARSHAWER: Okay. And how
6 would you -- would you like to have buyers
7 involved? Would you like to have other
8 participants in a supply chain involved as
9 signatories in an agreement like LGMA but
10 perhaps with scope and metric and requirements
11 that are relevant to their phase of the supply
12 chain?

13 MR. MUTHART: I think the goal
14 ought to be more people should be aware of
15 food safety and how to be safe with your food.
16 And so if there is an opportunity for Good
17 Housekeeping or a moms' group or a AAA to
18 become part of the process, you know, if the
19 point is to increase everyone's awareness,
20 then I think it's a good thing.

21 MR. WARSHAWER: So you see --
22 beyond the shippers and handlers, you see

1 education as the primary vehicle, more so than
2 establishing another set of metrics, another
3 set of audits and linking those as well
4 through a series of connected agreements?

5 MR. MUTHART: Well, I'm not sure I
6 understood that. I'm sorry.

7 MR. WARSHAWER: Sorry. I'll try
8 and rephrase it. For example, with
9 transportation or the buyers handling. I'm
10 wondering -- now, since the Leafy Greens
11 Marketing Agreement connects several sectors
12 of the supply chain as collaborators with
13 established metrics and protocols, can you see
14 going further up the supply chain with the
15 similar agreements that are -- contain metrics
16 and standards and performance relative to
17 those players and linking them to this
18 agreement?

19 MR. MUTHART: Well, perhaps except
20 at some point it gets a little cumbersome
21 because, you know, you might be referring to
22 let's include truck drivers, let's include

1 chefs in a kitchen who are cutting lettuce up
2 to go into a taco. You could include, you
3 know, moms at a dining room table. At some
4 point in time, it becomes impossible to do
5 outside of whoever the shipper is talking with
6 the trucking company to say, By the way,
7 you're handling food here and these are what
8 we expect of you.

9 There's some -- I think it's okay
10 to rely on the industry to have a certain
11 amount of conscience and a certain amount of
12 intelligence to make certain demands without
13 incorporating it into some legal document,
14 let's say.

15 MR. WARSHAWER: I understand. I'm
16 specifically wondering about buyers. Could
17 you see value in linking buyers' expectations
18 and buyers' handling practices and buyers'
19 responsibility through a series of agreements
20 that might be in some way similar to yours so
21 that they're also parties to this agreement in
22 some fashion?

1 MR. MUTHART: Can you give me an
2 example of a buyer and how you might link 'em?

3 MR. WARSHAWER: Retail buyer,
4 thinking mainly of -- I'm really talking
5 towards the idea that the super metrics that
6 the buyers establish and push back towards the
7 grower are not necessarily reflected -- that
8 kind of effort is not necessarily reflected in
9 their own practices. Would they be a welcome
10 party to a conversation like that where you
11 could include the buyers in some way in a more
12 broadly-ranging agreement to help address that
13 problem?

14 MR. MUTHART: I believe so.

15 MR. WARSHAWER: Thanks.

16 JUDGE HILLSON: Were there any
17 other questions from interested parties? Ms.
18 Mills.

19 MS. MILLS: Thank you, Your Honor,
20 Members of the panels, Laura Mills with Metz
21 Fresh. And I wanted to follow up on his
22 questioning regarding consumer confidence. We

1 heard earlier about the Know Your Farmer, Know
2 Your Food program and I'm wondering if -- I'd
3 like to ask each of the members of this panel
4 if they feel it would be appropriate for the
5 USDA Secretary Tom Vilsack to announce -- if
6 this program does become adopted, to announce
7 through, for example, a press conference at
8 the White House or somewhere else in the
9 company of producers and handlers this program
10 so that it does make consumers and the buyers,
11 whether it's food service, industrial, or
12 retail aware that there does exist a program
13 to enhance food quality and food safety?

14 So I'll ask you first, Mr. Nunes.
15 Do you think that that would be an appropriate
16 approach to try and educate the consumer and
17 the buyers?

18 MR. NUNES: Laura, I do agree with
19 that. I'd love to see that take place. You
20 know, it's got to start someplace, and I
21 really believe that the national program is
22 where it should start. We talk about the end

1 game, trying to get everybody in the supply
2 chain all the way to adhere to some sort of
3 GAP, GMP, GHP, whatever, and it's gotta start
4 someplace. It started with the LGMA with the
5 standard. It's moved to Arizona. Okay.
6 There's been other food products that have
7 adopted the same type of principles. Okay.
8 Now it should move to the national level.

9 In my opinion, in a number of
10 years, this industry is going to be regulated.
11 A bill's going to be passed, okay, and we need
12 to have a voice at the table at the FDA. We
13 have to have that voice. And I believe that
14 the national program will give us that
15 platform.

16 Okay. And I agree. We need to
17 have education. Education is the bottom line
18 here. Okay. But without the -- without a
19 national program to start with, we're dead in
20 the water. We're -- I think we're dead in the
21 water here. We need this program to make the
22 next steps, to push this up the supply chain,

1 to give us a safer supply.

2 MS. MILLS: Thank you. Mr. Smith.

3 MR. SMITH: Yes. Ms. Mills,

4 the -- I think it's an outstanding idea and I
5 think it would show a commitment to an -- by
6 regulators and industry working together in a
7 voluntary format to enhance the public safety.

8 And in my testimony, I've referred to what I
9 just pulled out of my file was an FDA and AMS
10 news release dated on October 5th where, as I
11 referred, the USDA's Produce Chief Leanne
12 Skelton is basically joining with the FDA for
13 a cross-jurisdictional cooperation effort and
14 getting -- reaching out to industry sources to
15 educate and promote food safety standards.

16 So I think something like this, if
17 we take the NLGMA and we talk about, Hey, now
18 we have -- we have everybody on the same page
19 working together to accomplish this, I think
20 that would be tremendous and I think that
21 would go a long way towards inspiring consumer
22 confidence.

1 But the most important thing is if
2 we do the NLGMA and everybody follows it,
3 we're gonna have so much safer product and
4 just vastly reduced risks that the public can
5 enjoy our products without fear, and that's
6 the most -- that, to me, is the bottom line.

7 MS. MILLS: Thank you. Mr.
8 Muthart.

9 MR. MUTHART: I'm an advocate of
10 educating the population in whatever is a
11 reasonable means to do it. And so I guess my
12 answer is yes.

13 MS. MILLS: Thank you. That's
14 all, Your Honor.

15 JUDGE HILLSON: Thank you. How
16 about redirect? Go ahead, Mr. Resnick.

17 MR. RESNICK: Thank you, Your
18 Honor. Jason Resnick. Very quickly, I just
19 wanted to ask the panel, along the lines of
20 education, we spoke about educating the
21 consumer. Do you believe educating growers
22 and handlers about the national agreement

1 should it come to fruition is an important
2 part of the process of developing the national
3 agreement, an education and outreach program?
4 Let's start with Mr. Nunes.

5 MR. NUNES: Yes, I do. You know,
6 start -- like I say, started with the
7 California LGMA. It gave us the tools to
8 educate and we learned a lot about food safety
9 since 2006, a whole bunch, and that came from
10 the LGMA. It came from the GAPs, the
11 auditable metrics. We had something to go
12 from. And from that, we were able to educate
13 our grower base.

14 And, in my estimation, it worked
15 small growers, big growers, whatever. It --
16 this -- it works. There has -- there's a
17 cultural change that has to take place in our
18 industry. We're not -- it's not produce
19 anymore. It's food that we're producing. So
20 it's a cultural change that's taking place.

21 MR. RESNICK: Thank you. Mr.
22 Smith.

1 MR. SMITH: Yeah, absolutely.
2 Yeah, what he said. I would echo. I think he
3 said it very well and I think it would go a
4 long ways.

5 MR. RESNICK: Thank you. Mr.
6 Muthart.

7 MR. MUTHART: Mr. Resnick, you
8 know, fear is going to stop people from doing
9 a lot of things. And I think if you could
10 educate say a smaller farmer, for instance,
11 that it's not such an onerous thing to do to
12 produce a food that is safe to eat, I think
13 that that fear goes away. And then that
14 conscience that I spoke of takes its place and
15 the farmer, regardless of his size or his
16 location, is then able to grow a safe food
17 product and go to bed at night and sleep.

18 MR. RESNICK: Thank you. I have
19 no further questions at this time.

20 JUDGE HILLSON: Anything else from
21 your panel? Anything else? Thank you,
22 gentlemen.

1 ALL: Thank you.

2 JUDGE HILLSON: Thank you for
3 testifying. And you, Mr. Resnick, may call
4 your next witness or witnesses, as the case
5 may be.

6 MR. RESNICK: Thank you very much,
7 Your Honor. At this time, the Proponent group
8 will call a panel of two witnesses, Barry
9 Eisenberg and Jed Murray.

10 JUDGE HILLSON: So did Tim Dempsey
11 dropped off your list?

12 MR. RESNICK: I'm sorry, yeah.
13 We're going to be making some adjustments
14 along the way.

15 JUDGE HILLSON: Okay. All right.

16 MR. RESNICK: Mr. Dempsey will be
17 on a panel tomorrow.

18 JUDGE HILLSON: That's fine.
19 Okay. I'm going to mark Mr. Eisenberg's
20 statement as Exhibit 84. And I'm going to
21 mark Mr. Murray's statement as Exhibit 85.

22 //

1 (Exhibits 84 and 85 were
2 marked for identi-
3 fication.)

4 JUDGE HILLSON: I guess you're
5 going first, Mr. Eisenberg, so please raise
6 your right hand.
7 Whereupon,

8 BARRY EISENBERG
9 having first been duly sworn, was called as a
10 witness and testified as follows; to wit:

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

14 MR. EISENBERG: Barry Eisenberg,
15 E-i-s-e-n-b-e-r-g.

16 JUDGE HILLSON: Okay. And you
17 have a statement you want to read, so why
18 don't you proceed.

19 TESTIMONY

20 MR. EISENBERG: My name is Barry
21 Eisenberg and I am the Vice President of
22 Technical Services for River Ranch Fresh

1 Foods. My responsibilities include food
2 safety, quality, and research programs. River
3 Ranch produces spinach, cut salads that
4 include iceberg and romaine, and cut
5 vegetables. We also pack cartons directly in
6 the field. Our products are for the retail
7 and food service sales. We do have the
8 exclusive rights to the use of the Popeye
9 Spinach label.

10 We operate out of Salinas,
11 California for eight months out of the year,
12 and then for the winter we process all of our
13 products in El Centro, California. Our
14 production regions include Salinas and San
15 Benito Counties. We also source product from
16 El Centro, Yuma, and Huron. For -- a limited
17 amount of our products do come from Mexico,
18 Chile, and Guatemala. And all of our
19 production is contracted.

20 Together with so many companies,
21 we have implemented the California and Arizona
22 Leafy Greens standards. Growers and

1 harvesters have accepted these standards and
2 they have focused everyone on what the
3 industry and other experts consider the
4 primary areas that could lead to food safety
5 issues.

6 Retail and food service customers
7 continue to demand more and more from us.
8 There does seem to be a correlation between
9 the last meeting they attended and their calls
10 to us asking for something new. It is not
11 uncommon that if we refuse to follow
12 customers' new standards, they will tell us
13 that they will go to a competitor. Needless
14 to say, in the present business environment,
15 we cannot afford to lose a customer.

16 River Ranch Fresh Foods is in full
17 support of the National Leafy Greens
18 initiative for many reasons. Briefly, food
19 safety is a critical concern for all of us and
20 we firmly support the science- and
21 technically-based understanding that people,
22 compost, water supplies, and animal intrusion

1 are sources of contamination that can be
2 monitored and reacted to so that customers
3 have a safer product. One national program
4 focused on assessing and acting on these risk
5 factors will create a safer fresh vegetable
6 food supply and gain consumer confidence.

7 I will not go into detail, but
8 gaining consumer confidence is essential. The
9 implementation of a single program across the
10 nation will show consumers a proactive
11 approach to food safety and Government
12 involvement in ensuring food supplies.

13 The industry has learned that food
14 safety recalls are no longer an issue for a
15 single company but for an entire industry.
16 One grower, harvester, or processor who does
17 not fully understand or follow proper food
18 safety practices can jeopardize the entire
19 industry . The discussion of standardization
20 has been met with impossible "one size does
21 not fit all." I am in full agreement with
22 this statement, but this should apply to the

1 application of good agricultural practices,
2 not to the practices themselves.

3 We have come a long way since the
4 LGMA was -- had been implemented. All of us
5 grew into this program identifying areas that
6 needed to be better defined and educating our
7 suppliers, but no one disagreed that the risks
8 identified were factors that could contribute
9 to a food safety concern. It must also be
10 noted that without a single national program,
11 our customers will continue to develop and
12 force us to implement practices that are not
13 science-based. The confusion amongst growers
14 is real and leads to leadership questions.
15 One of our growers has nine different manuals
16 to follow on a shelf in his office.

17 Many of us have concerns as we
18 hear others mention that we have never had a
19 problem, or it costs too much, or it's just
20 another attempt by the Government to get more
21 involved in our business. This direction
22 creates a major concern. Are they waiting for

1 an issue and then to start a program?

2 Finally, I believe that most
3 growers and harvesters in the United States
4 are following good agricultural practices, but
5 the only way we are going to improve consumer
6 confidence is to implement process management
7 practices that include an audit-based system
8 focused on agreed standards that are founded
9 on science and the best technical input we
10 have today.

11 A National Leafy Greens Marketing
12 Agreement will show strong leadership by
13 involving experts from industry, the
14 Government, universities, and other
15 disciplines to improve the safety of the U.S.
16 food supply. Yes, there will be challenges
17 and, as in the case with the LGMA, each issue
18 will be evaluated and addressed. We must
19 start movement in this direction if we are
20 going to regain consumer confidence by giving
21 them a safer product.

22 Thank you.

1 JUDGE HILLSON: Thank you, Mr.
2 Eisenberg. I'm going to receive your written
3 statement in evidence as Exhibit 84.

4 (Exhibit 84 was
5 received.)

6 JUDGE HILLSON: And, Mr. Murray,
7 could you please raise your right hand.
8 Whereupon,

9 JED MURRAY
10 having first been duly sworn, was called as a
11 witness and testified as follows; to wit:

12 JUDGE HILLSON: Okay. State your
13 name and spell it for the record, please.

14 MR. MURRAY: Jed Murray, J-e-d,
15 M-u-r-r-a-y.

16 JUDGE HILLSON: Okay. You may
17 proceed to read your statement.

18 TESTIMONY

19 MR. MURRAY: Hello. My name is
20 Jed Murray and it is my pleasure to testify on
21 behalf of Val Verde Vegetable Company
22 Incorporated of McAllen, Texas. Val Verde

1 ships seasonal produce grown in South Texas as
2 well as year-round produce imported from
3 Mexico. We at Val Verde Vegetable are proud
4 members of the Texas Produce Association.

5 I have worked with Texas Produce
6 for the last four years. Prior to working in
7 Texas, I worked for a large grower, packer,
8 and shipper here in California. My work in
9 production agriculture has taken me from
10 Salinas Valley to Yuma, Arizona and parts in
11 between. I have worked with farmers in Mexico
12 from the states of Sonora, Sinaloa,
13 Guanajuato, Coahuila, Puebla, and Tamaulipas.
14 Additionally, I have worked in various areas
15 of Peru sourcing product for the U.S.
16 marketplace.

17 I have worked with several
18 different food safety programs including
19 EuroGAP, USDA's QTV program, and various state
20 and national programs. As I mentioned
21 earlier, we are in support of the National
22 Leafy Greens Marketing Agreement. I want to

1 discuss three issues important to the success
2 of this program from the point of view of Val
3 Verde Vegetable and the Texas Produce
4 Association.

5 One, USDA is in a strong position
6 to administer this program. Two, the goal of
7 the program should be to maximize the number
8 of participants. Three, to be effective, the
9 program needs to be accepted by buyers.

10 Let me be up-front that we believe
11 in providing fresh produce to our -- safe
12 fresh produce to our customers. We recognize
13 that all groups along the food chain must do
14 all they can to flush out possible points of
15 contamination and this process is ever-
16 evolving.

17 My first point for strengthening
18 the National Leafy Greens Marketing Agreement
19 is this: It is very important that growers
20 and shippers have confidence in the agency
21 administering this program. We believe our
22 industry's long successful working

1 relationship with USDA puts the USDA in a
2 strong position to administer this agreement.
3 We want to work together with USDA to develop
4 regional and commodity specific metrics to
5 further improve the food safety chain.

6 Second, we are deeply concerned
7 about the possibility that with the NLGMA
8 being a voluntary program that some handlers
9 will bear the extra expense of complying with
10 the program while others will choose not to
11 participate. The USDA, in cooperation with
12 the industry groups, will need to commit to a
13 strong outreach program to develop and support
14 participation in the program. We understand
15 that if we choose to participate in this
16 program, that all the products handled by Val
17 Verde Vegetable that are defined as leafy
18 greens, wherever they are produced, in the
19 United States or Mexico, must meet the same
20 standards. We are deeply concerned that our
21 adherence, time, energy, and money complying
22 with the NLGMA will put our firm at a

1 disadvantage with low-cost, low-standard
2 handlers that will choose not to participate
3 in this program. When any firm causes or is
4 suspected of causing food-borne contaminant,
5 every firm marketing that product in that
6 category is hurt. This agreement needs to be
7 structured to encourage the largest number of
8 participants as possible so the playing field
9 is level and equal.

10 Third, the NLGMA needs to have
11 equal stature in the buying community as is
12 currently enjoyed by Primus Labs and other
13 third party auditors. NLGMA runs the risk of
14 losing support among handlers if buyers do not
15 recognize and support it. Therefore, we are
16 pleased to see retailer participation in
17 committee membership. Their participation in
18 the development of this program is important
19 to gain their support and cooperation.

20 As a member of the Texas Produce
21 Association, we support the development of a
22 National Leafy Greens Marketing Agreement. We

1 want to continually improve our nation's food
2 supply and we believe the USDA is the
3 Government entity best-suited to work with our
4 industry. We want the program structure to
5 encourage maximum handler participation, thus
6 ensuring equal playing environment. We also
7 believe the NLGMA needs to create metrics and
8 procedures that will give its members equal
9 stature to other certifying bodies.

10 Thank you for your time and
11 consideration of the items I have discussed
12 today.

13 JUDGE HILLSON: Okay. I'm
14 receiving Mr. Murray's written testimony,
15 evidence as Exhibit 85.

16 (Exhibit 85 was
17 received.)

18 JUDGE HILLSON: And I will ask the
19 USDA panel if they have questions of these two
20 gentlemen. Ms. Schmaedick.

21 MS. SCHMAEDICK: Good afternoon,
22 and thank you for your testimony. This is

1 Melissa Schmaedick with USDA. I'd like to
2 start out with some questions for Mr.
3 Eisenberg.

4 Just a point of clarification. In
5 your introduction, you state that River Ranch
6 produces spinach. Does that mean that you
7 grow spinach?

8 MR. EISENBERG: It's all
9 contracted.

10 MS. SCHMAEDICK: Okay.

11 MR. EISENBERG: So all of our
12 crops are contracted in such a way that either
13 we own a hundred percent of the product in the
14 field or we have a shared joint venture with
15 the grower. But all of our spinach is
16 marketed as washed and placed in a bag.

17 MS. SCHMAEDICK: Okay. You also
18 mentioned that you import a limited amount of
19 product from Chile and Guatemala.

20 MR. EISENBERG: Yeah. There's
21 about a six-week period of the year that
22 raddichio comes out of Chile. Even though

1 there may be some local, the quality is much
2 better. The growers there all have to meet
3 our standards and several different audit
4 standards, too.

5 Out of Guatemala, there's a period
6 of time when sugar and snow peas come out of
7 Central America.

8 MS. SCHMAEDICK: So obviously you
9 just mentioned that the growers that you work
10 with in Chile and Guatemala, they meet your
11 standards of production; is that correct?

12 MR. EISENBERG: Right, and -- and
13 even though it's not a leafy green, many of
14 the -- nearly all of the standards we use for
15 the LGMA we find no resistance at all from our
16 growers.

17 MS. SCHMAEDICK: Do you work
18 predominantly with large growers or small
19 growers in these foreign countries? How would
20 you characterize them?

21 MR. EISENBERG: Out of -- the
22 sugar, snap pea program out of Guatemala, that

1 is a large grower there, but a large grower in
2 that area might be 50 to 80 acres, so the
3 scale of the crop is a bit different.

