

UNITED STATES DEPARTMENT OF AGRICULTURE

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OFFICE OF ADMINISTRATIVE LAW JUDGES

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PUBLIC HEARING

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IN RE: WALNUTS GROWN IN	:	Docket No.
CALIFORNIA, PROPOSED	:	AO-SC-20-J-0011
AMENDMENT TO MARKETING	:	AMS-SC-19-0082
ORDER NO. 984	:	SC-19-984-1
	:	
	:	

Volume II

Tuesday,
April 21, 2020

Videoconference

The above-entitled matter came on for hearing, pursuant to notice, at 11:00 a.m. Eastern Daylight Time.

BEFORE:

THE HONORABLE CHANNING D. STROTHER

Chief Administrative Law Judge

APPEARANCES:

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Agriculture:

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ALSO PRESENT:

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ANDREW HATCH, USDA, Document Curator

DONALD HINMAN, USDA, AMS

PUSHPINDER KUMAR, USDA

TERRY VAWTER, USDA

WILLIAM CARRIERE, CWB

CHUCK CRAIN, CWB

HEATHER DONOHO, CWB

ROBERT DRIVER, CWB

RACHAEL GOODHUE, Ph.D., CWB

JACK MARIANI, CWB

ROBERT NORENE, CWB

WILLIAM TOS, JR., CWB

JOHN MACTAVISH, Grower

ERIN HOAGLAND, OALJ, Attorney Advisor

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

2 11:03 a.m.

3 JUDGE STROTHER: It's April 21st,
4 2020. This is the formal rulemaking in United
5 States Department of Agriculture Docket Number
6 20-J-0011, et al.

7 Let's say there are some other docket
8 numbers that aren't OALJ but CLJ's Hearing
9 Clerk's Office docket numbers. But I laid those
10 down before, and I'm sure they'll be in the
11 transcript.

12 This concerns walnuts grown in
13 California, hearing on proposed amendment of
14 Marketing Order Number 984. This is the second
15 and last scheduled day for hearing in this
16 matter. It's 11:04.

17 Anyone have any preliminary matters to
18 bring up? I do if others don't.

19 MS. CHILUKURI: Rupa Chilukuri, USDA,
20 Your Honor. I did want to note that Mr.
21 MacTavish did send testimony directly to Mr.
22 Andrew Hatch, I believe, on April 20th,

1 yesterday.

2 So technically that would be an ex
3 parte communication. But I understand that Mr.
4 MacTavish would like to also be a witness. So I
5 wanted to ask how you'd like to proceed with that
6 communication.

7 JUDGE STROTHER: Okay. Ms. Hoagland
8 forwarded me a copy of that. We invite, you
9 know, additional witnesses. We'd invite anyone
10 else to come in now.

11 So I don't think we need to be
12 concerned with an ex parte communication, since
13 this should be distributed to everyone before Mr.
14 MacTavish testifies. We certainly invite his
15 testimony.

16 I noticed that it's not on the website
17 that has all the exhibits yet. Can we get that
18 up, I guess Mr. Hatch?

19 MR. HATCH: Yes, we can.

20 JUDGE STROTHER: If it's possible.

21 MS. CHILUKURI: Which exhibit number
22 should be attached to that?

1 JUDGE STROTHER: I think the last
2 exhibit we had before that, and according to my
3 list it was Exhibit 29. I don't think we had
4 anything that we added to the exhibit list. So
5 it should be identified as Exhibit 30.

6 Make sure you have, I saw two
7 different versions, an earlier and a later one.
8 Let's make sure we get the later one up. Let's
9 unmute Mr., yes, he is unmuted. Good morning,
10 Mr. MacTavish.

11 (Whereupon, the above-referred to
12 document was marked as Exhibit No. 30
13 for identification.)

14 MR. MACTAVISH: Good morning.

15 JUDGE STROTHER: Okay. I take it the
16 way we identified the later one is you numbered
17 paragraphs, is that right? I actually already
18 shredded your early one.

19 MR. MACTAVISH: Well first, in the
20 revised one I wanted to thank you. I thank you
21 for allowing me to provide this last minute
22 testimony.

1 JUDGE STROTHER: No, you don't need to
2 thank me. You're welcome. We appreciate you
3 testifying.

4 Again, anyone else out there in the
5 viewing audience that would like to say something
6 in this hearing, I welcome them to come on too.
7 What you're doing is consistent with the
8 procedural rules that we set down at the
9 beginning.

10 My point though is what about your,
11 what can we look at on your second version, just
12 to make sure that we don't inadvertently get the
13 first one mixed up.

14 MR. MACTAVISH: The second to the last
15 line, the second paragraph of the first page says
16 first of all thank you, Your Honor.

17 JUDGE STROTHER: Very well. Okay, do
18 you have that Mr. Hatch?

19 MR. HATCH: Yes.

20 JUDGE STROTHER: Okay, thank you. So
21 we'll put you at the end of the list of
22 witnesses, at least the ones we have so far, Mr.

1 MacTavish. We've got two other witnesses to
2 handle this morning.

3 MR. MACTAVISH: Okay.

4 JUDGE STROTHER: Anything else, Ms.
5 Chilukuri?

6 MS. CHILUKURI: No, Your Honor, not at
7 this time.

8 JUDGE STROTHER: Okay.

9 (Simultaneous speaking.)

10 JUDGE STROTHER: I'm sorry?

11 MS. SCHMAEDICK: This is Melissa
12 Schmaedick, USDA. I do, if it's possible, I
13 would like to request two witnesses from
14 yesterday. I'd like to call them back if that's
15 possible.

16 JUDGE STROTHER: Which witnesses? I
17 think you're going to need to identify the
18 witnesses, and then we would ---

19 (Simultaneous speaking.)

20 JUDGE STROTHER: -- be objections to
21 that. One at a time. Sorry, Ms. Schmaedick. I
22 do the heavy lifting on this, so I want to get,

1 who did you have in mind?

2 MS. SCHMAEDICK: I'd like to call back
3 Jack Mariani and Bill Carriere, please.

4 JUDGE STROTHER: I didn't catch that.

5 MS. SCHMAEDICK: Mr. Jack Mariani and
6 Mr. Bill Carriere.

7 JUDGE STROTHER: Okay. If I recall
8 those are California Walnut Board witnesses.

9 MS. SCHMAEDICK: Yes. I believe
10 they're both handlers. I just have some follow-
11 up questions for those two individuals as
12 handlers. And they can come, you know, after
13 witnesses are finished.

14 JUDGE STROTHER: Okay. I guess, Ms.
15 Connelly, I guess we're looking to you to see
16 whether -- they're your witnesses essentially,
17 although we don't have Counsel per se. Do you
18 have any objection? And even whether you do or
19 not, are they available?

20 MS. CONNELLY: Yes, Judge, they are
21 available. And I believe Mr. Carriere is on the
22 line.

1 MR. CARRIERE: Yes, I am.

2 MS. CONNELLY: And I can contact Mr.
3 Mariani as well.

4 JUDGE STROTHER: Okay. Mr. Carriere,
5 do you have any objections to coming back on the
6 stand?

7 MR. CARRIERE: No, I'm here. I'll be
8 ready any time.

9 JUDGE STROTHER: Anyone else have any
10 objections?

11 Okay, hearing none, should we put
12 these recalled witnesses after Mr. MacTavish or
13 before?

14 MS. SCHMAEDICK: It's whatever, I
15 guess, works best for Mr. MacTavish and the two
16 witnesses to be recalled. I believe that they
17 would be best placed after there's testimony from
18 Ms. Connelly and Ms. Donoho. But other than
19 that, I'll leave it up to whatever is the best
20 way to proceed in your opinion.

21 JUDGE STROTHER: I think, since they
22 were originally scheduled earlier, I mean, I

1 don't know that our order is based on any
2 particular burden of proof or anything like that.
3 I think let's hear them before Mr. MacTavish.

4 So we'll figure out when Mr. Mariani's
5 available, I guess. And I will decide which
6 order or we will decide which order. Okay, so
7 two recalled witnesses that had no objection to
8 recalling.

9 MS. SCHMAEDICK: Thank you. That's
10 all I have.

11 JUDGE STROTHER: Okay. A couple of
12 housekeeping things. I don't know that we
13 decided, who has the originals of the exhibits in
14 this case? Do we have a keeper of the exhibits?
15 And by that I mean partly someone who's got to
16 get the exhibits to the hearing clerk.

17 Do we have someone assigned to that?

18 MR. HATCH: This is Andy Hatch. I do
19 have the originals that have been showing up on
20 the screen. And we've been posting the matching
21 documents to the website. So myself, Pushpa
22 Kathir, and Melissa Schmaedick have access to

1 those.

2 JUDGE STROTHER: Okay. I'm sorry?

3 MS. KATHIR: This is Pushpa Kathir --

4 (Simultaneous speaking.)

5 MS. SCHMAEDICK: This is Melissa
6 Schmaedick, USDA. The exhibits were all provided
7 to the Court Reporter over the weekend. So it
8 was my understanding that his copy would be
9 included with the transcript as the original copy
10 of the exhibits. Does that still work?

11 COURT REPORTER: That's correct, Your
12 Honor.

13 JUDGE STROTHER: That's correct, Mr.
14 Stroman?

15 COURT REPORTER: Yes.

16 MS. SCHMAEDICK: I just wanted to make
17 sure you get John MacTavish's testimony too.

18 COURT REPORTER: Yes. I did not
19 receive that, but I received the first 29
20 exhibits.

21 MS. KATHIR: I will send it. This is
22 Pushpa Kathir. I will send it forward to Dylan

1 right now, Mr. MacTavish's testimony.

2 JUDGE STROTHER: Thank you. Mr.
3 Stroman, are you numbering the exhibits, are you
4 putting a label on the first page that gives it
5 the exhibit number?

6 COURT REPORTER: Yes, Your Honor. I
7 am labeling the exhibits.

8 JUDGE STROTHER: Very well. This is
9 a good procedure then.

10 Okay, I take it that we're not ready
11 to talk about a briefing schedule or transcript
12 corrections, that type of thing? I'm not pulling
13 in a hurry.

14 MS. CHILUKURI: Well, since we're on
15 the record, Your Honor, I'm going to ask Ms.
16 Connelly if they'd be open to a record that
17 entailed, I guess, corrections, transcript
18 corrections seven business days after the
19 transcript is available on the AMS website.

20 So that would entail USDA taking the
21 lead and then sending the corrections to the
22 California Walnut Board. And then by the seventh

1 day we'd send them to you, seventh business day,
2 Your Honor, we'd send them to Your Honor for
3 certification.

4 And then in terms of briefing, it
5 would be 14 business days after the certification
6 of the transcript. If Ms. Connelly is open to
7 that, that would be the schedule that we suggest.

8 JUDGE STROTHER: I'm sorry, let me see
9 if I understand. You would consult with the
10 California Walnut Board to come up with a joint
11 set of proposed transcript corrections, is that
12 right?

13 MS. CHILUKURI: Right. We would take
14 the lead on doing the corrections. They could,
15 of course, do their own corrections. We'd send
16 it to them and then send you a joint correction
17 list. So we could disagree in some respect.

18 JUDGE STROTHER: Okay. What do we do
19 about anyone else that might have any objections
20 to the transcript corrections?

21 MS. CHILUKURI: People are available
22 now to lodge their objections in terms of the

1 timing. And, of course, they're available within
2 that seven day period that we proposed to send in
3 their corrections.

4 JUDGE STROTHER: Okay. Tell you what,
5 send proposed transcript corrections to Ms.
6 Chilukuri within a seven-day period after the
7 transcripts are posted to the website. And if
8 there are any issues with a joint filing, ongoing
9 controversies over transcript corrections, we'll
10 deal with that when it comes up, I guess, file
11 something quickly, okay.

12 We'll talk about a briefing schedule
13 later, I guess.

14 Yesterday, the issue of appearances
15 came up. And the hearing reporter asked what
16 should be listed in the way of appearances. And
17 normally our appearances are, as I formulated, an
18 attorney is speaking on behalf of someone else,
19 or some representative is speaking on someone
20 else.

21 We looked over the way this has been
22 done in other rulemakings, that is what has been

1 listed in the transcript for appearances. And
2 it's been done various ways.

3 First of all, I guess, I don't mean to
4 roll over the parties. But is there anyone among
5 the participants that does have a preference for
6 what ought to go in the appearances?

7 I'm going to put you on the spot
8 again, Ms. Chilukuri. Do you have any thoughts
9 on this?

10 MS. CHILUKURI: Your Honor, I'm trying
11 to recall what's been done in the past. And I
12 seem to recall that in some instances Judges have
13 asked for all individuals present to enter their
14 appearances. And those have been, I think
15 they've been listed in the transcript.

16 But I think people have been taking
17 different approaches. So it's focused sometimes
18 just on the department and the proponent. But I
19 have no objection to doing it either way.

20 JUDGE STROTHER: Yes. We did do
21 notices of appearance at the beginning. So we
22 have that set out in the transcript. Did someone

1 else have something to say?

2 COURT REPORTER: Your Honor, if I may,
3 the way I did it preliminarily was to list the
4 folks that were asking questions with addresses,
5 and then I included also present for everybody
6 else who entered an appearance with their
7 affiliation afterwards.

8 JUDGE STROTHER: You've already done
9 that?

10 COURT REPORTER: Yes, Your Honor.

11 JUDGE STROTHER: Okay, so that work
12 has been done, so we don't have to worry about
13 putting a burden on you. Seems good to me.
14 Let's just go with that.

15 It's more extensive than has been done
16 in other places, but I think it, my thinking is
17 that it gives a contact person for whatever
18 purposes in the official record, if someone
19 reading that record had any need to contact
20 somebody.

21 Anyone have any concerns? Okay, thank
22 you. Thank you, Mr. Reporter, good job.

1 All right. With that, I think we can
2 call our first witness unless anyone's got
3 anything else.

4 MS. CONNELLY: Your Honor, I just
5 wanted to mention that Mr. Mariani is on the
6 line.

7 JUDGE STROTHER: Hi, Mr. Mariani.
8 USDA, Ms. Schmaedick has asked that you be
9 recalled as a witness. Are you available for
10 that? Can he hear me? I can't hear him, ha, ha.
11 I don't see him on my screen either.

12 MS. CONNELLY: He's listed as an
13 attendee.

14 MR. HATCH: This is Andy Hatch. I'm
15 not seeing his name either.

16 MS. CONNELLY: It's showing on the
17 attendee list on my screen. Mr. Mariani, if
18 you're on the line, you can certainly use our
19 conference line to call in, the one that we
20 shared yesterday.

21 JUDGE STROTHER: All right. I see him
22 listed as Jack.

1 MS. CONNELLY: Yes.

2 JUDGE STROTHER: Let's unmute Jack.

3 Mr. Mariani, can you hear me?

4 (No audible response.)

5 JUDGE STROTHER: He is unmuted, I see
6 that. I'm not sure what to do.

7 MR. HATCH: Let me try to promote him
8 to panelist for a moment.

9 JUDGE STROTHER: Very well.

10 MS. CONNELLY: He says he's talking,
11 but maybe his speaker isn't working.

12 Mr. Mariani, you can call the office
13 conference line, the one that we shared with you
14 yesterday.

15 (Pause.)

16 JUDGE STROTHER: I wouldn't take up
17 the other participants' time with this, but Ms.
18 Connelly is our next witness. So I don't want to
19 burden her.

20 MS. CONNELLY: Mr. Mariani is in the
21 process of calling in.

22 JUDGE STROTHER: Very well. We could

1 put him up now before you, Ms. Connelly.

2 MS. CONNELLY: That's a possibility.
3 I believe that some of the questions that may
4 need to come will be based on my testimony. So I
5 would defer to USDA.

6 MS. CHILUKURI: Rupa Chilukuri, USDA.
7 Since the industry is the proponent, I think they
8 have the burden of sort of setting things
9 forward. So I would defer in terms of scheduling
10 to them in terms of whether or not Mr. Mariani or
11 Mr. Carriere should proceed Ms. Connelly. So if
12 Ms. Connelly would like to proceed first, then we
13 have no objection to that.

14 MS. CONNELLY: Okay. Why don't we ask
15 Mr. Mariani his availability when he joins us?

16 Mr. Mariani?

17 MR. NORENE: Sorry, Donald Norene.

18 MS. CONNELLY: Good morning, Mr.
19 Norene.

20 JUDGE STROTHER: Shall I go ahead?
21 Mr. Mariani, can you hear me?

22 MS. CONNELLY: I don't believe he's

1 joined us just yet, Your Honor.

2 JUDGE STROTHER: Very well.

3 MS. SCHMAEDICK: Your Honor, this is
4 Melissa Schmaedick. If it's too difficult to
5 recall Jack Mariani, it's not essential. It just
6 would be helpful. And I certainly don't want to
7 hold up the hearing.

8 JUDGE STROTHER: What about the
9 concept, Ms. Schmaedick, of having Ms. Connelly
10 testify and then see if you still have a need to
11 recall Mr. Mariani after that?

12 MS. SCHMAEDICK: Absolutely, I think
13 that is a good idea. If we could proceed with
14 Ms. Connelly, I think that would be a good way to
15 proceed.

16 JUDGE STROTHER: Very well. Okay, Ms.
17 Connelly, are you ready to go?

18 MS. CONNELLY: Yes, we are. Mr.
19 Mariani will be joining us here shortly so, yes.

20 JUDGE STROTHER: Okay. You're a new
21 witness, right, you have not been sworn before if
22 I remember. Raise your right hand please.

1 MR. MARIANI: This is Jack Mariani
2 finally.

3 MS. CONNELLY: Good morning, Mr.
4 Mariani.

5 JUDGE STROTHER: The sound quality is
6 pretty bad. Let's just come back to Mr. Mariani
7 assuming, well, can you hear me, Mr. Mariani?

8 MR. MARIANI: Yes. Yes, I can.

9 JUDGE STROTHER: Would you be
10 available to come back on the stand this morning?
11 We have a request from ---

12 MR. MARIANI: Yes, I will. Yes, for
13 sure.

14 JUDGE STROTHER: I didn't catch that,
15 I'm sorry.

16 MS. CONNELLY: Jack, could you repeat
17 your answer? Mr. Mariani? Sounds like we might
18 have lost him.

19 JUDGE STROTHER: Yes. I don't think
20 this is quite working. Jack still appears on my
21 screen. Well, let's go ahead and swear you in
22 and take your testimony, Ms. Connelly. Raise

1 your right hand.

2 WHEREUPON,

3 MICHELLE CONNELLY

4 was called as a witness, and, having been first
5 duly sworn, was examined and testified as
6 follows:

7 THE WITNESS: Yes.

8 JUDGE STROTHER: Okay. For Ms.

9 Connelly, I have three exhibits for
10 identification. Exhibit 25 is testimony.
11 Exhibit 26, PowerPoint with activity types,
12 simple calculations of creditable expenditures,
13 sample calculations of handler share of available
14 dollars. And for identification, Exhibit 27,
15 draft forms.

16 JUDGE STROTHER: Okay, Ms. Connelly,
17 you may give your statement.

18 (Whereupon, the above-referred to
19 documents were marked as Exhibit Nos.
20 25, 26, and 27 for identification.)

21 MS. CONNELLY: Yes, Judge. One
22 procedural question, if I may. I have a number

1 of things that were asked to defer to me
2 yesterday. Would you like me to address those at
3 the conclusion of my testimony or would you like
4 me to begin with those?

5 JUDGE STROTHER: It's up to you,
6 either way.

7 MS. CONNELLY: Okay. Well, why don't
8 I proceed with my testimony and we can come back
9 to those items?

10 MS. CHILUKURI: Your Honor, before we
11 proceed, I just wanted to interject a note that
12 USDA will be objecting for the record. Maybe it
13 would be better to do it when it's entered. But
14 I just wanted to note at the outset that USDA
15 will be objecting to the admission of Exhibit 27,
16 the draft forms.

17 Those have not been specifically
18 noticed in the Notice of Hearing. And we also
19 want to preserve USDA's position to be able to
20 send those to OMB in a separate proceeding. So
21 we wanted to maintain our ability to do that. So
22 I just want to note that at the outset.

1 And I'm happy to repeat that objection
2 if CWB chooses to enter those forms onto the
3 record.

4 JUDGE STROTHER: Ms. Connelly, since
5 you're acting as your own lawyer on this, do you
6 have any comment on that at this point?

7 MS. CONNELLY: We can forego those
8 forms on the record for exhibits.

9 JUDGE STROTHER: Okay. So Exhibit 27
10 is withdrawn, withdrawn by Ms. Connelly.
11 Anything further before we take Ms. Connelly's
12 statement?

13 MS. CHILUKURI: No, Your Honor.

14 JUDGE STROTHER: Please proceed, Ms.
15 Connelly.

16 MS. CONNELLY: Thank you, Your Honor.
17 As I said, my name is Michelle Connelly, M-I-C-H-
18 E-L-L-E, Connelly, C-O-N-N-E-L-L-Y. I'm
19 executive director for the California Walnut
20 Board and had the pleasure of serving this
21 industry for the past 16 years, both in marketing
22 and executive capacities.

1 Today I'll be testifying regarding the
2 proposal implementation, point eight of the
3 justification.

4 Just to reiterate, since it's been 24
5 hours since we've talked about this, the proposal
6 will be implemented by the authority's parameters
7 and the requirements proposed under the new
8 984.546.

9 Following approval from the Secretary,
10 the CWB would implement a program to become
11 effective in the following proper fiscal year.
12 We would say that that's the next marketing year,
13 beginning with October 1.

14 Annually, the CWB will establish a
15 budget with an annual assessment to be collected
16 including a budget for the credit-back program.
17 The CWB would then communicate to handlers that
18 the credit-back option is available for a pro
19 rata share, or portion of available credit-backed
20 funds and program procedures, for their use,
21 including activities that are eligible for
22 credit-back.

1 Okay, sorry for the echo on our end.

2 It seems to be our speaker phone.

3 I'd now like to address a few points
4 relative to language in Paragraphs A through E, 1
5 through 4. The Marketing Order Revision
6 Committee and staff developed the procedures with
7 careful thought as to how the program could be
8 reasonably administered such that the mechanics
9 were thought through from an implementation
10 perspective.

11 The Board has predetermined the scope
12 of qualified activities or qualified
13 expenditures. They use those two terms
14 interchangeably. However, the authority for the
15 program management will be delegated to staff to
16 implement. CWB accounting staff will administer
17 with the input of myself and our marketing staff
18 where applicable.