4 Out of Chile, raddichio is not a
5 large-acreage crop, so I would consider that
6 more of a small-sized grower.

7 MS. SCHMAEDICK: And when you were
8 working with your suppliers in these foreign
9 countries to come into compliance with the
10 LGMA program that you're a participant of,
11 what types of changes were made or what type
12 of modifications did they have to make to
13 become compliant?

14 MR. EISENBERG: Actually, the
15 growers that we deal with, their programs were
16 probably even beyond what the LGMA has put
17 into place, some of the pressures that Latin
18 America feels. With us, a lot of it is just
19 the documentation -- the one area that we
20 found that they were weak on is the
21 documentation of their education and tailgate
22 programs. It was informally done. But from

1 our side, the recordkeeping of education and
2 training programs is essential. But their
3 water testing, their evaluation of fields
4 beforehand all fit the same standards of the
5 LGMA.

6 MS. SCHMAEDICK: So would it be
7 correct to say that coming into compliance in
8 order to continue to do business with your
9 company did not pose a significant financial
10 burden?

11 MR. EISENBERG: No, not at all.
12 Now, we also do a grower preapproval before we
13 even enter into getting one box of product
14 from them, and that is a -- it's a face-to-
15 face review with them and a lot of what you
16 get from that is what is their attitude
17 towards food safety. This past year, we
18 eliminated two growers from our program in the
19 United States just simply because we did not
20 believe that they were taking it as a serious
21 operation. They were meeting standards but,
22 from our side, you know, we -- you know, we

1 had our questions.

2 MS. SCHMAEDICK: Uh-huh. On the
3 first page of your testimony, paragraph four,
4 you mention that the retail and food service
5 customers continue to demand more and more and
6 that there does seem to be a correlation
7 between the last meeting they attended and
8 calls asking for something new.

9 Building on that statement, how
10 would the proposed national program address
11 this phenomena that you see?

12 MR. EISENBERG: Well, you know, it
13 -- what it does, it creates a platform that is
14 transparent to everybody and is a set of
15 standards agreed to across the United States.
16 For us, that goes a long way to convincing our
17 customers that there is a leadership in place.
18 When the spinach -- in September 2006, we were
19 told by one of the directors of the FDA, The
20 one thing this industry must do is stay
21 together and to approach the situation
22 unified. We did not do that, okay, until the

1 LGMA started. Once we did that, every
2 customer of ours came in with a completely
3 different set of standards that we were to
4 follow. And it created havoc. Growers who
5 were truly behind improving food safety, you
6 know, threw up their hands and said, Well, who
7 in the hell is right? You know, this makes no
8 sense. Is it this, is it that? And when the
9 LGMA came out, it quieted everybody down and
10 especially many of the large food service
11 customers went right over to the LGMA
12 standards and, in fact, have been some of the
13 strongest proponents of it.

14 MS. SCHMAEDICK: If I understand
15 correctly, your company deals primarily with
16 the -- like the what has been referred to as
17 value-added fresh products, so the cut salads,
18 for example?

19 MR. EISENBERG: That's about 70
20 percent of our business.

21 MS. SCHMAEDICK: Right. Are you
22 currently having to meet any standards for --

1 Government standards outside of your customer
2 standards?

3 MR. EISENBERG: No. No. You
4 know, right now, you know, we follow the
5 guidelines that were set by the FDA. We
6 follow those. But at this time, no.

7 MS. SCHMAEDICK: Okay. Thank you.
8 That concludes my questions for Mr. Eisenberg.

9 I have a question for Mr. Murray.
10 My first question is, Mr. Murray, today are
11 you speaking on behalf of Val Verde Vegetable
12 or on the -- on behalf of the Texas Vegetable
13 Association?

14 MR. MURRAY: Both.

15 MS. SCHMAEDICK: Both.

16 MR. MURRAY: Primarily Val Verde
17 Vegetable, but Texas Produce Association asked
18 me to come out here also.

19 MS. SCHMAEDICK: Okay. And asked
20 for you to speak on their behalf?

21 MR. MURRAY: (Nods head.)

22 MS. SCHMAEDICK: Okay.

1 JUDGE HILLSON: That was a "yes";
2 right?

3 MR. MURRAY: Yes.

4 JUDGE HILLSON: They can't quite
5 pick up a nod.

6 MR. MURRAY: Both.

7 MS. SCHMAEDICK: And you indicate
8 that you work with product that comes from
9 Mexico but that you've also had experience
10 working with product coming out of Peru; is
11 that correct?

12 MR. MURRAY: Correct.

13 MS. SCHMAEDICK: And based on your
14 experience, how have producers in these
15 foreign countries been able to -- have they
16 been able to comply with the LGMA standards
17 that have been put in place?

18 MR. MURRAY: Regionally they've
19 been able to comply. For example, in certain
20 parts of Mexico, like Guanajuato, which is a
21 big farm production region, they're much
22 easier. They've got bigger land base.

1 They're able to comply with it. In some
2 zones, like Puebla, which is real small, where
3 one grower might only own a hectavia (ph),
4 which is two and half acres, lot more
5 difficult for them to comply and really they
6 aren't in the process to -- in the place to
7 really comply well because it's -- it's only
8 two acres that they're managing, two acres
9 here, two acres there. But your bigger
10 production regions, there's not a problem.
11 They've got the grower groups behind
12 themselves. They've got the infrastructure
13 and are committed to complying with it also.

14 MS. SCHMAEDICK: And is that a
15 similar experience in Peru?

16 MR. MURRAY: Well, Peru was
17 onions.

18 MS. SCHMAEDICK: Oh.

19 MR. MURRAY: So it wouldn't be the
20 leafy greens.

21 MS. SCHMAEDICK: Okay. So on the
22 second page of your statement, the bottom of

1 the third paragraph, you say, "This statement
2 needs to be structured to encourage the
3 largest number of participants as possible so
4 the playing field is level and equal."

5 What -- can you elaborate on that?

6 MR. MURRAY: Yeah. The -- it
7 seems to be that, you know -- I'll talk about
8 in Texas. There's let's say a few major
9 operators in the area. But then there's a lot
10 that can start a shed and, you know, basically
11 sweep out the floor and start producing and
12 competing against you. And that's very
13 difficult because, one, they're gonna -- if
14 they have a problem, you know, it's gonna
15 damage all of our livelihoods. But, two, the
16 cost structure is not as competitive also.
17 We're competing against people who are selling
18 for a lot less and less quality. They may be
19 selling seconds. So we want to encourage the
20 bus to get them involved and on board so
21 they're competing on a level playing field
22 selling safe product.

1 MS. SCHMAEDICK: How would you go
2 about doing that in this proposed program?

3 MR. MURRAY: I think it's a famous
4 quote, "It's above my pay grade."

5 MS. SCHMAEDICK: Okay.

6 MR. MURRAY: No, but education --
7 I'm sorry -- would be the biggest factor to
8 get them involved as well as making it with
9 the regional metrics that we discussed, having
10 regional metrics that they can buy off on and
11 know that they can accomplish.

12 MS. SCHMAEDICK: Okay. Thank you.
13 This is a question for both Mr. Eisenberg and
14 Mr. Murray. How long have you been aware of
15 the drafting of this national proposed
16 program?

17 MR. EISENBERG: Well, for --

18 JUDGE HILLSON: Please say who you
19 are before you answer.

20 MR. EISENBERG: This is Barry
21 Eisenberg. I can't say exactly. I am the
22 Chairman of United Fresh Produce Association

1 Food Safety Council, and so we've been
2 discussing for quite a while within the
3 council the need for this. But I know that my
4 interaction with Hank and Scott is continual,
5 but to say exactly the time frame, I'm not
6 sure.

7 MS. SCHMAEDICK: Would it be
8 accurate to say that you have been aware that
9 throughout the process of its development?

10 MR. EISENBERG: Yes.

11 MS. SCHMAEDICK: Okay.

12 MR. EISENBERG: Known about it,
13 yes. Actually involved in it, really on the
14 periphery.

15 MS. SCHMAEDICK: Okay.

16 MR. MURRAY: Jed Murray. I'd say
17 August of this year.

18 MS. SCHMAEDICK: Okay. Thank you.
19 Those are my questions.

20 JUDGE HILLSON: Mr. Hill.

21 MR. HILL: Brian Hill, Office of
22 the General Counsel. Just have a couple of

1 questions for you, Mr. Eisenberg, if that's
2 okay. You mentioned consumer confidence and
3 increasing consumer confidence, and this
4 question has been asked before but I'll ask it
5 to you. Since the mark that we're talking
6 about is going to be seen not by the consumer,
7 how do the consumers gain confidence by the
8 passing of this?

9 MR. EISENBERG: Barry Eisenberg.
10 You know, I tell my staff this all the time.
11 I say, You know, we are phenomenal technical
12 people but we're about the lousiest marketers
13 that you'll ever find. I have a lot of
14 confidence in the Government bringing this to
15 the forefront. But also, too, our customers
16 are looking for something that they can also
17 present to their consumer base, so I think
18 we're going to get a lot of activity from them
19 and also, you know, many, many of the
20 associations all signed onto this and their PR
21 and the visibility of their spokespeople I
22 think are going to go a long way in making the

1 consumers aware of it.

2 MR. HILL: And you've also
3 mentioned on your second page, you said that,
4 "One of our growers has nine different manuals
5 to follow on a shelf." Is this someone who's
6 currently using the LGMA from California?

7 MR. EISENBERG: Absolutely.

8 MR. HILL: Now, if that's the
9 case, what makes you believe that a -- this --
10 that this going through, a national agreement,
11 would change things?

12 MR. EISENBERG: Well, for one
13 thing, the customers who came up with these
14 manuals, now what's going to happen is that
15 there will be one manual they can use across
16 the United States and a lot of the manuals
17 came at the very beginning of the -- let's say
18 the beginning of 2007. And the things that
19 are in there are items that I believe our
20 customers just don't have confidence that
21 we're following closely enough. They list
22 sampling regiments, and we can't figure out

1 where they came up with their standards. You
2 know, others include incredible pathogenic
3 testing that has to be done and as of yet, you
4 know, we are surely not believers that
5 pathogen testing is the answer. We believe
6 process management and auditing and reacting
7 to that is really the key.

8 MR. HILL: Okay. That's all I
9 have for now.

10 JUDGE HILLSON: Ms. Carter.

11 MS. CARTER: Good afternoon.

12 Antoinette Carter with USDA. I'm -- just a
13 few follow-up questions first for Mr.
14 Eisenberg. I believe you mentioned that you
15 source product from Chile and Guatemala,
16 raddichio I believe you stated from Chile and
17 sugar and snap peas from Guatemala?

18 MR. EISENBERG: Yes. That's
19 correct.

20 MS. CARTER: What about Mexico?
21 You had mentioned that you source product from
22 there. What products do you source?

1 MR. EISENBERG: In fact, Vic Smith
2 -- I don't know if he's still in the room --
3 we -- all of our green onions come from Mexico
4 and that's from his operation. There are
5 times of the year that cilantro will come out
6 of Mexico. And those are the two major
7 products that we would get from Mexico.

8 MS. CARTER: Okay. And you
9 mentioned that you do have requirements on the
10 growers that you source supply from. Does
11 that also apply to your growers in Mexico as
12 well?

13 MR. EISENBERG: Absolutely. But,
14 you know, for example, the LGMA says test
15 water monthly. It's common in Mexico that
16 they're testing water weekly, so they go --
17 they understand what needs to be done but they
18 have a tendency to go overboard which, from my
19 side, I have no complaints about.

20 MS. CARTER: Okay. Thank you.
21 And just a couple of questions for Mr. Murray.
22 Could you state what products you grow -- you

1 ship? You said you ship products that are
2 seasonally grown in South Texas as well as
3 imported product from Mexico. What products
4 are those?

5 MR. MURRAY: We ship cabbage --
6 green cabbage, red cabbage -- cilantro,
7 parsley, kale, endive, kohlrabi, a few others
8 escape me, but a lot of greens items, the
9 mustard greens, collard greens. We do those
10 also.

11 MS. CARTER: Okay. I guess in
12 terms of your distribution, can you share with
13 us the scope of your distribution? And I
14 guess that's probably a question for Mr.
15 Eisenberg as well.

16 MR. MURRAY: Nationwide and then
17 occasionally some stuff will go into Canada or
18 maybe to the Bahamas.

19 MS. CARTER: Okay. And, Mr.
20 Eisenberg, with regards to your distribution?

21 MR. EISENBERG: Throughout the
22 United States, Canada, and Mexico.

1 MS. CARTER: Okay. And then just
2 one final question for Mr. Murray. On page
3 two of your statement, you state that the
4 National -- you believe the National Leafy
5 Green Marketing Agreement that's being
6 proposed "needs to create metrics and
7 procedures that will give its members equal
8 stature to other certifying bodies."

9 Could you explain what you mean by
10 that?

11 MR. MURRAY: Well, I think it goes
12 to the point of if this gets implemented, we
13 wouldn't want to see multiple buyers from
14 different chain stores or from food service
15 introduce to us a wide range of other
16 requirements. If we're going to do this and
17 this becomes a standard, let's make it a
18 standard -- this shouldn't be a marketing
19 tool; correct? So if it's not a marketing
20 tool, I shouldn't have other people coming to
21 me with stiffer requirements to keep pushing
22 the benchmark further and further and

1 separating the two from a national agreement
2 that we all signed off on. It should be
3 sufficient to do the proper procedures. So I
4 want it equal and I want to have the same
5 stature as any other body so they don't say,
6 Well, no, you've done the National Leafy
7 Greens, but we need you to pass this test as
8 well as this test as well as this test.

9 MS. CARTER: So are you saying
10 that it is your hope that if the proposal was
11 adopted, that it would provide some uniformity
12 and a standardized I guess --

13 MR. MURRAY: Absolutely.

14 MS. CARTER: -- program?

15 MR. MURRAY: Absolutely.

16 MS. CARTER: Okay. Thank you.

17 JUDGE HILLSON: Any other panel
18 members? Ms. Dash?

19 MS. DASH: Suzanne Dash. Mr.
20 Eisenberg, could you tell me if your company
21 would be considered a large handler under
22 SBA's definition of \$7 million gross sales per

1 year?

2 MR. EISENBERG: We would be large.

3 MS. DASH: Okay. Have you seen
4 the document prepared by Intertox, the
5 business case that includes costs for
6 implementing food safety?

7 MR. EISENBERG: No.

8 MS. DASH: Thank you. Mr. Murray,
9 what is your position with Val Verde?

10 MR. MURRAY: I handle their
11 operations, their outside operations.

12 MS. DASH: Okay. Is Val Verde a
13 grower and a handler?

14 MR. MURRAY: We're strictly a
15 handler.

16 MS. DASH: Handler. And would
17 your company be considered a large handler
18 under SBA definition?

19 MR. MURRAY: We're a member of the
20 Small Business Association. So under the
21 definition, for greens we'd probably be large,
22 but we're right there at the line.

1 MS. DASH: Okay. And have you
2 seen the document prepared by Intertox?

3 MR. MURRAY: Yes, I have.

4 MS. DASH: And as a -- did you
5 look at any of the cost figures?

6 MR. MURRAY: Uh-huh.

7 MS. DASH: Did that seem in line
8 with your company?

9 MR. MURRAY: I think the one thing
10 that's missing is the start-up costs. That
11 seems to me like it looks at mostly ongoing
12 and doesn't have implementation, which should
13 be a lot more money in the beginning I would
14 think to set up if it's going to be rodent
15 traps in the field, the allocation across all
16 resources. I think it seems in line for an
17 ongoing process but not a start-up.

18 MS. DASH: Okay. Thank you.
19 That's all I had.

20 JUDGE HILLSON: Anything else from
21 the panel? Mr. Souza.

22 MR. SOUZA: Anthony Souza, USDA.

1 Good afternoon, gentlemen. My first question
2 is for Mr. Murray. You mentioned in your
3 statement that you worked with various
4 programs, including EuroGAP, USDA Quality
5 Through Verification programs, and various
6 other state and national programs. What is it
7 about this program that you feel would benefit
8 industry?

9 MR. MURRAY: Well, I think the big
10 thing is to have a universal playing field and
11 a universal program that it would be my hope
12 that everyone accepts and doesn't, you know,
13 ask for something different.

14 MR. SOUZA: On the second page of
15 your statement, you mention in the third
16 paragraph that "USDA, in cooperation with
17 industry groups, will need to commit to a
18 strong outreach program."

19 What do you envision this outreach
20 to incorporate?

21 MR. MURRAY: I'll give you an
22 example of Texas AgriLife Extension. Their --

1 like Dr. Juan Anciso I think you met last
2 week, he is spending time with our growers,
3 helping train them, introduce them to the
4 various trends coming their way. He's
5 volunteered to come and speak to all of them
6 so that they can start getting accustomed to
7 the concepts and I think people refer to -- at
8 first glance, you might be intimidated by the
9 process, but to slowly introduce the ideas and
10 show them that, you know, it's -- you're
11 already doing everything right. It's mostly
12 a documentation process. So that would be an
13 example of what I'm talking about, is some of
14 the work that he's doing that's helping our
15 growers get accustomed to changes coming down
16 the way.

17 MR. SOUZA: Currently with the
18 work that you do for Val Verde Vegetable, do
19 you do any value-added product?

20 MR. MURRAY: No, sir.

21 MR. SOUZA: Thank you. Some
22 questions for Mr. Eisenberg.

1 Just a follow-up to a question
2 that Ms. Schmaedick had asked you earlier and
3 I believe it was an educational program and
4 you mentioned the terminology "tailgate"
5 programs.

6 Could you describe a little bit
7 what a tailgate program is?

8 MR. EISENBERG: Yeah. A tailgate
9 program is normally limited to maybe five or
10 ten minutes and it's one where you generally
11 pick a single topic and it will happen
12 possibly before everybody starts to work or at
13 one of the breaks and you may -- we have 14
14 different tailgate sessions we do out in the
15 field. You know, one is on hand washing.
16 Another one is improper use of tools. Another
17 one's on chlorination. But they're really
18 short and highly focused.

19 MR. SOUZA: Want to move out of
20 the fields and into the plants. In your
21 statement here, you've got two plants, one in
22 El Centro and one in Salinas; is that correct?

1 MR. EISENBERG: That's -- yes.

2 MR. SOUZA: Where the -- my
3 understanding where the implementation of the
4 proposed rule differs from the current
5 California or Arizona leafy greens is that
6 they will incorporate GMPs or the processing
7 plants into the audit scheme as well. Is that
8 your understanding?

9 MR. EISENBERG: I'm not fully --
10 I'm not sure. When I read it over, I see GMPs
11 now listed in there, you know, and that would
12 be new ground.

13 MR. SOUZA: Have you read the
14 proposed national agreement?

15 MR. EISENBERG: Yeah, the copy
16 here? Yes.

17 MR. SOUZA: In there under Section
18 970.66, Audit Verifications, it talks about
19 GHP, GMPs, and all handlers shall be subject
20 to verification audits in there, and then it
21 goes further and talks about shall be verified
22 by audits by the Inspection Service or FDA.

1 You stated earlier that you're not aware of
2 having any FDA audits for good manufacturing
3 in your processing plant; is that correct?

4 MR. EISENBERG: No, no. The FDA
5 does come in --

6 MR. SOUZA: Okay.

7 MR. EISENBERG: -- and they review
8 the -- review our processes. But to state
9 that there are very specific things that must
10 be done in satisfaction of FDA regulations or
11 demands, that -- no. So that's a voluntary
12 program where all of the suggestions are
13 listed in their guidance documents we
14 basically have implemented. So when they come
15 in, they can see all of our paperwork. You
16 know, of course when there's a recall, we
17 follow all other standards.

18 MR. SOUZA: Okay. Is it your
19 understanding in the proposed rules that that
20 voluntary audit walk-through, whatever you
21 want to call it, would suffice as following
22 the rules of the law under the proposed rules?

1 MR. EISENBERG: We've requested
2 from the FDA that they develop regulations for
3 our processing plants, that -- that they go to
4 the next step and -- and I know that's under
5 discussion there and being reviewed.

6 MR. SOUZA: Are you personally
7 familiar with these reviews that have been
8 done by FDA in your plant?

9 MR. EISENBERG: The last three
10 reviews that have been done by the FDA in our
11 plant have been more walk-throughs. We have
12 never had a -- in the last three years, we
13 have not had a formal audit done by the FDA.
14 So after the spinach incident, they came
15 through, went through our entire process,
16 spent two days with us, but to say that that
17 was a formal audit, which I define as saying
18 that you have a checklist of items that are
19 checked off on, no, it was very specific where
20 they were looking for water -- water
21 sanitation records, our records from the
22 fields, our -- you know, lot tray system.