19 The procedures explicitly define the
20 eligible and ineligible activities as a means to
21 guide program users and mitigate the role of
22 staff interpretation. The activities are very

1 straightforward.

2 Handlers have a portion of funds as
3 determined by the prior year's percent of total
4 acquisitions and percent of budgeted revenue as
5 determined by the Board which can be used for
6 reimbursement against assessment for eligible
7 activities.

8 Each handler's portion of available
9 funds will be based on the prior year
10 acquisitions as a means to determine their, if
11 you will, ceiling for eligible expenditures based
12 on budgeted funds for the program.

13 The prior year would be the best
14 available data to determine that share as
15 acquisitions are reported throughout the year.

16 The MORC discussed varying levels of
17 reimbursements from 50 cents to 65 and ultimately
18 decided on 70 cents as the amount that's
19 attractive for handlers to participate and
20 encourage use in the program with the goal of
21 incurring, excuse me, attempting to spur
22 increased investment in walnut activities.

1 Reimbursement via check would be made
2 following the submission and processing of the
3 activity subject to eligibility of the
4 submission. It's the intent of the Board to
5 ensure timely processing of reimbursement with
6 all facets of the program.

7 The CWB marketing year-end is August
8 31st. In order for the CWB to be able to close
9 the books to prepare for our financial audit, all
10 requests for reimbursement need to be received in
11 a timely manner.

12 The program will be evaluated on an
13 annual life basis and could be changed through
14 the informal rulemaking process with the approval
15 of the Secretary.

16 I'd now like to call out a few
17 specific paragraphs. In regard to Paragraph B,
18 handlers can only receive reimbursement on funds
19 for which they have paid. Therefore it is the
20 intent of the Board that handlers would be fully
21 paid on all assessments before any reimbursement
22 would be given.

1 With regard to Paragraph C, the intent
2 of the Board is to eliminate any potential abuses
3 of the program by ensuring that only the handler
4 who performs such activities if he filed a claim
5 for credit-back.

6 The handlers have to provide
7 documentation, including the credit-back form,
8 along with copies of proof of payment, evidence
9 of the activity in order to prove that the
10 activity was actually conducted.

11 In regard to Paragraph D, budget for
12 the program and the handlers' portion of
13 eligibility are established annually. Any unused
14 funds are returned to the Reserve, therefore any
15 qualifying activities can only be reimbursed for
16 the year in which the program was established.

17 Regarding Paragraph E, 1 through 4,
18 the Board is establishing and developing that
19 procedures and not every activity could be
20 conceived, and that exception could be allowed
21 for an expense not covered in the procedures on
22 the premise that there is established norms for

1 the pricing of the activities.

2 These procedures are expected to
3 evolve over time as needs arise, the ability to
4 modify the procedures, provide flexibility as
5 needed to ensure equity in the program, and
6 ultimately compliance with the program and the
7 procedures.

8 The Board established a caveat for
9 accepted professional practices to ensure
10 consistency and minimize program abuse. This is
11 something that the agency rates, for example,
12 where the agency standard is 15 percent. That's
13 the rate that would be used when the activity is
14 judged. A claim submitted with an agency rate
15 of, say, 30 percent would be rejected given the
16 established law for that activity.

17 I'd now like to proceed with giving
18 some practical examples of how this works. So if
19 the moderator could please cue up the PowerPoint
20 slides.

21 MR. HATCH: That's Exhibit 26 for
22 identification.

1 MS. CONNELLY: Okay, thank you, Mr.
2 Hatch. We can begin with the sample calculation
3 of handler's share.

4 So this example, back one, thank you.
5 This is an example of how we would calculate or
6 determine the pro rata share for each handler.
7 There again, the handlers assessment is based on
8 the inspected product at the rate of the
9 budgetary process for this program. Handlers are
10 being reimbursed up to their cap of X dollars
11 based on their respective share of acquisitions
12 of budget.

13 So if we assume the rate of four
14 dollars per hundredweight, which should give the
15 Board a budget of approximately \$25 million. If
16 the program budget was set at ten percent of
17 assessments, or let's say about \$2.5 million, the
18 Handler X would have a ten percent share of
19 acquisition. So his available cap would be
20 \$250,000. And that, again, would be the pro rata
21 share.

22 Moving on, next slide. One more

1 please. Eligible activities are listed here.
2 They range from advertising through trade shows
3 and seminars. I won't read the full list.

4 If we go to the next slide, you can
5 see that the procedures for each activity would
6 be detailed out, as you see here, with a clear
7 definition of what that activity entails and then
8 subsequent examples of what's a reimbursable
9 activity versus a non-reimbursable activity.

10 Next slide. Some related procedures
11 filed had listed non-eligible activities. And
12 the reason for defining these as eligible and
13 ineligible activities is to ensure that the
14 intent of the Board is maintained and that
15 activities conducted need to promote the sale,
16 consumption, and use of California walnuts.

17 Next slide. Here are some examples of
18 how reimbursement would work. And the Board has
19 determined that there will be walnut-only
20 reimbursement versus those that are different.
21 So anything that is considered a walnut-only
22 product, whether a walnut butter, or a walnut

1 milk, would be eligible for 100 percent credit
2 back. These are examples. This example here
3 shows how that calculation would work.

4 Similarly, on the next slide please --

5 -

6 COURT REPORTER: Are you able to get
7 any closer to your mic? I'm sorry to interrupt.

8 MS. CONNELLY: My mic is right here.
9 I can turn it up.

10 COURT REPORTER: Thank you.

11 MS. CONNELLY: Yes, that's better. So
12 with respect to mixed nuts or otherwise
13 promotional materials that are of a mixed nature,
14 the walnut portion would be eligible for credit-
15 back. And this provides a calculation of how we
16 would determine that.

17 And on the next slide these are some
18 further examples of how these calculations would
19 work for various products or various types of
20 promotional activity.

21 So that concludes my testimony, Your
22 Honor.

1 JUDGE STROTHER: Okay. Time for
2 examination of this witness. Does USDA have any
3 questions for Ms. Connelly? Going once, going
4 twice?

5 MS. SCHMAEDICK: No, Your Honor, I'm
6 sorry. I think I was on mute. Melissa
7 Schmaedick has requested to speak.

8 JUDGE STROTHER: Ms. Schmaedick, the
9 witness is yours.

10 MS. SCHMAEDICK: Thank you.

11 Hi, Ms. Connelly, and thank you for
12 your testimony. So we've covered quite a bit of
13 information here. I'd like to kind of walk
14 through things step by step.

15 Do you have a copy of Exhibit 1 with
16 you which is the Notice of Hearing, which
17 included the proposed language?

18 MS. CONNELLY: Yes, I do.

19 BY MS. SCHMAEDICK:

20 Q I'm sorry, did you answer?

21 A Yes, I do.

22 Q Okay, right. So I guess I'd like to

1 start out with a question regarding the
2 calculation of the creditable expenditures and
3 credit-back that is available to a handler.

4 I know that you gave us some examples.
5 But could you just explain, for example, the
6 calculation using the previous year's receipts?
7 Why is it important to use that previous year's
8 receipts? Why don't you just use one year
9 versus, say, an average of two years or some
10 other calculation?

11 A Yes. The reason for the prior year is
12 the prior year is the most current year. And in
13 any given year the acquisitions may change.
14 Therefore, the most recent year is the most
15 reasonable number to use. And we wouldn't use
16 the current year, because acquisitions are a
17 moving target throughout the year. So the prior
18 year is the best.

19 Q Okay. And I'm looking at Page 7671
20 which I believe is the third page of Exhibit 1.
21 I'm in the middle column. I'm under 584.46,
22 Paragraph B. And I'm almost down towards the end

1 of that column.

2 And it says no handler shall receive
3 credit-back for any creditable expenditures that
4 would exceed the total amount of credit-back
5 available to him or her for the applicable
6 marketing year. Can you expand on that a little
7 bit?

8 A Yes. So as we saw with the
9 calculation, every handler has their portion that
10 is available to them. So no one could exceed
11 that amount that would be available to them under
12 the program as determined by the Board who set
13 the amount of the program. And then each handler
14 has their respective share.

15 Q Okay. So if you look at the second
16 sentence, it says further, no handler shall
17 receive credit-back in an amount that exceeds
18 that handler's assessment paid in the applicable
19 marketing year at the time the credit-back
20 application is made. Can you explain that?

21 A Sure. So the handler's assessment,
22 the handlers pay their assessment, and therefore

1 they have their eligible portion in this instance
2 that would be available to them. So they can't
3 receive credit back that would exceed what
4 they're allowable to do under the program.

5 Q And how does this phrase at the time
6 of the application, the time that the credit-back
7 application was made, would that ceiling ever
8 change? Or what is just the meaning or the
9 importance of that phrase?

10 A The importance of that phrase is
11 because the ceiling can change. As I just
12 mentioned, in any given year or for using a prior
13 year's acquisition, those acquisitions change
14 year to year depending upon the handler's
15 circumstances. So there may be an opportunity
16 for that to change in any given year that we're
17 evaluating the program.

18 Q So could it conceivably increase then?

19 A In theory, yes, if their acquisitions
20 have changed over time. Yes.

21 Q Okay. Would you foresee a situation
22 where, let's say, a handler, according to your

1 example, is allocated or has a ceiling of
2 \$250,000, if they don't use that amount within
3 the marketing year, does that amount roll over
4 into the next year?

5 A No, it does not. Any unused funds in
6 the program year return to the reserve.

7 Q I apologize. I'm having a hard time
8 hearing you today. So you said that the funds
9 would, what would happen?

10 A The funds would be returned to the
11 reserve.

12 Q To the reserve, okay. And what is the
13 reserve?

14 A The Board carries a reserve which is
15 a reserve of funds to deflect from any ongoing
16 operating costs. We carry this on an annual
17 basis. So any unused funds would go back into
18 the reserve that we have.

19 Q Okay. So those funds would not go
20 back into the general marketing and promotion
21 fund?

22 A No. This credit-back program is

1 separate from the other activities that the Board
2 conducts.

3 Q I apologize again. You're kind of
4 breaking up on my end. So my apologies for
5 asking redundant questions.

6 Moving on, the next sentence in that
7 column says marketing promotion expenses shall be
8 credited at a rate recommended by the Board and
9 approved by the Secretary.

10 So you did discuss in your testimony
11 that you looked at various levels from 50 cents
12 to 65, and you ultimately ended up in around 70
13 cents. But what type of factors would influence
14 the Board's recommendation for a specific rate?

15 A I think, well, there were a number of
16 factors that were looked at. And I think at this
17 point that the 70 level was determined to be the
18 most enticing at this point.

19 But the Board was also very much clear
20 about do we want to potentially incentivize new
21 products versus other types of activities. The
22 program was left quite available, widely open in

1 terms of what was qualified, not to be limiting
2 in any way, to be fair and equitable.

3 But that certainly could change over
4 time if the, you know, if the Board decided that
5 they wanted to focus more on one type of activity
6 versus another.

7 Q So carrying that thought one step
8 further, I can't remember which witness
9 specifically alluded to the possibility of having
10 different rates for different types of
11 activities. Can you explain that thought process
12 there and examples that may come up in the
13 future?

14 A Certainly. I believe that was, I
15 think, Mr. Norene that spoke to that yesterday.
16 But yes, again, there was discussion about the
17 fact that we want to incentivize potentially new
18 products and new introductions of things versus,
19 say, advertising. And so would the rates be
20 varied?

21 And certainly they could be varied.
22 But at this point in time, the Board has

1 determined that the 70 cents is the applicable
2 rate. But the point is that we left a lot of
3 flexibility in things in the sense that we can go
4 through the informal rulemaking process if we
5 decide we want to change that at a further
6 juncture.

7 Q And so your comment there about the
8 flexibility and then deciding to go with
9 potentially different rates, is there a process
10 by which that rate would be analyzed, identified,
11 and then approved by the Board?

12 A Yes, absolutely. So every year, we
13 would be analyzing the program, evaluating it.
14 And if the group that's analyzing the program, it
15 would be guided by the Marketing Order Revision
16 Committee, if they determined that they wanted to
17 separate to the different level we would go
18 through a recommendation to the Board and then
19 through the informal rulemaking process.

20 Q And can you describe the informal
21 rulemaking process?

22 A Certainly. The committee would review

1 and discuss the issue at hand. The committee
2 itself would make a formal recommendation to the
3 Board, the full Board, excuse me. And the Board
4 would then direct staff to work with the USDA to
5 develop the ten point justification for the
6 informal rulemaking. And then we would go
7 through the process of moving that through USDA.

8 Q So does that process include a public
9 comment period for people to express their views
10 on that proposed rate or the proposed changes?

11 A Yes, it does.

12 Q Thank you. I'm going to skip to the
13 second page of your testimony. Right at the top
14 of that page you state the reimbursement would be
15 a check, would be made following the submission
16 and processing of the activity subject to the
17 eligibility of submission.

18 So my first question is you say this
19 will be a check. Do you foresee any other types
20 of reimbursement forms in the future? Will it
21 always be by check?

22 A At this point, we don't anticipate

1 that. You know, the Board, for internal
2 procedures, we issue checks for everything that
3 we do here. So that would be the form of
4 reimbursement that we would likely stick with
5 going forward. I don't see that changing anytime
6 soon.

7 Q Is there a reason why you use checks?

8 A It's for our internal procedures,
9 making sure that we're maintaining proper
10 internal controls. There are two signatories on
11 checks, you know, everyone in this office has a
12 various role that they play in attaching anything
13 that's related to it.

14 Q So would it be safe to say that it
15 provides a certain, I guess, tracking system, or
16 clarity, and transparency in terms of the paper
17 trail, how things are reviewed, processed, and
18 reimbursed?

19 A Correct. It's a documentation trail
20 for us. Again, it's an internal control.

21 Q Thank you. Moving down on the same
22 page of testimony there, you speak to Paragraph

1 B. And there's a note in italics that says
2 wholly owned subsidiaries, no third party
3 affiliate. Can you explain what you mean by that
4 and why it's important?

5 A Absolutely. So we have to remember
6 that the handler is paying assessment for the
7 entities that are regulated under the order. So
8 therefore, the handler or its wholly owned
9 subsidiary are only the ones that are eligible,
10 not a third party or affiliate.

11 Q Can you give an example of when a
12 third party or an affiliate may be party to a
13 promotional activity?

14 A Well, so for example, one of our
15 handlers perhaps owns an operation that's under
16 their own veil, if you will, that produces a line
17 of snack products, for example. And so they may
18 not be the handler itself. It's another name,
19 it's a brand and name of a product, for example.
20 That would be a case where it would be
21 potentially a wholly owned subsidiary.

22 Q And what's an example of a third party

1 or an affiliate?

2 A A third party or an affiliate could
3 be, for example, a handler owns a stake in a
4 snack company. It's not a wholly owned
5 subsidiary, they own 50 percent of Bob's snack
6 company.

7 Or potentially, it's some other third
8 party organization like a, I don't know, a
9 retailer perhaps, something along this line,
10 retail brand.

11 Q So how would that work then if the
12 handler is a third party? Do they just get a
13 portion of the expenses reimbursed, or how would
14 you handle that?

15 A No. There is no third party or
16 affiliate, only wholly owned subsidiaries are
17 eligible. Again, that's because the handlers and
18 their wholly owned subsidiaries, excuse me, are
19 those that are regulated under the order.

20 Q Okay, thank you for that
21 clarification. So does that tie in then to
22 Paragraph C where you state only that only

1 handlers who perform the activities and who file
2 a claim for credit-back essentially get paid or
3 reimbursed?

4 A Correct.

5 Q And you state that the intent is
6 because the Board wants to eliminate potential
7 abuses. Can you expand on that, give us some
8 examples?

9 A Certainly. So by making sure that the
10 handler is the only one, or the handler's wholly
11 owned subsidiary, are the only ones that are
12 eligible, that eliminates any potential -- if you
13 allow for affiliates or other parties, there is
14 potential for someone else to be using another
15 mechanism.

16 So we wanted to keep the, the intent
17 was to keep the definition very tight in order to
18 make sure that that does not happen.

19 Q Thank you. It continues to say that
20 the handlers have to provide documentation
21 including the form and copies of proof of
22 payment, et cetera.

1 Are you intending to accept any form
2 of documentation, a pile of receipts, or does it
3 have to be presented in a specific format? Do
4 you have any thoughts on that?

5 A We will, yes, have a process for that.
6 And the documentation needs to have a certain
7 level of proof of payment, a certain level of
8 evidence that the activity has occurred.

9 And ideally, they would be submitted
10 with, you know, some type of form to keep things
11 uniform, if you will, just to keep it straight
12 for us. We're not necessarily dictating that
13 that evidence looks a certain way. But certainly
14 it would need to be submitted with a form or some
15 mechanism where it keeps things clean across
16 everyone using it.

17 Q And do you anticipate that your office
18 and your staff would work with handlers who are
19 wanting to use the credit-back system in terms of
20 providing support? Are there questions about
21 documentation or whether or not an activity is
22 considered eligible?

1 A Absolutely. You know, our goal, as I
2 mentioned in my testimony, is to make sure that
3 we make the program information widely available
4 and that we are there to answer questions and
5 address any concerns anyone may have throughout
6 the process.

7 Q And just to confirm, are there any
8 reasons or factors that would preclude a handler
9 from participating?

10 A No. Every handler is eligible under
11 the rules of the program.

12 Q What about a situation where a handler
13 is not current on paying their assessments due
14 for that current year? Would that impact their
15 ability to have the access?

16 A Yes, it would. So the program is
17 widely open, but yes, the Board's expectation is
18 that everyone is current on their assessments
19 before they'd be eligible to receive anything
20 back.

21 Q So what would happen if a handler was,
22 they had made partial payment but not fully,

1 they're not fully caught up on their assessment
2 payment?

3 A We would certainly talk to them about
4 their submission. We would hold it until they
5 are current and could process it at that time.

6 Q I see. So they would have the ability
7 to essentially catch up on their payments that
8 are due. They wouldn't be directly disqualified
9 from participating?

10 A Correct.

11 Q Okay. Thank you. In your statement
12 regarding Paragraphs E, 1 through 4, you talk
13 about the current list of eligible activities.
14 And you say that the procedures will evolve over
15 time as needs arise.

16 Can you explain what types of factors
17 may cause those needs to evolve?

18 A Certainly. I mean, we realize that we
19 can't conceive everything that may come before
20 us. So we're certainly living in a time right
21 now when things are changing very rapidly.

22 So, you know, if there's an activity

1 we hadn't conceived yet, or perhaps if some of
2 the going standards, industry standards change,
3 like they have 15 percent of gross billings, that
4 was mentioned as an example, you know, there may
5 be a need to revise this. Again, the informal
6 rulemaking process gives us that flexibility to
7 do that.

8 Q And if those, if the Subcommittee or
9 the Board were considering making changes to what
10 would be considered an eligible activity. Would
11 those meetings be open to the public?

12 If let's say other interested parties
13 within the industry wanted to provide feedback
14 would they be able to do so?

15 A Absolutely. All of our meetings are
16 open meetings. As you know, we're a federal
17 marketing order. So, any meeting is open to
18 anyone to attend that wishes to express an
19 opinion.

20 Q Thank you. Your last paragraph on
21 that second page, you state that the Board
22 established a caveat for accepted professional

1 practices. What is your gauge for determining
2 what an accepted professional practice is?

3 A Certainly. I think this example
4 gives, is a prime example of how that is. With
5 respect to advertising, when we talk about
6 advertising, the going accepted practice, if you
7 will, is that 15 percent of gross billings.

8 It's that, that's where the 15
9 percent agency rate comes into play. That's a
10 standard. That's a norm. That hasn't changed in
11 many, many years.

12 However, if that would change over
13 time, then of course we would want to reflect
14 that, so that we are being, you know, fair enough
15 for all involved.

16 And in this example I think we used
17 say a 30 percent rate. So, if we received
18 something from, in a submission that showed a
19 going rate of 30 percent, we know that that's not
20 on the mark.

21 So, there again, that's where those
22 accepted professional practices come in, if you

1 will, as a gauge to understand what's fair and
2 equitable, and reasonable under the program.

3 Q Now, what would you, how would a
4 handler, if the handler is, does not agree with a
5 determination made by your staff on the
6 eligibility of a activity, or the parameters of
7 an accepted professional practice. How would the
8 handler address his concerns?

9 A Certainly. There is an appeals
10 process that would put into place. So, the
11 handler could request the Executive Committee
12 review their claim. If they're not happy with
13 that outcome, it could be escalated for the full
14 Board's review.

15 If that wasn't enough there certainly
16 would be options that it could go to the
17 Secretary, who ultimately has the final
18 authority.

19 Q Thank you. I want to turn to the last
20 page of Exhibit 1, to Page 7672, and look at the
21 first column. I'm looking specifically at the
22 applicability, Paragraph B, applicability to

1 marketing year, and Paragraph E, qualified
2 activities.

3 So, just to be sure I understand,
4 Paragraph B, is the intent there that the credit
5 back program if it were implemented would be
6 designed for each trade in a single marketing
7 year at a time?

8 A Well, the program is being designed,
9 if you will, as a whole, for it to live beyond
10 just a single year. Every year we would
11 determine, we would evaluate it, and determine
12 how we would go forward. The budget would then
13 be determined every year.

14 Q And I apologize. That definitely
15 wasn't stated very clearly. But just to confirm
16 then, the program is run on a yearly basis?

17 And the budget is established each
18 year, as well as the reimbursement rate, if you
19 will? And the eligible activities, would those
20 also be reviewed on an annual basis?

21 A Yes, of course. As we stated earlier,
22 if there was any need to amend anything, you

1 know, we would want to review how that is
2 working, and go through the process if there was
3 anything to amend that. Yes, we would.

4 Q Okay. Thank you. Well, the
5 activities that are listed under Paragraph E,
6 qualified activities, which I believe you also
7 referred to as credible expenditures.

8 This is a fairly extensive list. Can
9 you tell me more about the background of how this
10 list was developed?

11 A Certainly. The Marketing Order
12 Revision Committee looked at all various types of
13 activities that could be included, and determined
14 that these were the most potentially widely used
15 activities which would be supporting the, you
16 know, the goal here, which is to promote, you
17 know, the sale and consumption of California
18 walnuts. So, advertising being the big one, paid
19 media.

20 Of course, if someone is potentially
21 looking at launching a new product, then one of
22 the ways that you could do that is to detail that

1 product out to the trade.

2 So therefore, trade shows would be an
3 important part of that stuff. And as would
4 promotion. Because you're going to want to
5 promote that new product.

6 So, the, activities selected really
7 ladder up to what the goal is here, which is to,
8 you know, promote use and consumption of walnuts.

9 Q Are these activities similar to the
10 types of activities you would find in credit back
11 programs for other commodities?

12 A Yes. Very similar types of
13 activities. I guess the Almond Board the Prune
14 Board do similar types of activities under their
15 program.

16 Q I want to turn your attention to the
17 middle column, and specifically under Paragraph
18 D(4)(i). You talk about marketing promotion
19 activities, pursuant to a contract with the
20 Foreign Agricultural Service and/or the
21 California Department of Food and Agriculture.

22 Can you expand on that paragraph, and

1 what those activities might be? And how you
2 would approach them under this credit back
3 program?

4 A Certainly. When it comes to the
5 Foreign Ag Service, as well as CDFA, they run
6 various promotional programs that handlers can
7 certainly apply for.

8 The goal here in working with the
9 Board and the Committee on this, is really to
10 ensure that there's no abuse of this system. So
11 that is if someone is actually using one of these
12 programs they need to confirm to us, as the
13 Walnut Board, that they're not being reimbursed
14 for an activity under that program.

15 If they are, then they wouldn't be
16 eligible. We don't, we want to, you know,
17 preclude anyone from, if you will, double dipping
18 or abusing the program.

19 Q And how would you go about, I guess
20 determining if someone is participating in those
21 programs, or cross checking to prevent?

22 A Well they would, first they would need

1 to disclose that to us. But also, we have the
2 ability, we work with the Foreign Ag Service and
3 CDFA on a regular basis.

4 So, there is a way for us to work with
5 their teams to determine, you know, if anyone is
6 utilizing the program on their end. So, there
7 are checks in the system.

8 Q Looking at the paragraph about that,
9 D(3)(i), it does, it says that handlers name and
10 needs to be used in the promotion. But also the
11 words California Walnuts. Why are the words
12 California Walnuts important?

13 A Well, it directly relates back to the
14 goal and the mission of this program, which is to
15 promote the sale and consumption of California
16 Walnuts.

17 So, requiring that is important, so
18 that that's visible and out in front on any
19 activity that's conducted that it is in fact
20 promoting California Walnuts.

21 Q If a handler were to not include the
22 words California Walnuts would that disqualify

1 them as having conducted an eligible activity?

2 A Correct. And there, I believe there
3 is a caveat with an and/or in there, with respect
4 to the brands. So, an and/or. But there have
5 been -- California Walnuts does need to be
6 reflected on the packaging.

7 Q So, it could just say California
8 Walnuts, and not necessarily be a branded
9 product?

10 A Correct.

11 Q Is that correct? Okay. Thank you for
12 that clarification. Jumping back to the first
13 column, the very bottom. I'm on Page 7672.
14 There's a statement there that says a credit back
15 would be granted for marketing research.

16 And then in parentheses, except pre-
17 testing and test marketing of paid advertising.
18 Can you explain those terms for us, and why
19 they're excepted?

20 A Certainly. So, when it comes to this
21 program, and the program's design, the Board's
22 intent was that activities that were considered

1 normal course of business would be excluded,
2 similar to the ineligible activity list.

3 So, the reason this is called out
4 specifically is, if you're testing an ad
5 campaign, pre or post, that's considered a normal
6 cost of business. So, it would be therefore
7 excluded.

8 Q So, pre-testing, and test marketing of
9 paid advertising, those are industry terms for I
10 guess testing out an ad before you issue it? Or
11 does that mean that --

12 A Exactly. Yes, correct. So, pre-
13 testing, or test marketing, yes. It's basically
14 seeing what the consumer, gauging the consumer
15 level of acceptability toward what you're doing.

16 Q Thank you. And a couple of other
17 activities that are not included in the paid
18 activities, according to this Exhibit 1. I'm
19 sorry, the eligible activities. One is travel
20 expenses. Why are travel expenses not included?

21 A Again, that goes back to what is
22 deemed a normal cost of business, which would be

1 something that you would normally be doing in the
2 context of conducting these activities, versus
3 something that's specific to promoting the sale
4 and consumption of walnuts.

5 Q It also states promotional activities
6 that result in price discounting. What does that
7 mean, price discounting? And why is that
8 excluded?

9 A Sure. Price discounting would be in
10 the context of a sales promotion. There tends to
11 be price discounting that's utilized, or a
12 discount off a product. That helps potentially
13 entice consumers to buy it.

14 And that was expressly excluded
15 because the goal here is to promote the sale and
16 consumption of the product. And so, discounting
17 the product doesn't meet the means for that end.
18 You know, if the handler chose to do that on
19 their own, that's fine. But not something that
20 the Board would reimburse for.

21 Q Okay. Thank you. And then, it is
22 also stated in Exhibit 1 that no credit back will

1 be given for any activity that targets farming or
2 grower trade. Can you explain why those
3 activities are excluded, and what they might
4 include?

5 A Sure. When it comes to activities
6 targeted at the farming trade, let's say, for
7 example, you wanted to take billboard ads on the
8 side of the highway.

9 Well, that's wonderful for him to
10 promote their business. But that's not
11 necessarily meeting the goal or the means to an
12 end, which is again to promote the sale and
13 consumption of walnuts.

14 Q Okay. Thank you. At this time I have
15 no further questions. Thank you.

16 JUDGE STROTHER: Anyone else from USDA
17 have examination of this witness?

18 MS. VAWTER: Your Honor, this is Terry
19 Vawter. I have a question.

20 JUDGE STROTHER: Ms. Vawter, your
21 witness.

22 BY MS. VAWTER:

1 Q Michelle, when you were talking about
2 third parties and why they don't get a portion of
3 the reimbursement, could it simply boil down to
4 the fact that they're not the party that's paying
5 the assessment?

6 A Yes, that's correct. That's exactly,
7 I believe, what I said in my testimony was that
8 yes, the handler's paying the assessment. And
9 their wholly owned subsidiaries are the only ones
10 that are regulated under the order.

11 Q Okay. Good. I just wanted to clarify
12 that. Thank you. That's all, Your Honor.

13 JUDGE STROTHER: Anyone else, USDA?
14 Ms. Schmaedick, I should ask you now, do you
15 still have a need to recall Mr. Carriere and Mr.
16 Mariani? I'm not --

17 MS. CHILUKURI: Your Honor, this is
18 Rupa Chilukuri, USDA. I do have questions for
19 Ms. Connelly. I'm not sure as to your question
20 to Ms. Schmaedick. I think she's on. But --

21 MS. SCHMAEDICK: I'm sorry. It just,
22 I, if a question was asked, I apologize. I

1 missed it. What was the question?

2 JUDGE STROTHER: Do you still have a
3 need to recall the previous witnesses, Mr.
4 Mariani and Mr. Carriere? I'm checking --

5 (Telephonic interference)

6 JUDGE STROTHER: -- by Ms. Connelly
7 that her testimony might satisfy you. That's all
8 I'm following up on.

9 MS. SCHMAEDICK: Yes. if it is still
10 possible I would like to recall Mr. Mariani and
11 Mr. Carriere.

12 JUDGE STROTHER: Okay.

13 MS. SCHMAEDICK: But that, obviously
14 after this is finished.

15 JUDGE STROTHER: All right. All
16 right, Ms. Chilukuri, your witness.

17 BY MS. CHILUKURI:

18 Q Ms. Connelly, I just wanted to clarify
19 some terms for the record. So, you refer, I
20 think in your testimony it says crop and fiscal
21 year. And I think you may have also said
22 marketing year. Can you tell me the differences

1 between those terms?

2 A Sure. Under the marketing order the
3 official term is marketing year. So, I apologize
4 if I confused anyone. We tend to use terms
5 interchangeably when we refer to our fiscal year
6 or our crop year. They all mean the same thing,
7 which is the September 1 to August 31 timeframe.

8 Q Thank you. And as it relates to other
9 terms, there was discussion of creditable
10 expenditures, qualified activities, eligible
11 activities, all these different terms.

12 And I'd like to look to the regulatory
13 text and talk about the terms that are used
14 there. So, can you tell me what a creditable
15 expenditure would be?

16 A So, a creditable expenditure, they
17 mean one and the same. But yes, in the
18 regulatory text context we're referring to the
19 same thing.

20 So, that would be any of those
21 activities, and activities, reimbursements
22 against those activities, a qualified

1 expenditure, if you will.

2 Q Okay. I'm taking a look at Exhibit 1.
3 And I'm looking at 984.46(c). And I think it's a
4 slight distinction. But I want to see if you
5 think there is a distinction. So part of the --

6 A All right.

7 Q -- expenditures --

8 A Sorry, could you repeat where you are?

9 Q Sure. I don't see it up on the
10 screen. So, I'm trying to see if there's some --
11 Andrew, could you, Andy Hatch, could you please
12 put that Exhibit 1 back on the screen, so we
13 could take a look? Thank you.

14 So, I'm taking a look at, it would be
15 the first, it would be 7671 in terms of page
16 number. And it would be 984.46(c), creditable
17 expenditures.

18 A Yes.

19 Q Okay. So, I see that it's listed
20 separately than what's under 984.546, qualified
21 activities, which is under E. So, I'm asking, is
22 there a distinction, even if it is slight?

1 A No. These are referring to the same
2 thing. We're using the terms interchangeably.

3 Q And what do the terms mean?

4 A So, in the case of a creditable
5 expenditure it's those expenditures against the
6 marketing promotions that have been paid, similar
7 to the other qualified activities. Again, it's a
8 creditable expenditure that's resulting from the
9 qualified activities. So, it's one and the same.

10 Q Okay. And I think Ms. Schmaedick had
11 discussed with you a little bit as it relates to
12 how the Board chose the \$0.70 rate. Can you go
13 into a little bit more on the decision making
14 process, and the factors that you considered in
15 determining that? Why wasn't it 100 cents?

16 A Most certainly. Well, the Board
17 evaluated the various types of activities.
18 There's other groups that have credit back
19 programs, and they use various different rates.

20 So again, it led to a robust
21 discussion about really what made the most sense,
22 you know, for us, and for our organization. And

1 it really was determined that that 70 cent level
2 would really entice the handler to participate.

3 And that's really what we want, is we
4 want people participating, to make this as
5 successful as it can be.

6 Q And I was wondering if you could give
7 me a couple of examples of how product promotion
8 would work in practice?

9 So for instance, if I have a candy
10 bar, and I were to promote that using a qualified
11 activity, and that candy bar is mixed with some
12 other nuts?

13 I'll let you sort of fill out the hypo
14 based on maybe reality, or whatever make sense.
15 How would I compute what I should get reimbursed
16 on?

17 A Absolutely. Mr. Hatch, could you
18 bring up my PowerPoint? While we're waiting for
19 him to do that I can walk us through. Thank you,
20 Mr. Hatch. Could you go to the last page,
21 please?

22 So, Ms. Chilukuri, these are examples

1 of how that potentially could work. So, if a
2 product, for example in a snack bar has, you
3 know, 30 percent of walnuts, again, it's walnuts
4 that, only the walnut portion that would qualify
5 under a mixed based activity. So, the eligible
6 credit back would be 30 percent.

7 So, Mr. Hatch, if you could go back,
8 or up a slide? So, here you would use this
9 formula to then calculate what your various rate
10 was, based on the percentage of walnuts, as you
11 can see here.

12 So, you take the expense, plus the
13 credit back percentage, which in that case would
14 be 30 percent. And that would give you the new
15 amount. Apply that by the 70 percent credit back
16 rate. And that would give you the amount.

17 Q Okay. And as it relates to that, I
18 see in 984.546(E)(ii), it says the clear and
19 evident purpose of each qualified activity shall
20 be to promote the sales, consumption, or use of
21 California Walnuts.

22 So, how does that work, for instance,

1 with a mixed product?

2 A Well, not --

3 Q Sorry. Go ahead.

4 A I'm sorry. So, the, only the walnut
5 portion would be eligible. Again, with the
6 understanding that of course it's only walnuts
7 that are eligible under the program.

8 We wanted to make this somewhat
9 flexible in the sense that we know that, you
10 know, several of our processors also handle say
11 almonds, and some other types of products.

12 We wouldn't want to preclude a snack
13 mix from being eligible for the walnut portion,
14 because we know that may helping to boost
15 consumption. Again, the walnut portion is in
16 line with the goals and objectives of the
17 program.

18 Q And in terms of, for instance joint
19 participation by a handler and a manufacturer for
20 a complementary product you would, a handler
21 would have to have a brand on there, or the words
22 California Walnuts? Is that correct?

1 A Correct.

2 Q You also, I think in your PowerPoint
3 you referred to eligible activities. So, I don't
4 see that in the regulatory text. So, that would
5 be, you're using that sort of as common terms,
6 that that would be a qualified activity? Is that
7 accurate to say?

8 A That is correct. That is correct.

9 Q Okay. And just in terms of, if you
10 could sort of walk us through how the assessments
11 work? And why I ask that is just, I'm trying to
12 figure out the timing of these different
13 components of this program. So, are assessments
14 done, or paid on a yearly basis, or monthly,
15 quarterly? How does that work?

16 A Sure. Assessments are collected
17 throughout the year. It's based on inspections.
18 And so, it depends on how those inspections are
19 then, how they, how the handlers submit that
20 information to us. So, it's typically, you know,
21 on a monthly basis. And so, it's, yes.

22 Q Okay. So, and backing out even

1 further, as it relates to the program can you
2 walk me through, and these don't have to be
3 completely precise in terms of the timing.

4 But when would a budget be formulated,
5 assessments be issued, and then communication
6 regarding activities? How exactly do you
7 envision that working?

8 A Sure. I can actually give a very
9 practical world example. We actually have been
10 going through the process of building our budget
11 now, which is typically what we do in the spring.

12 And we'll present the budget to the
13 Board in our spring meeting. We do that in a
14 timely manner, because USDA has to confirm our
15 activities. And that takes a period of time
16 before the year begins.

17 So, in the case of real world example,
18 we actually will be making a recommendation,
19 Executive Committee will be making a
20 recommendation to the Board to include a portion
21 of assessments for this program.

22 Then we will go through the process of

1 having the Board meeting. Then, when the Board
2 approves, then come September USDA will confirm
3 our budget over the summer. And then, come the
4 new year, September 1, our new marketing year,
5 the program would be announced.

6 Our vision, of course, assuming that
7 the USDA confirms on our budget, we would then
8 communicate out to the handlers with all of the
9 regular communications that happen at the
10 beginning of the year, all the forms, and the
11 various things they have to complete throughout
12 the year.

13 This would be part of that handler
14 packet. So that they would understand the
15 program is open to them. And of course then how
16 they use it. And then, what their obligations
17 are under the program.

18 Q Okay. And in terms of being able to
19 participate, handlers have to be current on
20 assessments, correct?

21 A Yes, that's correct.

22 Q I wanted to take a look at the

1 qualified activities that you have set out. I'm
2 curious if the qualified activities under
3 984.546(E) do, does the Board engage in any of
4 these qualified activities as part of their
5 generic marketing effort?

6 A Yes, we do. Several of the activities
7 are standard activities, if you will. But I
8 think the distinct difference here to make is
9 that, you know, what the Board is able to do
10 under these types activities is a generic
11 promotion.

12 What the handlers will be able to do
13 is a branded level promotion, which gives them
14 additional exposure to walnuts.

15 Q And when you say generic promotion
16 that would entail that it just says California
17 Walnuts? Or what, how would that be different?

18 A Correct. Correct. It's just, it's
19 generic in activity. It's California Walnuts.
20 There's no brand. There's no name, if you will.

21 Q Okay. Let's see. I have a couple
22 more questions that relate, as it relates to the

1 reg text. Let me make sure I'm looking at the
2 right language.

3 So, at 984.546(d) there is a reference
4 to the applicability to marketing year. And it
5 says, credit backs will be granted only for
6 creditable expenditures for qualified activities
7 that are conducted and completed during the
8 marketing year.

9 So, in terms of language, conducted
10 and completed. So, if I'm a handler, and I have
11 a marketing activity that goes over two year, how
12 does that work in terms of the claim that I
13 submit?

14 A So, you're only eligible for what you,
15 the activity that's conducted within a given
16 year. So, if it goes over two years you'd have
17 to be, ask for reimbursement under your, the
18 first year, and under the second year. We would
19 not allow for any flexibility in that.

20 Because again, these dollars are
21 budgeted for on an annualized basis. And
22 therefore, you can only have a claim back against

1 that activity for the year in which it is given.

2 So, in theory, in your hypothetical
3 the handler could submit for the portion that's
4 available to them in the first year, and then
5 potentially in the second year. But they have to
6 be kept separate.

7 Q Okay. And I understand, based on your
8 testimony, that assessments are paid monthly.

9 So, if I have a marketing campaign where I shell
10 out all the money up front in the marketing year,
11 but I haven't paid my assessments, what do I do
12 with the handlers?

13 Do I submit that to you, and just wait
14 until my assessments are paid? Do I not submit
15 it to you? How do I approach that?

16 A Well again, your assessments would
17 have to be current, would have to be paid. So
18 yes, you have to have enough, have paid in enough
19 to get something back.

20 So, if the claim exceeds what's
21 allowable at that point, then we would wait until
22 that, they've paid in what is appropriate for

1 them to be reimbursed for.

2 Q Okay. And just going down, I think
3 Ms. Schmaedick had asked you about informal
4 rulemaking in that process. I want to ask you,
5 just in terms of the differences.

6 What does, I'm not sure if I'm making
7 this clear. But 984.46, can you tell me the two
8 differences between those two provisions? How
9 984.46 operates, and how 984.546 operates?

10 A Sure. Well, 46, or excuse me, yes,
11 the first portion, 46, is basically the change to
12 the language that is required here.

13 Then the 546 is really the working
14 level operations, which typically might be done
15 in a separate process. But for efficiency's sake
16 we've done both of these things at the same time.
17 So that the industry is able to get closer to our
18 objective of implementing this program in the
19 next marketing year.

20 Q Okay. I also wanted to look at some
21 language in 984.46 specifically, under Part A,
22 and see if you'd be open to a clarification

1 change.

2 So, in 984.46(a) the last sentence is,
3 the expenses of such projects shall be paid from
4 funds collected pursuant to 984.69 and 984.70,
5 and may be credited back pursuant to Paragraph C
6 of this section.

7 C refers to creditable expenditures.
8 And I'm wondering if the California Walnut Board
9 would be open to also including Paragraph B in
10 that sentence. B refers to credit back for
11 promotion expenses.

12 A As a further clarification? I'm not
13 sure I understand your question.

14 Q The way the reg text, the regulatory
15 text reads right now it only refers to Paragraph
16 C. So, I'm asking, in terms to clarify the
17 language if the California Walnut Board would be
18 open to adding Paragraph B in that sentence?

19 So, it would read, and may be credited
20 back pursuant to Paragraphs B and C of this
21 section.

22 A That would include --

1 Q It also --

2 A -- the eligibility for reimbursement?

3 Is that what you're asking? B and C? Because B

4 is assessment payments, and C is eligible,

5 handler eligibility for reimbursement.

6 Q I'm looking at 984.46.

7 A Okay. I'm sorry. I'm still not

8 understanding your question here.

9 Q My question is --

10 A Oh, I see. Okay. There was a typo

11 there. Yes. Now I understand your question.

12 Okay. May be credited back pursuant to

13 Paragraph, it would have to be, yes, B and C.

14 Q Okay. Thank you. I think those are

15 all my questions for now. Thank you very much,

16 Ms. Connelly.

17 A Thank you.

18 MS. VAWTER: Your Honor, this is Terry

19 Vawter. May I ask Ms. Connelly a question,

20 please?

21 JUDGE STROTHER: Yes, you may, Ms.

22 Vawter.

1 BY MS. VAWTER:

2 Q Thank you. Michelle, you talked about
3 handler packets. Can you tell me, are handler
4 packets something that you put a collection of
5 information, forms, and other material that you
6 provide to the handlers on an annual basis?

7 A Yes, that is correct. Those are sent
8 out to handlers on an annualized basis. So,
9 every year before the season, as we get into the
10 beginning of the season, all of their
11 obligations, forms, everything is communicated to
12 them.

13 Q And so, do you propose that when you,
14 when this program is put into effect the handler
15 packet will not only include things it has
16 normally included, but it will include
17 information with regard to the credit back
18 program? Is that correct?

19 A That is correct.

20 Q All right. Thank you. I appreciate
21 your answer. That's all, Your Honor.

22 JUDGE STROTHER: Okay. Anyone else

1 from USDA?

2 MS. CHILUKURI: Your Honor, Tracy
3 McGowan would like to speak. Do you have
4 speaking capabilities, Tracy.

5 MS. MCGOWAN: Yes. I just got them
6 back. Thank you, Andrew. I just have a couple
7 of questions. And I have to apologize, I lost
8 connectivity for a few minutes.

9 And so, if either of these questions
10 are repetitive, or a question that was asked
11 earlier while I was not logged in, I apologize
12 ahead of time. So, please just let me know if
13 there's a repetition here.

14 I just have a couple of questions.
15 So, I'm wondering, under the regulatory text, and
16 this is at 984.546(e)(I). That's the provision
17 that says that credit backs shall be that which
18 is appropriate when compared to acceptable
19 professional practices and rates for the type of
20 activity conducted.

21 And I know that the issue of what
22 constitutes acceptable professional practices was

1 addressed earlier in the questioning. But I'm
2 wondering on rates.

3 If you had a claim where it was for a
4 creditable expenditure, but the Board determined
5 that the rate was too high that was paid, that
6 was, you know, above the market, what would
7 happen to that claim? How would, would the
8 handler be contacted? Would there be a partial
9 payment made? How would that be handled?

10 THE WITNESS: Well, certainly when it
11 comes to that, I think earlier I did mention
12 that, you know, if the claim, you know, we would
13 work with the handler to discuss the claim.

14 Obviously if the claim exceeds what
15 the rate would be, we would work with them. So
16 for example, we would pay potentially up to the
17 amount of what is the norm or the practice, as
18 opposed to the full amount of the claim that they
19 were working towards.

20 So, like 15 percent versus 30 percent,
21 for example, in the example I gave earlier during
22 my testimony.

1 BY MS. MCGOWAN:

2 Q Would there be just a marketing
3 expense, and advertising expense? Not the rate
4 pay to the agency, but just the overall rate that
5 the Board could determine that that was too high?

6 A We would use, you know, norms that
7 were established. And that's, hence why that 15
8 percent was used as an accepted norm. If
9 something was outside of that, again, you know,
10 there has to be a determination made about what
11 that norm looks like.