1 MR. SOUZA: Could you briefly walk
2 us through on what one of the walk-throughs
3 are like that FDA conducts?

4 MR. EISENBERG: Normally what
5 happens is that either one or two or sometimes
6 even Department of Health Services will join
7 them. They'll come through and if it's for --
8 in most cases -- let's say in two cases we've
9 had them come through because of a specific
10 consumer issue. Okay. And in that case,
11 they're very targeted in what they're looking
12 at.

13 For example, after the spinach
14 incident, they came through. They wanted to
15 know about our entire spinach process, so we
16 took 'em to our traceability system so they
17 had confidence that we knew what was coming
18 out of the field, how it was processed, what
19 products it ran -- what products it went into.
20 They were very interested in our Retain
21 Program, and so they came through, pulled many
22 samples out of our Retain Program.

1 It was more of a checking of our
2 documentation and walking through the process
3 to make sure that our standard operating
4 procedures were being followed.

5 Now, the FDA audit is completely
6 different than what we would get from a Primus
7 or any number of the other companies that come
8 through and audit us. Those are, you know,
9 very lengthy checklists of yes and no's.

10 MR. SOUZA: How many third party
11 audits would you say your company goes through
12 in a year?

13 MR. EISENBERG: At each facility,
14 probably five, so, yeah, probably ten -- ten
15 total a year.

16 MR. SOUZA: Are those supplier
17 audits as well or --

18 MR. EISENBERG: We have two
19 companies that absolutely they're -- well, we
20 have customers who come through and audit us
21 who have very detailed systems. Then the
22 other three auditors are recognized national

1 auditing companies -- Primus Labs, Steritech,
2 and Davis Fresh.

3 MR. SOUZA: So would it be correct
4 in saying that under the proposed rule, an
5 audit verification for GMPs would require some
6 sort of checklist developed off of a matrix in
7 order to complete that audit?

8 MR. EISENBERG: Absolutely.

9 MR. SOUZA: In -- are you familiar
10 with the definition in the proposed rule for
11 leafy greens?

12 MR. EISENBERG: Not off the top of
13 my head. Sorry about that.

14 MR. SOUZA: Do you have that
15 document available?

16 MR. EISENBERG: I thought I did,
17 but I brought the wrong one up here to the
18 table.

19 MR. SOUZA: You can find that
20 definition on 970.15. My question is: As a
21 value-added producer, what would be your
22 definition for baby leaf items or spring mix?

1 MR. EISENBERG: You know, baby
2 leaf items to us is just a -- it's strictly
3 based on size of the leaf. That's how we do
4 it from the field. Spring mix is -- can be
5 any one of 14 different components as far as
6 our specification is concerned. So they
7 normally contain five or six standard
8 components but, because of how we source it
9 and different periods of the year some crops
10 grow better than others, the spring mix can be
11 a mixture of any one of 14 different products.

12 MR. SOUZA: And are those 14
13 different products covered under the
14 definition of leafy greens?

15 MR. EISENBERG: Most of them are
16 here. In our case, they would end up being a
17 cultivar or a variety of one of 'em so, yes,
18 they would all fit underneath that.

19 MR. SOUZA: With that in mind, if
20 you were to turn to 970.83 under Compliance
21 and look down under number four, commingles
22 leafy green vegetables that fail to meet the

1 requirements, would that be an issue for your
2 company?

3 MR. EISENBERG: Not for our
4 company because anybody who supplies us with
5 product has to be a preapproved supplier.
6 They have to meet our own auditing standards.
7 And if they're supplying us, they absolutely
8 have to meet all LGMA standards.

9 MR. SOUZA: Are there ever times
10 that you come up short and you have to buy on
11 spot market or source out from somewhere?

12 MR. EISENBERG: Absolutely. But
13 even then, we will only buy from approved
14 suppliers. So, for example, on green leaf,
15 even though we source from let's say two major
16 growers, we have three other growers who are
17 approved, so we have their audit results, we
18 know that they're LGMA members, they meet
19 different criteria, so that if we have to spot
20 buy, it's going to be from one of those three
21 people. And if we can't source from them,
22 then we won't carry the product.

1 But it's really rare now that
2 anybody with leafy greens isn't a member of
3 the LGMA in California or Arizona.

4 MR. SOUZA: Thank you. No further
5 questions.

6 JUDGE HILLSON: Are there any --
7 everyone in the panel asked their questions.
8 Any other interested parties have questions of
9 either of these two gentlemen? Okay. Come on
10 up, Mr. Warshawer.

11 MR. WARSHAWER: Steve Warshawer.
12 Mr. Eisenberg, you -- is it correct -- am I
13 correct that you've worked with farms across
14 a really wide range of scales generally
15 overseas from fairly small to very large?

16 MR. EISENBERG: Yes.

17 MR. WARSHAWER: And you made the
18 comment that one size fits all is not where
19 it's at?

20 MR. EISENBERG: Yeah. Not so much
21 based on the size of a farm. I'm referring
22 there more to like the type of crop. Like,

1 for example, a citrus crop is going to be
2 different than let's say a spinach crop. Or
3 if you have a mechanically harvested operation
4 versus a hand operation.

5 MR. WARSHAWER: Do you have any --
6 would -- with that in mind, do you want to see
7 GAPs metrics that are scaleable perhaps
8 according to size, product type, or mix of
9 both?

10 MR. EISENBERG: I think the same
11 principles have to be applied across the way.
12 To what degree that they are implemented, I
13 think that's where we're gonna find some
14 differences between the scale of the
15 operations.

16 MR. WARSHAWER: And how do you
17 think that those differences will be addressed
18 within the framework of the LGMA -- the
19 proposed LGMA?

20 MR. EISENBERG: Well, for one
21 thing, everybody's gonna have the same
22 standards for the first time. So, for

1 example, I would not be surprised if there are
2 growers throughout the nation who are not
3 analyzing their irrigation water on a
4 continual basis. That now would become part
5 of an established set of standard operating
6 procedures. The pre-inspection -- the pre-
7 inspection of fields that is documented I
8 think will be something that we'll see
9 standardized across all farms. Right now,
10 it's done -- I mean, I have to say even prior
11 to the spinach incident, we inspected all of
12 our fields before harvest. We never recorded
13 it. Okay? Then with the LGMA, now it's all
14 recorded and, frankly, we're better off
15 because of it.

16 MR. WARSHAWER: Thank you. Do you
17 have -- have you experienced any confidence-
18 related concerns about audit integrity
19 overseas given that your overseas audits are
20 not conducted by USDA or USDA-trained
21 auditors?

22 MR. EISENBERG: No. No. We

1 use -- for all of our overseas audits, we use
2 Primus Labs. They're an internationally
3 recognized group, have a long history of
4 audits. They're known to be very tough and
5 which has absolutely been the case.

6 Also, too, for all of our outside
7 suppliers, at least once a year we go out and
8 visit the operations ourselves. Since my wife
9 is from Chile, darnit if I have to go out
10 there and take a look at the operations.

11 MR. WARSHAWER: Can I ask you to
12 explain what you meant by the -- this is in
13 relation to outreach -- this is in relation to
14 the public acceptance and knowledge of the
15 LGMA and its implementation and its
16 intentions. You referred to "many different
17 associations signing up for the LGMA." I
18 thought the LGMA was a handler --

19 MR. EISENBERG: No. I'm talking
20 about supporting it.

21 MR. WARSHAWER: Supporting it.

22 MR. EISENBERG: Yeah, sorry.

1 Excuse me.

2 MR. WARSHAWER: Okay.

3 MR. EISENBERG: My apology.

4 MR. WARSHAWER: I was just
5 confused by that. And also in your testimony,
6 in description of your operation, you've
7 mentioned quite a range of products that you
8 use beyond leafy greens. Do you see a need
9 for this agreement to go beyond a leafy greens
10 agreement?

11 MR. EISENBERG: From our customer
12 standpoint, they don't understand why we would
13 not extend it past leafy greens. For example,
14 cauliflower and broccoli are not on the list.
15 Every one of our customers, though, insists
16 that we have the same standards for those
17 products that we have for the others which is
18 -- you know, we had already put that into
19 place because we really thought that the
20 standards spelled out in the leafy greens made
21 sense for a lot of our crops, and we've had no
22 resistance with our growers.

1 MR. WARSHAWER: Do you have a
2 sense of why we aren't being presented with a
3 National Produce Marketing Agreement that
4 addresses the broader range of products as
5 opposed to leafy greens?

6 MR. EISENBERG: You know, it --
7 you know, as I -- I haven't been able to find
8 a broccoli or a cauliflower incident that's
9 occurred, and so I think it's really focused
10 on the crops that have the greatest risk, and
11 we would support that.

12 MR. WARSHAWER: Okay. Thank you.
13 And, Mr. Murray, I hope no one will take
14 offense by this question, but I'm wondering --
15 you made a point of emphasizing a close
16 working relationship between USDA and the
17 produce industry as an asset in regard to
18 implementing the process.

19 Could there then be a possible
20 perception of a little too much coziness,
21 bordering on lack of objectivity, lack of
22 separation of functions in a agency that's

1 strongly involved in the industry also being
2 the agency that's inspecting and auditing and
3 verifying the practices of that industry?

4 MR. MURRAY: Not with clearly
5 spelled out guidelines and expectations.

6 MR. WARSHAWER: Okay. And you
7 mentioned a concern about the LGMA being
8 voluntary and you focused on education and
9 outreach as the mechanism to assure
10 participation. Would you prefer that the
11 agreement was mandatory rather than voluntary
12 in requiring outreach to achieve higher
13 compliance?

14 MR. MURRAY: Yeah.

15 MR. WARSHAWER: Because there's a
16 marketing order process, isn't there?

17 MR. MURRAY: Yeah. But myself and
18 everyone involved so we ensure, you know, safe
19 produce for all individuals.

20 MR. WARSHAWER: Understood. Do
21 you have any ideas yourself as to why the
22 voluntary marketing agreement approach has

1 been chosen as opposed to the marketing order
2 approach which makes a set of rules mandatory?

3 MR. MURRAY: No.

4 MR. WARSHAWER: Okay. And you
5 talked about your experience with EuroGAPs.
6 What is the role of the buyer in EuroGAPs?

7 MR. MURRAY: I just mentioned I
8 was involved in it.

9 MR. WARSHAWER: Okay.

10 MR. MURRAY: I didn't talk
11 about -- but the role of the buyer definitely
12 seems to drive the metrics.

13 MR. WARSHAWER: And science -- the
14 role of science in EuroGAPs?

15 MR. MURRAY: I think it's a cross
16 between science and public perception on
17 EuroGAP.

18 MR. WARSHAWER: And how about
19 government?

20 MR. MURRAY: What about it?

21 MR. WARSHAWER: Its involvement.

22 MR. MURRAY: Which government?

1 MR. WARSHAWER: Any government
2 involvement in EuroGAPs.

3 MR. MURRAY: Oh, I -- I've not
4 perceived to see a high standard of government
5 involvement in the EuroGAP development.

6 MR. WARSHAWER: EuroGAPs outside
7 of government and as a cross between science,
8 public perception, and it's driven by buyers.
9 That's a summary. Is that a correct summary
10 of the --

11 MR. MURRAY: Driven by buyers,
12 yes, public perception.

13 MR. WARSHAWER: And have you had
14 any experience with it since it became
15 GlobalGAPs?

16 MR. MURRAY: No.

17 MR. WARSHAWER: And given the
18 importance of the buyer involvement in
19 acceptance of LGMA, do you feel that
20 participation in the Marketing Committee is
21 enough to help secure that acceptance?

22 MR. MURRAY: Say that again.

1 You're going too fast for me.

2 MR. WARSHAWER: I'm sorry. You
3 stated -- you made a strong claim about the
4 importance of buyer acceptance of the LGMA.

5 MR. MURRAY: That's correct.

6 MR. WARSHAWER: Given that
7 importance, is participation by buyers in the
8 Marketing Committee of the LGMA sufficient or
9 might other measures be considered and taken?

10 MR. MURRAY: I think it's a good
11 start. I don't know what the other measures
12 are, but I think it's a very good start.

13 MR. WARSHAWER: Okay. My next
14 question was what else -- any other
15 suggestions?

16 MR. MURRAY: I think -- I just
17 think it's a good start that they're involved
18 in it 'cause you're gonna get their agreement.

19 MR. WARSHAWER: Okay. And you
20 stated -- you stated the importance of the
21 Leafy Greens Marketing Agreement achieving the
22 stature of Primus in the eyes of buyers. How

1 -- and you emphasized outreach again as the
2 mechanism. I thought Primus was an auditor
3 and the Leafy Greens Marketing Agreement is a
4 complete system, if you will.

5 Can you help me understand what
6 you meant by --

7 MR. MURRAY: Primus is an auditor
8 but they do a lot to help create standards and
9 provide forms and checklists for the growers
10 to use to get themselves to the point where
11 they have compliance. And people respect all
12 the work they've done in the industry. And I
13 think that this agreement needs to be in such
14 a place that people respect when someone is
15 certified as being National Leafy Greens
16 compliant, that there is that equal respect
17 that -- approval from an inspection that
18 Primus has.

19 MR. WARSHAWER: And just one more
20 question. Do you know if Primus owns any
21 standards or is Primus independent of the
22 standards and simply supplying auditing

1 services as well as other related material to
2 support --

3 MR. MURRAY: I don't know the
4 answer. I have my suspect (sic), but I don't
5 know the answer.

6 MR. WARSHAWER: Okay. Thank you.

7 JUDGE HILLSON: Thank you. Any
8 redirect, Mr. Resnick?

9 MR. RESNICK: I have no questions.

10 MR. HORSFALL: I have one.

11 JUDGE HILLSON: Go ahead, Mr.
12 Horsfall.

13 MR. HORSFALL: Scott Horsfall,
14 LGMA. Dr. Eisenberg, you were asked and
15 others have been asked today to kind of
16 speculate about whether or not you think a
17 national program will help bring buyers into
18 alignment with a single standard and you
19 answered that question.

20 I'm curious about the opposite.
21 In the continued absence of a national program
22 or national standard, do all of these buyer

1 pressures go away? What happens then?

2 MR. EISENBERG: If we don't have
3 the program, I believe the buyers -- there's
4 gonna be a greater proliferation of programs
5 that they are going to be coming up with.

6 Even though on our side we still look at food
7 safety as not a competitive advantage, from
8 the buyer's standpoint, it's a very difficult
9 story. We deal with one customer who
10 understands that the program they have in
11 place makes no scientific sense, but from
12 their standpoint, that's something that they
13 believe their consumers want to hear about and
14 the lawyers in their company push it ahead,
15 too.

16 MR. HORSFALL: Thank you.

17 JUDGE HILLSON: I thought you
18 didn't have any questions.

19 MR. RESNICK: Well, now I do.

20 JUDGE HILLSON: Okay. Go ahead.

21 MR. RESNICK: Thank you. Jason
22 Resnick. I heard Mr. Horsfall address you as

1 "Dr." Are you a Ph.D.?

2 MR. EISENBERG: Yes.

3 MR. RESNICK: Okay. Would you
4 just quickly reference your educational
5 background for the record?

6 MR. EISENBERG: I have a Ph.D. in
7 post-harvest physiology from Ohio State and,
8 after that, was on the faculty of the
9 University of Illinois and was department head
10 at Cal Poly in San Luis Obispo for a period of
11 time and I've had the wonderful opportunity of
12 working for Chiquita and Campbell Soup and
13 with Chiquita seven years in Europe where my
14 son was born. As he reminds me, he can never
15 be President of the United States. That's a
16 12-year-old for you, so --

17 MR. RESNICK: Thank you. I have
18 nothing further.

19 JUDGE HILLSON: Any other
20 questions back there? Okay, gentlemen. You
21 may step down. Thank you very much for your
22 testimony.

1 Mr. Resnick, you mentioned a panel
2 tomorrow. Does that mean you have two more
3 panels for today? Is that your plan or --

4 MR. RESNICK: That's our
5 intention.

6 JUDGE HILLSON: Okay. And let me
7 just make sure there's no one else who came in
8 late to sign up who has to testify today. Not
9 that I would likely let you testify at this
10 late point anyway, but -- okay.

11 Well, I have -- let's take a ten-
12 minute break. I've got a couple minutes after
13 4:00. And then we'll hear our last two
14 panels.

15 MR. RESNICK: Thank you.

16 JUDGE HILLSON: Go till we're
17 done. Off the record.

18 (Recess from 3:56 p.m., until 4:09
19 p.m.)

20 JUDGE HILLSON: And, Mr. Resnick,
21 I see your next panel is seated. You want to
22 call them as witnesses?

1 MR. RESNICK: Thank you, Your
2 Honor. The Proponent group calls Josh Rolph,
3 Shelly Tunis, and Tim Dunn.

4 JUDGE HILLSON: And are they going
5 to testify in that order?

6 MR. RESNICK: Yes.

7 JUDGE HILLSON: Okay. Let me just
8 mark up their exhibits.

9 So first I'm going to mark Mr.
10 Rolph's exhibit as 86 and Ms. Tunis will be 87
11 and Mr. Dunn will be 88.

12 (Exhibits 86, 87, and 88
13 were marked for identi-
14 fication.)

15 JUDGE HILLSON: Okay. Mr. Rolph,
16 please raise your right hand.
17 Whereupon,

18 JOSH ROLPH
19 having first been duly sworn, was called as a
20 witness and testified as follows; to wit:

21 JUDGE HILLSON: Okay. Can you
22 please state your name and spell it for the

1 record.

2 MR. ROLPH: Josh Rolph, Rolph,
3 R-o-l-p-h.

4 JUDGE HILLSON: Okay. You have a
5 statement you want to read?

6 MR. ROLPH: I would.

7 JUDGE HILLSON: Please proceed.

8 TESTIMONY

9 MR. ROLPH: My name is Josh Rolph.
10 I'm the director of the National Affairs and
11 Research Division for the California Farm
12 Bureau Federation. Our organization
13 represents 85,000 members who grow and raise
14 more than 350 commodities in California. I
15 appreciate the opportunity to express the
16 California Farm Bureau's support for the
17 proposed National LGMA.

18 Our farmers take very seriously
19 the responsibility to provide safe and quality
20 food. As a result of the food safety crisis,
21 farmers, shippers, and handlers immediately
22 developed the California LGMA to establish a

1 system implementing and enforcing effective
2 practices to improve food quality.

3 The agreement created an advisory
4 board to review and respond to data, research,
5 and consumer interest. The agreement allows
6 flexibility for continuous improvements to our
7 food safety efforts while including Government
8 oversight of the board's actions. An
9 essential tool within the agreement allows for
10 rapid adjustments that may be required in
11 order to respond to new science that may show
12 what improvements can be made to assure safe
13 quality food for the public.

14 The California Farm Bureau is one
15 of the proponent groups of the effort to
16 complement the California Agreement's
17 successful track record through the creation
18 of a national marketing agreement administered
19 by USDA. This national agreement will bring
20 the same standards to all companies growing,
21 packaging, or selling leafy greens nationally
22 and implementation of a national agreement

1 would be a huge leap forward for product
2 safety. With national standards in place,
3 produce buyers would be able to address food
4 safety issues with a consistent and cost-
5 effective plan.

6 The proposed national agreement's
7 impact on growers would be similar to the
8 California Agreement because it would require
9 participating handlers to only purchase from
10 a grower who adheres to the best practices.
11 The California Farm Bureau and Western Growers
12 worked with researchers and regulatory
13 agencies to draft best management practices
14 which the board of the California Agreement
15 reviewed and accepted. These practices focus
16 primarily on farm activities, but they also
17 highlight the importance of implementing a
18 program that establishes best practices for
19 all suppliers in the food chain in the
20 growing, processing, and distribution of leafy
21 greens. The California Farm Bureau is pleased
22 that the proposed National Marketing Agreement

1 would focus not just on practices on the farm
2 fields but would also look to create good
3 handling practices and good manufacturing
4 practices.

5 The grower members of our
6 organization have invested significantly in
7 on-farm food quality and safety programs under
8 the California Agreement. The proposed
9 national agreement would be able to coordinate
10 with California to prevent any unnecessary
11 additional costs. I believe that involvement
12 in a national program will provide the
13 additional benefit of improving buyer and
14 consumer confidence in California's leafy
15 greens vegetables.