12 But the goal is to set out in all of
13 the procedures what these things look like, so
14 that there's less interpretation involved on the
15 Board.

16 Q Okay. And similarly, the, if the
17 Board were to determine that the claim did not
18 include sufficient documentation, would there be
19 a back and forth with the claimant, allowing them
20 to supplement their claim?

21 A Absolutely. You know, our accounting
22 staff, which you'll be hearing from Ms. Donoho

1 following my testimony, we would go back and
2 forth with the handler.

3 Of course our goal is to make that a
4 process that, and the program as widely used as
5 possible. So of course we want to work with them
6 to make sure that we can help them along, and
7 document the process so that it's to their
8 advantage.

9 Q Those are all the questions I have.
10 Thank you.

11 JUDGE STROTHER: Okay. And other
12 examiners from USDA? Anyone from the industry
13 proponents?

14 THE WITNESS: Anyone on the phone?
15 That doesn't sound like there's anyone here,
16 Judge.

17 JUDGE STROTHER: No one's called in to
18 you? The second day is not as popular I guess.
19 Okay. Anyone who's not a member of either of
20 those two groups?

21 PARTICIPANT: No.

22 JUDGE STROTHER: How about you, Mr.

1 MacTavish? You got any, do you have any
2 questions for Ms. Connelly? You have to,
3 somebody unmute Mr. MacTavish, please. Still
4 looks muted to me. There you go. Mr. MacTavish,
5 can you hear me?

6 MR. MACTAVISH: I can. Thank you.

7 JUDGE STROTHER: Do you have any
8 questions?

9 MR. MACTAVISH: I have a couple.

10 JUDGE STROTHER: Your witness.

11 MR. MACTAVISH: Can you hear me?

12 JUDGE STROTHER: We can. I can.

13 MR. MACTAVISH: Yes, just a couple.

14 Hi, Michelle. John MacTavish here. If you
15 would, I was just curious, for these credit back
16 reimbursements, how are they treated for income
17 tax purposes?

18 THE WITNESS: In what respect? I
19 mean, obviously any of the expenditures at the
20 handler level would be their own responsibility
21 for tax purposes. It doesn't, it wouldn't change

22 --

1 BY MR. MACTAVISH:

2 Q Well, they're going to get a
3 reimbursement. Are they going to get a check
4 from the California Walnut Board? Will it be
5 income to them? Will it be treated as 1099
6 income?

7 A No. No, it will not.

8 Q So, they will get to write off the
9 full expense of the marketing event, and get paid
10 a 70 percent, receive a 70 percent credit without
11 any tax due on that credit?

12 So, in that scenario they would
13 actually be out nothing if they were in a high
14 enough tax bracket.

15 A I can't speak to the individual
16 handler's situation.

17 Q Just hypothetically. I'm just saying,
18 if you're in a 40 percent combined state and
19 federal tax bracket, and you write off \$100,000
20 dollar expense, you would have out of pocket
21 expenses of \$60,000.

22 And I'm going to get a %70,000 dollar

1 reimbursement from the California Walnut Board.

2 So, I'm \$10,000 dollars to the good. I just
3 wanted clarification that that's the way it is.

4 A Again, I can't speak to what an
5 individual handler's --

6 Q If it is --

7 A -- operation is. I can speak to the
8 fact that yes, there, you know, under the program
9 if they're eligible for reimbursement, they will
10 be reimbursed. How they choose to handle that
11 from a tax standpoint is their own operation.

12 Q So, there's been no discussion of how
13 that will be treated to the handler for tax
14 reporting?

15 A That's outside of the scope of the
16 proposal, sir.

17 JUDGE STROTHER: That was not his
18 question, Ms. Connelly. Let me give a shot at
19 this. Did this come up in the discussions before
20 the California Walnut Board as to what the tax
21 effect of these --

22 THE WITNESS: It did not. And it did

1 not because again, it's not affecting the Board's
2 tax status.

3 JUDGE STROTHER: Well, could it not be
4 significant as to the benefits and costs to the
5 processors? I'm not challenging that. But, I
6 mean, it's a possibility of what the effect would
7 be. But it's not something that the California
8 Walnut Board considered? Is that correct.

9 THE WITNESS: That is correct. I
10 mean, the goal here is to, again, to promote the
11 sale and consumption of walnuts. That's the
12 objective of the proposal.

13 BY MR. MACTAVISH:

14 Q I understand that's the goal of the
15 proposal. I'm just trying to see, what is the
16 skin in the game, what is the true skin in the
17 game for the handler?

18 A Well, the handler has to again, as we
19 presented, the handler has to spend. For every
20 dollar that they spend, which is incremental
21 spend on their end, they receive 70 cents back in
22 credit for eligible expenditures.

1 Q I understand that. And I guess I'm
2 surprised that this hasn't been addressed. If I
3 spend \$100,000, I write that \$100,000 dollars off
4 as a deductible marketing expense to my business,
5 and I am in a high enough tax bracket, I will end
6 up getting money, net after tax, from this
7 program.

8 MS. CHILUKURI: Your Honor --

9 MR. MACTAVISH: Because the after tax
10 costs --

11 MS. CHILUKURI: It seems to be that
12 this is --

13 (Simultaneous speaking)

14 MS. CHILUKURI: I don't see a question
15 that hasn't already been asked and answered. And
16 I see that this is Mr. MacTavish's testimony,
17 which we're all happy to hear. But I think it
18 would be better if he --

19 JUDGE STROTHER: Okay. Let's move on.

20 MR. MACTAVISH: Well --

21 JUDGE STROTHER: Mr. MacTavish, you
22 think about this for a minute. You slipped away

1 from me a little bit on that, Ms. Connelly. Let
2 me just try this again.

3 I asked you if the tax effect of these
4 payments was considered by the California Walnuts
5 Board. And I think what you answered was, no,
6 which I would take as a no, if that's right. And
7 then you went into, it's not a part of the
8 proposal. Did this come up in discussions with
9 the California Walnuts Board?

10 THE WITNESS: No, it did not. No, it
11 did not. This was, we were specifically focused
12 on the regulatory text and the inner workings of
13 the program, how it would function.

14 JUDGE STROTHER: Go ahead, Mr.
15 MacTavish, your witness.

16 MR. MACTAVISH: Okay. I've got a
17 couple other quick ones. I'm sorry for taking so
18 much time.

19 JUDGE STROTHER: Not at all.

20 MR. MACTAVISH: They just got, they
21 just come, they're just questions that kind of
22 pop in my head as I hear, you know, the day's

1 testimony. So, bear with me.

2 Will, the second question is, will the
3 books and records of program utilization, they
4 types of activities that are conducted in this
5 program, will those be available for California
6 Walnut Board membership review?

7 Like, could I see what's being done
8 with those promotional credit back dollars? Or
9 is that something that is just in a, kept in a
10 black box for, I guess those that are on the
11 Board to see?

12 THE WITNESS: Well I, you know,
13 anything that we do is of course of public
14 record. I think, you know, they would be
15 available with a caveat that, you know, anything,
16 there are privacy matters. So, anything that
17 would be available would be available without
18 necessarily the handler entity information being
19 disclosed.

20 BY MR. MACTAVISH:

21 Q So, that would be fine if the names
22 were removed. And then another question. You

1 mentioned that to be qualified for the credit
2 back reimbursement, that the California Walnut
3 Board would have to be included on the packaging.
4 And is that in a, or did you? I see you shaking
5 your head.

6 A No, I did not. No, not the Board.

7 Q Not California Walnut Board, but
8 California Walnuts. Excuse me, my mistake. I
9 apologize for that. Well, the California Walnut,
10 or California Walnuts be a, in a, is it required
11 to have a prominent location on the packaging?

12 Or could it be just listed below the
13 ingredients? What does the marketing order
14 specify with how prevalent the California Walnuts
15 labeling will be on packages produced?

16 A It's on the, it's in the regulatory
17 text, the, and it does indicate that it needs to
18 be highly visible and/or present text.

19 Q Okay. And then lastly, and this is
20 kind of just a clarification. Because I heard a
21 couple of different responses from you. So,
22 growers are assessed a, or the handler assesses

1 the grower the four cents per pound. And they
2 collect that typically before you get your first
3 payment.

4 And so, I heard you say that you
5 collect assessments from the handlers on a
6 monthly basis. And so, I'm just wondering, is
7 that a requirement for all handlers? So they can
8 collect it I guess whenever they want. But
9 they're only required to submit it monthly?

10 A No. The handlers receive, take their
11 acquisitions, and then submit, you know, upon
12 their acquisitions their invoice. So, they're
13 invoiced from us on a monthly basis as they
14 submit them.

15 So, no claim for reimbursement would
16 be allowed to be processed unless the handler was
17 current on their assessments. So, nothing would
18 be allowed above a level that was received.

19 Q So, when are they required to send you
20 the assessments?

21 A They're invoiced --

22 Q You said monthly?

1 A -- based on the, they're invoiced
2 based on the acquisitions.

3 Q On the acquisitions?

4 A And that's --

5 Q As they receive, as they receive nuts
6 from the growers?

7 A It's as they, yes. Because they
8 receive the product. The handlers receive the
9 product. The handlers then have, as that product
10 is inspected, then they submit. We bill based on
11 what is acquired.

12 Q Okay. So, and then they're required
13 to pay that over the course of the year, monthly?

14 A Correct.

15 Q Okay. Thank you for clarifying that.

16 JUDGE STROTHER: Let me --

17 MR. MACTAVISH: That's all I have.

18 JUDGE STROTHER: Stay on the line, Mr.
19 MacTavish. I don't have a position in this. I'm
20 just trying to make a clear record. And I'm
21 afraid the record might be a little muddy as to
22 what this witness is testifying to exactly.

1 If I recall the question there's a
2 predicate. You said that the processor charges
3 the grower a four cent amount? Is that correct,
4 Mr. MacTavish?

5 MR. MACTAVISH: Well, yes. They
6 essentially pass on the assessment to the
7 growers. So, they collect what the California
8 Walnut Board, California Walnut Commission
9 assessment, which is I think four cents per
10 pound.

11 JUDGE STROTHER: Okay.

12 MR. MACTAVISH: So, we pay it as a --
13 So, I was just trying to understand how --

14 JUDGE STROTHER: I understand. Stop.
15 Let me, yes, sir. Ms. Connolly, do you agree
16 with that statement?

17 THE WITNESS: I'm sorry, Judge, I
18 wasn't, I'm trying to communicate with one of
19 your compatriots. Because I really need a bio
20 break.

21 JUDGE STROTHER: Tell you what, let's
22 take a break right now for ten minutes. And

1 we'll come back with you still on the stand. How
2 about that?

3 THE WITNESS: That's fine.

4 JUDGE STROTHER: Okay.

5 THE WITNESS: Thank you.

6 JUDGE STROTHER: let's come back at 2
7 o'clock Pacific time. Off the record.

8 (Whereupon, the above-entitled matter
9 went off the record at 12:50 p.m. and resumed at
10 1:01 p.m.)

11 JUDGE STROTHER: Back on the record.
12 Okay. That should be the end of the break. Ms.
13 Connolly's still under oath, still on the stand.
14 And I guess I was doing the examining.

15 I'm just trying to make clear for the
16 record what it is you're agreeing to in Mr.
17 MacTavish's cross, and what you're not.

18 Is it your testimony that the process
19 of charges the grower, the four cents, or
20 whatever the assessment is, do you know how
21 that's done, Ms. Connolly?

22 THE WITNESS: It's a contract between

1 the handler and their grower. The Board has no
2 involvement in that. But yes, the assessment is
3 collected however the handler chooses to do that
4 with their grower.

5 JUDGE STROTHER: And how it's
6 typically done?

7 THE WITNESS: It, you know, typically?
8 It would be hard to say. There's 90 some
9 companies that do this. It may be that they
10 withhold the assessment from the grower payment.
11 It may be that they have another mechanism. I
12 don't know.

13 JUDGE STROTHER: Is how it's done
14 something the California Walnuts Board took into
15 account in developing the proposal at issue in
16 this hearing?

17 THE WITNESS: No. Because this is in
18 relation to the handler assessment. The handler
19 assessment is what's paid to us.

20 JUDGE STROTHER: All right. As I
21 understand your answers, no, you didn't take that
22 into account. Okay. Anything further from you,

1 Mr. MacTavish?

2 MR. MACTAVISH: No, thank you.

3 JUDGE STROTHER: Any follow-up? And
4 new follow-up examination by anybody of this
5 witness? Okay. Seeing none. By the way, I
6 assume there were no objections along the way.
7 The folks that are minding those, no comments I
8 may not have noticed? Is that correct?

9 MS. HOAGLAND: That's correct.

10 JUDGE STROTHER: Okay. Then I have
11 two exhibits that were identified, that need to
12 be offered for the record. Exhibit 25 is Ms.
13 Connolly's testimony. Exhibit 26 is her
14 PowerPoint presentation. Exhibit 27 was
15 withdrawn. So, it is not being offered.

16 Any objections to entering Exhibits 25
17 and 26 into the record? Hearing none, those
18 exhibits are made a part of this record. And you
19 may step down, Ms. Connolly. Appreciate your
20 testimony today. Thank you.

21 (Whereupon, the above-referred to
22 documents were received into evidence

1 as Exhibit numbers 25 and 26.)

2 THE WITNESS: Your Honor, I did also
3 want to just address a few things that were asked
4 in earlier testimony, that were deferred to me.
5 If I could clarify those points for the record?

6 JUDGE STROTHER: I'm sorry. We did
7 say that you would put that, go into that at the
8 end of your statement. And there was no
9 objection at that time. And so, we'll just
10 continue your testimony.

11 We'll treat this as just a part of,
12 well, we've had cross in between, but we'll go
13 back and do some cross on this part. Please
14 proceed.

15 THE WITNESS: Thank you, Your Honor.
16 So, there was a question asked with respect to
17 pull outs, the amount of the acreage that's
18 coming out of the ground.

19 USDA in their process under the
20 National Agricultural Statistics Service, when
21 they do their estimates they use an average of a
22 three percent pull out rate for the pull out of

1 trees.

2 I did also want to call out on Mr.
3 Hinman's, one of his charts. He indicated the
4 1920 rate of production being at 650,000 tons.
5 That is not final yet.

6 USDA will finalize that number when
7 they issue the new report in the fall. So that
8 will come out, or excuse me, August, I believe
9 it's 30th this year.

10 So, when they issue the objective
11 measurement for 2020 that will actually be a
12 final number. That 650 is typically readjusted
13 for farm use, et cetera, et cetera.

14 There was a question asked about the
15 40 percent market penetration rate. I have
16 clarified, that was a nationally representative
17 sample of 1,000 people. The 400, Mr. Hinman, is,
18 was that 40 percent that actually were purchasing
19 the product.

20 I also wanted to clarify, there was a
21 question asked about the scope of assessments
22 under similar types of programs. So, just as a

1 range of assessment rates, almonds and prunes use
2 a rate anywhere between ten and 15 percent of
3 their assessments as the rate for the program.

4 There was a question asked about
5 substantiating the jobs number. And Mr. Crain's
6 testimony, he indicated 85,000 jobs directly and
7 indirectly.

8 This was the result of an economic
9 analysis, a separate one that was done by the
10 Board, that looked at the impacts of walnut
11 growers and handlers in the State of California.
12 That was a separate piece of research that the
13 Board conducted. So, that was it for the follow-
14 ups for me. Thank you.

15 JUDGE STROTHER: Okay. Any further
16 questions from USDA?

17 DR. HINMAN: Yes. Don Hinman, USDA.

18 JUDGE STROTHER: Your witness, Mr.
19 Hinman.

20 BY DR. HINMAN:

21 Q Thank you, Ms. Connolly. I very much
22 appreciate those clarifications. Just to be

1 sure, I had pointed out that the 630 was a
2 forecast. And the 650 was offered as an
3 estimate, just theoretically.

4 Is it still a reasonable estimate at
5 the moment, based on the only information we
6 have, based on your other shipment data? So,
7 it's not official until they issue the updated
8 figure?

9 But it is a reasonable estimate for
10 the moment. That's on, based on the information
11 you have at the moment. Is that correct?

12 A Yes, that is correct.

13 Q Okay. And then, in the, in your
14 testimony, and then in Dr. Goodhue's you both
15 used this example of a ten percent figure, and a
16 \$2.5 million dollar budget estimate for an
17 example, as a hypothetical for the credit back
18 program.

19 And we also heard testimony, somebody,
20 I thought I heard, and maybe you can help me
21 correct this, that there were estimates, you
22 know, someone mentioned in the \$3 to \$4 million

1 range. Is that, did I misunderstand that? Or is
2 that also a possible range of your estimated
3 budget?

4 A No, that's correct. I mean, at ten
5 percent it would be approximately \$2.7 million.
6 So, for the case of an example.

7 Q But did you look at, is ten percent
8 just a starting point for a reasonable place to
9 look at for planning, like you do. Did you, were
10 other ranges of that discussed? And what were
11 those ranges, you know, allowing ten percent
12 approximately?

13 A Yes. So, as I just indicated, the
14 ranges for the various programs that are
15 currently being used by the prune industry and
16 the almond industry, they range from anywhere
17 from ten to 15 percent of assessments.

18 Almonds has had that rate for several
19 years. I don't know what that translates to into
20 dollars. But, you know, ten to 15 percent is a
21 reasonable starting point, and comparable to what
22 other industries are utilizing.

1 Q All right. Okay. And then, the
2 85,000 jobs annually, can you say a little bit
3 more about the study that you commissioned, or
4 whatever it was you did to get that estimate, to
5 say who did that estimate? And basically explain
6 the method that was used?

7 A Sure. This was, that was conducted by
8 Tetolian and Associates for the Board. It was
9 really looking at the economic impacts of what,
10 if you will, handlers and growers are bringing to
11 the state, in terms of quantifying not only the
12 job, but the revenue levels.

13 I'd have to pull the study to look at
14 the specifics that they went through. I don't
15 have it off the top of my head. But again, it
16 was, that was really to substantiate the fact
17 that the industry employs, whether directly or
18 indirectly, supports 85,000 jobs. And that's a
19 number that we use often. And we cite for USDA
20 when we're communicating with the Secretary's
21 office.

22 Q Could you repeat the name of the firm,

1 or spell it all out?

2 A Yes. Tetolian and Associates.
3 They're a Sacramento based firm.

4 PARTICIPANT: Could you spell that,
5 please?

6 THE WITNESS: Oh, gosh. Okay. T-E-T-
7 O-L-I-A-N, and Associates.

8 DR. HINMAN: Okay. Thank you very
9 much. No further questions.

10 JUDGE STROTHER: Okay. Anyone else
11 from USDA? Anyone from the industry proponents?
12 Anyone that's participating via Zoom? Anyone
13 that's participating via telephone?

14 Okay. Hearing none, I'm going to put
15 the exhibits in. That completes the testimony
16 and examination of Ms. Connolly. Ms. Connolly,
17 for the second time we're going to let you step
18 away, step down from the virtual stand. And we
19 appreciate your testimony today.

20 THE WITNESS: Thank you, Your Honor.

21 JUDGE STROTHER: Before we go to Ms.
22 Donoho, should we talk about, is Mr. Mariani

1 available to testify?

2 MR. MARIANI: I'm on the line if you
3 can hear me.

4 JUDGE STROTHER: I can. Ms.
5 Schmaedick asked that you be recalled to the
6 stand. And there wasn't any objection. So, I'm
7 allowing it, assuming you don't have an
8 objection, and based on your availability. Would
9 you like to retake the stand now?

10 MR. MARIANI: I'd be happy to.

11 JUDGE STROTHER: Ms. Schmaedick, are
12 you ready?

13 MS. CHILUKURI: I apologize. I was on
14 mute again. Ms. Schmaedick is ready, yes.

15 JUDGE STROTHER: Okay. Mr. Mariani,
16 you're still under oath.

17 WHEREUPON,

18 JACK MARIANI
19 was re-called for examination, and having been
20 previously duly sworn, was examined and testified
21 further as follows:

22 JUDGE STROTHER: Your witness, Ms.

1 Schmaedick.

2 Ms. Schmaedick, do you need something
3 to be on the screen of exhibits for Mr. Mariani?

4 MS. SCHMAEDICK: Yes. I believe I'll
5 have questions with regard to Exhibit No. 1, the
6 Federal Register Notice.

7 JUDGE STROTHER: Okay. Mr. Hatch, can
8 we put Exhibit 1 up on the screen. Thank you.

9 I would ask, Mr. Hatch, I'm sorry to
10 break this up, but time will go by. Do we have
11 Mr. MacTavish's statement online as Exhibit 30
12 yet?

13 You're on mute. Better take Mr. Hatch
14 off mute, please.

15 MR. HATCH: Mr. MacTavish's testimony
16 is posted to AMS' website. I received
17 confirmation a few minutes ago. And I'll have
18 Mr. MacTavish's testimony ready to display when
19 he testifies.

20 JUDGE STROTHER: Very good. Thank you.

21 Ms. Schmaedick, your witness.

22 MS. SCHMAEDICK: Thank you, Your Honor.

1 BY MS. SCHMAEDICK:

2 Q Good morning, Mr. Mariani. Thank you
3 for joining us again. How are you all?

4 A -- earlier difficulties.

5 Q I'm sorry?

6 A I said, Good morning, and I'm sorry
7 about the earlier difficulties.

8 Q Ah, yes. No problem. I'm glad you
9 were able to join us.

10 So I'd like to ask you some questions
11 about Exhibit No. 1. And I'd like to start on
12 page 7671, and then eventually go to 7672. So,
13 that would be the third and fourth pages of that
14 exhibit.

15 Now, Mr. Mariani, just to reconfirm,
16 were you part of the MORC, the subcommittee that
17 did the analysis and drafting of this proposed
18 regulatory text?

19 A Yes, I was.

20 Q And, again just to reconfirm for the
21 record, are you a handler?

22 A Yes. I'm considered a large handler.

1 Q Thank you.

2 I wanted to ask you your -- with
3 regard to the proposed language under 984.546, in
4 your opinion was there a robust discussion of the
5 terms that are proposed in the paragraphs A
6 through F of 984.546?

7 A Is it possible to view those, the
8 language that you're referring to?

9 Q Sure. So, it begins on page 7671, the
10 third column. In sort of middle of that third
11 column down it starts out with paragraph (a)
12 under 984.546. It says, "Timeliness of
13 reimbursement claim and credit-back rate."

14 And then it goes, continues to
15 paragraph (b), "Assessment payments."

16 And then it continues to (c), "handler
17 eligibility" at the top of page 7672.

18 (d) is "Applicability to marketing
19 year.

20 (e) is "Qualified activities."

21 And then paragraph (f) is in the third
22 column of page 7672, and that addresses

1 "Appeals."

2 So, 984.546 is the proposed, are the
3 proposed procedures that explain how this program
4 is supposed to work. Is that correct?

5 A That is my belief, yes.

6 Q And so you were involved in the
7 development of these proposed procedures?

8 A Yes, I was.

9 Q In your opinion as a handler, do the
10 activities that are described under paragraph
11 (e), "Qualified activities," do they accurately
12 capture the types of activities that a handler
13 would be involved in regarding promotion to
14 promote consumption of walnuts?

15 A In paragraph (e). Let me take a peek
16 at it here as it's coming over my screen.

17 Okay. Yes, those were the, those were
18 the areas that we discussed very thoroughly
19 during our conversations at the MORC committee.
20 And agree that those, those were the, those were
21 the areas that we discussed and recommended.

22 Q Thank you.

1 And those activities does it include
2 activities that both large handlers and small
3 handlers would be engaged in or could be engaged
4 in if they chose to?

5 A Yes. We had a lot of conversation
6 along those lines. And as I think you've heard,
7 over these last two days there's been
8 discussions about trying to grow our market,
9 trying to create some new demand. And they were
10 talking a lot about some new, creating new
11 products, whether they be snack nuts, or butters,
12 or milk.

13 But one of the things that we
14 specified during our MORC conversations is we
15 wanted to leave it as wide open as possible so
16 any, any handler, large or small, would be able
17 to utilize the opportunity, and which would
18 include just regular shelled or in-shell walnuts.
19 So that was one or one of our reasons for trying
20 to make it as open-ended as possible so it would
21 be so inclusive not to exclude any part of our
22 industry.

1 Q Thank you.

2 And with regard to now I am switching
3 myself over to page 7671, the third column,
4 looking at paragraph (a) which is, "Timeliness of
5 reimbursement claim and credit-back rate." And
6 if I understand this paragraph (a) correctly, it
7 describes the process for which a handler would
8 submit their claim and sort of the parameters for
9 that reimbursement being issued.

10 I want to draw your attention to one
11 specific part that states "that such creditable
12 expenditures" must be "documented to the
13 satisfaction of the Board within 15 days after
14 the end of that marketing year."

15 Do you understand that language? Can
16 you describe what that means to you?

17 A Well, my understanding -- and I would
18 ask Ms. Connelly later to correct me if I'm wrong
19 -- but my understanding would be that the handler
20 would provide the Board proof of his activities
21 to be reimbursed.

22 And this would have to be done so in

1 a timely manner, realizing that the marketing
2 year of the Board ends on a certain date. And
3 these activities must be performed within that,
4 that time frame to be submitted, submitted for
5 reimbursement from the Board during their
6 marketing year.

7 Q And does the 15 days, does that seem
8 like a reasonable amount of time for a handler to
9 submit the documentation, that 15 days within the
10 -- or after the end of the marketing year?

11 A I think it's reasonable. I mean,
12 after all, the handler is working on a marketing
13 year 365 days, so I think that's a reasonable
14 amount of time.

15 Q Any other alternatives recommended
16 based on your recollection of the meeting?

17 A No, I don't think, in my recollection
18 we didn't -- this was presented to us and I think
19 the group thought that was a reasonable amount of
20 time for a handler working under an entire year's
21 flexibility, realizing that the Board's marketing
22 year is, you know, defined very strictly by the

1 USDA, so we thought that was a reasonable
2 recommendation.

3 Q Thank you.

4 And as a handler -- before I proceed
5 I want to direct your attention now to page 7672,
6 paragraph (f), which is in the third column,
7 middle of that column, and it is titled
8 "Appeals." I want to ask you your opinion of the
9 appeals process that is being proposed.

10 Are you comfortable with the terms of
11 the appeals process as they are proposed?

12 A Yes. Yes, I am very comfortable with
13 it. I think our Board manager and our staff at
14 the Board is very capable of addressing virtually
15 every type of issue that may come in front of
16 them. They're very capable and competent.

17 If in fact that the handler disagrees
18 with their decision it would go to the Executive
19 Committee, who I believe also is very, you know,
20 very open minded. And one that, you know, the
21 goal, the entire goal here is to create more
22 demand. And I think, you know, everybody is

1 cognizant of that fact and what our goal is.

2 And if things are reasonable, they're
3 going to be approved. If they're not, you know,
4 if the Executive Committee also declines it and
5 then, Ms. Connelly previously mentioned, it could
6 go to the USDA eventually or the Secretary for
7 final determination. So, I think it's a very
8 logical and fair form of, you know, solving any
9 dispute that we've spelled out here in this
10 language.

11 Q Thank you.

12 And my last question for you addresses
13 the proposed language that's directly above that,
14 paragraph (f), "Appeals." It's a statement --
15 or, I apologize, it's paragraph (D)(iii). It
16 says, "Checks from the Board in payment of
17 approved credit-back claims will be mailed to
18 handlers within 30 days of receipt of eligible
19 claims."

20 Can you give me your opinion on that
21 period of 30 days?

22 A I would say it's very, I would say

1 it's very fair. As long as it doesn't put a
2 overly-burdened office of the Walnut Board to
3 because it's done in a timely manner. But that,
4 you know, I'd say if it's possible to be done in
5 30 days that's a very, I think, very fair from a
6 handler's standpoint.

7 Q Thank you.

8 Does this fall within the lines of
9 standard business operations to be payable within
10 30 days?

11 A Very much so.

12 Q Thank you.

13 Overall, do you believe that the
14 proposed language is written in a way that is
15 understandable for handlers participating in the
16 industry, in your opinion?

17 A Yes, I do.

18 MS. SCHMAEDICK: Thank you. I have no
19 further questions.

20 JUDGE STROTHER: Okay. I guess this
21 witness is called back for all purposes. Anyone
22 else from USDA?

1 MS. VAWTER: Yes. This is Terry
2 Vawter. I have a question or two, please.

3 JUDGE STROTHER: Your witness.

4 MS. VAWTER: Thank you.

5 BY MS. VAWTER:

6 Q Mr. Mariani, in regards to the 15 days
7 by which the handlers should provide all
8 documentation for marketing activity undertaken
9 in the marketing year, is it possible that there
10 will be handlers who will submit claims
11 throughout the year and/or they have a project
12 that they do, say, over the holiday season that
13 they would certainly meet -- certainly exceed the
14 15 days by if they have a project that was done
15 in December and they turn their paperwork in in
16 February. So, I think my point is, is it
17 conceivable that not every handler will be
18 submitting all their claims at the end of the
19 year?

20 A Oh, I think very much so. I would
21 assume as a handler myself, I would be surprised
22 if our company was not submitting our, our

1 activities for reimbursement after a certain
2 project was completed. I don't know why anybody
3 would want to wait till the very last moment.

4 So, I definitely think that most, you
5 know, the vast majority of the recommendations
6 for reimbursement would be made much earlier than
7 the end of the marketing year.

8 Q Okay. I appreciate that.

9 One more thing. I believe that many
10 of the witnesses have stated that one of the
11 goals of the program is for the Board to remain
12 flexible in what they see as authorized or
13 eligible activities, and would adjust the program
14 as they found that it needed to be adjusted.

15 Is that your opinion as well, please?

16 A Definitely so.

17 MS. VAWTER: All right. I appreciate
18 it.

19 Thank you, Your Honor, I'm done.

20 JUDGE STROTHER: Anyone else from USDA?

21 MS. CHILUKURI: Yes, Your Honor. Rupa
22 Chilukuri with USDA.

1 JUDGE STROTHER: Counsel, your witness.

2 BY MS. CHILUKURI:

3 Q Mr. Mariani, just going by what other
4 people have asked you, I want to talk a little
5 bit more about the qualified activities and
6 what's covered and what's not covered.

7 So, under 984.546(e), that lists the
8 qualified activities. And then if you get down
9 to I think it's 5(ii) and then (A), (B), (C), and
10 (D), that lists additional qualified activities,
11 I just wanted more information on what factors
12 the Board and various committees considered in
13 determining what should be qualified activity and
14 what shouldn't be qualified activity?

15 A Well, I would say in general that
16 MORC's philosophy was to make any activity that
17 would be a strong possibility of increasing
18 demand or sales for walnuts a qualified activity.
19 And I think the areas that have been included
20 pretty much shows, shows the MORC's ideas of, you
21 know, expanding those to as many areas as
22 possible while still trying to maintain a very

1 fair way for the industry's money to be invested.

2 Q So if I understand you correctly you
3 are trying to balance between being flexible and
4 inclusive in terms of activities, but also as Ms.
5 Connelly talked about potential abuses, so just
6 balancing different, different practices along
7 those lines? Is that accurate?

8 A Very much so. Very much so, yes. I
9 think, you know, we definitely had a lot of
10 discussion about trying to avoid abusing any of
11 this recommended program that we're trying to
12 bring forward to benefit our California walnut
13 growers and try to get prices, over the long
14 term, back up over the cost of production.

15 And I think a lot of times it gets
16 lost that, you know, walnuts, you know, tree nuts
17 in particular, walnuts specifically, it takes --
18 you know, once a grower finally gets those
19 walnuts in the ground it takes, you know, it's
20 approximately 5 years before he starts to see any
21 type of return on it.

22 So, they've got a huge investment and

1 a loss over, you know, for four or five years.
2 And then finally when they start producing, you
3 know, some of the losses that we've seen per acre
4 on some of the charts yesterday, it's just, it's
5 just terrible.

6 So, you know, that's what's brought us
7 to this point and try to create this, this new
8 area for trying to create more sales and more
9 demand. And, you know, that's why I think when
10 we look at the areas that we voted for, areas
11 that we could legally try to promote and
12 advertise walnuts we made it as inclusive as
13 possible, while at the same time to avoid any,
14 anybody abusing the program.

15 Q I just wanted to ask you a question as
16 sort of a hypothetical that I think Ms. Connelly
17 asked you as well.

18 So, if I have a beet salad and I want
19 to do a -- I want to do an in-store demonstration
20 and I want to make a salad with beets, walnuts,
21 walnut oil, arugula, would that be covered under
22 the reg text as you have it set forward now?

1 A That's a good question. You know, I
2 would assume as long as it remains part of that,
3 this you just described, it probably would be.
4 That's a little bit of a technical question. I'm
5 not sure if I've got the total answer for it.
6 But I think, you know, the goal is obviously if
7 it creates more demand, more sales for walnuts
8 probably, yes, it would be included.

9 But I wouldn't know if I'd be the
10 person to actually answer that question.

11 MS. CHILUKURI: Okay, thank you. Thank
12 you very much.

13 No further questions, Your Honor.

14 JUDGE STROTHER: Okay. Anyone else
15 from USDA?

16 (No response.)

17 JUDGE STROTHER: Mr. Mariani, I think
18 I'll let you say anything you want at the end of
19 any further questions, so you don't have to speak
20 up now.

21 But any examination from anyone else
22 in the industry proponents category?

1 (No response.)

2 JUDGE STROTHER: Anyone have any
3 question that's participating through Zoom?

4 (No response.)

5 JUDGE STROTHER: Anyone that's phoned
6 in have any questions?

7 MR. HATCH: Mr. MacTavish did indicate
8 that he has a question. I'm trying to activate
9 his mike.

10 Mr. MacTavish, can you speak?

11 JUDGE STROTHER: It shows he's muted on
12 my screen, Mr. Hatch.

13 MR. MACTAVISH: How about now, can you
14 hear me now?

15 MR. HATCH: Yes.

16 JUDGE STROTHER: We can.

17 MR. MACTAVISH: I have a quick question
18 for -- Can you hear me?

19 JUDGE STROTHER: Yes. Your witness,
20 Mr. MacTavish.

21 BY MR. MACTAVISH:

22 Q Just a quick question. I was curious

1 if the Walnut Marketing Board could share with us
2 what the credit-back ratio was for the almond and
3 prune industry, much discussions. And it's a
4 program designed after those programs and I'm
5 just curious what ratio they reimbursed
6 participants in their program?

7 A If you're asking me, I don't have that
8 information. I'm sure that, I'm sure Ms.
9 Connelly or somebody could make that available to
10 you at a later date, but offhand I don't have
11 those numbers.

12 Q Do you think it's more than 70 percent
13 or less?

14 A I think it's probably somewhere in the
15 same area, but I just, I don't have an exact
16 number.

17 MR. MacTAVISH: Okay, fair enough. I
18 thought it would be valuable for the record just
19 to have, you know, what the other marketing
20 orders authorize.

21 That's all I got. Thank you.

22 JUDGE STROTHER: Mr. Mariani, do you

1 have anything you want to say after your
2 examination since you're acting essentially as
3 your own lawyer? That's why I'm going about it
4 this way. Any redirect on yourself?

5 MR. MARIANI: Nothing from my end, Your
6 Honor.

7 JUDGE STROTHER: Okay. That completes
8 your, your examination. You didn't have any
9 exhibits that I recall, so you may step down from
10 the virtual stand. And thank you for your
11 testimony today.

12 (Witness excused.)

13 JUDGE STROTHER: So, I guess did we
14 ever get hold of -- I see that Mr. Carriere is on
15 my screen but muted. And we determined that he
16 was going to come back on the stand.

17 Do you still want him, Ms. Schmaedick,
18 I guess is the first question.

19 MS. SCHMAEDICK: Yes, Your Honor. If
20 Mr. Carriere is available that would be helpful.

21 JUDGE STROTHER: Okay. Mr. Carriere,
22 are you willing to come back on the stand and

1 answer some further questions?

2 MR. CARRIERE: Yes. I'm here. Ready.

3 JUDGE STROTHER: Okay. Very good.

4 Ms. Schmaedick, Mr. Carrier is still
5 under oath.

6 WHEREUPON,

7 WILLIAM CARRIERE

8 was re-called for examination, and having been
9 previously duly sworn, was examined and testified
10 further as follows:

11 JUDGE STROTHER: Ms. Schmaedick, your
12 witness.

13 MS. SCHMAEDICK: Thank you.

14 BY MS. SCHMAEDICK:

15 Q And, yes, we're still in the morning.
16 Good morning, Mr. Carriere. Thank you for coming
17 back.

18 I would like to pose to you very much
19 the same questions that I posed to Mr. Mariani
20 regarding the proposed regulatory text under
21 Section 984.546 specifically. That language is
22 part of Exhibit 1, and I'm focusing on the last

1 two pages of Exhibit 1, pages 7671 and 7672.

2 And so, generally, can you remind us
3 are you representing yourself as a handler?

4 A Yes. I'm a handler. I'm a grower.
5 And I was on the Market Order Revision Committee,
6 or am on the Market Order Revision Committee. So
7 I remember all these points.

8 Q As you were participating in the
9 discussion of, for example, the list of qualified
10 activities do you feel that the discussion was
11 robust and allowed for consideration of many
12 different types of activities that may or may not
13 apply?

14 A Yes, definitely. As I mentioned in my
15 testimony, it was robust, and not just that one
16 meeting, we had several meetings. We discussed
17 everything from, you know, what's an eligible
18 activity, what's a qualified activity.

19 What the, what the intent of the whole
20 thing was, as Mr. Mariani mentioned, was to make
21 it as inclusive as possible without allowing for
22 people to abuse the program. So that's why we

1 discussed lots of different examples: what would
2 be included, what would not be included, you
3 know, the third party discussion.

4 We didn't want, as an example, I threw
5 out that I would sell walnuts to Walmart and
6 Walmart could advertise my walnuts, and that's
7 not a reimbursable expense because I don't own
8 Walmart. And so that would be something that
9 would not qualify. Those are all kinds of
10 examples that were discussed.

11 Q Thank you.

12 And so you, just to restate, you are
13 both a handler and a producer. Is that correct?

14 A That's correct.

15 Q So, what is your position on the
16 exemption of credit-back for any activities that
17 target farming or grower trade? Do you believe
18 that that's a fair activity to not have qualified
19 as a reimbursable activity?

20 A Yeah, absolutely. We don't want this
21 money to be used to grow your, your handle. I
22 mean I, we send out -- we advertise to get more

1 growers to market through us, for example. But
2 that doesn't increase the consumption of walnuts,
3 so that's not the purpose of this program at all,
4 and that's why it's not included.

5 Q Thank you.

6 In your role as handler do you have --
7 do you engage at all in any promotion activities
8 through the Foreign Agricultural Service or the
9 California Department of Food and Agriculture
10 Program?

11 A We have in the past. For example, the
12 trade show booth, we went to a trade show and we
13 shared it with an almond handler and a prune
14 handler. And we were representing walnuts. And
15 CDFA helped pay for the booth.

16 And that was also discussed, you know.
17 Ms. Connelly talked about double-dipping, so we
18 wouldn't -- that wouldn't be an eligible
19 reimbursement because they already paid for it.
20 So, you couldn't be able to prove that you paid
21 for it if you were reimbursed.

22 Q Thank you.

1 In your opinion do the terms that are
2 being proposed for submitting documentation,
3 including the time frame of, last opportunity, if
4 you will, to file a claim within 15 days after
5 the end of the marketing year, do those seem
6 reasonable to you?

7 A Yeah. Yeah, I think so. We did
8 discuss that a little bit.

9 But as Mr. Mariani mentioned, I would
10 be in the same opinion that, you know, if we were
11 advertising, for example, something in October, I
12 would gather all the data and submit the
13 reimbursement as soon as I had enough qualified
14 assessments paid, for example, to get reimbursed
15 for it. I wouldn't wait until August or the 15
16 after -- the 15 days after August actually. I
17 would do it as soon as possible to get my money
18 back as quickly as possible.

19 Q I see. So, I'm just going to use an
20 example to make sure my understanding is correct.

21 If your calculated cap or your maximum
22 amount reimbursable let's say is \$1,000, and over

1 the course of the first couple of months of the
2 marketing year you pay in \$100 of assessments,
3 you then would -- and you had activities that
4 let's say qualified for \$50 of reimbursement,
5 your intention then would be to submit that
6 request for reimbursement as soon as possible?

7 A Yeah. I mean, that's a pretty small
8 number but I'd probably wait until the \$100 was
9 there. But this is kind of how to report, you
10 know, most of, we're charged most of our fee at
11 the beginning of the season because that's when
12 most of the crop is sold. It's very seasonal.
13 So, most of our assessments are due pretty
14 quickly after harvest.

15 You know, as we ship product out we
16 ship most of our product very quickly. And,
17 granted, some is held quite a long time but most
18 of it is shipped pretty quickly. So, I think we
19 would pay in enough assessments at the beginning
20 of the season so that that wouldn't be an issue.

21 I think Ms. Vawter's example of
22 waiting till February would be reasonable, you

1 know, because then we'd have plenty of time to
2 get through the busy season, get all our
3 paperwork together. And certainly if I still had
4 outstanding reimbursable expenses or qualified
5 activities, or interchangeable terms available,
6 you know, in August, then I would have plenty of
7 time because that's kind of the slowest time of
8 the year for us. So that 15 days is no problem
9 at all.

10 Q Thank you.

11 And this reimbursement mechanism, if
12 you will, was it designed specifically to
13 facilitate the quick reimbursement of handler
14 promotional expenses the expenses that qualify?

15 A That was the intent, yes.

16 MS. SCHMAEDICK: Okay. Thank you.

17 I have no further questions. Thank
18 you.

19 JUDGE STROTHER: Questions from anyone
20 else at USDA?

21 (No response.)

22 JUDGE STROTHER: Questions from

1 industry proponents?

2 (No response.)

3 JUDGE STROTHER: Questions from anyone
4 on Zoom?

5 (No response.)

6 JUDGE STROTHER: Questions from anyone
7 that has called in?

8 (No response.)

9 JUDGE STROTHER: Do you have anything
10 further to say, Mr. Carriere?

11 THE WITNESS: Well, I would just like
12 to address one thing. You know, we communicate a
13 lot with our growers on all these things.
14 Whenever there's changes; they have questions.
15 And I think it's twofold. It is the
16 responsibility of the handler to get out and tell
17 their growers what's going on. Part of my role
18 being on the Walnut Board is to hear about this
19 stuff and communicate it to constituents, so to
20 speak. And especially our growers, we
21 communicate all of this to our growers.

22 So, any time a grower comes in asks,

1 Is this going to cost me money? Or are you
2 going, you know, is this going to lower my
3 return, or whatever? We explain it in detail to
4 them as much as possible. But we don't hand them
5 our financials. And I think we explain enough
6 that our growers trust us and trust that we're
7 making good business decisions. And I think
8 that's the end of it.

9 If a grower's not happy with the way
10 I'm spending my money or the way I'm applying or
11 not applying for credit-backs, for example, and
12 they're not happy with that, then they should go
13 to another handler. And we encourage that,
14 actually. We want growers that trust us and
15 trust that we're using these programs and our --
16 their money to pay for expenses to market their
17 crop at the highest value. And that's, that's
18 why we're here.

19 Like I mentioned in my testimony,
20 we're our largest grower, and so my goal is to
21 return the maximum return to my farm as well.
22 And we treat all our growers the same as we treat

1 our own farm.

2 So, all of these discussions and the
3 reason I participate on the Board goes back to
4 that, so that I'm informed so that I can explain
5 this to my growers when they come asking.

6 Because we have plenty to do, and we're just big
7 enough where a family where I can participate in
8 these Board meetings and bring it back to the
9 family and to our growers so they understand it.

10 Thank you.

11 JUDGE STROTHER: Does that complete
12 what you have to say?

13 THE WITNESS: Yes. Thank you very
14 much.

15 JUDGE STROTHER: All right. With that
16 I suppose does -- does anyone, USDA have any
17 further examination of this witness?

18 MS. SCHMAEDICK: No, Your Honor.

19 JUDGE STROTHER: Counsel?

20 MS. CHILUKURI: We were just saying no,
21 Your Honor, we don't have any additional
22 questions for Mr. Carriere.

1 JUDGE STROTHER: Very well.

2 Industry proponents?

3 (No response.)

4 JUDGE STROTHER: Anyone else
5 participating in the, this hearing have any
6 questions, further questions for this witness?

7 (No response.)

8 JUDGE STROTHER: Okay. There are no
9 exhibits I know, but I thank you for coming back
10 on the stand, Mr. Carriere. You may step down
11 from the virtual witness stand.

12 THE WITNESS: Thank you, Your Honor.

13 (Witness excused.)