16 In closing, the California Farm
17 Bureau would like to go on record in support
18 of the National LGMA. If the agreement takes
19 effect, it will bring standardization across
20 the country and will improve all aspects and
21 phases of growing, handling, processing, and
22 shipping. All of these improvements will have

1 the result of enhancing consumers' confidence
2 and trust in these nutritious products.

3 JUDGE HILLSON: Okay. Mr. Rolph,
4 I will receive your written testimony as
5 Exhibit 86.

6 (Exhibit 86 was
7 received.)

8 JUDGE HILLSON: And I guess we'll
9 move on to Ms. Tunis. Please raise your right
10 hand.

11 Whereupon,

12 SHELLEY TUNIS
13 having first been duly sworn, was called as a
14 witness and testified as follows; to wit:

15 JUDGE HILLSON: Can you please
16 state your name and spell it for the record.

17 MS. TUNIS: My name is Shelly
18 Tunis, and my last name is spelled T-u-n-i-s.

19 JUDGE HILLSON: Okay. And feel
20 free to read your statement.

21 TESTIMONY

22 MS. TUNIS: I'm an attorney and I

1 represent Yuma Fresh Vegetable Association, or
2 YFVA. The Association has been in existence
3 for over 61 years and it's comprised of
4 growers and shippers of fresh vegetables and
5 melons and related agricultural businesses.
6 Our members grow both conventional and organic
7 leafy green products. Yuma Fresh Vegetable
8 Association supports the proposed National
9 Leafy Greens Marketing Agreement at 7 CFR part
10 970 set forth in the Federal Register at
11 Volume 74, Number 170, on Thursday, September
12 3rd, 2009.

13 Yuma agriculturalists take pride
14 in providing fresh fruit and vegetables to the
15 people of the United States. According to the
16 U.S. Census, there are over 105 million
17 households in the U.S. During the winter
18 months, Yuma farmers produce enough iceberg
19 lettuce for each of those 105 million U.S.
20 households to consume about five heads of
21 iceberg lettuce, three heads of romaine
22 lettuce, one head of leaf lettuce, and one

1 bunch of broccoli. In addition, Yuma farmers
2 produce spinach, spring mix, cabbage, and
3 approximately 30 other vegetables and melons.
4 In fact, during the winter months, anywhere in
5 the United States and parts of Canada, if you
6 eat a salad containing iceberg lettuce, more
7 likely than not the iceberg lettuce you will
8 eat has been grown in Yuma. Arizonans take
9 pride in our innovative Yuma agricultural
10 community who supplies fresh fruits and
11 vegetables to people in the Unites States and
12 Canada as well as to people in Asia and
13 European countries.

14 After the California E. coli
15 0157:H7 outbreak in spinach in 2006, members
16 of the Arizona leafy greens industry decided
17 in the spring of 2007 that they wanted to
18 proactively address food safety concerns and
19 implement an Arizona Leafy Greens Marketing
20 Agreement. YFVA worked closely with the staff
21 of the Arizona Department of Agriculture, the
22 Office of the Arizona Attorney General, and

1 Western Growers representatives to develop and
2 implement an Arizona Leafy Greens Marketing
3 Agreement. By September 2007, shippers began
4 signing the Arizona Marketing Agreement and
5 the Marketing Committee was operating by early
6 November. According to the Arizona Leafy
7 Greens Marketing Committee, signers of the
8 Arizona Marketing Agreement produce 96 percent
9 of the annual \$1 billion of Arizona-grown
10 leafy greens products. Arizona shippers,
11 farmers, and contractors are beginning their
12 third season operating under the Arizona Leafy
13 Greens Marketing Agreement.

14 Our YFVA members have told me that
15 initially in 2007, there was a learning curve
16 relating to the food safety standards and
17 complying with the leafy green metrics. But
18 now it is easier for them to make decisions
19 when they plan for their seasons. Farmers who
20 work with multiple shippers appreciate the
21 uniformity of standards and the level playing
22 field between companies that operate in

1 Arizona and California. Some of our members
2 who operate in states other than Arizona and
3 California would like to see those states
4 function under the same set of leafy green
5 standards as Arizona and California. However,
6 our members also recognize that any leafy
7 greens marketing agreement must accommodate
8 regional differences. YFVA members appreciate
9 that Section 970.67(d) of the draft National
10 Leafy Greens Marketing Agreement relating to
11 audit metrics permits audit metrics to be
12 developed to accommodate differences in
13 production and handling in different regions
14 of the country.

15 Our YFVA members also believe that
16 their experiences with the Arizona Leafy
17 Greens Marketing Agreement during the past two
18 years could be beneficial as USDA continues
19 the process of implementing a National
20 Marketing Agreement. The Arizona Leafy Greens
21 Marketing Committee has kept per-carton
22 assessments low while providing for audits,

1 administration, food safety research, outreach
2 sessions, and developing training materials
3 for workers who handle leafy greens. This
4 season's assessment is set at .0025 cents per
5 carton or the equivalent. This year, the
6 Arizona Leafy Greens Marketing Committee, in
7 conjunction with the Arizona Department of
8 Agriculture Citrus, Fruit and Vegetable
9 Standardization program is in the process of
10 training four inspectors who will be certified
11 by USDA to perform food safety audits. Our
12 members believe it is beneficial to have
13 auditors familiar with Arizona conditions
14 performing leafy green audits. YFVA members
15 are encouraged that Section 970.14 entitled
16 "Inspection Service" of the draft National
17 Leafy Greens Marketing Agreement allows
18 entities approved by USDA, such as the Arizona
19 Department of Agriculture, to perform audits
20 on behalf of USDA.

21 YFVA members appreciate efforts of
22 coordination between the National and the

1 Arizona Leafy Greens Marketing Agreements, but
2 our members are also wary of possible
3 duplication of the leafy greens marketing
4 agreements. We believe good communication
5 among all parties is essential to coordinate
6 the execution of the National Leafy Greens
7 Marketing Agreement and to avoid unnecessary
8 efforts and duplication with the Arizona Leafy
9 Greens Marketing Agreement. Furthermore, YFVA
10 wholeheartedly endorses the comments presented
11 by Arizona Assistant Attorney General and
12 Arizona Leafy Greens Marketing Committee
13 Counsel, Casey Cullings. YFVA presents four
14 additional specific comments relating to the
15 draft National Leafy Greens Marketing
16 Agreement.

17 One, Section 970.43, Nominations.
18 Paragraph (b)(3) states that each producer and
19 handler shall have only one vote, even though
20 the producer or handler operates in more than
21 one zone. Yet the paragraph does not indicate
22 in what zone the handler or producer may vote.

1 We suggest the paragraph (b)(3) is revised to
2 state:

3 "(3) Each producer and handler
4 shall have only one vote and each shall
5 designate the zone in which he or she shall
6 vote."

7 Number two, Section 970.44,
8 Alternate Members, and Section 970.48(b),
9 Procedure. The second sentence of Section
10 970.44 and the subsection at Section 970.48(b)
11 are redundant and potentially conflicting,
12 since the wording is slightly different. We
13 suggest you remove the second sentence of
14 Section 970.44 and maintain Section 970.48(b)
15 as stated. Section 970.44 would be revised to
16 state:

17 "An alternate for a member shall
18 act in the place of each member during the
19 member's absence or, in the event of the
20 member's removal, resignation,
21 disqualification, or death, until a successor
22 for each member's unexpired term has been

1 selected and has qualified."

2 Number three, Section 970.75,
3 Research and Promotion. This section allows
4 for marketing and promotion research, but the
5 section does not permit food safety research.
6 The Arizona Leafy Greens Marketing Committee
7 has granted considerable money to fund food
8 safety research projects and for a number of
9 years Arizona producers and shippers have
10 likewise funded food safety research. YFVA
11 believes the National Leafy Greens Marketing
12 Agreement should have the discretion to fund
13 food safety research along with marketing
14 research. YFVA believes -- members believe
15 that including a discretionary provision
16 allowing for food safety research would be in
17 the best interests of the National Leafy
18 Greens Marketing Agreement and leafy greens
19 producers and handlers. We suggest revising
20 Section 970.75 to state:

21 "(a) The Committee, with the
22 approval of the Secretary, may fund, (1)

1 marketing research and development projects
2 and/or promotional activities, including paid
3 advertising designed to assist, improve, or
4 promote the efficient adoption,
5 implementation, and marketplace acceptance of
6 the agreement and products handled by
7 signatories; (2) food safety research
8 projects, including relationships between
9 pathogenic microorganisms and environmental
10 and/or biological agents, reducing risk of
11 cross-contamination in the food supply chain
12 from the field to the table, and training
13 personnel who handle products.

14 (b) The expenses of such projects
15 shall be budgeted and paid from funds
16 collected pursuant to Section 970.56."

17 Number four, Section 970.95,
18 Amendments, and Section 970.98, Withdrawal.
19 Since the agreement is in essence a contract
20 between the signatories and the USDA, the
21 signatories should have the opportunity to
22 withdraw from the agreement if the provisions

1 are altered and the signatories do not agree
2 with the alterations. Under the Arizona Leafy
3 Greens Marketing Agreement at Article XIII,
4 Section C, all signatories must agree to the
5 amendment for the amendment to become
6 effective. While this provision has presented
7 difficulties in obtaining changes to the
8 Arizona Marketing Agreement, a limited time to
9 withdraw after the adoption of an amendment
10 would accomplish the same goal. Our suggested
11 revision to Section 970.98, Withdrawal,
12 incorporates language submitted by Arizona
13 Assistant Attorney General Casey Cullings.
14 The revised Section 970.98 would state:

15 "(a) A signatory may withdraw
16 from this agreement by: (1) filing a written
17 request for withdrawal for the subsequent crop
18 year with the Committee at least 30 days prior
19 to the start of the subsequent crop year; (2)
20 filing a written notice with the Committee
21 stating that the signatory ceases to be a
22 handler of leafy green vegetables or products;

1 (3) filing a written request for withdrawal
2 from the Committee no more than 15 days after
3 the adoption of an amendment to the agreement.

4 (b) A signatory's withdrawal does
5 not relieve the signatory of the obligation to
6 pay assessments or charges due. And,

7 (c) A signatory that withdraws
8 shall not use the official certification
9 mark."

10 In conclusion, the members of the
11 Yuma Fresh Vegetable Association support the
12 National Leafy Greens Marketing Agreement and
13 YFVA members are prepared to lend their
14 expertise to further develop and implement the
15 National Marketing Agreement. As this process
16 advances, our YFVA members look forward to
17 communicating and coordinating with USDA
18 personnel and the proponents of the National
19 Leafy Greens Marketing Agreement. Thank you
20 for the opportunity to testify here today.

21 JUDGE HILLSON: Okay. Thank you,
22 Ms. Tunis. I'll receive your written

1 statement into evidence as Exhibit 87.

2 (Exhibit 87 was

3 received.)

4 JUDGE HILLSON: And, Mr. Dunn,

5 please raise your right hand.

6 Whereupon,

7 TIM DUNN

8 having first been duly sworn, was called as a

9 witness and testified as follows; to wit:

10 JUDGE HILLSON: Please state your

11 name and spell it for the record.

12 MR. DUNN: Tim Dunn. My last name

13 is D-u-n-n.

14 JUDGE HILLSON: Okay. And you may

15 read your written statement.

16 TESTIMONY

17 MR. DUNN: Good afternoon. My

18 name is Tim Dunn and I am a producer here in

19 the Yuma area. While I personally grow edible

20 beans, germ wheat, and a lot of seed crops, my

21 family produces a number of crops, including

22 leafy greens.

1 I am also the Chairman of the
2 Arizona Agricultural Advisory Committee and
3 the first Vice President of the Arizona Farm
4 Bureau Federation. I appreciate the
5 opportunity to speak today in favor of the
6 National Leafy Greens Marketing Agreement on
7 behalf of the Arizona Farm Bureau.

8 The Arizona Farm Bureau has
9 roughly 2700 agricultural producer members in
10 13 counties of the state. We represent a wide
11 spectrum of commodities in the state,
12 including leafy greens, with a large number of
13 our membership coming from the Yuma area.

14 While we believe the current food
15 supply is very safe now, recent food safety
16 concerns have shown the impacts uncertainty
17 can have on the fresh produce industry. With
18 that in mind, we have a vested interest in the
19 development and implementation of a National
20 Marketing Agreement that creates a benchmark
21 set of standards that are science-based and
22 practical to implement.

1 We applaud USDA in moving forward
2 with a marketing agreement approach to
3 developing standards for the produce industry
4 rather than imposing marketing orders or
5 federal mandates. We believe that this
6 approach will ensure flexibility and allow for
7 adjustments as new practices and technologies
8 are developed to further minimize the
9 potential for contamination. We also believe
10 the establishment of a nationally recognized
11 standard for food safety that recognizes
12 regional differences is critical to ensure the
13 practical implementation of a successful
14 safety standard for handling of fresh produce.

15 When it comes to this type of
16 system, one size does not fit all, and we
17 believe that the National Leafy Green
18 Marketing Agreement is the best approach in
19 creating a practical, voluntary system
20 accessible to producers of all sizes and
21 geographical areas.

22 Uncertainty in the marketplace is

1 also detrimental to the creation of capital
2 that is sorely needed in our current economy.
3 Investment thrives on limiting risk and
4 minimizing uncertainty. We have seen the
5 success of regional voluntary marketing
6 agreements in California and Arizona and by
7 creating one recognizable standard should also
8 minimize the need for multiple metrics and
9 audits. Our hope is that a system will drive
10 much of the cost out of this current system
11 and the uncertainty that comes with it.

12 While we recognize that we cannot
13 be guaranteed that one system will satisfy and
14 be agreed upon by every buyer, we believe that
15 the NLGMA is a good start to providing a
16 platform for uniform management practices that
17 reduce food safety risk. We are also
18 encouraged by the amount of input producers
19 and handlers will have in the proposed system.
20 We feel that this is a critical element to
21 ensure that all the handling practices
22 outlined in the agreement are practical to

1 implement. After all, the sustainability of
2 such a program relies heavily on the ability
3 of producers to adopt and implement the
4 outlined practices.

5 I will end my remarks with a thank
6 you to the USDA for their willingness to work
7 with the industry in creating a workable
8 program to improve the marketability of our
9 products and benefit the consumer. We applaud
10 the efforts that have been made thus far in
11 the implementation of this program and stand
12 ready to work with other interested parties in
13 implementing this program.

14 Thank you.

15 JUDGE HILLSON: Thank you, Mr.
16 Dunn. I'll receive your written testimony as
17 Exhibit 88.

18 (Exhibit 88 was
19 received.)

20 JUDGE HILLSON: Did you have any
21 further direct, Mr. Resnick, of any of these
22 three witnesses?

1 MR. RESNICK: Not at this time,
2 Your Honor.

3 JUDGE HILLSON: Okay. Then I will
4 ask the USDA panel if they have any questions.
5 Who would like to go first? Ms. Schmaedick,
6 looks like it's you again.

7 MS. SCHMAEDICK: Melissa
8 Schmaedick, USDA, and thank you to the three
9 members of the panel for your testimony. My
10 first question is actually a question that I
11 wanted to pose to each of you, and so I'll
12 just ask the question and if you want to
13 respond to it in turn, that would be great.

14 Each of you represent a different
15 organization of growers and handlers and I was
16 wondering if you could talk a little bit about
17 your membership profile. For example, how
18 many growers versus handlers are in your
19 membership, how many -- what percentage would
20 fit in the small business category versus a
21 large business category, and what percentage
22 actually deals directly in leafy green -- in

1 the leafy green industry.

2 MR. ROLPH: Josh Rolph. Don't
3 have the data right in front of me, so what I
4 would provide would be a rough guess. But our
5 membership is made up primarily of growers.
6 You also asked whether they're small or large.
7 I would say they fall probably in the medium
8 range, whether -- you probably have roughly
9 half that are considered small and half that
10 are large. But very rough guesses.

11 MS. SCHMAEDICK: And do you have
12 any idea what percentage are involved in leafy
13 green industry?

14 MR. ROLPH: We represent farmers
15 and ranchers, so the percentage would be less
16 than ten percent is a rough guess --

17 MS. SCHMAEDICK: Okay.

18 MR. ROLPH: -- that are leafy
19 green producers.

20 MS. SCHMAEDICK: Thank you.

21 MS. TUNIS: Shelly Tunis, the Yuma
22 Fresh Vegetable Association has growers,

1 producers, and shipper-handlers. I'm not sure
2 of the specifics. Our Association probably
3 has more grower members than shipper members.
4 I can't really say if they would fall under
5 the large producer or small producer. We're
6 not -- we don't usually get into their
7 finances on that. I'm not sure on that. Some
8 grow both conventional and organically. And,
9 again, a rough guess but I -- I would think
10 that nearly all, close to a hundred percent of
11 our members grow leafy green products because
12 that's the primary product grown in Yuma.

13 MS. SCHMAEDICK: Thank you.

14 MR. DUNN: Representing the
15 Arizona Farm Bureau, we are a statewide
16 organization, 2700 farm families, agricultural
17 producers for 13 counties. That's gonna be a
18 mixture of both large and small. Includes
19 cattle producers also. There is approximately
20 300 members in Yuma County which probably over
21 90 percent of that's gonna be touched by the
22 leafy greens industry, whether they currently

1 grow leafy greens or they're ground in
2 production and they follow the same food
3 safety regulations for the following crops, so
4 that touches a lot of our Yuma County Farm
5 Bureau members.

6 MS. SCHMAEDICK: And this is
7 another question for the three of you. Is
8 your membership aware of the proposed program
9 and has it been discussed within your
10 organizations?

11 MR. ROLPH: Yes, in some --

12 JUDGE HILLSON: I'm sorry but
13 you've got to have him identify himself again.

14 MR. ROLPH: Josh Rolph. This has
15 been discussed at great length beginning three
16 years ago. And I know you didn't ask about
17 the state -- origin of the state plan, but
18 it's been an evolving process and our growers
19 are very strongly in support of a national
20 plan.

21 MS. SCHMAEDICK: Thank you. What
22 about your handler members? Are they also in

1 support of it?

2 MR. ROLPH: Since we're a farmer
3 organization, some are farmers and handlers,
4 but I would say that, yes, they're also very
5 supportive and have been very active and
6 engaged in the process.

7 MS. SCHMAEDICK: Thank you.

8 MS. TUNIS: Shelly Tunis. The
9 Yuma Fresh Vegetable Association, the --
10 certainly falling under the Arizona Leafy
11 Greens Marketing Agreement for the past two
12 years are familiar with that. And the board
13 has voted to support the National Leafy Greens
14 Marketing Agreement. I know there has been
15 some discussions among our membership, but
16 nothing formal has been discussed among our
17 membership for the National Leafy Greens
18 Marketing Agreement.

19 On the other hand, I cannot say
20 that I have heard any opposition to the
21 National Leafy Greens Marketing Agreement,
22 even though we -- I can't say that everybody's

1 in support of it either.

2 MS. SCHMAEDICK: And just to
3 interject real quickly. Can you tell me what
4 your membership -- the number of members of
5 your organization?

6 MS. TUNIS: There's approximately
7 a hundred members of the Association and
8 that's between the shipper members, the grower
9 members, and then the ag-related business
10 members.

11 MS. SCHMAEDICK: Okay. Thank you.

12 MR. DUNN: Tim Dunn. Yes. The
13 way Farm Bureau policy works, we've discussed
14 that and we have policy at the state level
15 that is in favor of the National Marketing
16 Leafy Greens Agreement and that was discussed
17 last year at our annual meeting. We have --
18 it's not been debated at a board level this
19 year, but we have policy. That's why I'm able
20 to testify here today to talk about it.

21 MS. SCHMAEDICK: Thank you. Now
22 I'd like to ask some specific questions. Ms.

1 Tunis, on page two of your testimony,
2 paragraph two, you state that, "Our members
3 believe it is beneficial to have auditors
4 familiar with Arizona conditions performing
5 leafy green audits."

6 Can you expand further on that
7 statement and explain why you think that is
8 important?

9 MS. TUNIS: Shelly Tunis. I
10 believe that our members recognize that
11 there's differences among growing regions and,
12 therefore, it's beneficial to have the people
13 who are auditing familiar with those various
14 conditions and the differences. And for that
15 reason, they would like people familiar with
16 Arizona conditions as compared to other
17 conditions in different regions.