14 JUDGE STROTHER: Are we ready for our
15 next witness? I call the next witness is Heather
16 Donoho.

17 Do we have Ms. Donoho on one way or
18 another?

19 MS. DONOHO: Yes, I'm here.

20 JUDGE STROTHER: There you are. Thank
21 you.

22 Please raise your right hand.

1 WHEREUPON,

2 HEATHER DONOHO

3 was called for examination, and having been first
4 duly sworn, was examined and testified as
5 follows:

6 JUDGE STROTHER: I have one exhibit for
7 identification from Ms. Donoho, Exhibit 28, which
8 is her testimony or statement.

9 (Whereupon, the above-
10 referred to document was
11 marked as Exhibit No. 28 for
12 identification.)

13 Ms. Donoho, you may proceed to give
14 your statement.

15 THE WITNESS: Thank you. My name is
16 Heather Donoho, H-E-A-T-H-E-R, last name D-O-N-O-
17 H-O. I am the accounting director for the
18 California Walnut Board, and I will be testifying
19 today on point 8 of the justification, which is
20 the proposal implementation.

21 The proposal would be implemented
22 through the authority's parameters and the

1 requirements proposed under the new Section
2 984.546. Following approval from the Secretary,
3 the CWB would implement the program to become
4 effective the following crop/fiscal marketing
5 year as soon as possible.

6 Annually, the CWB will establish a
7 budget with an annual assessment to be collected,
8 which includes a budget for the credit-back
9 program. The CWB would then communicate to
10 handlers that the credit-back option is available
11 to them, what their pro rata portion of available
12 credit-back funds is, and the issue procedures on
13 the program and its use, including activities
14 that are eligible for credit-back.

15 Handlers will be provided with program
16 details, including their available portion of
17 credit-back, via their annual pre-season handler
18 packets. The handlers who choose to utilize the
19 credit-back system will receive routine
20 communications from the CWB, including reminders
21 of filing deadlines. The program includes an
22 appeals process to ensure that handlers have a

1 way to challenge a decision with which they
2 disagree.

3 Procedures were developed through
4 robust discussion with the Marketing Order
5 Revision Committee and staff with agreement on
6 the scope of included and excluded activities.
7 The procedures provide participants with
8 direction on the included and excluded
9 activities. Eligible activities include paid
10 media and advertising placement, public relations
11 and publicity, sales promotional work, research
12 and trade shows, and trade seminar activities.

13 The mix of activities was selected
14 that best support the program objective of
15 promoting the sale and consumption of walnuts.
16 The CWB activities are generic, and the
17 activities under this program, as discussed,
18 would be branded. For the handlers who have
19 multiple product lines of various products, the
20 program encourages activity to grow, foster, and
21 develop these new business segments to move
22 additional volume.

1 Compliance oversight of the program
2 was taken into account when developing the
3 procedures. Handlers will be provided with
4 program details, including their available
5 portion of credit-back via their annual pre-
6 season handler packets, as I mentioned earlier.
7 The handlers who choose to utilize the credit-
8 back program will receive communications from the
9 CWB, including reminders for filing deadlines.
10 And the program includes an appeals process to
11 ensure that handlers have a way to challenge a
12 decision with which they agree -- disagree.
13 Excuse me.

14 As a new program, we understand that
15 we could not conceive every nuance that may
16 emerge with the program, such as a standard
17 practice change, but there is a mechanism for
18 informal rulemaking, as approved by the
19 Secretary, that would allow for future program
20 modifications.

21 The Board understands that handlers
22 may conduct activities with other partners such

1 as USDA and the California Department of Food and
2 Agriculture, but handlers, as discussed earlier,
3 would not be eligible under the program to
4 "double dip," as there are mandatory spending
5 requirements for this program.

6 The reimbursement submission process
7 is outlined clearly in the procedures. The CWB
8 accounting staff, along with the input of the
9 executive director and marketing staff, as
10 needed, will administer the program. Per the
11 procedure, the credit-back form will be submitted
12 to the CWB, along with required documentation.

13 Internally, we would go through our
14 normal procedures to process the submission as we
15 would do for any other payable. We would date
16 stamp the claim when received, review it for
17 correctness and for required documentation and
18 proof of payment. We would route for approval,
19 generate a check, and mail the check. The
20 submission process is outlined, however our
21 internal procedures are not included.

22 The procedures may need to change over

1 time. And depending on the scope of the change,
2 this could be a housekeeping change, a committee-
3 level change, or something that would have to go
4 through the informal rulemaking process.

5 The program was designed with an
6 appeals process in place as a mechanism to manage
7 any unforeseen issues that may arise, especially
8 with this being a new program. If a claim is
9 denied, the handler may ask for a review by the
10 CWB Executive Committee. If the handler is not
11 satisfied with this review, the handler may
12 request to have the full Board review.

13 Finally, a handler may request an
14 appeal review with the U.S. Secretary of
15 Agriculture who has the ultimate oversight on the
16 matter. A handler must submit a written request
17 that includes permission to share the specific
18 information relating to the claim in question
19 with the committee. Appeals may be personally
20 presented by the handler, or presented by the CWB
21 staff. If the staff presents, the identity of
22 the party involved will be kept confidential

1 unless otherwise waived in writing.

2 And that concludes my testimony.

3 (Pause.)

4 JUDGE STROTHER: Sorry. Examination by
5 USDA?

6 MS. SCHMAEDICK: Yes, Your Honor.
7 Melissa Schmaedick for the Agency.

8 JUDGE STROTHER: Your witness.

9 MS. SCHMAEDICK: Thank you.

10 BY MS. SCHMAEDICK:

11 Q Good morning, Ms. Donoho, and thank
12 you for your testimony. I want to start by
13 turning to page 2 of your testimony, specifically
14 looking at your statement in support of paragraph
15 (e)6(i) through 4(i).

16 You mention there a form. I'm just
17 curious, is there -- are you requiring handlers
18 that want to participate to submit something, or
19 is this just sort of a documentation that would
20 facilitate keeping track of individuals who are
21 participating in the program?

22 A Well, we'll be providing a template

1 for the handler for a claim. But a handler is
2 free to include the information that's needed on
3 any form that they choose to use. So it would
4 just need to include a listing of expenditures,
5 that type of thing. But they can use their own
6 form.

7 Q Okay. And can a handler choose to
8 participate in the program at any point within
9 the marketing year, or would they have to
10 participate from the beginning?

11 A No, they absolutely could participate
12 at any point during the year.

13 Q Thank you. Turning your attention to
14 your statement for paragraph (f) at the bottom of
15 that second page of testimony, you state that
16 "Handlers must submit a written request that
17 includes permission to share the specific
18 information relating to the claim in question
19 with the Committee."

20 Can you explain to us why that is
21 important and what that is intended to address?

22 A Well, as the Board we're bound by

1 confidentiality, so we would, in the event the
2 handler wants to appeal a decision, we would need
3 for the handler to authorize us to provide the
4 information on the expense in question to, first,
5 the Executive Committee so they could see exactly
6 what was being questioned.

7 Q So then am I correct in understanding
8 that the claims for reimbursement would be
9 handled by the Board staff primarily?

10 A Yes. That's correct.

11 Q And then if there were questions or
12 you needed to interact with the handler, would
13 that stay the responsibility of the staff? Or at
14 what point would that evolve to the committee?

15 A I think it would evolve only when the
16 handler claim has been denied and the handler
17 disagrees for some reason with staff's decision.
18 Otherwise, the day to day communication that
19 might include questions on a form, or maybe
20 something that's missing from a form that needs
21 to be provided, that would just be between staff
22 and the particular handler.

1 MS. SCHMAEDICK: Okay, thank you. I
2 have no further questions.

3 JUDGE STROTHER: Anyone else from USDA?

4 Hearing none --

5 MS. CHILUKURI: Yes, Your Honor. Can
6 I ask one question? Rupa Chilukuri, USDA.

7 JUDGE STROTHER: Your witness, counsel.

8 MS. CHILUKURI: Thank you.

9 BY MS. CHILUKURI:

10 Q Ms. Donoho, if you could take a look
11 at 984.46. That's on Exhibit 1. I just wanted
12 to ask you about 984.46(b), "Credit-back for
13 promotion expenses," and confirm your
14 understanding of how this authority operates. So
15 the Board when does its budget has, as it says
16 right here, "The Board may provide for crediting
17 the pro rata expense assessment obligations." So
18 is it your understanding that the Board could
19 decide not to use the authority?

20 A Yes, that is my understanding.

21 Q Okay. So certain years it could
22 decide it's within -- it makes sense to try to do

1 credit-back; other years it may decide to use
2 their money in a different way. Is that correct?

3 A That's -- that's correct.

4 MS. CHILUKURI: Okay. I have no
5 further questions. Thank you.

6 JUDGE STROTHER: Okay. Anyone else
7 from USDA?

8 Anyone from the industry proponents?

9 Anyone on Zoom?

10 Anyone on the telephone?

11 Ms. Donoho, since you're sort of your
12 own lawyer here, I give you redirect yourself if
13 you have anything further to say.

14 THE WITNESS: I do not. Thank you,
15 Your Honor.

16 JUDGE STROTHER: Okay. With that, we
17 have one exhibit for identification which was
18 Exhibit 28, Ms. Donoho's testimony. Any
19 objection to entering that exhibit into the
20 record?

21 Hearing not -- hearing none, the
22 exhibit is made a part of the record.

1 (Whereupon, the above-referred to
2 document was received into evidence as
3 Exhibit No. 28.)

4 JUDGE STROTHER: You may step down
5 from the virtual witness stand, Ms. Donoho.
6 Thank you for your testimony today.

7 (Witness excused.)

8 JUDGE STROTHER: On my clock it's
9 11:10 out west. I would propose to just go
10 forward with our final witness, unless someone is
11 in need of a bio or other break.

12 I don't see anyone frantically waving
13 their hand or anything. So, okay.

14 Mr. MacTavish, can you hear my voice?

15 MR. MacTAVISH: Yes, sir.

16 JUDGE STROTHER: You are taking the
17 virtual witness stand now.

18 I'd ask you to raise your right hand.

19 WHEREUPON,

20 JOHN MacTAVISH
21 was called for examination, and having been first
22 duly sworn, was examined and testified as

1 follows:

2 JUDGE STROTHER: I have one exhibit for
3 Mr. MacTavish, which is his testimony, which I
4 notice has been posted on the AMS web page
5 associated with this hearing and is now on our
6 screens.

7 Mr. MacTavish, the floor is yours.
8 Please give your statement.

9 THE WITNESS: Judge Strother, thank
10 you so much for allowing me to provide this
11 testimony. Before I actually begin I just wanted
12 to kind of preface my discussion based on how I
13 got here.

14 Yesterday, actually my intent was to
15 listen to a hearing on this credit-back proposal,
16 hoping to gain some new knowledge, get a better
17 understanding of the industry. And as I listened
18 to each of the presentations, questions started
19 just ringing off in my head. And being new to
20 this whole process, I just started firing them
21 off on the chat board.

22 And I was on my home computer, didn't

1 have a mic, and so I wasn't really able to
2 communicate. And I apologize for having to send
3 my questions in the text format. It was just
4 really not an effective way to communicate the
5 questions that I was raising.

6 And so, like I said, I apologize for
7 how that was probably a little awkward. It just
8 didn't -- as I -- I really didn't want to
9 testimony -- provide testimony. But after your
10 encouragement and just saying if I had anything
11 to say I should say it, here I am. So I guess I
12 will begin.

13 My name is John MacTavish. For the
14 last 10 years I have grown walnuts on a 40-acre
15 parcel. I am a first generation grower. I have
16 no affiliations, foreign partnerships. I have
17 served on no committees associated with either
18 the CWB or CWC, nor do I act in a handler
19 capacity.

20 Now, in that statement as I was
21 reading it a few minutes ago I do have to make
22 one -- I guess just make one clarification. I'm

1 here speaking as just an independent grower who's
2 listened to the testimonies of all of the
3 presenters. And when I wrote this last night, I
4 said I was in -- that there was no affiliations.

5 I am, actually, as of a month ago, a
6 member of the California Walnut Bargaining
7 Association -- or the walnut -- California Walnut
8 Bargaining Association. But I'm not acting in
9 any capacity for that association. That's an
10 association of growers. So I don't know if that
11 needs to be amended, but I'm not affiliated with
12 them other than a member, a recent membership
13 going back a month.

14 JUDGE STROTHER: That'll be fine. The
15 testimony you give, we'll label.

16 THE WITNESS: Okay.

17 JUDGE STROTHER: May I ask, do you have
18 an address, hopefully not a personal residence
19 address because I'm afraid of personal
20 information being published and something bad
21 happening from that. Is there a business address
22 for yourself you could give for the record?

1 THE WITNESS: Business address is a
2 home address. I'm retired.

3 JUDGE STROTHER: Okay. Let's leave
4 your address out of the record then.

5 THE WITNESS: Okay. Again, thank you
6 for this opportunity. First of all, and very
7 importantly, I would like to go on the record
8 that I am all in favor of growing the walnut
9 industry and achieving higher prices for all
10 parts of the industry.

11 Yesterday, as I just previously
12 explained, I believe many of the questions I
13 asked were not fully understood and therefore not
14 answered. The purpose of my testimony today is
15 to clarify my questions as well as offer my view
16 as a small grower of how the walnut industry
17 operates. In my opinion it's a little different
18 than what was described yesterday. And my doing
19 so is in hope that this will facilitate the
20 marketing order process you're going through.

21 Yesterday one of the first points that
22 I was trying to clarify was the fact that the

1 assessments that are a major discussion of this,
2 is a credit-back of an assessment the handler
3 contributes to the association are actually in
4 practice paid for by the grower. They're
5 collected by the handler, but they are taken out
6 of the growers' payments. So we pay them.

7 And Chuck Crain, when asked this
8 question yesterday -- and I think if you look at
9 the testimony it will confirm this -- although
10 another presenter said it could be negotiated,
11 and I think Michelle Connelly said it could be
12 negotiated, unfortunately, in practice the grower
13 always pays.

14 That could be verified very easily by
15 asking the growers that are members of the
16 association if they pay it or if their handler
17 pays it.

18 So what's the importance of that? The
19 implication is that true handlers, or handlers
20 that don't grow, or the handler's business side
21 of a handler/grower operation, and they actually
22 are two separate businesses, you've got a grower

1 who grows and they -- if they're a grower/handler
2 they also handle. But they gain access to the
3 bargaining efforts of the California Walnut Board
4 with no out-of-pocket expenses since those
5 expenses are all borne by the grower, collected
6 by the handler.

7 So what kind of got me interested in
8 this whole hearing was the press release that was
9 sent out on February 12th from the USDA, I
10 believe. I'm looking at it. And in the second
11 paragraph, and I'll read it, and it's announcing
12 the public hearing. But it says, the second
13 paragraph, the Walnut Board, which is responsible
14 for local administration of the order, proposed
15 amendments that would authorize the Board to
16 credit for market promotion expenses paid by
17 handlers against their annual assessment and
18 establish new rules -- or establish rules and
19 regulations for the Board -- exercise new
20 authority.

21 I hope that you can appreciate how a
22 grower feels when a press release goes out and

1 how a layperson could interpret that. Handlers
2 are getting a credit-back of assessments that
3 they are told are being paid by handlers. Well,
4 that's kind of what -- I saw that on my desk and
5 I said, you know, and I realized that the hearing
6 has been both sides.

7 I just happened to be at my computer,
8 and I logged in and, you know, just started
9 hearing the testimony. So it really was kind of
10 that -- and the communications that I received
11 from the California Walnut Board essentially have
12 said the same thing.

13 And so I believe it's misleading to
14 state that handlers are subject to an assessment
15 when it's a deduction from what the grower
16 receives from his or her crop. And as I just
17 described, in every communication I -- every
18 communication that I have received from the USDA
19 or the California Walnut Board it makes the
20 statement that assessments are paid by the
21 handler, but when really they're only collected
22 by the handler.

1 For all the growers that are tired --
2 and I'm really making this statement for all the
3 growers who are tired of paying to defray the
4 membership of the California Walnut Board, at
5 least for the record it would seem to make sense
6 that if it's paid by the grower that the records
7 would reflect that and all communications would
8 reflect that.

9 So that was one thing that I was
10 trying to, I guess, point out to those that were
11 on the call and making questions is that I don't
12 really think the -- that the questions really
13 understood the industry. And so I hopefully --
14 hopefully that clarifies it.

15 And I know there will be some push-
16 back saying it can be negotiated. But I think
17 it's real simple. Let's poll the growers and see
18 who pays and who doesn't, and the facts will be
19 very clear.

20 Secondly, there was a presentation
21 that described the industry flows, how the
22 industry flows from the grower to the consumers.

1 It was stated that the grower sells his crop to
2 the handler. I think that was the exact term
3 that Chuck Crain used. And I found that --

4 MS. CONNELLY: Your Honor, I'd like to
5 object.

6 Your Honor, you're on mute.

7 JUDGE STROTHER: I am here. I was
8 muted. I'm sorry. Who's objected?

9 MS. CONNELLY: This is Ms. Connelly.
10 The Walnut Board would object to in point 2 of
11 this testimony. This is a lot of explanation
12 about relationships that have nothing to do with
13 the proposal at hand.

14 THE WITNESS: I haven't made my point.

15 JUDGE STROTHER: I'm going to overrule.
16 It does seem to me that the relationship between
17 the handler and the grower is relevant to this
18 hearing, at least relevant enough for this
19 testimony to go in. If we get further afield
20 somehow, you can object again, and we'll address
21 it at that point. It's helpful background, if
22 nothing else, in my opinion.

1 So the objection is overruled. You
2 may continue.

3 THE WITNESS: Thank you, Your Honor.
4 And that's really my point is just to provide all
5 of the background that I think needs to be
6 described, and not just from a handler position.

7 So, so I felt that was an interesting
8 way of describing the sales transaction where you
9 sell something at a price to be determined in the
10 future by the person who's buying it. And I
11 wanted to explain that.

12 So the grower actually cultivates,
13 harvests, hulls, and dries the crop at his or her
14 expense. And you heard that he or she then
15 delivers the crop to the handler, again at the
16 grower's expense. No payments are made.

17 The grower then -- the grower turns
18 over the ownership title of the crop, their crop,
19 losing all control with no influence on what
20 price they receive. The handler proceeds to
21 ready the crop for market. And this would
22 include fumigation costs, shelling, sorting,

1 packing, storage, marketing, shipping, sales
2 commissions, et cetera, all the costs of moving
3 the product to market.

4 (Simultaneous speaking.)

5 MS. HOAGLAND: There's an objection.

6 THE WITNESS: -- partial payments are
7 made to the grower.

8 JUDGE STROTHER: Hang on, Mr.
9 MacTavish.

10 That's you, Ms. Hoagland?

11 MS. HOAGLAND: We have an objection to
12 point 2 from the California Walnut Board.

13 JUDGE STROTHER: Is that different from
14 you, Ms. Connelly?

15 MS. CONNELLY: No. That was my earlier
16 objection, Your Honor.

17 JUDGE STROTHER: Very well. Thank you.
18 We'll handle it, Ms. Hoagland. You may continue.

19 THE WITNESS: Okay. Thank you. Thank
20 you.

21 So, again, this is background so that
22 the people asking the questions and, hopefully,

1 this should have been -- probably would have been
2 better off earlier on than at the end. But I
3 guess this is background for the record.

4 So it is only when the product is sold
5 that you know what you've received.

6 Oh, so let me go back just a minute.
7 So as the product is sold, partial payments are
8 made to the grower at levels and intervals
9 determined by the handler. It is only when all
10 the product is sold that you know what you have
11 received for the sale of your crop. In some
12 cases this comes almost a year after delivery.

13 So I think it was misleading in the
14 presentation to say that the grower sells his
15 crop to the handler. For me, that implies
16 getting something of value immediately at a then-
17 determined price, which is not the case in
18 practice.

19 On point 3 in the presentation by the
20 University of California professor, and I didn't
21 have access to the exhibits, so I apologize for
22 not knowing the professor's name, but she stated,

1 and I think I got the quote correctly, because it
2 kind of caught me by surprise, that growers'
3 costs would be unaffected by this program,
4 referencing the credit-back program.

5 And so one of the questions that I
6 texted in that I don't know how it was
7 interpreted or how it was communicated, but I
8 think there was a little lacking in that whole
9 process, was that ask the professor how -- how
10 the professor could be certain that these new
11 marketing costs would not be added to the other
12 costs the grower pays to the handler for selling
13 their crop. As I described earlier in point 2,
14 there are -- you know, the marketing costs are
15 included in what the handler determines their
16 costs of operations to charge to the grower.

17 JUDGE STROTHER: Mr. MacTavish, hold on
18 for a moment. We have an objection from Mr.
19 Driver.

20 Mr. Driver, are you on? Mr. Driver?

21 MR. HATCH: I'm trying to make sure
22 he's activated now.

1 JUDGE STROTHER: Okay. You need to
2 unmute him.

3 MR. HATCH: Yes.

4 JUDGE STROTHER: There you are. I can
5 see you, but I can't hear you yet.

6 There you are, you're unmuted.

7 Mr. Driver, identify yourself again.

8 I know you --

9 MR. DRIVER: Yes. Robert Driver.

10 Robert L. Driver. I'm a California Walnut Board
11 member. I testified yesterday. And I would like
12 to address what I believe is a misunderstanding
13 of the competitive nature of handler/grower
14 relationships.

15 I do agree, because I have had three
16 different handlers over the years, I do agree
17 that the grower usually ends up having it taken
18 out of his -- the proceeds of his crop. But I
19 thought that Mr. Crain made it clear yesterday
20 that if a handler does not pay a competitive
21 return, that handler would naturally lose
22 growers.

1 Mr. Crain is not my handler. But that
2 is the real world.

3 JUDGE STROTHER: Mr. Driver, I
4 understand what you're saying. I would suggest
5 that this is not so much an objection to
6 testimony as it's something to explore with this
7 witness through your own examination.

8 And then I guess if we call one
9 witness back, we may call you back, I suppose.
10 But you seem to have a disagreement with this
11 witness as to the -- veracity is too strong a
12 word, but I think in fact you would probably
13 agree that the testimony is relevant, you just
14 don't think it's accurate. Is that right?

15 MR. DRIVER: Yes, Your Honor.

16 JUDGE STROTHER: All right. Hold your,
17 hold your thoughts for examination on this
18 question. And at that time you can ask him
19 whether he agrees, or what he bases his testimony
20 on, or something like that. Objection overruled.

21 MR. DRIVER: Thank you.

22 JUDGE STROTHER: Thank you, Mr. Driver.

1 Please continue, Mr. MacTavish.

2 THE WITNESS: Thank you, Your Honor.

3 So I'm just going to kind of go through this
4 because I know there will be, you know, more
5 objections. And I'll just wait till -- going to
6 get to it and then we can go to those.