18 MS. SCHMAEDICK: In your opinion,
19 would it similarly be important for -- for
20 example, in the case of Ohio or New York, that
21 the auditors be familiar with the regional
22 production and handling environments?

1 MS. TUNIS: I believe it's always
2 beneficial for them to be familiar with it.
3 I understand that sometimes that's not always
4 possible because of the lengthy training
5 process that auditors have to go through. But
6 I think that is preferable certainly, if not
7 always possible.

8 MS. SCHMAEDICK: In that same
9 paragraph, you also mention the current
10 assessment that's being placed under the
11 Arizona Leafy Greens Marketing Agreement and
12 it's a per-carton or equivalent. Can you --
13 and this may not be -- you might not be the
14 right person to ask this question, but I'm
15 wondering with so many different types of
16 leafy green vegetables, what is the process
17 for calculating equivalent? If you can't
18 measure on a carton basis, how do you come up
19 with an equivalent assessment?

20 MS. TUNIS: I'm not sure I can
21 answer that question for you. I just know
22 that they do that. I'm not sure exactly how

1 they do that.

2 MS. SCHMAEDICK: Okay.

3 JUDGE HILLSON: When you read
4 that, you said .0025 cents per gallon and I'm
5 just -- per carton -- and isn't that .0025
6 dollars? Is it a quarter of a cent per
7 carton; is that what you -- or am I -- is it
8 the way you said it?

9 MS. TUNIS: It is a quarter cent
10 per carton, yes.

11 JUDGE HILLSON: Okay, not .0025
12 cents per carton but one fourth of a cent per
13 carton.

14 MS. TUNIS: Yes. Thank you very
15 much.

16 JUDGE HILLSON: Okay. Back to
17 you, Ms. Schmaedick.

18 MS. SCHMAEDICK: Thank you. On
19 page two of your testimony, you are
20 recommending a change to the language in
21 proposed Section 970.43, Nominations. I
22 believe you're suggesting that the language

1 allowing a producer or handler to designate
2 the zone in which he or she shall vote should
3 be added? Is that correct?

4 MS. TUNIS: Yes. That's correct.

5 MS. SCHMAEDICK: Can you explain
6 why that's important?

7 MS. TUNIS: A number of our
8 members operate both in California and in
9 Arizona, and those are different zones under
10 the proposed national agreement, so they would
11 have to choose between voting in the
12 California zone or the Arizona zone, and I
13 think that's important that they designate
14 which zone they vote in.

15 MS. SCHMAEDICK: And to clarify,
16 if a producer or a handler were operating in
17 two different zones, are you saying that they
18 are allowed one vote in one zone?

19 MS. TUNIS: It's my understanding
20 that they would be allowed only one vote but
21 they would have to choose which zone they vote
22 the one vote.

1 MS. SCHMAEDICK: Thank you. On
2 page three of your testimony, you are
3 proposing some modifications to 970.75,
4 Research and Promotion. And, again, you may
5 not be the best person to ask, so I apologize
6 in advance, but my question actually relates
7 to paragraph (a)(1) and the top that goes
8 "Marketing research, development projects, and
9 promotional activities, including paid
10 advertising." Do you have any idea what type
11 of activities that language speaks to?

12 MS. TUNIS: No. I don't. I was
13 just incorporating that to try to say how it
14 would all fit together, but the main point
15 that we were trying to emphasize was really
16 under (2) about the food safety research
17 projects because the other is existing
18 language in the draft national agreement.

19 MS. SCHMAEDICK: And so looking at
20 the paragraph (a)(2) that you're recommending
21 be added, do you have any examples of the type
22 of activities that would be included under

1 that authority?

2 MS. TUNIS: When this was put
3 together, we looked at some of the research
4 projects that the Arizona Leafy Greens
5 Marketing Agreement had funded and they had
6 funded various projects involving birds in the
7 fields and water supplies and so we -- we
8 tried to take what had -- they had already
9 funded and incorporate that in. They have
10 also talked about cross-contamination through
11 the various process and also training
12 personnel who handle the products. So that's
13 where that came from really is the research
14 projects that the Arizona Leafy Greens
15 Marketing Committee has funded.

16 MS. SCHMAEDICK: Would the
17 research be limited to production activities,
18 or would it also include handling and
19 manufacturing activities?

20 MS. TUNIS: Certainly the -- it
21 would include manufacturing and handling
22 activities that would fall under anywhere in

1 the food supply chain, from the field to the
2 table.

3 MS. SCHMAEDICK: And how do you
4 envision if this program were implemented with
5 this particular authority in it, how would it
6 be applied let's say on a regional basis --
7 for example, if there's a production or
8 handling issue that is specific to a region in
9 Florida, how would that be addressed under the
10 proposed program?

11 MS. TUNIS: I think that's really
12 up to the Committee to decide how they would
13 like to handle that. I don't have any
14 specifics of how it would be handled except
15 that we really believe it's important to have
16 a discretionary provision in there that allows
17 for food safety research and allow the
18 Committee to decide whether they want to fund
19 it and which projects they would like to fund.

20 MS. SCHMAEDICK: On the last page
21 of your testimony, page four, you are
22 proposing some modified language for 970.98,

1 particularly adding a new paragraph (a)(3),
2 filing a written request for withdrawal with
3 the Committee no more than 15 days after the
4 adoption of an amendment to the agreement.

5 Can you explain to me in greater
6 detail how you would see that working?

7 MS. TUNIS: Because this is a
8 contract, in essence, between USDA and the
9 signatories, we believe that they should be
10 allowed to withdraw -- the signatories should
11 be allowed to withdraw if they -- if there is
12 an amendment that they really do not agree
13 with. And -- because, otherwise, they would
14 have to wait until the end of the year to
15 withdraw. And I'm not sure exactly that 15
16 days is the appropriate time. But I believe
17 it's more important to have the opportunity to
18 withdraw if the agreement is amended and they
19 don't agree with the amendment, and it would
20 not relieve them of responsibilities up to
21 that point for paying any assessments or
22 charges or -- but if they really strongly

1 object to that amendment, it seems like there
2 should be an opportunity to withdraw.

3 MS. SCHMAEDICK: Thank you. I
4 have questions for Mr. Dunn. On the first
5 page of your testimony, paragraph four, you
6 state, "We applaud USDA in moving forward with
7 a marketing agreement approach to developing
8 standards for the produce industry rather than
9 imposing marketing orders or federal
10 mandates."

11 Can you expand on that statement
12 for me?

13 MR. DUNN: Tim Dunn. As a
14 producer, I just -- in going through the --
15 what we've done in the past with the
16 California and Arizona Leafy Greens, having
17 input into that and being -- working with what
18 your end users are wanting and the marketing
19 agreement approach, we seem to get more input
20 and it's more science-based and we're able to
21 come together from a ground level with what
22 works for our region and we had to make it

1 work for Yuma, we had to make it work for
2 California, as opposed to being -- coming from
3 -- take no offense -- coming from the USDA
4 from Phoenix or from D.C. this way. It seems
5 like we have a more -- a more hands-on
6 approach to something that's going to work for
7 us as opposed to a marketing order and/or the
8 mandates.

9 MS. SCHMAEDICK: Okay. Thank you.
10 And on page two of your testimony, paragraph
11 three, the last sentence states that, "The
12 sustainability of such a program relies
13 heavily on the ability of producers to adopt
14 and implement the outlined practices."

15 I just wanted to clarify. Based
16 on your understanding of the proposed program,
17 would handlers and processors also be relied
18 upon?

19 MR. DUNN: Yes. You have to rely
20 on the handlers, but the comment there comes
21 from we develop a system and it has to be able
22 to be implemented on the ground and/or as a

1 facility -- handling facility. All of the
2 processes involved needs to be able to be
3 implemented and cross-checked, and so you
4 could include the handlers in there as well.

5 MS. SCHMAEDICK: Thank you.
6 That's all the questions I have for now.
7 Thank you.

8 JUDGE HILLSON: Ms. Carter.

9 MS. CARTER: Good afternoon.
10 Antoinette Carter with USDA. I guess my first
11 question is to Ms. Tunis. On page two of your
12 prepared statement, you reference I guess the
13 proposed agreement and that it provides for
14 some coordination with current state marketing
15 agreements. How would -- how do you envision
16 that coordination occurring?

17 MS. TUNIS: It's my understanding
18 that if the National Marketing Agreement moves
19 forward, it will take a while to implement it,
20 maybe a year, up to two years. In the
21 meantime, the Arizona Leafy Greens Marketing
22 Agreement would continue to operate, but there

1 needs to be some coordination then between
2 when the national agreement would become fully
3 operational and effective because our members
4 are concerned that there's not a duplication
5 of efforts.

6 So there would need to be good
7 communication and coordination between when
8 the national agreement becomes operational and
9 effective so therefore the Arizona agreement
10 then would no longer really be needed, or it
11 would be modified to work more closely than
12 with the national agreement.

13 MS. CARTER: Okay. And just to I
14 guess direct the question to the other
15 panelists as well in terms of how do you
16 envision what the impact of the proposed
17 agreement would be on the state -- existing
18 state programs for the organizations that you
19 are representing, could you comment on that,
20 if your associations have taken any position
21 or had any discussions with regards to that?

22 MR. ROLPH: We don't have a

1 position on that, but --

2 JUDGE HILLSON: Please state your
3 name again.

4 MR. ROLPH: Josh Rolph -- sorry.
5 Yeah, no position on that. I would defer to
6 comments that have already been stated from
7 the Proponent group on that point.

8 MS. CARTER: Okay. Thank you.

9 MR. DUNN: Tim Dunn. We have not
10 discussed the transition period that that
11 would take, but we know that we have a good
12 process in place now and how that would
13 transition, but we have not discussed that.

14 MS. CARTER: Okay. Thank you.

15 JUDGE HILLSON: Any other
16 questions from our USDA panel? Ms.
17 Schmaedick.

18 MS. SCHMAEDICK: Melissa
19 Schmaedick, USDA. This is a question for both
20 Ms. Tunis and Mr. Dunn. Can you describe what
21 the implementation process was for the Arizona
22 state program and, more specifically, when the

1 state program was created, was there a time
2 between the creation of the administrative
3 part of the program and the actual
4 implementation of the metrics or best
5 practices?

6 MS. TUNIS: Shelly Tunis. The
7 program was created -- the signatories signed
8 in September of 2007 and then the Marketing
9 Committee actually was elected by the
10 signatories. There was a time before there
11 was implementation of the program -- the
12 season in Yuma usually runs from November to
13 March, and in 2008, I believe there were only
14 really informational audits conducted then.
15 It wasn't really a full-fledged audit because
16 all the procedures weren't necessarily in
17 place. So there was more of an educational
18 effort put forth and -- before the full-
19 fledged audits occurred.

20 MR. DUNN: Tim Dunn. I remember
21 going back -- I don't know the exact dates --
22 but when California's was implemented and the

1 handlers were coming to the Arizona growers
2 and we did not have ours implemented -- or was
3 asking the growers to get this implemented on
4 our side, we met in a little Mexican
5 restaurant, La Fonda, with a bunch of growers
6 and there was a lot of angst in the room about
7 is this something we actually want to do and
8 how do we do it, and we went to the Director
9 of the Department of Agriculture and started
10 working on getting the state rules in place
11 and the -- what are they? -- the legislative
12 work for that to get it in place and trying to
13 get the metrics set up so that we could
14 actually have those -- the next steps going
15 on.

16 But it was -- you know, it was
17 that process of wanting to meet as a grower,
18 the grower community meeting the needs of the
19 handlers and taking it to the Department of
20 Ag. and getting that set up in place and then
21 going through the process of getting it
22 established and working.

1 MS. SCHMAEDICK: So as a grower
2 organization, did you have the opportunity to
3 be directly involved in the development of the
4 metrics?

5 MR. DUNN: Tim Dunn, yes. We have
6 members -- I personally wasn't. We had
7 members of our group that were involved with
8 not only our group but other groups, yes.

9 MS. SCHMAEDICK: Do you believe
10 that that was important to the successful
11 drafting and implementation of the state
12 program?

13 MR. DUNN: Yes, I do. I think it
14 helped from the regional differences that Yuma
15 had compared to California, from the San
16 Joaquin Valley, it helped -- I think that --
17 those were important.

18 MS. SCHMAEDICK: If you were to
19 project the Arizona experience onto the
20 proposed national program, would you believe
21 that it's equally important for producers and
22 other interested parties to have a voice in

1 the development process of metrics?

2 MR. DUNN: I think as you go to
3 the regional areas, I think there needs to be
4 some input from those areas so that there's a
5 good understanding of what's different in that
6 area and there should be some grower input and
7 handler input 'cause it's, you know, trucking
8 time, the distance between the field to the
9 coolers and all that stuff all has to be taken
10 into the metrics.

11 MS. SCHMAEDICK: Based on your
12 experience, does having the opportunity to be
13 involved in such a process build confidence in
14 a program?

15 MR. DUNN: Yes. I think it does.

16 MS. SCHMAEDICK: Thank you.

17 JUDGE HILLSON: Anything else from
18 USDA panel? Any questions from interested --
19 other interested parties? Mr. Warshawer.

20 MR. WARSHAWER: Steve Warshawer.
21 Ms. Tunis, you explained how the Arizona
22 agreement created a level playing field for

1 growers in relation to the handlers and
2 shippers. Previously, there had been many
3 different requirements from handlers and
4 shippers and the -- I guess they're called
5 shippers in Arizona, and the growers had to
6 contend with that diversity of requirements
7 and -- at the Arizona agreement level that --
8 and many witnesses have focused on similar
9 problems with relation to buyers and multiple
10 standards.

11 How would you like to see the
12 problem of multiple standards from buyers
13 addressed, you know, based on any experience
14 gained in the Arizona Leafy Green Marketing
15 Association process?

16 MS. TUNIS: Certainly there is a
17 concern with super metrics and buyers imposing
18 additional. Beyond that, I'm not sure I'm the
19 best person to answer that question.

20 MR. WARSHAWER: Thank you. And
21 you also proposed rewording on the section of
22 voting status for handlers or growers, I

1 suppose, who were in multiple zones, and you
2 were emphasizing the need for each wanting to
3 select a zone and vote only in that zone.

4 I wonder if you can see how the
5 zone voting system where there may be a
6 certain number of companies who are present in
7 multiple zones that that situation and their
8 ability to choose which zone they vote in
9 could lead to some manipulation and by a small
10 body of the larger membership and thereby
11 allow them to control multiple zones and, in
12 effect, have greater control on the
13 implementation of the agreement as a whole?

14 MS. TUNIS: It's my understanding
15 under the national agreement that the person,
16 whether they're a handler or a producer, they
17 would have only one vote, even though they're
18 in multiple zones. So for that reason, we
19 believe it's important that they choose which
20 zone to utilize their one vote.

21 As far as collusion, I really -- I
22 don't see that happening.

1 MR. WARSHAWER: Okay. Thank you.
2 My question was based on the idea that, for
3 example, in Arizona where 32 of the 35 members
4 also are signatories to the Cal. agreement,
5 take that concept and spread it nationally and
6 some small number of members, maybe -- perhaps
7 it will be hundreds of members nationally, but
8 some block of 20 or 30 who are present in four
9 or five zones could among themselves determine
10 who's gonna vote where and gain more seats in
11 that faction. That's -- I was just wondering
12 if you saw any need to preemptively act to
13 avoid that possibility?

14 MS. TUNIS: I'm not sure we've
15 even thought of that possibility.

16 MR. WARSHAWER: Thanks. And let's
17 see -- Mr. Dunn, you expressed a preference
18 for voluntary marketing order rather than a --
19 sorry -- voluntary marketing agreement rather
20 than a mandatory marketing order. And the
21 LGMA existing state programs and the proposed
22 national program are handler agreements.

1 Can you see how -- how do you see
2 that voluntary versus mandatory aspect playing
3 out in relation to growers who are not
4 signatories but they still end up obligated to
5 comply based on handler preference? Shouldn't
6 the same voluntary rights be preserved clear
7 back to the growers if we're placing value on
8 voluntary participation among the handlers?

9 MR. DUNN: Tim Dunn. Yes, we want
10 it to remain voluntary but when you're talking
11 food safety, if you have -- if you have basic
12 food safety requirements that need to be met
13 and if you're not willing to do those, I don't
14 think your products should be entering into
15 the marketplace that's gonna degenerate the
16 other people that are doing a food safety or
17 cooperating correctly.

18 MR. WARSHAWER: I understand that.

19 MR. DUNN: You can voluntarily
20 grow produce but you might not necessarily be
21 able to ship it to an end user because you
22 don't want to follow current safety programs.

1 MR. WARSHAWER: I appreciate that.
2 I guess what I'm wondering is wouldn't it make
3 sense for growers to also be -- have some
4 signatory status and be able to voluntarily
5 engage in the agreement and that would be
6 their demonstration of willingness to
7 participate, willingness to adhere to the
8 standards, as opposed to being required to do
9 so in order to sell to a certain handler?

10 MR. DUNN: I guess we could look
11 into that, but at this point it's a handler --
12 a handler agreement to start at one spot. So
13 I would assume several growers could do that
14 but, you know, we haven't thought about that
15 as far as pushing that forward.

16 MR. WARSHAWER: The reason why I'm
17 bringing that up is my perpetual theme of the
18 buyers. How would the industry view it if a
19 group of buyers came together and developed
20 what are voluntary standards among themselves
21 but effectively become mandatory because the
22 buyers all say, Well, you don't have to sell

1 to us. You can sell to somebody else, but
2 these are the agreements we've come to and, in
3 order to accept delivery, we require that you
4 follow our standards?

5 Just -- not totally a
6 hypothetical, but I'm wondering, again, my
7 theme of how to connect all the supply chain
8 in a similarly accountable fashion and
9 whether, you know, whether the handlers see in
10 relation to the growers what is happening to
11 them in relation to the buyers.

12 JUDGE HILLSON: Was that a
13 question? Are you asking him --

14 MR. WARSHAWER: It was a question,
15 whether the status -- the handler agreement is
16 voluntary, but do you see that it exerts some
17 mandatory influence on growers and what would
18 the response be from handlers if buyers were
19 to attempt to influence in a similar fashion?

20 MR. DUNN: Well, I think that's
21 where we come back to a science-based program
22 that we can -- that we can attain in a proven

1 -- in the field. And if the buyers are
2 wanting to ask for something that can't be
3 done, then the growers aren't going to be able
4 to comply, so it's --

5 MR. WARSHAWER: So the end -- the
6 science emphasis allows all of the different
7 interest groups to potentially reach a
8 consensus?

9 MR. DUNN: I believe so. If we --

10 MR. WARSHAWER: Thank you.

11 JUDGE HILLSON: Do you have any
12 redirect, Mr. Resnick?

13 MR. RESNICK: I do not, Your
14 Honor.

15 JUDGE HILLSON: Okay. Go ahead,
16 Ms. Schmaedick.

17 MS. SCHMAEDICK: Melissa
18 Schmaedick, USDA. I just wanted to follow up
19 on the previous question. And this is open to
20 the panel, anybody who cares to answer. If
21 hypothetically producers were allowed to be
22 signatories in addition to handlers, would

1 that change the voluntary nature of the
2 program and would it change how a handler
3 would remain compliant with the program?

4 MR. DUNN: Tim Dunn. I'm not sure
5 -- if I could answer that. I mean, I'm not
6 sure how it would affect the handler. I'd
7 have to do more research.

8 MS. SCHMAEDICK: Would it affect
9 the grower?

10 MR. DUNN: If it became a
11 signator.

12 MS. SCHMAEDICK: If the grower
13 were a signatory and they wanted to sell to a
14 handler who was a signatory, is that handler
15 still subject to the terms of the agreement if
16 they're a signatory?

17 MR. DUNN: You know, I don't -- I
18 would guess that they would be, but I'm not an
19 attorney. I'm not -- so -- I mean, I would
20 guess that if you're following the rules and
21 you haven't met all the rules of the agreement
22 and you're a signatory and the handlers sell

1 from handler to handler, so it would be
2 similar but, like I said, somebody else could
3 probably answer that better than me.

4 MS. SCHMAEDICK: Thank you.

5 MS. TUNIS: Shelly Tunis. If --
6 under the Arizona Leafy Greens Marketing
7 Agreement, it is certainly a shipper -- what
8 we call a shipper or a handler agreement, and
9 so we've always looked at it that way. As was
10 pointed out, if the producer is working with
11 that shipper, then the producer has to comply.
12 So if the shipper or handler is already a
13 signatory, that seems to include all the
14 growers or producers that that shipper-handler
15 will work with. I'm not sure how much that
16 would add to have the producers being
17 signatories at this point.

18 MS. SCHMAEDICK: Thank you.

19 JUDGE HILLSON: Okay. Thank you
20 very much. You may all step down. Thank you
21 for testifying.

22 And I guess, Mr. Resnick, you're

1 going to call one more panel for today?

2 MR. RESNICK: We have one more
3 panel of two witnesses, Your Honor.

4 JUDGE HILLSON: Okay. Well, call
5 them on up.

6 MR. RESNICK: Dr. Michele Jay-
7 Russell and Jorge Fonseca.

8 JUDGE HILLSON: Are they going to
9 testify in that order?

10 MR. RESNICK: Yes.

11 (Pause.)

12 JUDGE HILLSON: Mr. Resnick, Dr.
13 Russell handed me a written statement plus I
14 guess what's three attachments. Do you have
15 any -- should they just be numbered
16 consecutively or do you want --

17 MR. RESNICK: I believe so.

18 JUDGE HILLSON: Okay. I thought
19 there was one -- I have a statement plus three
20 attachments. You have four? Unless it's an
21 attachment to the statement itself.

22 Let's go off the record for a

1 second while we sort it out.

2 (Off the record briefly.)

3 JUDGE HILLSON: Back on the
4 record. Okay. We just sorted out the
5 numbering here and, first of all, I'm going to
6 label Dr. Russell's written statement as
7 Exhibit 89, and then there were four
8 attachments. One of them begins with the
9 words -- one of them is an article by Cooley
10 and others, "Incidence and Tracking of E.
11 Coli." I'm going to label -- that's just the
12 title page -- I'm going to -- that will be
13 Exhibit 90.

14 And the next one is another
15 article on E. coli by Michael Jay, Michael
16 Cooley, and others, and I'm going to -- that's
17 several pages. That's going to be Exhibit 91.

18 And the next one is "Food Safety
19 Risks and Mitigation Strategies for Feral
20 Swine," and that's going to be -- I can't
21 remember the number -- Exhibit 92.

22 And the final one is a State of

1 Alaska Epidemiology Bulletin on -- I'm not
2 going to pronounce it -- something to do --
3 something you can get from eating raw peas.
4 And that's Exhibit 93.

5 So I've marked all those exhibits.
6 (Exhibits 89, 90, 91, 92,
7 and 93 were marked for
8 identification.)

9 JUDGE HILLSON: And, Doctor, if
10 you could please raise your right hand.
11 Whereupon,

12 MICHELE JAY-RUSSELL
13 having first been duly sworn, was called as a
14 witness and testified as follows; to wit:

15 JUDGE HILLSON: Okay. If you
16 would, state your name and spell it for the
17 record.

18 DR. JAY-RUSSELL: Michele Jay-
19 Russell. Last name is J-a-y hyphen
20 R-u-s-s-e-l-l.

21 JUDGE HILLSON: Okay. And you
22 have a written statement you'd like to read?

1 DR. JAY-RUSSELL: Yes, I do.

2 JUDGE HILLSON: Please proceed.

3 TESTIMONY

4 DR. JAY-RUSSELL: Yes. And I do
5 apologize that the page numbers did not come
6 out, but each page has a heading if you need
7 to refer to this later.

8 My name again is Michele Jay-
9 Russell and I am the Program Manager of the
10 Western Center for Food Safety (WCFS) at the
11 Western Institute for Food Safety and Security
12 at the University of California, Davis. As
13 background, my training includes a Doctor of
14 Veterinary Medicine (DVM), a Master's of
15 Preventive Veterinary Medicine, and I am a
16 Ph.D. Candidate in Microbiology. In my
17 current position, I work actively in applied
18 food safety research, outreach, and education.
19 My research focus is pre-harvest leafy green
20 food safety with an emphasis on identifying
21 potential risk factors and mitigation
22 strategies to prevent microbial contamination

1 of produce from vertebrate, meaning domestic
2 and wild animal, reservoirs. Our
3 collaborative research group is approximately
4 halfway through an extensive multi-year
5 longitudinal study of the epidemiology and
6 ecology of E. coli 0157:H7 in leafy greens in
7 the California Central Coast. This is funded
8 by USDA CSREES and other funding with FDA
9 CSFSAN through the Western Center for Food
10 Safety. Both myself and others from this
11 research group have provided input into the
12 development and implementation of the
13 California Leafy Green Marketing Agreement,
14 including the GAP metrics.

15 And in this testimony, I will
16 mention that I am focusing on specific areas
17 related to my research as I will give in
18 detail during this testimony.

19 My involvement in leafy green food
20 safety actually began prior to joining UC
21 Davis in 2008. I worked previously as a
22 research scientist with the California

1 Department of Public Health where I served as
2 the State Public Health Veterinarian, followed
3 by a position in the Food and Drug Branch.

4 Over my ten-year career at CDPH, I
5 investigated many food-borne disease
6 outbreaks, including the 2006 E. coli 0157:H7
7 outbreak linked to bagged spinach. During the
8 spinach outbreak, I participated in the farm
9 investigation and served as a team leader on
10 the California Food Emergency Response Team
11 (CalFERT). As a result of these experiences,
12 I know firsthand the devastation that food-
13 borne disease outbreaks can cause to the
14 patients and their families and the industry,
15 as well as the impacts on consumer confidence
16 and the burden these outbreaks cause on our
17 already stressed public health system.

18 And for these reasons, I see an
19 urgent need to implement science-based
20 strategies to reduce the risk of future leafy
21 green-related outbreaks and recalls. The
22 National Leafy Green Marketing Agreement

1 (NLGMA) represents one such avenue. Based on
2 my experience in public health and as a
3 university scientist, I have several comments
4 on the proposal that are specific to my areas
5 of expertise in zoonotic diseases and food
6 safety.

7 And I've broken these into two
8 groups, the first being potential risk factors
9 for contamination of leafy green vegetables in
10 the pre-harvest environment with food-borne
11 pathogens.

12 The NLGMA GAP audit metrics
13 include "encroachment by animals of
14 significant risk," and this is in Section
15 970.9 and also referred to in 970.67. And
16 these are based, at least in part, on the
17 document "Commodity Specific Food Safety
18 Guidelines for the Lettuce and Leafy Green
19 Supply Chain."

20 I was one of the contributors and
21 reviewers of this document and continue to
22 conduct applied research on the role of

1 domestic animals and wildlife in the microbial
2 contamination of leafy greens or the growing
3 environment, which can include water, soil, or
4 bioaerosols, as I mentioned earlier. It is
5 important to note that concern about disease
6 transmission between animals and people in the
7 context of food safety is not new. Cattle and
8 other livestock are considered reservoirs of
9 a number of zoonotic food-borne pathogens such
10 as Campylobacter, E. coli 0157, other
11 shigatoxi producing E. coli, and salmonella.
12 Likewise, food-borne pathogens have been
13 isolated from a variety of wildlife species
14 worldwide and public health officials
15 routinely provide safety information for
16 hunters to prevent infections during handling
17 and processing of game meat. As an example,
18 venison contaminated with E. coli 0157:H7 has
19 been associated with several outbreaks in the
20 United States and the strain has been isolated
21 from deer droppings.

22 In contrast, the risk of domestic

1 animals and wildlife transmitting zoonotic
2 food-borne pathogens to fresh produce prior to
3 harvest is not as well defined. In many
4 produce-growing regions across the United
5 States, livestock and wildlife populations
6 coexist in close proximity to crops, thus
7 raising the possibility of food-borne pathogen
8 transmission. In general, the incidence of
9 food-borne pathogens in wildlife populations
10 appears to be low. However, several notable
11 exceptions exist and I will describe those in
12 more detail shortly.

13 There are two potential mechanisms
14 of food-borne pathogen transmission from
15 domestic animals or wildlife to leafy greens
16 and both of these routes are addressed by the
17 NLGMA GAP metrics.

18 The first is direct transmission,
19 where fecal defecation or runoff, for example,
20 from a cattle operation, goes onto the plant.

21 The second is indirect
22 transmission, where the fecal contamination of

1 water, which could be surface or well, soil,
2 sediment, and/or bioaerosols may subsequently
3 contaminate the plant, and let me mention that
4 most of these pathogens are shed in the feces.

5 Much of what we know today about
6 the potential risk factors relating to produce
7 contamination with food-borne pathogens comes
8 from the results of outbreak investigations.

9 Our understanding of these processes remains
10 incomplete, but the available information
11 forms the basis for some of the GAP metrics in
12 the NLGMA. It is important to note that even
13 a low level of contamination at the pre-
14 harvest level may represent a serious food
15 safety risk because the infectious dose for
16 many of these pathogens is very low,
17 especially for the young, the elderly and
18 immunocompromised. Furthermore, downstream
19 failures during processing, transport, and
20 handling, such as temperature abuse, could
21 allow pathogens coming from the fields to grow
22 to more significant numbers.

1 Now I'm going to describe a couple
2 of case studies to illustrate these points.
3 During the environmental investigation of the
4 spinach outbreak in 2006, the outbreak strain
5 was isolated from cattle, feral swine, soil,
6 sediment, and surface water samples at a
7 single ranch in San Benito County where the
8 implicated product was harvested. In
9 Attachment 1, as shown, prior to the E. coli
10 outbreak, prior to the spinach outbreak, E.
11 coli 0157 had been isolated from surface
12 water, creek streams, and cattle feces in the
13 Salinas Valley region. I'm not going to refer
14 specifically to the attachments, but you have
15 them to look at later.

16 The second attachment has a table
17 that shows the percent positive samples from
18 the spinach investigation. I will note on
19 that table, it's on the back of Attachment 2,
20 and you can see a larger version of the
21 numbers as well as on the page before it a
22 blow-up version of photographs from the

1 spinach investigation. I'm not going to read
2 all of these percentages since we're getting
3 toward the end of the day, but suffice it to
4 say that some of them were surprisingly high,
5 such as 33 percent positive in cattle feces
6 and high positives in feral swine colonic
7 feces. A large feral swine population was
8 documented at the ranch and evidence of
9 intrusion into surrounding row crops was
10 documented.

11 The exact mechanism of transfer of
12 the pathogens to the plants was not
13 determined, but the fact that the molecular
14 data suggested that the spinach outbreak
15 strain was circulating between cattle, feral
16 swine, and the environment (water, soil) near
17 the fields and agriculture wells indicates
18 that multiple potential sources of
19 contamination existed on the farm.

20 Following this outbreak, I
21 published a paper with Jerry Wiscomb, a
22 wildlife biologist with USDA Wildlife

1 Services, that addressed more specifically the
2 potential food safety concerns and mitigation
3 strategies for feral swine near produce.

4 That's Attachment 3.

5 A more direct link between
6 wildlife fecal contamination and a produce
7 outbreak was recently documented in Alaska in
8 2008. That paper is shown in Attachment 4.
9 This outbreak of Campylobacteriosis involved
10 63 illnesses linked to consumption of
11 contaminated fresh peas. The investigators
12 identified the outbreak strain in 14 sandhill
13 crane fecal and two pea samples. Similar to
14 the spinach outbreak investigation, a very
15 large population of cranes was observed near
16 the pea fields. Additionally, deficiencies in
17 the pea processing water (residual chlorine)
18 were found.

19 These outbreaks illustrate the
20 potential for domestic animals and wildlife
21 near produce fields to carry food-borne
22 pathogens, which strongly supports the

1 inclusion of GAP metrics that address these
2 risks as defined in the NLGMA. The outbreaks
3 also show that although the prevalence of
4 food-borne pathogens in livestock or wildlife
5 may be low overall in a region, there may also
6 be "hot spots" or situations where the
7 population density reaches a critical mass
8 that could theoretically promote a
9 contamination event. The relationships
10 between pathogen carriage, wildlife population
11 density, and commingling with domestic
12 livestock such as cattle are areas of active
13 research in California and other states. For
14 example, researchers at Ohio State University
15 recently reported that European starlings can
16 serve as a vehicle to disseminate E. coli
17 O157:H7 from dairy farm to dairy farm.

18 And, finally, communication of
19 research findings with industry.

20 Recommendations for risk reduction to product
21 leafy green vegetables from food safety
22 hazards.

1 A major goal of the applied
2 research on leafy greens at WIFSS, in
3 collaboration with the USDA ARS Western
4 Regional Research Center and others is to use
5 the information obtained from our studies and
6 past outbreak investigations to, one, inform
7 producer growers about specific strategies to
8 prevent pre-harvest microbial contamination of
9 produce; two, educate the livestock community
10 about potential impacts of rangeland runoff on
11 watersheds and downstream stakeholders; and,
12 three, develop effective management practices
13 for improving water quality.

14 In California, the LGMA is an
15 important avenue by which to communicate our
16 research findings. Similarly, the National
17 LGMA will create a bridge with researchers and
18 it provides the needed flexibility to
19 implement changes as new scientific findings
20 emerge. For example, some growers and
21 conservationists have raised concerns about
22 conflicts between food safety approaches and

1 environmental quality. The key to addressing
2 and resolving these conflicts is continued
3 research and communication of findings to all
4 stakeholders. Although the specific issues
5 will vary by region, a national approach is
6 needed.

7 The Technical Advisory Board of
8 the NLGMA, which is in 970.45, represents an
9 important mechanism in the proposal for
10 university scientists to communicate with
11 scientists from the conservation communities
12 (NRCS, EPA, and others) in order to promote
13 both food safety goals and environmental
14 stewardship.

15 And if I could deviate slightly, I
16 would like to add that in addition to NRCS and
17 EPA, others that would be very useful on a
18 technical advisory board are U.S. Fish and
19 Wildlife Services and the Marine and Fisheries
20 Services, the National Marine and Fisheries
21 Services, as well as the USDA Wildlife
22 Services.

1 Finally, it is my belief that we
2 can achieve these goals and the NLGMA is a
3 step forward in the process.

4 Thank you very much for the
5 opportunity to testify today.

6 JUDGE HILLSON: Okay. Thank you,
7 Doctor, and I'm going to receive in evidence
8 Exhibit 89, which is your written testimony,
9 and Exhibits 90 through 93 which are the four
10 attachments, and those will all be received
11 into evidence.

12 (Exhibits 89, 90, 91, 92,
13 and 93 were received.)

14 JUDGE HILLSON: And I'm going to
15 mark the written statement of Mr. Fonseca as
16 Exhibit 94.

17 (Exhibit 84 was marked
18 for identification.)

19 JUDGE HILLSON: Could you please
20 raise your right hand, sir.

21 Whereupon,

22 JORGE FONSECA

1 having first been duly sworn, was called as a
2 witness and testified as follows; to wit:

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

6 DR. FONSECA: Jorge Fonseca. My
7 last name, F-o-n-s-e-c-a.

8 JUDGE HILLSON: Okay. And you
9 have a statement you'd like to read, sir; is
10 that correct?

11 DR. FONSECA: Yes, sir.

12 JUDGE HILLSON: Please go right
13 ahead.

14 TESTIMONY

15 DR. FONSECA: My name is Jorge
16 Fonseca. I'm a researcher and extension
17 specialist in the areas of post-harvest
18 physiology and produce safety with the
19 University of Arizona stationed at the Yuma
20 Agricultural Center.

21 To give you some educational
22 background that I have, I have three degrees,

1 post-graduate degrees, one being on
2 physiology, Ph.D. in physiology from Clemson
3 University in South Carolina.

4 I've held my present position for
5 the past six years. As part of my research,
6 I grow about ten acres per year of leafy
7 greens. However, the impact of the results of
8 my research go beyond that acreage.

9 Besides being an active consultant
10 for the leafy green areas in the areas of
11 produce safety, I've done specific research
12 that targets some of the current metrics in
13 the California and Arizona Leafy Green
14 Marketing Agreement. I've been a regular
15 instructor for the FDA/JIFSAN in their
16 international training programs on good
17 agricultural practices. I'm a collaborator
18 with multi-state efforts to transfer
19 technology on food safety. I've received
20 funding from state, federal, commodity group
21 associations and private entities to conduct
22 studies that aim to identify better ways to

1 prevent contamination of product in leafy
2 green fields.

3 I support the NLGMA because my
4 understanding is that what happens in one area
5 of the country and even overseas if this
6 country ships product to the U.S. can be
7 devastating for the entire leafy green
8 industry. I have conducted research and
9 extension work throughout the country and
10 other regions of the world, and by observing
11 what is being done in all of those places, my
12 opinion is that in California and Arizona the
13 industry has taken a most aggressive approach
14 to reduce the risk of contaminated vegetables.
15 Whether the new guidelines are too stringent
16 or not, it's something that needs to be
17 evaluated during the next few years, but
18 clearly it is better to lean on the safer
19 side, meaning we should rather have a more
20 conservative approach while more information
21 is generated by research. We're talking about
22 saving the industry, but the main point is

1 that we want to protect the lives of
2 consumers.

3 Further, I believe that based on
4 my research, the guidelines may even need to
5 be a bit more stringent in the future when
6 more data confirms initial information that is
7 being generated in different areas. I have
8 found, for example, that the area contaminated
9 as a result of splashed particle from animal
10 feces in the field goes beyond the five-foot
11 perimeter indicated in the California/Arizona
12 Leafy Green Marketing Agreement metrics. The
13 farthest distance traveled by fecal matter can
14 even be more than twice what has been
15 established, depending on the speed wind
16 during a sprinkle irrigation session.

17 Moreover, the National Marketing Agreement
18 would allow the industry to engage with
19 federal and state agencies to facilitate the
20 rapid identification and mitigation of any
21 contamination, as well as to refine the
22 program with vigilance towards continual

1 improvement.

2 Nevertheless, the current Leafy
3 Green Marketing Agreement has already
4 incorporated some metrics that are clearly the
5 result of science, something that is far
6 better than just conducting produce safety
7 programs based on common sense.

8 I don't discuss here issues
9 related with logistics; for example, who
10 should be overseeing or who should audit this
11 agreement and what the impact on cost
12 production is, as these are not issues
13 directly related with my work as a university
14 employee.

15 Based on what I can perceive as a
16 researcher, I give my support to the National
17 Leafy Green Marketing Agreement. Thus, I want
18 to go on record as a supporter of this
19 movement that will bring standardization
20 across the country for the sake of this
21 industry and ultimately for the safety and
22 standard of living of the consumers.

1 I welcome any questions related to
2 my statement.

3 JUDGE HILLSON: Okay. I'm going
4 to receive Dr. Fonseca's written testimony
5 into evidence as Exhibit 94.

6 (Exhibit 94 was
7 received.)

8 JUDGE HILLSON: Do you have any
9 direct of these two witnesses?

10 MR. RESNICK: Just very briefly,
11 Your Honor. I would just ask Dr. Jay-Russell
12 to recite her post-graduate education.

13 DR. JAY-RUSSELL: My background is
14 I have a Doctor of Veterinary Medicine, DVM,
15 and a Master's of Preventive Veterinary
16 Medicine, MPVM, and I am a Ph.D. Candidate in
17 Microbiology.

18 MR. RESNICK: From which school?

19 DR. JAY-RUSSELL: This is from
20 University of California, Davis.

21 MR. RESNICK: That's all.

22 JUDGE HILLSON: Questions from the

1 USDA panel. Ms. Schmaedick, you look like
2 you're ready.

3 MS. SCHMAEDICK: Melissa
4 Schmaedick, USDA. Thank you both for your
5 testimony. I must say that Ms. Jay-Russell,
6 while you were giving your testimony, I was
7 writing questions down to ask you, but then
8 you went through and you answered all of them.
9 So I'm not as prepared as I normally am.

10 My first question is really kind
11 of a simple question but it might help clarify
12 some questions that have been raised at other
13 hearing locations. Is the University of
14 California, Davis location a land grant
15 university?

16 DR. JAY-RUSSELL: Yes, it is.

17 MS. SCHMAEDICK: Thank you. You
18 mentioned a study that you're currently
19 working on. Is it my understanding -- is my
20 understanding correct that it's not quite
21 complete yet; is that correct?

22 DR. JAY-RUSSELL: Correct. We

1 have at least one more year to go and our
2 agreement with the participants is that we
3 won't be releasing data till we have all of it
4 finished and analyzed. We did put out some
5 preliminary wildlife data earlier this year,
6 but at this point I'd say it's about a year
7 out before we start to publish those results.

8 MS. SCHMAEDICK: So that answers
9 the question of whether or not we could have
10 a copy of your study. Are there -- you
11 explained there was earlier releases of your
12 data. Have those been included here in what
13 you've submitted?