7 So the point I was trying to make is
8 that somebody was making a claim in a
9 presentation that there would -- there will be no
10 -- that the grower's costs will be unaffected by
11 this program. And I disagree with that statement
12 because for the following reason.

13 There's absolutely no transparency
14 when it comes to what a handler charges a grower
15 for services. They're making -- thereby it makes
16 it impossible to know if the costs for this
17 program were just another to be borne by the
18 grower as a deduct to the grower's cost proceeds.

19 All of the costs of handling are
20 unknown. So to make that statement was, to me,
21 not an accurate statement. And that was what I
22 was, you know, questioning, is that you can't

1 really say that my costs would not be affected by
2 this program when you have no idea what my costs
3 are, nor do I.

4 And I guess just as, again, background
5 information, the grower receives a price per
6 pound determined by the handler after the handler
7 has made accommodations for his or her expenses
8 and profit. There is no disclosure of the
9 handler's expenses for services provided to the
10 grower.

11 The problem is that although we are
12 part of the same industry, we are not partners
13 when it comes to profits. And I heard one of the
14 other presenters say, you know, it's a trust
15 business. And, you know, that's one approach to
16 it. I'd prefer it to be trust and verify, if at
17 all possible.

18 So we have no way of verifying what
19 we're being charged or, you know, and at the end
20 of the year when prices are essentially within a
21 penny or two of all the major handlers, you know,
22 it's, it's hard to know really are you getting a

1 competitive price.

2 So further on that point I'm unaware
3 of any other businesses where you're allowed to
4 charge for services but are not required -- to
5 disclose them. If you just think through all the
6 things that you buy, you usually know what you're
7 paying for them.

8 So all that being said, again this is
9 just hopefully to help people understand from my
10 perspective, from a different perspective how the
11 industry works. I think it is in the best
12 interests of all that a handler make money, be
13 financially healthy and profitable. I mean,
14 that's -- I'm not opposed to handlers making
15 profit, you know, being profitable. That's not
16 my point. My point is that, you know, that the
17 industry needs -- the people evaluating this need
18 to understand how the industry really works.

19 Point 4, in Mr. Crain's presentation
20 it was clear that recent low prices were making
21 it difficult for growers to remain profitable.
22 And I asked Mr. Crain if the handler

1 profitability was being impacted in the same way
2 it was impacting growers. And I believe the
3 record will indicate that he responded it was.

4 And, unfortunately, because no grower
5 knows, as I just described, what he is paying his
6 handler for services and profits, nobody will
7 ever know. Without transparency it is difficult
8 to see in a non -- to see a non-conflicted
9 incentive to get the best price for grower
10 clients of the handler/grower. Instead, I see it
11 as handlers have a competing -- a competing
12 incentive to maximize throughput or product.

13 What that means is the more product
14 they're able to handle, the more money they make.
15 I believe it would lead to a more trusting
16 arrangement, somebody mentioned the trust word,
17 to actually see revenues of the handling side of
18 this industry. Now, this Walnut Board and Walnut
19 Commission were created to represent the handlers
20 and the growers. So it seems to me that there
21 should be some way of saying hey, how are the
22 handlers doing; how are the growers -- we know,

1 we saw how the growers were doing yesterday. You
2 can't make money at \$0.65 a pound growing
3 walnuts.

4 So in this environment what I want to
5 know is are -- you know, it would be very helpful
6 in creating trust if we could see how well we are
7 doing collectively as an industry, and see if the
8 pain is being spread evenly amongst the handlers
9 and the growers.

10 So let me close by saying that I
11 reiterate that I am all for growing the walnut
12 industry and higher prices for all. As I
13 mentioned a couple times in preparing my -- my
14 purpose in preparing these remarks is in the hope
15 that all those involved in reviewing the
16 marketing order or credit-back proposal are
17 equipped with more than one point of view.

18 And, again, this is my point of view.
19 Am I concerned that this will be a cost
20 ultimately borne by the grower? Yes, I am, for
21 the reasons that I think I've described already.

22 Am I concerned, and this is probably

1 the biggest one that gets in my craw, that the
2 handler pays no assessments, yet receives credit
3 for paying them? And you could look at all the
4 exhibits, all the communications, all the press
5 releases that are put out by the USDA and the
6 California Walnut Board. And, yes, I am.

7 And, unfortunately, since my original
8 reason for listening in on the call was to hear
9 the pros and cons of the credit-back proposal,
10 not to testify, I am unable to provide any well
11 thought out recommendations or suggestions on how
12 to grow our domestic market.

13 In other words, I hate to be the guy
14 saying hey, why are we, you know, not having any
15 solutions, but I really wasn't planning on
16 testifying. I was just listening and saying hey,
17 wow, that's interesting. That doesn't really
18 work, or that's not how I see the industry
19 working.

20 So I wasn't really prepared yesterday
21 or today to really question whether or not this
22 credit-back is a good thing or a bad thing.

1 Lastly, I'm still trying to understand
2 why it's only today that as an industry -- and
3 I'm a newcomer -- why are we focusing on growing
4 our most important and reliable market, the U.S.
5 consumer.

6 Before I close I do have one other big
7 concern that was raised this morning. And I
8 don't think I really received an answer. Maybe
9 Mr. Driver can shed some light on this one
10 because he was maybe part of the process.

11 But according to Michelle Connelly,
12 when I asked how the reimbursements will be
13 treated for tax purposes, in my mind I can see an
14 example, a scenario possibly -- and that's why
15 I'm just looking for clarification -- where a
16 handler can actually get more money out of this
17 program than they spend.

18 Bear with me if you would. Visualize
19 this. It will take 20 seconds.

20 If I'm a handler and I participate in
21 this program with a \$100,000 marketing
22 investment, and my combined federal and state tax

1 brackets are 40 percent -- which is not a high
2 tax bracket today with the State of California
3 taxes -- I would be offsetting that \$100,000
4 expense with \$40,000 of tax savings. And my out-
5 of-pocket costs after tax would be \$60,000.

6 According to this credit-back program
7 I can apply to the Walnut Board and request
8 \$70,000 of my \$100,000 as a reimbursement. I've
9 got a \$60,000 net after tax cost and I'm getting
10 70.

11 If that's how it works, I want some of
12 that, I guess.

13 So, that's just one point that I heard
14 today that if I'm wrong I'll be pleasantly
15 corrected. But I didn't get an answer. So, if
16 anybody on the line can confirm that I'm wrong or
17 confirm that I'm right, that would be, I think, a
18 relevant point for this discussion.

19 And like I said, I'm here just to
20 provide background information, a different point
21 of view. And I thank everyone for allowing me to
22 provide these comments.

1 And that's all I have to say. And I'm
2 happy to answer any questions anybody has for me.

3 JUDGE STROTHER: Okay. As is our usual
4 procedure, is there any examination of this
5 witness by USDA personnel?

6 MS. CHILUKURI: Yes, Your Honor. Rupa
7 Chilukuri, USDA. I just have a few questions for
8 Mr. MacTavish.

9 JUDGE STROTHER: Your witness.

10 MS. CHILUKURI: Thank you.

11 JUDGE STROTHER: Mr. MacTavish.

12 THE WITNESS: Yes, ma'am. Yes, sir.

13 JUDGE STROTHER: We heard your voice.
14 Is there something you wanted to say?

15 THE WITNESS: No. I was just saying
16 they can, they can call me John.

17 JUDGE STROTHER: No. We're going to
18 call you Mr. MacTavish.

19 THE WITNESS: Okay.

20 JUDGE STROTHER: This is a formal
21 rulemaking, as we all know. I'm joking, but
22 we'll use Mr. MacTavish.

1 Please continue, USDA.

2 MS. CHILUKURI: Thank you.

3 BY MS. CHILUKURI:

4 Q Mr. MacTavish, thank you for your
5 testimony. I just have a few questions for you.

6 I want to sort of connect it back to
7 the Notice of Hearing and the proposal at hand,
8 and your knowledge about the walnut marketing
9 order.

10 Have you, have you read the walnuts
11 order, marketing order?

12 A I've read most of it, yes.

13 Q Okay. And do you know who's regulated
14 by the walnuts marketing order?

15 A Who's regulated by it? You mean --

16 Q Right. Directly regulated.

17 A -- the California Walnut Board.

18 Q Okay. And also, I wasn't quite, quite
19 sure, and, you know, having read the testimony
20 and listening to it do you have a position on the
21 credit-back authority and the related rules and
22 requirements?

1 A Well, I think I just stated one
2 concern that I have, and that is if it is, as I
3 described, if it allows the handlers to get more
4 money after tax than they put in, yeah, I have a
5 problem with that. I just don't think that's
6 really skin in the game.

7 I heard "skin in the game" a number of
8 times yesterday, and I think that's a valuable
9 point. But if you can actually spend money and
10 after it's all said and done end up with more
11 money than you spent, I would have a concern, I
12 would have a concern over this.

13 Q Okay, thank you.

14 And the last question I have for you
15 is, are you aware that in this process there's
16 also a grower referendum where you can vote on
17 these proposals and you have an opportunity to
18 decide yea or nay on the facility? Are you aware
19 of that?

20 A Yeah. I think I recall reading that.
21 And I guess there's another, another form of
22 background information. Most of the growers I

1 think, and it was in Mr. Crain's presentation, or
2 many of the growers, maybe even half the growers
3 fall in my category, you know, 40 to 100 acres.
4 And they're struggling to make it.

5 And so most of us don't have time, or
6 most of them don't have the time to get involved
7 in these types of matters. And like I said, I
8 was just, I just happened to, just coincidentally
9 happened to see that it was yesterday. Had no
10 intention of testifying. Just wanted to hear
11 what was being said and learn something. And it
12 was through those presentations that I was
13 saying, hey, well wait a minute, that's not the
14 way I see it. And that's not the way it happens
15 to me.

16 So I just started asking questions.
17 And here I am. My intent was just, you know, to
18 try and see if I could gain some new knowledge
19 about the industry that I'm a part of.

20 MS. CHILUKURI: Those are all the
21 questions I have. Thank you for answering and
22 for your testimony.

1 JUDGE STROTHER: Any further
2 examination from anyone at USDA?

3 (No response.)

4 JUDGE STROTHER: And let me say, I
5 don't know if the procedure is clear, we do refer
6 to California Walnut Board as a proponent of this
7 proposal. I don't know whether that puts the
8 burden on them as USDA made a reference to. But
9 I will allow, assuming there's no objections, to
10 a follow-up witness who we've had before coming
11 in from the proponents of the proposal if someone
12 wants, wants to do that.

13 So, with that, again, no, looks like
14 no further examination of this witness by the
15 industry proponents?

16 MS. CONNELLY: Judge, I believe there
17 are a few folks that would like to speak.

18 JUDGE STROTHER: Very well. Your
19 witness.

20 MR. DRIVER: Robert Driver.

21 JUDGE STROTHER: Mr. Driver, please.
22 Your witness.

1 MR. DRIVER: Yes. In regard to tax
2 implications, could I speak to that?

3 JUDGE STROTHER: Why don't you ask the
4 witness whether he --

5 MR. DRIVER: All right. All right.

6 JUDGE STROTHER: That's one way of
7 doing it. Otherwise I'm going to put you on the
8 stand yourself and you can explain.

9 MR. DRIVER: All right.

10 BY MR. DRIVER:

11 Q Mr. MacTavish, since IRS is the entity
12 that writes the tax code, or Congress of course,
13 or the government writes the tax code and the IRS
14 interprets it and collects the tax, I believe
15 that we are not called as members of the Walnut
16 Board to opine on matters that we have no control
17 under.

18 Do you understand that?

19 A It was discussed that -- and it should
20 have been by legal counsel the ramifications of
21 giving a handler money from a, from a --
22 especially from a source of funds that they

1 didn't pay into.

2 MS. CONNELLY: They did pay into that.
3 That's actually the reimbursement of assessments
4 paid. It's a handler order.

5 THE WITNESS: Yeah, I'd like you,
6 Michelle, to prove to me that the handlers
7 actually pay the money and it's not a grower
8 payment.

9 MS. CONNELLY: There is -- we receive
10 checks from --

11 THE WITNESS: Collected by, collected
12 by the --

13 JUDGE STROTHER: Hold on, witness talk
14 through me to anyone else that's participating in
15 this. The witness, you're the one testifying so
16 you may say whatever you like.

17 THE WITNESS: Okay. I was just saying
18 that, you know, I know a lot of growers, I've
19 talked to many of the handlers, and if the
20 handler assesses or deducts the payment of the
21 assessment from the proceeds. And I've heard it
22 a couple times over the last couple days that it

1 could be negotiated.

2 But in real practice and, like, I
3 said, if you read Chuck Crain's testimony, he was
4 truthful and he said the handler passes it on to
5 the grower.

6 I mean, read, read the testimony from
7 Chuck's presentation. He was truthful.

8 And, you know, I don't want to get
9 into an argument about it. But if you can prove
10 otherwise, then I'd be happy to examine what
11 your, your evidence is. But I would say if you
12 ask the growers who pays the assessment it's
13 going to be if not all, pretty much all.

14 (Telephonic interference.)

15 JUDGE STROTHER: We're on the record.

16 THE WITNESS: I apologize.

17 MS. CONNELLY: Your Honor, if I may,
18 may I ask Mr. MacTavish a question?

19 JUDGE STROTHER: Mr. Driver, may Ms.
20 Connelly ask Mr. MacTavish a question?

21 MR. DRIVER: Yes.

22 JUDGE STROTHER: Proceed, Ms. Connelly.

1 BY MS. CONNELLY:

2 Q Mr. MacTavish, when you said you
3 indicated that you had read the marketing order,
4 who is the legal responsible entity for executing
5 the order?

6 A USDA.

7 Q And within the context --

8 A Can we defer to the question?

9 Q Well, I think your answer will be
10 evident.

11 The legal entity that is responsible
12 under the order for collecting assessments is
13 whom?

14 A (No audible response.)

15 JUDGE STROTHER: I'm sorry, is that --

16 THE WITNESS: I'm not hearing anything
17 if somebody's speaking.

18 BY MS. CONNELLY:

19 Q Yes. I asked the question who is the
20 legal responsible entity for collecting the
21 assessments under the order?

22 A The handler.

1 Q Thank you.

2 A Collecting? Then why does it say paid
3 by handlers against their annual assessments in
4 the press release, and the communication that you
5 -- That was my point all along is that it says
6 paid for, not collected on behalf of, it says
7 paid for.

8 JUDGE STROTHER: If I might interject,
9 I think things are getting a little muddy in the
10 record.

11 Ms. Connelly, you said collect the
12 assessment. Collecting from whom?

13 MS. CONNELLY: The handler is the legal
14 entity.

15 If Mr. MacTavish would refer back to
16 the language of the order --

17 JUDGE STROTHER: No, no, let's not. I
18 don't need to go there.

19 MS. CONNELLY: It's paid to the CWB.
20 And I think, I think that we need to just be
21 clear about that for the record. But it's taken
22 to CWB by the handlers.

1 MS. CHILUKURI: Your Honor, if I may
2 interject with the actual order language and ask
3 Mr. MacTavish about that. I started that and he
4 answered with the wrong answer. But if I just
5 may read that language into the record.

6 JUDGE STROTHER: But I think that that
7 will help the record, the clarity of the record.
8 My point, by the way, is that, and I know that
9 Mr. MacTavish has talked about the handlers
10 collecting the amounts from the growers. I think
11 the California Walnuts Board collects the
12 assessment from the handlers. And I'm just
13 trying to get a clear question.

14 Sure, I would welcome the actual
15 language of the order, Ms. Chilukuri.

16 MS. CHILUKURI: Yes, Your Honor.

17 So, I'm looking right now in 984.69.
18 And that's labeled "Assessments."

19 Sorry. I'm having some computer
20 problems.

21 Okay. So, it says with "(a)
22 Requirement for payment. Each handler shall pay

1 the Board, on demand, his pro rata share of the
2 expenses authorized by the Secretary for each
3 marketing year. Each handler's pro rata share
4 shall be the rate of assessment per kernel weight
5 pound of walnuts fixed by the Secretary times the
6 kernel weight of merchantable walnuts he has
7 certified. At any time during or after the
8 marketing year the Secretary may increase the
9 assessment rate as necessary to cover authorized
10 expenses and each handler's pro rata share."

11 I just wanted to refer all of us to
12 that language, that the order regulates handlers
13 to pay the assessment per the order. Again, we
14 can't speak to -- I'm not speaking to the
15 business relationships that handlers and growers
16 have with each other. But this is what the order
17 says. And that's why the Board as the
18 instrumentality of USDA is collecting from these
19 handlers.

20 MR. MACTAVISH: Can I speak?

21 JUDGE STROTHER: Yes, it's your turn,
22 Mr. MacTavish.

1 MR. MACTAVISH: Yeah, well, I
2 understand that. But I'm looking at my grower
3 payment. And there's an assessment paid to the
4 California Walnut Commission and the California
5 Walnut Board.

6 So there's something that's, I guess
7 that doesn't add up to me or doesn't match up to
8 me with the regulations and how I am billed for
9 payment as a Commission assessment and a Board
10 assessment.

11 I'll be happy to take my name off it
12 and submit it to you, Judge, for the record.

13 And that's my point, is that it's --
14 we're playing with words here. The grower
15 actually has that money taken out of what they
16 get and given to the Association. If that's the
17 way it is, that's the way it is. I just want it
18 to be, you know, be honest.

19 The grower pays for this out of their
20 hard-earned dollars. And the handler doesn't.
21 They just take it out of what they pay the
22 grower. And I don't know why there's such a --

1 you know, why is there such a disagreement about
2 who collects it or who pays it or what the
3 marketing order says?

4 JUDGE STROTHER: Okay. I --

5 MR. MACTAVISH: My point was purely --

6 JUDGE STROTHER: Mr. MacTavish, I
7 think you've made your point. I think --

8 MR. MACTAVISH: Thank you.

9 JUDGE STROTHER: -- Ms. Chilukuri was
10 that the, it's the handler that's regulated by
11 this order and the order that's being amended,
12 and the money is collected from the handler and
13 not directly from the grower. Is that your
14 point?

15 MS. CHILUKURI: That is my point.

16 JUDGE STROTHER: Very well. Okay.
17 I'm going back to you, Mr. Driver.

18 MR. DRIVER: Well, I just want to make
19 the following statement. You know, 100 handlers
20 --

21 JUDGE STROTHER: Wait just a minute.
22 You may not make a statement, Mr. Driver. You

1 may ask, in the technical matter of cross
2 examination, you may say something and ask the
3 witness, which is the way, the usual legal way of
4 sneaking in a statement. But this will not be
5 your testimony. I will put you back on the stand
6 and you can make whatever statement you want.

7 But if you want to bring up a point
8 just for something, for us to think about, which
9 won't be evidence unless the witness agrees with
10 you, you can say, Mr. MacTavish, would you agree
11 that, and then say whatever it is you are trying
12 to get on the record.

13 MR. DRIVER: All right. Thank you for
14 the clarification.

15 Mr. MacTavish, hypothetically, if
16 grower A paid you ten cents a pound less than
17 grower B and you had either anecdotal information
18 or you had actually seen a payment, I'm wondering
19 what would your response be in regard to the
20 disparity in those payments between the two
21 growers. I'm talking about between the two
22 handlers.

1 JUDGE STROTHER: Do you have that
2 question in mind, Mr. MacTavish?

3 MR. MACTAVISH: Yeah, well, so, well,
4 obviously in this environment, ten cents a pound
5 is a huge difference between, in your
6 hypothetical question.

7 To my knowledge, of all the growers
8 and handlers that I have shared information with,
9 nobody was outside of the ten percent, or ten
10 cents a pound rate recently. It's a kind of an
11 industry where everybody kind of ends up around
12 the same point. So, but, you know, that was kind
13 of the purpose of me testifying, was that there's
14 no transparency.

15 And this is really going to get into
16 the weeds, Judge. But the -- and this is really
17 not part of the purpose of your hearing today.
18 But there's whole other part in this where the
19 grower grades your crop.

20 JUDGE STROTHER: Stop. Stop, please.
21 Stop, stop, stop. You were asked a question.
22 Your duty as a witness is to respond to the

1 question, not to take that as an opening to go
2 somewhere else with it. Mr. Driver --

3 MR. MACTAVISH: Well, it's -- I
4 understand, but it's related. It could be
5 related. And like I said, I don't -- you know,
6 obviously --

7 MS. CHILUKURI: Your Honor, I object
8 --

9 MR. MACTAVISH: -- you'd want to find
10 your best price for your crop. So --

11 MS. CHILUKURI: -- you've already gone
12 so far afield as it relates to the Notice of
13 Hearing itself that if Mr. MacTavish is saying
14 that he's going to go further afield --

15 (Simultaneous speaking.)

16 MS. CHILUKURI: -- your admonishment.

17 JUDGE STROTHER: That's fine. And I
18 don't necessarily agree that we've gone beyond
19 the notice. But, Mr. Driver, you are the cross-
20 examiner here. Did you get an answer to your
21 question?

22 MR. DRIVER: No, I did not. It

1 matters not whether it's ten cents a pound, five
2 cents, or two cents. What would be your response
3 to seeing the difference of, between your two
4 opportunities to sell your product to different
5 handlers?

6 MR. MACTAVISH: If the price is with
7 one or two cents, I wouldn't lose any sleep over
8 it, because it changes from year to year as you
9 know. You said you had change handlers three
10 times. There must have been a reason why.

11 MR. DRIVER: There was a reason why.

12 MR. MACTAVISH: So one to two cents,
13 hey, you know, go with -- you know, sometimes
14 you're going to be above it. Sometimes you're
15 going to be below.

16 MR. DRIVER: Was that a question?

17 MR. MACTAVISH: No. I'm saying so I
18 wouldn't, it wouldn't -- if the price was close,
19 I don't want to be switching handlers every year.
20 I want them to be, I want my handler to be
21 financially secure and profitable. I just, you
22 know, don't think there's enough transparency to

1 really make that determination.

2 JUDGE STROTHER: Mr. Driver, back to
3 you. Did you get an answer to your question?

4 MR. DRIVER: I did. I don't believe,
5 though, that one or two cents is germane. I just
6 -- yes, he answered the question, but it was
7 indirect.