14 DR. JAY-RUSSELL: The Department
15 of -- the California Department of Fish and
16 Game had a press release I think in April this
17 year that I could get a copy for you of that.

18 MS. SCHMAEDICK: Okay.

19 MR. RESNICK: That was introduced
20 in Monterey. It was actually presented.

21 DR. JAY-RUSSELL: It has some of
22 our -- it has their data and then some of our

1 USDA CREES data.

2 JUDGE HILLSON: You don't know off
3 the top of your head what exhibit that was, do
4 you, Mr. Resnick?

5 MR. RESNICK: I can find out.

6 DR. JAY-RUSSELL: It's titled
7 "Preliminary" -- the data was quite
8 preliminary and it's prominent in the title of
9 the press release.

10 JUDGE HILLSON: Did it come in
11 under someone else? I mean, obviously it came
12 in under -- who did it come in under?

13 DR. JAY-RUSSELL: Andy Gordas
14 (ph)?

15 MR. RESNICK: I think it came in
16 under Jill North, but --

17 MS. SCHMAEDICK: Well, if it's
18 already been submitted, then that answers my
19 question.

20 DR. JAY-RUSSELL: Okay.

21 MS. SCHMAEDICK: Thank you.

22 Coming from California, I am sure that you are

1 very aware of the concerns that have been
2 raised about potential conflicts between
3 conservation regulation and good agricultural
4 practices.

5 In your experience and based on
6 your professional work, does conservation
7 necessarily have to contradict with good
8 agricultural practices?

9 DR. JAY-RUSSELL: I don't believe
10 so. I believe they can be done in a balanced
11 manner and in some cases we don't have all the
12 answers, but in order to accomplish that, we
13 have to work together to have both areas a
14 priority, and that has been a philosophy in
15 the past at UC Davis in research such as
16 runoff from cattle rangeland with parasites
17 and using vegetation buffers. And so if we
18 continue with the science, I believe that we
19 can find a balance that we can promote food
20 safety goals and environmental stewardship.

21 MS. SCHMAEDICK: And do you have
22 any experience working with the organic

1 industry?

2 DR. JAY-RUSSELL: Not directly.

3 MS. SCHMAEDICK: Okay. The
4 additional Government agencies that you
5 mentioned as potential candidates to the
6 Technical Review Board, would adding their
7 representation on the Technical Review Board
8 further the ability of this proposal to
9 address the concerns of meshing environmental
10 conservation practices with good agricultural
11 practices?

12 DR. JAY-RUSSELL: I believe so.
13 The -- right now, as the LG- -- NLGMA is
14 written, NRCS, EPA, and FDA are listed on the
15 Committee along with the land grant university
16 Food Safety representative and USDA
17 representatives. That covers water quality
18 and environmental contamination issues. It
19 would be helpful because wildlife has become
20 such a focus in California to have wildlife
21 agencies such as U.S. Fish and Wildlife and
22 Marine Fisheries Services, and I also -- we

1 work very closely with USDA Wildlife Services
2 and they are extremely helpful in bringing us
3 information on appropriate wildlife management
4 strategies. That's their business and we rely
5 on them quite a bit to look at the -- when
6 there is animal damage, what is the best
7 practice. So I think they would add to that
8 committee.

9 MS. SCHMAEDICK: Are you aware of
10 the term "super metrics"?

11 DR. JAY-RUSSELL: I have heard the
12 term.

13 MS. SCHMAEDICK: What is your
14 understanding of the term?

15 DR. JAY-RUSSELL: My understanding
16 -- I've never seen any written definition of
17 "super metrics" -- the context I've heard it
18 used in, metrics that go beyond the California
19 LGMA and are usually being promoted by buyers
20 or auditors that are associated with handlers
21 or buyers.

22 MS. SCHMAEDICK: In your

1 professional opinion, would the proposed
2 national program with its proposed involvement
3 and representation of these different interest
4 groups, would this program provide a vehicle
5 to mitigating the proliferation of super
6 metrics?

7 DR. JAY-RUSSELL: I don't know the
8 industry well enough to understand if this
9 National LGMA would supersede the "super
10 metrics," but I would say that, if it did, I
11 consider that a positive step because, as a
12 researcher and scientist, it's very difficult
13 to put standards out or share information and
14 then have it going to multiple different
15 groups all developing different approaches and
16 uses and interpretations of the data. It
17 would be much easier to have a national
18 central location to go through the data, even
19 knowing that each site and state and region
20 will have specific issues, but to have one
21 overall entity would I think help resolve some
22 of the conflicts, and it would help us -- we'd

1 know who to take our information to when we're
2 doing a press release or a publication.

3 MS. SCHMAEDICK: Thank you. One
4 last question for you. You mentioned that you
5 were part of the Farm Investigation Team.
6 This is on page one of your --

7 DR. JAY-RUSSELL: Uh-huh.

8 MS. SCHMAEDICK: -- testimony,
9 that was involved in the analysis of the 2006
10 E. coli spinach event.

11 DR. JAY-RUSSELL: Uh-huh.

12 JUDGE HILLSON: Is that a "yes"?
13 I'm sorry. You've got to --

14 DR. JAY-RUSSELL: Yes. I'm sorry.
15 Yes.

16 MS. SCHMAEDICK: Can you tell
17 us -- the question has come up in a couple of
18 different contexts. Can you tell us whether
19 or not the farm that was identified as having
20 the contaminated product, was that a
21 conventional farm or an organic farm?

22 DR. JAY-RUSSELL: It was actually

1 -- they were in their second year of
2 transitional -- I'll repeat that. They were
3 growing organically and they were in their
4 second year of transitional organic, but the
5 product was sold as conventional because they
6 still had one year left to go.

7 MS. SCHMAEDICK: Okay. Thank yo
8 for clarifying that. My next question is for
9 Dr. Fonseca; is that correct?

10 DR. FONSECA: Yes.

11 MS. SCHMAEDICK: Yes. Am I
12 understanding correctly that you do research
13 with water-related issues; is that correct?

14 DR. FONSECA: Yes, I do.

15 MS. SCHMAEDICK: Yes.

16 DR. FONSECA: Part of my projects
17 here at the Yuma Ag. Center have to do with
18 water. In fact, right now we just got funds
19 for a large grant for a large project for the
20 next four years on water issues, federal-
21 funded.

22 MS. SCHMAEDICK: Over the past --

1 I think we're on hearing location number five
2 -- over the past hearing days, there has been
3 a lot of confusion over the term "region" and
4 how that might be defined and whether or not
5 it would be linked to, for example, watershed
6 or the source of water that's used in the
7 producing. Do you have any comments on that
8 particular subject?

9 DR. FONSECA: I think in -- I'm --
10 I'm not a water specialist. That's one thing
11 that I should have clarified before. This is
12 more like for a water specialist type of
13 person. However, we do see just in the -- i
14 the valley where we are, right towards the
15 west side of where we are on the south side,
16 we do see patterns along the -- the area as we
17 go south and as we go towards certain areas.
18 So I think a -- definitely within a region,
19 the location where the -- where you're
20 sourcing the water from might have an
21 intrinsic effect on what the quality is. I
22 don't know if I'm responding the right -- the

1 right thing here because your question was
2 more like whether we should look at regions as
3 something that is a main factor for dividing
4 quality water. I don't know if that's what
5 the --

6 MS. SCHMAEDICK: My question is
7 more -- it's related to how the term "region"
8 might be defined under the proposed program
9 because currently it's not a defined term, and
10 I'm wondering if looking at water is one
11 factor that might be helpful in defining a
12 region. And based on your work, is that
13 something that you would find to be helpful,
14 accurate?

15 DR. FONSECA: I don't think I can
16 answer that based on my work, but I can give
17 you an opinion.

18 MS. SCHMAEDICK: Okay.

19 DR. FONSECA: I think if you --
20 even with the national -- the Leafy Green
21 Marketing Agreement that we have right now,
22 California and Arizona, you could see two

1 definite -- or two different regions right
2 there because of the origin of the water. And
3 I think clearly water is one of the main --
4 it's probably the main factor in, you know,
5 when they came to develop this agreement, and
6 it's probably -- it's probably one of the main
7 factors that should be taken into
8 consideration when it comes to defining
9 regions or if there's -- if something is
10 needed to be tailored to specific area,
11 probably water should come up as one of the
12 factors to be considered.

13 MS. SCHMAEDICK: Thank you. You
14 mentioned in your statement that you are an
15 extension specialist; is that correct?

16 DR. FONSECA: Yes.

17 MS. SCHMAEDICK: So do you have
18 the opportunity to work with various sizes of
19 growing operations? -- small farmers, large
20 farmers, etc.?

21 DR. FONSECA: Yeah. I've been
22 involved with different type of growers and --

1 that have, you know, different sizes of -- in
2 their operations. Yes.

3 MS. SCHMAEDICK: And in your work
4 as a consultant in the area of produce safety,
5 based on your work experience, is it possible
6 for small growing operations to meet the same
7 food safety standards or good agricultural
8 practices as large farmers?

9 DR. FONSECA: I've seen small
10 operations that could be just as -- could be
11 just as safe or even safer than operations of
12 more than 1,000 acres. So I think it's just
13 a matter of identifying what the risks are and
14 trying to work around those risks. Probably
15 there's -- the small growers would -- some of
16 the small growers would show or their
17 operation would have different type of risks
18 and I think in -- I was reading some of the
19 other hearings and I -- and the example of
20 Lancaster County in Pennsylvania was brought
21 and that's one good example that if you're
22 working with animals, then there's an

1 intrinsic risk right there, but there's always
2 ways for a small grower to do it differently,
3 I think, that is feasible.

4 MS. SCHMAEDICK: And --

5 DR. FONSECA: From my point of
6 view.

7 MS. SCHMAEDICK: And are those
8 measures necessarily costly or might --

9 DR. FONSECA: Yeah, but that's
10 variable. I don't --

11 MS. SCHMAEDICK: You just said you
12 weren't going to speak to that. I'm sorry.

13 DR. FONSECA: Yeah.

14 MS. SCHMAEDICK: Okay.

15 DR. FONSECA: That's probably
16 something that I -- but it's costly for some
17 people and might not be as costly for some
18 others. It depends on where you are also.
19 Yeah.

20 MS. SCHMAEDICK: Okay. Thank you.
21 I believe that concludes my questions. Thank
22 you.

1 JUDGE HILLSON: Okay. Anyone else
2 from the USDA panel have questions for either
3 of these two? Go ahead, Ms. Dash.

4 MS. DASH: Suzanne Dash. Dr. Jay-
5 Russell, on page two of your testimony, you
6 talk about NLGMA GAP audit metrics. And you
7 seem to have some specific metrics. Are you
8 talking about California?

9 DR. JAY-RUSSELL: I was referring
10 to the general statement in the NLGMA where I
11 quote encroachment by animals of significant
12 risk. The specifics, to my knowledge, have
13 not been worked out for the NLGMA, but I am
14 aware of the specific GAP metrics for the
15 California LGMA. But in this spot, I was
16 referring to the general statement that was in
17 970.9 and also referred back to 970.67. I
18 apologize for not referencing those.

19 MS. DASH: Okay. Is that also
20 true further down on page two where you talk
21 about the two potential mechanisms?

22 DR. JAY-RUSSELL: Correct, because

1 the reason that there's concern about
2 encroachment or intrusion by animals is
3 because of the possibility of fecal
4 contamination, either directly or indirectly.

5 MS. DASH: Okay. Thank you. And
6 I had one question for Dr. Fonseca. Do you
7 sell any of the leafy greens that you grow?

8 DR. FONSECA: No. We can't.

9 MS. DASH: Okay. Thank you.
10 That's all.

11 JUDGE HILLSON: Anything else from
12 the USDA panel? Ms. Carter.

13 MS. CARTER: Antoinette Carter
14 with USDA. What's been marked as Exhibit 90
15 is an abstract. Is it possible to provide the
16 actual study that was done?

17 DR. JAY-RUSSELL: Yes. The
18 reference -- let me check if it -- I may have
19 actually included a web link in --

20 JUDGE HILLSON: There is a --

21 DR. JAY-RUSSELL: -- the
22 footnotes.

1 JUDGE HILLSON: There's a web link
2 on the bottom of this page you gave us that is
3 marked as Exhibit 90. Would that be the
4 article?

5 DR. JAY-RUSSELL: Looks like I
6 don't have the web link actually in the
7 footnote.

8 JUDGE HILLSON: I'm talking about
9 the exhibit itself has a web link.

10 DR. JAY-RUSSELL: Yes. That's the
11 -- that would be the web link.

12 JUDGE HILLSON: Would looking at
13 it help you?

14 MS. CARTER: I should check.

15 DR. JAY-RUSSELL: Yes. That is --
16 at the bottom of the attachment, that I call
17 Attachment 1, is the abstract, has the link
18 to the full paper. It is a very long paper.
19 That's why I didn't print the whole thing.

20 MS. CARTER: Okay.

21 JUDGE HILLSON: Would you want me
22 to take notice of the link or do you want to

1 print it out yourself or do you --

2 MR. HILL: Take notice of the
3 link.

4 JUDGE HILLSON: I'll take notice
5 that this link is a link.

6 MS. CARTER: Thank you. Thank
7 you.

8 JUDGE HILLSON: This article.

9 MS. CARTER: That's all I have.

10 JUDGE HILLSON: Anything else from
11 the USDA panel? Mr. Souza.

12 MR. SOUZA: Thank you. Anthony
13 Souza, USDA. I've got a question for both Dr.
14 Fonseca and Dr. Jay-Russell. We've heard a
15 lot over the last few days of testimony about
16 metrics being based on the best sound science
17 that's available and we've also heard a little
18 bit today about some research that is going
19 on.

20 At what -- what constitutes best
21 sound science and, with research that's going
22 on, at what point would that be looked at as

1 being adopted as best sound science within the
2 industry?

3 JUDGE HILLSON: You addressing
4 that to both of them; is that --

5 MR. SOUZA: Yes.

6 JUDGE HILLSON: Does anyone --
7 whichever of you goes first, just please
8 identify yourself for the record.

9 DR. JAY-RUSSELL: Michele Jay-
10 Russell. An example of an area that we're
11 investigating is the importance of population
12 density of wildlife and also the proximity to
13 cattle operations and whether birds or rodents
14 or other wild pigs could move or transport a
15 food-borne pathogen from say a cattle pasture
16 over to the plants or if the wildlife could
17 actually transport from one herd to another
18 herd like what I talked about with Jeff
19 LeJeune's research in Ohio on dairy farms.

20 So we have some anecdotal
21 preliminary work from the outbreak
22 investigation with the spinach outbreak where

1 we saw very high density of feral pigs near
2 cattle and with the ability to enter fields.
3 If we subsequently gather additional data
4 where we, you know, feel strongly that there
5 are barriers that need to be put up to prevent
6 the movement of the pathogens between
7 livestock and wildlife, for example, or if we
8 find that there is a threshold with population
9 density that may be a red flag of a problem or
10 be correlated with increased pathogen
11 presence, that would be the kind of data that
12 I would be, you know, excited about in terms
13 of the -- you could develop a specific
14 strategy versus a non-targeted strategy toward
15 animals that might be in contact with leafy
16 green fields.

17 Does that answer your question?

18 MR. SOUZA: What type of research
19 would it take in order to change a matrix as
20 far as animal inclusion or --

21 DR. JAY-RUSSELL: If you're --
22 this is Michele Jay-Russell again. If you're

1 referring to -- you mean, like some people use
2 the term, you know, having a list of species
3 and possibly removing a species from the list?
4 I'm -- you know, that -- for me, I think
5 having a large amount of negative data has
6 some use, but we have to be very careful
7 because it's biology and things can change and
8 what I mentioned in my testimony is the idea
9 of hot spots and I would like to better
10 understand why one herd of cattle has a high
11 prevalence of E. coli 0157 or one area of a
12 region has a high level of a pathogen in a
13 wildlife species and then it's very low in
14 other locations. I would want to understand
15 that before actually changing -- you know,
16 making a change such as saying that a certain
17 species is altogether not a risk.

18 MR. SOUZA: Thank you. Dr.
19 Fonseca.

20 DR. FONSECA: Jorge Fonseca. I
21 agree with Michele. Perhaps to summarize what
22 is a sound science that should be used as

1 foundation for this type of metrics, I would
2 look at data that is generated in actual
3 conditions, in the condition where the crops
4 are grown or the -- in the same region where
5 the crops are grown. The problem that I have
6 seen in the past, not perhaps in the last five
7 years, but before 2004, 2003, we would see a
8 lot of data but basically conducted in
9 controlled conditions in labs and then we came
10 to this point four or five years ago and we
11 observed data that was generated with actual
12 pathogens in the lab and then other type of
13 data in the field that was not necessarily
14 targeting the same thing that we had in the
15 lab.

16 I believe now with research like
17 what she is doing and some other research from
18 other areas, even in UC Davis, you see they
19 are using surrogate to pathogens in actual
20 conditions under different scenarios that can
21 happen in field conditions. So I think that's
22 the type of data that we want. Different

1 scenarios but are still in open fields or
2 similar to what we have in crop production
3 currently.

4 MR. SOUZA: Thank you. No further
5 questions.

6 JUDGE HILLSON: Anything else from
7 the USDA panel? Are there any questions from
8 interested parties? Ms. Mills, come on up.

9 MS. MILLS: Thank you, Your Honor.
10 Again, Laura Mills with Metz Fresh. My
11 question is addressed to both of you. Ms.
12 Russell, you indicated earlier that there have
13 been some preliminary research data that has
14 been made available through Department of Fish
15 and Game press release.

16 DR. JAY-RUSSELL: Uh-huh.

17 MS. MILLS: Can you define what
18 you mean by "preliminary," please?

19 DR. JAY-RUSSELL: Yes. Actually,
20 if you don't mind, I can pull that out, which
21 might be easier. I know I didn't copy this,
22 but it sounds like it's already on the record

1 from a previous hearing.

2 JUDGE HILLSON: That's what I'm
3 told.

4 MR. RESNICK: Well, you know, I
5 couldn't find a reference to it.

6 JUDGE HILLSON: Is there some --

7 MR. RESNICK: It may have been
8 referenced in prior testimony but not actually
9 admitted, so --

10 DR. JAY-RUSSELL: Is it something
11 -- I have a copy --

12 MR. RESNICK: Yeah. We should go
13 ahead and --

14 DR. JAY-RUSSELL: If you want me
15 to go ahead and leave it here.

16 JUDGE HILLSON: Okay. You just
17 have the single copy at this point?

18 DR. JAY-RUSSELL: I only have one.

19 JUDGE HILLSON: We can take care
20 of making copies of that; right?

21 DR. JAY-RUSSELL: Sure.

22 MR. RESNICK: Thank you.

1 JUDGE HILLSON: I will -- if you
2 need to talk about it first, but then give it
3 to me and I'll mark it as Exhibit 95.

4 DR. JAY-RUSSELL: Okay.

5 JUDGE HILLSON: But I'll be able
6 to keep that one; right?

7 DR. JAY-RUSSELL: Yes, sir.

8 JUDGE HILLSON: Okay.

9 DR. JAY-RUSSELL: Thank you. So,
10 for example --

11 JUDGE HILLSON: Off the record.

12 (Off the record briefly.)

13 JUDGE HILLSON: Back on the
14 record. We were just off the record because
15 it turned out that Ms. Mills' microphone
16 wasn't working, so we had the answers to the
17 questions but we're not real clear on what
18 your questions were. If you wouldn't mind
19 just -- they don't have to answer them again,
20 but if you just wouldn't mind restating what
21 it was that you just asked the doctors.

22 MS. MILLS: Yes, Your Honor. I'd

1 asked Dr. Russell that she had referred to
2 preliminary data in her earlier testimony and
3 I just wanted to know what her definition of
4 that preliminary data was or research.

5 DR. JAY-RUSSELL: Okay. This is
6 Michele Jay-Russell again and I have the DFG
7 news release that was released April 7th of
8 this year. The -- "preliminary" refers in
9 particular to the statistical analysis that we
10 are anticipating doing at the end of this
11 study. We when we submitted this grant
12 calculated the minimum sample size that we
13 needed for each of the main species of concern
14 that would be likely to be near crops in the
15 Central California coast. Based on very low
16 prevalence numbers, we anticipated most
17 species would probably have less than one
18 percent positive, which means that from an
19 epidemiologist's perspective, we have to test
20 hundreds of those animals in order to give a
21 reliable percent positive. So when you look
22 at the actual numbers that were released,

1 there were 311 black-tailed deer, 184 wild
2 pigs, 73 birds, 61 rabbits, 58 Tule (ph) elk,
3 52 ground squirrels, 51 coyotes, 24 mice, 19
4 raccoons, 17 opossums, and 16 striped skunks.

5 The numbers are still lower than
6 what our goal was. We are endeavoring to
7 sample at least 2,000 animals and the -- the
8 number of deer is actually reaching close to
9 our goal in the study. The caveat that of
10 course in a short preliminary press release
11 that isn't here, we would describe this in a
12 longer paper, a number of those samples were
13 obtained through convenience sampling through
14 hunter harvest, and in some cases that
15 specimens were aged as long as ten days and
16 many of them were over three or four days old.
17 In contrast, our study that is funded by USDA,
18 we do not include samples that are older than
19 two days old. So this data does mix two
20 different studies and -- which actually brings
21 the numbers down even lower in terms of what
22 we would be considering as part of our overall

1 Central Coast study.

2 So the -- there's still usefulness
3 and, because of the concern about wildlife, we
4 -- and because we were working with Fish and
5 Game, it felt appropriate to provide some
6 preliminary information, but do keep in mind
7 that in a short press release, it doesn't have
8 all of the caveats that go with it. And we
9 did only find four positives at that point,
10 including a pig, a coyote, and two Tule elk.
11 And we've continued to test wildlife and will
12 -- have decided we will wait till the end of
13 the study to put out the next release.

14 JUDGE HILLSON: May I have that?

15 MS. MILLS: Thank you.

16 JUDGE HILLSON: I'm going to mark
17 it and receive this press release, the DFG
18 news release, as Exhibit 95.

19 (Exhibit 95 was marked
20 for identification and
21 received.)

22 JUDGE HILLSON: Go ahead. Back to

1 you, Ms. Mills.

2 MS. MILLS: On page four of your
3 testimony, you indicate that, "The key to
4 addressing and resolving these conflicts is
5 continued research and communication of
6 findings to all stakeholders." You also
7 mention the Technical Advisory Board of the
8 NLGMA and the fact that it provides a
9 mechanism for scientists from the university
10 to communicate with scientists from the
11 conservation communities.

12 In your role with the USDA, can
13 you participate at the national level as a
14 scientist that would be able to consult on the
15 development of National LGMA metrics?

16 DR. JAY-RUSSELL: Are you asking
17 if my position would fit into the university
18 land grant food safety -- yes, I believe so
19 and there are several -- several of us at UC
20 Davis. I am not an extension specialist but
21 we also have extension specialists, but we are
22 a land grant university and I would imagine

1 that UC Davis would potentially be
2 participating on the Technical Advisory Board.
3 But I don't -- I don't know that specifically.
4 But we would qualify.

5 MS. MILLS: Thank you. With your
6 mention of communication of findings to all
7 stakeholders, would you include the growers or
8 producers and the handlers in that stakeholder
9 group?

10 DR. JAY-RUSSELL: Yes.

11 MS. MILLS: Would you support a
12 requirement for an educational component in
13 the National LGMA Marketing Agreement to
14 include both conservation and food safety
15 practices?

16 DR. JAY-RUSSELL: Would you be
17 referring to an educational component that
18 would be the responsibility of the Technical
19 Advisory Board to develop and the NLGMA to
20 then implement, or would this be a university
21 program?

22 MS. MILLS: It could be done in

1 cooperation with oversight by the Technical
2 Review Board.

3 DR. JAY-RUSSELL: Right.

4 MS. MILLS: Or it could be at the
5 discretion of the USDA to determine how it
6 would be developed.

7 DR. JAY-RUSSELL: Right.

8 MS. MILLS: But would you support
9 some sort of --

10 DR. JAY-RUSSELL: I would support
11 an educational function. I don't know how it
12 would specifically work, but that is a key
13 part of our mission and ultimately, as I
14 mentioned in the testimony, it's communication
15 of the findings that's key. And it's also to
16 have everyone receiving the same information.
17 Having an education component could be very
18 useful.

19 MS. MILLS: Are you familiar with
20 the Center for Produce Safety?

21 DR. JAY-RUSSELL: Yes.

22 MS. MILLS: And how do you

1 interact with the Center for Produce Safety?

2 DR. JAY-RUSSELL: I don't directly

3 interact with the Center for Produce Safety.

4 They are housed in the same building as

5 Western Institute for Food Safety and

6 Security, but we are -- we are separate.

7 MS. MILLS: Would you support

8 having the Center for Produce Safety be the

9 clearinghouse, if you will, for research data

10 from researchers such as yourself to make that

11 available to all producers and handlers and

12 buyers throughout the country?

13 DR. JAY-RUSSELL: I don't know. I

14 think I'd have to think some more. We -- in

15 terms of you mean our primary -- any primary

16 data?

17 MS. MILLS: Yes.

18 DR. JAY-RUSSELL: Well, from a

19 university perspective, there's issues with

20 intellectual property. I guess I'm not

21 understanding the question. Do you mean --

22 MS. MILLS: As a means of

1 communicating the findings to the
2 stakeholders, I think industry grapples with
3 where to go and find that research data
4 readily available.

5 DR. JAY-RUSSELL: Oh, if you're
6 referring to -- which I believe CPS already
7 does -- having a website or a central location
8 with links and documents, yes, I would support
9 that.

10 MS. MILLS: Okay. Thank you.
11 Next my questions are for Mr. Fonseca. And
12 you indicated that you consult to growers on
13 food safety?

14 DR. FONSECA: Yes. Yes. I've
15 done it.

16 MS. MILLS: Okay. Would you
17 support an educational requirement under the
18 NLGMA for the handlers and/or producers with
19 required food safety and conservation
20 practices?

21 DR. FONSECA: Yes. I see it as a
22 positive measure. Yes.

1 MS. MILLS: With your role with
2 the university, would you be able to
3 participate on the National LGMA Technical
4 Review Board or subcommittees that might be
5 developed to work with the Technical Review
6 Board that are regional in nature?

7 DR. FONSECA: Yes. I would think
8 so, if we were invited. Yeah.

9 MS. MILLS: Okay. Thank you. No
10 further questions.

11 JUDGE HILLSON: Thank you, Ms.
12 Mills. Are there any other questions from
13 interested parties? You need -- that
14 microphone's not working so you'll have to sit
15 next to Mr. Giclas.

16 MR. WARSHAWER: Steve Warshawer.
17 Okay. For Dr. Jay-Russell or Dr. Fonseca, if
18 surface water carries a harmful pathogen,
19 is -- and this may be a really naive question
20 but, having experts here is prompting me to
21 want to be educated by you, is there any
22 possibility of some kind of kill step in

1 relation to those pathogens being used on
2 irrigation water coming into fields? Is there
3 any practicality to that?

4 JUDGE HILLSON: It's addressed to
5 whichever one of you wants to answer it as
6 long as you say who you are.

7 DR. FONSECA: Jorge Fonseca.
8 There is a killing step for pathogens in
9 water. Whether it is practical or not is the
10 issue. The -- I'm not saying here we are
11 doing that, but in some areas I've seen
12 growers applying drip irrigation and at the
13 same time before pumping the water using a --
14 some sort of a killing step into the water and
15 filtration and then the sanitation part.

16 MR. WARSHAWER: So you're saying
17 that this technique exists and its cost
18 feasibility is not universal necessarily?

19 DR. FONSECA: Yes. Well, in --
20 yes.

21 MR. WARSHAWER: Okay.

22 DR. FONSECA: Because in a case

1 like this, like in Arizona, it would be very
2 difficult since we have -- we use full
3 irradiation and we're talking about large,
4 large volumes of water.

5 MR. WARSHAWER: And, again, would
6 that -- would a kill step approach be
7 similarly impactful in wash or post-harvest
8 water? In other words, I'm trying to get at
9 when -- because I just don't know. Again, you
10 guys know so I'm asking -- I hope you know.
11 When -- is the kill step in the wash water and
12 the post-harvest process supposed to
13 accomplish the same thing that it would have
14 in the irrigation water to clean up that
15 problem, or is the problem now in the plant?

16 DR. FONSECA: Okay. Here we have
17 to distinguish two things. If -- to kill
18 pathogens in the water is much, much easier
19 than killing pathogens in the product. So in
20 post-harvest, the main -- the main point we
21 are looking at when sanitizing water is
22 killing the pathogens in the water, so

1 preventing cross-contamination.

2 MR. WARSHAWER: Got it. Okay.

3 DR. FONSECA: That's basically it.

4 But whatever's in the product is -- we don't
5 have a killing step unless it's irradiation.

6 MR. WARSHAWER: Okay. And for
7 both of you again, if what we want is a
8 science-based approach to food safety,
9 would -- why would the Technical Committee --
10 would the Technical Committee be better
11 equipped to set standards as opposed to merely
12 advising the council, the Administrative
13 Committee -- sorry -- the Administrative
14 Committee. The Technical Committee which is
15 composed at least partially of scientists in
16 the proposed NLGMA advises the Administrative
17 Committee, would it make sense for the
18 Technical Committee to be proposing the
19 standards being that it is the science-based
20 body within the agreement?

21 DR. FONSECA: Jorge Fonseca again.
22 That has been something that I've thought

1 before, that it would -- but I think, in a
2 way, it is being done and I was part of the
3 Subtechnical (ph) Committee for a certain time
4 here in Arizona. I could see how that is
5 managed and there's actually suggestions from
6 that Subtechnical Committee to the main body
7 and that's the way I understand it. So you're
8 talking about even bringing that Subtechnical
9 Committee into the main board; right?

10 MR. WARSHAWER: In some fashion,
11 yes. That's the question.

12 DR. FONSECA: Some fashion. I
13 think it could be helpful.

14 MR. WARSHAWER: Could be helpful.
15 Okay. Thank you. And are you -- either of
16 you aware of any testing or research on colony
17 development in the actual produce bags after
18 processing or shipping? In other words,
19 research on what's happening to the pathogens
20 once they're in the bag?

21 DR. JAY-RUSSELL: This is Michele
22 Jay-Russell. That's outside of my research

1 area.

2 MR. WARSHAWER: Okay.

3 DR. JAY-RUSSELL: The only comment
4 I could make is that during the spinach
5 outbreak investigation, there were I believe
6 13 bags of leftover spinach where the outbreak
7 strain of E. coli 0157 was recovered. So we
8 know it can be recovered in the bag. But I do
9 not -- I'm not familiar with research on its
10 survival and growth. But that may be
11 available. I'm not familiar with it.

12 MR. WARSHAWER: Okay. And my last
13 question is for you also. On the list of
14 animals of concern, am I correct in
15 understanding your testimony that rather than
16 simply creating lists of animals of concern,
17 you see it as important to create a
18 description of the context of that risk? --
19 that it's not a list of species; it's as much
20 a list of contexts as it is of species?

21 DR. JAY-RUSSELL: Right. Yes.
22 That's correct.

1 MR. WARSHAWER: Okay. Thank you.

2 JUDGE HILLSON: Do you have any
3 redirect, Mr. Resnick? Mr. Giclas?

4 MR. GICLAS: I just have one
5 question and it's for both panelists, Dr.
6 Fonseca and Dr. Jay-Russell, and that question
7 is, you know, with diverse -- we've talked a
8 lot about best science and good science, etc.,
9 and I think that Mr. Souza was trying to get
10 to this. But with diverse scientific opinion,
11 how does -- how does the academic or the
12 scientific community, if you will, arrive at
13 consensus as to what the right opinion is? Do
14 you have a response to that, I mean, an idea
15 about that?

16 DR. FONSECA: Jorge Fonseca. I
17 believe in the academia, a consensus come
18 after either we have a very thorough study
19 that was done in a particular place and was
20 well -- it had been well-proven or after
21 several works have confirmed the same pattern.
22 But you're asking as more about the logistics

1 to get to the consensus or to -- how to help
2 the scientific community accept something over
3 something else?

4 MR. GICLAS: Well, I'm seeking
5 your guidance and your opinion on, you know,
6 how do we know what the best science is. How
7 do we act? I mean, and in the absence of
8 that, what does the industry do? I mean, I
9 think those are some of the questions that
10 have come up in the hearing and I'd like to
11 hear your opinion on that.

12 DR. JAY-RUSSELL: Do you have an
13 example? Often we're talking very generally.
14 Even the statement I took out of the NLGMA
15 about wildlife or animal intrusion, but the
16 decisions are more specific and case by case.

17 JUDGE HILLSON: Just for the
18 record, that last statement was by Dr. Jay-
19 Russell.

20 MR. GICLAS: I'll try to give you
21 an example. Let's take the example of deer.
22 There are some studies that show very low

1 incidence. There are other studies that show,
2 you know, higher levels. In response to
3 previous questions, you've talked about
4 contextual risk. I might, deer might be more
5 of a risk if they're close proximity to cattle
6 or in those types of areas. They may be a
7 lesser risk in other areas where they're
8 not -- so, you know, with all of the
9 questions, you know, that remain unanswered in
10 that particular area, what's your advice to
11 industry in terms of addressing that risk?

12 DR. JAY-RUSSELL: The -- this is
13 Michele Jay-Russell again. Well, the first --
14 in the attachment -- I believe it was
15 Attachment 3, we write about mitigation
16 strategies for feral swine and get into some
17 very specific recommendations. And with --
18 the very first recommendation is to do an
19 assessment of the problem, and I think it is
20 science-based to look at -- to truly define,
21 you know -- to have -- if, you know, what is
22 the level or what is the activity that the

1 deer are exhibiting. And it could be a range,
2 from fecal depositions onto the plants.
3 Especially if you have large numbers of feces,
4 then that needs mitigation and is an
5 appropriate approach. Where -- I think where
6 you're going is what is, you know, a single
7 deer track, how does -- how do you mitigate
8 that or do you even mitigate it. And it is --
9 I'm not -- I don't think I have the full
10 answer for the -- as you move further and
11 further away from likely risk. But I also
12 don't think there's a point where we can just
13 completely say there's no risk without doing
14 an assessment. And so I guess those are the
15 kind of -- that's the kind of language and I
16 think some of that's in the guidance documents
17 and such that we need to look at, assess the
18 risk and then mitigate it and also stay within
19 all of the legal requirements when dealing
20 with wildlife or water quality and those
21 areas.

22 DR. FONSECA: Jorge Fonseca. I

1 think when we see data that come from certain
2 practices or certain examples, like the one
3 you're referring to, we -- all we can do at
4 that particular point is to trust the -- just
5 the source where that came from in the sense
6 that we cannot extrapolate the data that they
7 found to -- beyond certain perimeters, to put
8 in those words.

9 I can give you an example of
10 something I mentioned here today. We found
11 that the particles of feces containing E. coli
12 in the field here in Yuma could go beyond the
13 five-feet perimeter, right. But this is here
14 in Yuma and it's -- to me, that is -- we
15 proved that. But if we move the same trial to
16 a very high relative humidity conditions, it
17 might happen that it's lower than that because
18 the -- the water vapors is putting the
19 environment heavy and then those particles are
20 perhaps not running as long as we've found
21 them here, just to put an example.

22 So I think we just need to be very

1 cautious when we look at data that comes from
2 certain variables, certain areas before
3 expanding that to the region and to the nation
4 for standardization.

5 However, there are some -- some --
6 like for water, for example, that has been
7 proven for many years, like the
8 standardization of certain bacteria
9 indicators. I don't know if that answered
10 your question.

11 MR. GICLAS: I think it does, and
12 I guess my follow-up is so would you both
13 agree -- I mean, I think what you're saying is
14 that mitigation strategies need to be tailored
15 to the risk and the risk varies from region to
16 region or environment to environment or
17 operation to operation.

18 DR. JAY-RUSSELL: This is Michele
19 Jay-Russell. I think you just said it very
20 well. And I was listening to Jorge, it struck
21 me, too. I worked in, you know, risk
22 reduction from zoonotic diseases for many

1 years, ranging from rabies to haunta virus and
2 what is extremely difficult in this situation,
3 what we're talking about here with leafy green
4 and produce contamination at the pre-harvest
5 level is that it's not just one pathogen or
6 one animal species. It's so complex with
7 multiple potential pathogens, multiple species
8 that might carry these pathogens, plus you
9 have the water and the soil, and then now
10 looking nationally all these different
11 microclimates and environments across the
12 country. So it's incredibly hard to make a
13 broad statement in how you can -- I think it
14 goes back to the original question, how would
15 the metrics be updated or changed if -- with
16 new data. And there is going to have to be a
17 judgment call, you know, case by case by -- by
18 the individuals actually on the ground that
19 are implementing the metrics. So the best we
20 can do is provide the over -- the science to
21 make the right decisions in each of these
22 unique situations.

1 MR. GICLAS: So would you agree
2 that based on the fact that there has to be a
3 judgment call and the role as you describe it
4 for the scientific community is to provide
5 that kind of input and advice, that the
6 Marketing Agreement as it's proposed is,
7 number one, structured with the flexibility to
8 allow that and, you know, number two, I would
9 say organized appropriately with the Technical
10 Committee providing counsel, if you will, or
11 advice to the Marketing Committee and the
12 USDA?

13 DR. JAY-RUSSELL: This is Michele
14 Jay-Russell. In my testimony, I did
15 specifically state support for having the
16 Technical Advisory Committee and that being a
17 useful approach I think to getting the
18 science-based information in there and having
19 it be real information, not just a word
20 "science-based," that we don't know
21 specifically what that means without the --
22 that's why I keep going back to examples and

1 trying to get my head around it.

2 DR. FONSECA: Jorge Fonseca. I
3 totally endorse what you both just said.

4 MR. GICLAS: Thank you. I don't
5 have anything else.

6 MR. RESNICK: We have nothing
7 further.

8 JUDGE HILLSON: Go ahead, Ms.
9 Schmaedick.

10 MS. SCHMAEDICK: Melissa
11 Schmaedick, USDA. This is a question to the
12 both of you. Do you happen to have a copy of
13 the proposed language in front of you?

14 MR. RESNICK: There's copies right
15 in --

16 DR. FONSECA: Okay.

17 DR. JAY-RUSSELL: Yes.

18 MS. SCHMAEDICK: I would like to
19 direct your attention to proposed Section
20 970.67, Audit Metrics.

21 DR. JAY-RUSSELL: I found it.

22 MS. SCHMAEDICK: Okay. I'll go

1 ahead and read the first sentence of that
2 section. It states, "Audit metrics shall be
3 recommended by the Committee to USDA for
4 approval after consultation with a Technical
5 Review Board."

6 Based on that information, does
7 your level of comfort in terms of the
8 Technical Review Board's ability to provide
9 input into the development of metrics, does it
10 change at all?

11 DR. JAY-RUSSELL: No.

12 JUDGE HILLSON: Could you say
13 which one's answering, please.

14 DR. JAY-RUSSELL: Michele Jay-
15 Russell. No. I believe I understood that the
16 Technical Committee would be providing the
17 advice or recommendations but USDA would be
18 making the final recommendation.

19 MS. SCHMAEDICK: Thank you.

20 DR. FONSECA: Jorge Fonseca. The
21 same thing. That's what I understood.

22 MS. SCHMAEDICK: Thank you. No

1 further questions.

2 JUDGE HILLSON: Anything else from
3 the USDA panel? Anything else from anybody?

4 Okay. Then thank you very much
5 for testifying, Doctors, --

6 DR. JAY-RUSSELL: Thank you.

7 JUDGE HILLSON: -- and you may
8 both step down. And now was there an exhibit
9 that we couldn't find that she referred to
10 that Mr. Resnick said he was sure was in there
11 but couldn't locate?

12 MR. RESNICK: I believe that was
13 Exhibit 95.

14 JUDGE HILLSON: Oh, that was the
15 one? Okay.

16 MR. RESNICK: That was the one.

17 JUDGE HILLSON: Which is all in
18 there now. Okay. So my understanding is
19 tomorrow we have one more three-person panel
20 from the Proponents and then we have three
21 witnesses including yourself, Mr. Warshawer;
22 right?

1 Okay. Does anyone want to start a
2 half an hour earlier? I mean, I'm still on
3 Eastern time, so I'd rather start at eight
4 o'clock if that's okay with everybody. Any
5 objections to starting at eight o'clock?
6 Good. We're going to start at eight o'clock
7 tomorrow morning.

8 Okay. We're off the record.

9 (Proceedings recessed at 6:32
10 p.m., to reconvene the following day at 8:00
11 a.m.)

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