8 JUDGE STROTHER: Do you have follow-
9 up?

10 MR. DRIVER: I do not.

11 JUDGE STROTHER: You completed your
12 questions?

13 MR. DRIVER: Completes my questions.

14 JUDGE STROTHER: Anyone else from the
15 industry proponents for this witness?

16 Anyone participating in this hearing
17 via Zoom have any questions? Anyone that's on
18 the telephone have any questions?

19 Mr. MacTavish, since you're basically
20 your own lawyer in this, I'm going to give you
21 redirect of yourself. Is there anything further
22 you would like to say?

1 MR. MACTAVISH: I just would like to
2 thank you again. And like I said, my purpose
3 from the beginning was just to provide a
4 different perspective and just to say some things
5 that I think might have been misinterpreted in
6 the answers that I received to my questions
7 yesterday. And it was a fascinating experience.
8 So thank you very much.

9 JUDGE STROTHER: Just to reiterate, if
10 there's anyone else out there that's listening in
11 to this hearing at all, it's not too late. It's
12 almost too late if you want to testify. But
13 we'll still let you in.

14 We're looking for testimony from the
15 broadest, relevant testimony and non-repetitive
16 testimony from a broad cross section people. If
17 anyone wanted to come and tell us about things,
18 you're more than welcome. And there are no
19 apologies to be made, it's consistent with the
20 process.

21 Fools rush in perhaps. I'm going to
22 give USDA another shot. USDA have any other

1 questions? Particularly, Ms. Schmaedick, you're
2 the one who's got to write up this decision.

3 By the way, I will say for the record
4 that, you know, I am making a determination where
5 there was an objection and I overruled it and I
6 allowed the evidence in. That's my determination
7 for purposes of developing this record.

8 That is not -- I'm not the decision-
9 maker here. If the decision-maker decides to
10 give no weight to that testimony, perhaps because
11 it's not relevant or not reliable or for whatever
12 reason, that will be the decision-maker's
13 determination. All I'm determining is it's
14 relevant enough to put in this record to go the
15 appropriate --

16 MS. HOAGLUND: Judge Strother?

17 JUDGE STROTHER: -- including the
18 secretary. Yes.

19 MS. HOAGLUND: Mr. Norene had, he's
20 indicated that he had his hand up. I can't see
21 him any longer on the shot. Okay. I see him.
22 He's on Zoom.

1 JUDGE STROTHER: Ah he is muted again.

2 Mr. Norene, did you have something?

3 MR. NORENE: Yes, Your Honor. And
4 again, my name is Robert Norene, R-O-B-E-R-T, N-
5 O-R-E-N-E. I've been a member of the Walnut
6 Bargaining Association and a founding member
7 since 1995. I've negotiated with handlers and
8 it's guessed many of these contract issues that
9 Mr. MacTavish addresses.

10 I appreciate your last comments
11 regarding allowing his testimony and overriding
12 the objection of Ms. Connelly. But Mr. MacTavish
13 is under some misleading opinions about
14 handler/grower relationships. I --

15 JUDGE STROTHER: Yeah, Mr. Norene, you
16 don't have questions for this witness, but you
17 believe that there are things in Mr. MacTavish's
18 testimony that you would like the opportunity to
19 respond to on the record. Is that correct?

20 MR. NORENE: That's correct, Your
21 Honor.

22 JUDGE STROTHER: Okay. Let's put,

1 let's slot you into being recalled to the stand,
2 assuming that no one has any objections to that.
3 Do you have any questions for this witness?

4 MR. NORENE: Do I have questions for
5 Mr. MacTavish?

6 JUDGE STROTHER: Yes.

7 MR. NORENE: Not especially, Your
8 Honor.

9 JUDGE STROTHER: Well, for instance,
10 you could ask him do you agree, Mr. MacTavish,
11 that blah, blah, blah.

12 MR. NORENE: Okay. Thank you, Your
13 Honor.

14 Mr. MacTavish, when you look at your
15 grower return sheet from whoever your handler
16 might be, do you see a total amount of funds
17 withheld from your grower payments?

18 MR. MACTAVISH: I'm not sure I
19 understand the question.

20 MR. NORENE: The handler that I sell
21 walnuts to --

22 MR. MACTAVISH: Do you mean the

1 assessments or the total expenses?

2 MR. NORENE: No, your grower return
3 sheet should indicate an amount withheld from
4 payments that you get for the walnuts that you
5 delivered. Those payment amounts should be a
6 total that you could divide by the total amount
7 of pounds of walnuts you delivered to give you a
8 total cents per pound, in-shell pound that you
9 delivered.

10 That amount should not exceed
11 somewhere in the neighborhood of 2.75 cents
12 overall for a California Walnut Board and
13 California Walnut Commission assessments. The
14 California Walnut Commission assessment is an
15 obligation of walnut growers. The California
16 Walnut Board assessment is an obligation by
17 handlers.

18 Many handlers, but not all, many
19 handlers do collect, withhold that amount of
20 money for the California Walnut Board from
21 growers, but not all. That is a contract
22 obligation negotiation between you and the

1 handler that you choose to sell your walnuts to.

2 So do you see that information on your
3 grower payout sheet?

4 MR. MACTAVISH: I do.

5 MR. NORENE: Would you be able to give
6 us a total amount of your funds withheld on cents
7 per pound?

8 MR. MACTAVISH: Yeah, let me do the
9 math for you. It's close to whatever the maximum
10 is or both parts of it. There's a breakdown, a
11 California Walnut Commission assessment and a
12 California Walnut Board assessment.

13 MR. NORENE: Okay. What is the
14 California Walnut Board assessment?

15 MR. MACTAVISH: Let's see here. Well,
16 that would be a price per pound or an assessment
17 per pound. So --

18 MR. NORENE: Look at your in-shell
19 delivery pound.

20 MR. MACTAVISH: I got you. I got you.
21 I got you. I'm just trying to find that
22 information. It looks like the California Walnut

1 Commission assessment is one percent.

2 MR. NORENE: One cent, one cent.

3 MR. MACTAVISH: One cent, excuse me.

4 And the -- and it looks like it's 1.85 California
5 Walnut Board assessment.

6 MR. NORENE: 1.85 cents per in-shell
7 pound?

8 MR. MACTAVISH: Well, yeah. So --

9 MR. NORENE: So the --

10 MR. MACTAVISH: Yeah.

11 MR. NORENE: That's a long ways from
12 four cents per pound was the number that you had
13 used previously. So I think that clears the air
14 on one misunderstanding that --

15 MR. MACTAVISH: Well, let me -- that's
16 for one part. That's for one shipment. Let me -
17 - that's not the annual. So I'd have to look at
18 last year's record and --

19 MR. NORENE: Okay. Well, you know,
20 I'd suggest you do that at your leisure. But I
21 thought it was --

22 MR. MACTAVISH: It doesn't change the

1 record that -- let me clarify my answer.

2 MR. NORENE: Yeah.

3 MR. MACTAVISH: What isn't clarified
4 and my whole point in this is that this is a
5 credit back for expenses paid by handlers against
6 their annual assessments. Those dollars are,
7 include my assessments. Would you agree?

8 MR. NORENE: The credit back will be
9 paid, if you're asking me a question. I guess
10 that's all right, Your Honor?

11 JUDGE STROTHER: For clarification of
12 the questions you've asked him.

13 MR. NORENE: If I understand your
14 question, Mr. MacTavish, you suggest that the
15 handler is going to get money for funds that you
16 paid in his behalf to the California Walnut
17 Board.

18 But in reality, he needs to spend
19 funds, advertising, market promotion, product
20 development. He needs to spend funds in order to
21 get any reimbursement from the California Walnut
22 Board.

1 Now, the funds that he spends are in
2 addition to any other marketing expenses, et
3 cetera, PG&E bills, labor bills, whatever he
4 might spend in the course of his operation, the
5 cost to transport walnuts from your huller/dryer
6 to his plant facility. The only --

7 MR. MACTAVISH: I understand. I
8 understand all that. Get to the point, please.

9 MR. NORENE: Yeah, he --

10 JUDGE STROTHER: You might stop every
11 once in a while and say do you agree, Mr.
12 MacTavish.

13 MR. NORENE: Oh, thank you, Your
14 Honor. So, if you agree with those various
15 scenarios, you have to realize that he's going to
16 get reimbursed from the California Walnut Board
17 partially for his market promotion, his
18 advertising or product development costs. Do you
19 agree with that?

20 MR. MACTAVISH: You misunderstood my
21 question to you.

22 MR. NORENE: Okay. I'll try --

1 MR. MACTAVISH: I said -- let me
2 repeat myself. I said that the handler is going
3 to get reimbursed from money that I pay to the
4 Association. Is that correct?

5 MR. NORENE: I don't believe so.

6 MR. MACTAVISH: So they're truly going
7 to get a reimbursement of money they paid to the
8 Association that came out of their bottom line.

9 MR. NORENE: The handler pays an
10 assessment. Pardon me, Your Honor. The handler
11 pays an assessment based upon a product that is
12 inspected by, oh boy, by the DFA, Dried Fruit
13 Association, when it's ready for shipment. That
14 precipitates his need to pay the assessment to
15 the California Walnut Board. Part of the --

16 MR. MACTAVISH: So where does the
17 money that I pay go?

18 MR. NORENE: It goes to the handler.

19 JUDGE STROTHER: And all of this is by
20 way of clarifying the questions Mr. MacTavish is
21 being --

22 MR. MACTAVISH: Yeah, we're not

1 getting anywhere. I don't think he's
2 understanding what I'm trying to get to.

3 And so, you know, like I said, I'm
4 being assessed. And nobody's answered this
5 question, which is I think a valid one, Your
6 Honor. And that is -- and I gave the example.
7 And I'll give it again.

8 I understand the handler has to spend
9 money to get money. But if they're reimbursed
10 for their, for the money they spend to a tune
11 greater than they spend, I want some of that.

12 And I gave you the \$100,000 example
13 after tax and after reimbursement, so the handler
14 is positive. He isn't spending any of his or her
15 money.

16 JUDGE STROTHER: I think you've made
17 that very clear on the record. I think we're
18 clear as to that. And I think we can move on.

19 MR. MACTAVISH: Thank you.

20 JUDGE STROTHER: Okay. Mr. Norene,
21 did you have any further questions?

22 MR. NORENE: No, Your Honor. I don't

1 have any tax advice information. You know, I
2 can't react to that comment.

3 I just wanted to clarify, and I think
4 Mr. MacTavish has, that there was an error in a
5 comment of four cents per pound leads to a
6 significant misunderstanding.

7 There's additional clarification that
8 needs to be undertaken. And hopefully, if Mr.
9 MacTavish participates in the industry and the
10 Walnut Bargaining Association, we can help
11 clarify his understanding of our industry.

12 JUDGE STROTHER: Okay. None of that's
13 testimony. You're supposed to be asking
14 questions of the witness. And you can come back
15 on and testify. I'll let you do that.

16 MR. NORENE: Thank you, Your Honor.

17 JUDGE STROTHER: I mean, it's not
18 going to be evidence. But you're just speaking,
19 making statements while you're examining the
20 witness.

21 Are we back to you, Mr. Driver?

22 MR. DRIVER: I have no further

1 questions.

2 JUDGE STROTHER: You may have said
3 that before actually. All right. No further
4 questions from Mr. Driver. Anyone else from the
5 industry have any questions? Anyone from USDA
6 have any questions?

7 MR. HATCH: Ms. Chilukuri and Melissa
8 Schmaedick had been disconnected. They're
9 attempting to connect back in.

10 JUDGE STROTHER: Okay. Let's give
11 them a moment.

12 MR. HATCH: This is Andy Hatch.
13 They're continuing to try to connect. And I've
14 conveyed that they have a couple minutes through
15 text.

16 JUDGE STROTHER: Thank you. Any idea
17 what's going on, Mr. Hatch?

18 MR. HATCH: They're connecting back
19 in. And I'm trying to activate them back to
20 speaking and everything.

21 MS. CHILUKURI: Hi. I'm Rupa
22 Chilukuri, USDA. I'm sorry. I think we got

1 kicked off at some point. So I apologize for
2 that.

3 JUDGE STROTHER: I'm not sure it was
4 your fault, Counsel. Is Ms. Schmaedick back yet?

5 MS. CHILUKURI: Ms. Schmaedick is
6 joining --

7 JUDGE STROTHER: Okay, Great.

8 MS. CHILUKURI: -- joining through my
9 phone. So she is on --

10 (Telephonic interference.)

11 JUDGE STROTHER: Okay. Great. Can
12 you hear me, Ms. Schmaedick? All right. So I
13 guess I'll just go through --

14 (Telephonic interference.)

15 JUDGE STROTHER: I don't know whether
16 we had any testimony from Mr. MacTavish while you
17 were offline, Ms. Chilukuri and Ms. Schmaedick,
18 or not.

19 But I guess I was making another pass
20 through to see whether anyone had any further
21 questions. Let's just try it that way. Does
22 USDA have any further questions?

1 MS. SCHMAEDICK: I do not.

2 JUDGE STROTHER: Okay.

3 MS. CHILUKURI: Nor do I, Your Honor.

4 JUDGE STROTHER: All right. Mr.

5 MacTavish, did you say everything you had to say?

6 MR. MACTAVISH: Probably more than I
7 needed to say. Thank you, Judge.

8 JUDGE STROTHER: Not at all. Okay.

9 We had one exhibit, which was Exhibit 30, which
10 is Mr. MacTavish's testimony. Any objection to
11 that going into the record? Hearing none,
12 Exhibit 30 is admitted into the record.

13 (Whereupon, the above-referred to
14 document was received into evidence as
15 Exhibit 30.)

16 JUDGE STROTHER: Okay. I think we're
17 out of the initial witnesses, where I expressed a
18 willingness if there was no objection to have
19 either (telephonic interference) Mr. Mariani come
20 back on the stand, something of a rebuttal. Does
21 the California Walnut Board want to recall these
22 witnesses as rebuttal witnesses?

1 MS. CONNELLY: I don't believe that we
2 do, Your Honor.

3 JUDGE STROTHER: Okay. Then I guess
4 we allowed USDA to call back Mr. Mariani and Mr.
5 Carriere before. Does USDA want to recall any
6 witnesses really for purposes of rebuttal I guess
7 even though you're not the proponent of the
8 change in the marketing order?

9 MS. CONNELLY: No, Your Honor. I
10 don't believe that we are (telephonic
11 interference) --

12 JUDGE STROTHER: Okay. It sounds like
13 no one wants any further --

14 MS. CONNELLY: -- recalling any
15 additional witness.

16 JUDGE STROTHER: Okay. Anything else
17 having to do with witnesses that we need to talk
18 about now?

19 MS. CONNELLY: Are there going to be
20 additional witnesses?

21 JUDGE STROTHER: There are no
22 additional witnesses.

1 MR. MACTAVISH: Judge?

2 JUDGE STROTHER: Yeah.

3 MR. MACTAVISH: Judge? John MacTavish
4 here.

5 JUDGE STROTHER: Yes, sir.

6 MR. MACTAVISH: Am I still on?

7 JUDGE STROTHER: I can hear you, yes.

8 MR. MACTAVISH: Yeah, I think I was
9 speaking to a Mr. Norene. And I just wanted to
10 set the record straight. I looked at my grower
11 payments. And can you hear me?

12 JUDGE STROTHER: We can. Proceed.

13 MR. MACTAVISH: Okay. I'm sorry. So
14 I am being assessed at the four cent rate after
15 doing my calculations. So I just wanted to let
16 him rest assured that I have my facts together
17 and that I wasn't incorrect. It's on edible
18 yield and not, and I was comparing, I was reading
19 those numbers on in-shell.

20 JUDGE STROTHER: Okay. I blame myself
21 for this record getting a little sloppy. And
22 this --

1 MR. MACTAVISH: And that's it. Hey,
2 thank you for putting up with all this.

3 JUDGE STROTHER: That's what we're all
4 here for. Mr. Norene, did you hear Mr.
5 MacTavish's statement just then?

6 MR. NORENE: Thank you, Your Honor.
7 I missed a part of it. It broke up. Could he
8 repeat that answer, please?

9 JUDGE STROTHER: Actually, let me test
10 my understanding of this. Did you say, Mr.
11 MacTavish, that you were in fact being assessed
12 the four cents on your statements?

13 MR. MACTAVISH: Yeah, yes.

14 JUDGE STROTHER: That's what he said.

15 MR. MACTAVISH: It's based on edible
16 yield, not in-shell.

17 JUDGE STROTHER: Do you have that in
18 mind, Mr. Norene?

19 MR. NORENE: I believe, Your Honor, if
20 he looked at the statement, it's four cents per
21 hundred weight of edible yield. That's the
22 correction that he needs to acknowledge. If he

1 would read that whole statement, he would be able
2 to see that.

3 JUDGE STROTHER: Mr. MacTavish, do you
4 agree with that, that it's --

5 MR. MACTAVISH: I agree.

6 JUDGE STROTHER: The witness agrees.

7 MR. NORENE: Thank you, Your Honor.

8 JUDGE STROTHER: Okay. That completes
9 you. Apparently, no one wants to call you back
10 on the stand, Mr. Norene. (Telephonic
11 interference) step down again from the virtual
12 witness stand.

13 We have no more witnesses as I
14 understand it. Going once, going twice, sold.
15 All right.

16 So should we take lunch and then come
17 back and talk about the procedural schedules?
18 Ms. Chilukuri, I'm looking to you as one of the
19 counsel.

20 MS. MCGOWAN: Your Honor, this is
21 Tracy McGowan, USDA. (Telephonic interference.)

22 JUDGE STROTHER: I'm sorry. You broke

1 up.

2 MS. MCGOWAN: I believe Ms. Chilukuri
3 is on again. I will --

4 (Telephonic interference.)

5 JUDGE STROTHER: Can you hear me, Ms.
6 Chilukuri?

7 MS. CHILUKURI: I can. I'm having a
8 little bit of trouble.

9 JUDGE STROTHER: Okay. And I think --

10 MS. CHILUKURI: So I asked, during a
11 break, I asked Tracy to avoid any feedback issues
12 or anything like that.

13 MS. MCGOWAN: Correct. I can speak.
14 If you would like to talk about the scheduling, I
15 can speak on behalf of Ms. Chilukuri, if you'd
16 like to do that now. If you'd like to take a
17 little break and do it afterwards, it's certainly
18 up to you, Your Honor.

19 JUDGE STROTHER: Have you had the
20 opportunity to talk to other participants about
21 scheduling? Is this a consent proposal or --

22 MS. MCGOWAN: I can't speak to that

1 there has been any consent by all the
2 participants, no. These are just, it states that
3 USDA has discussed, not with the other
4 participants.

5 JUDGE STROTHER: Okay. Let's go ahead
6 and tell me which -- let's put what you have on
7 the record. And if we have -- we may have to go
8 off the record just to save pages to discuss.
9 But go ahead. What does USDA propose for a
10 schedule?

11 MS. MCGOWAN: So the proposal would
12 be, I believe you spoke already about corrections
13 to the transcript. And I just wanted to clarify.
14 Would that be, the proposal is, would that be
15 seven calendar days after receipt of the
16 transcript for corrections, or would it be seven
17 business days to submit corrections to the
18 transcript?

19 JUDGE STROTHER: It wasn't my
20 proposal. My recollection is someone said seven
21 business days, but whatever the parties think
22 they need and want. You've got to coordinate, as

1 I understand it, with other parties.

2 I don't think it's going to -- it only
3 took us two days to make the transcript. It
4 shouldn't take that long to go through it I
5 wouldn't think.

6 But you do have to coordinate with
7 others, as I understand USDA's proposal, but
8 whatever the parties can agree to until you
9 can't, and then I'll order something.

10 MS. MCGOWAN: Do we need to coordinate
11 off the record, because I would propose seven
12 calendar days, that would be one week, to submit,
13 the USDA would submit corrections to the
14 transcript after receiving them from the parties.

15 JUDGE STROTHER: Works for me. Any
16 objections? What would we do if anyone had any
17 problems with any of the objections you couldn't
18 agree to amongst yourselves?

19 MS. MCGOWAN: Well, I believe that we
20 would submit our corrections. And if another
21 party didn't agree with ours, they could submit
22 their corrections as well, in addition.

1 But we would be happy to collect the
2 corrections and submit those that we agreed with.
3 I'm just, I'm not familiar if there's been a
4 disagreement over the corrections before what to
5 do about that.

6 JUDGE STROTHER: Well, before I guess
7 I had suggested if there was a disagreement,
8 (telephonic interference) about that at the time.
9 Mr. MacTavish, you're back on screen. You
10 shouldn't --

11 MR. MACTAVISH: And we were --

12 JUDGE STROTHER: Okay. Ms. McGowan,
13 I'll tell you what. These things are coming to
14 me. Why don't we put seven calendar days for
15 corrections? And then you can tell me whether
16 there are corrections you couldn't agree to and
17 we'll decide what to do then.

18 MS. MCGOWAN: Very good, Your Honor.

19 JUDGE STROTHER: All right.

20 MS. MCGOWAN: Judge Strother, just to
21 clarify, it's seven days after the transcript is
22 available on the AMS website?

1 JUDGE STROTHER: Yes. Seven days
2 after posting. I guess, Mr. Hatch, we post the
3 transcript on the same web page that the exhibits
4 are posted on now?

5 MR. HATCH: That's exactly right, Your
6 Honor.

7 JUDGE STROTHER: Very well. Okay.
8 Ms. McGowan, is there a proposal on briefing?

9 MS. MCGOWAN: Yes, Your Honor. On
10 briefing, we would then propose two weeks, that
11 would be 14 calendar days, after the transcript
12 is certified for a briefing deadline.

13 JUDGE STROTHER: California Walnut
14 Board, you're the ones that, one of the main, you
15 are the proponent.

16 By the way, Ms. McGowan, are you
17 proposing an initial brief and an answering brief
18 format, that is everybody would go first with an
19 initial brief, then everybody would have the
20 opportunity to answer?

21 MS. MCGOWAN: I would have to defer,
22 if Ms. Chilukuri is still on and can hear me.

1 MS. CHILUKURI: Yes. Ms. McGowan, I
2 can. This is Rupa Chilukuri, USDA. I just
3 wanted to --

4 (Simultaneous speaking.)

5 MS. CHILUKURI: -- a brief can be in
6 the form of a letter. It can be very simple.
7 So, at this point, I wouldn't request (telephonic
8 interference).

9 JUDGE STROTHER: You were breaking up,
10 Ms. Chilukuri.

11 MS. CHILUKURI: Sorry. Can you say
12 that again, Judge Strother?

13 JUDGE STROTHER: You were breaking up.
14 I couldn't hear what you said.

15 MS. CHILUKURI: Let me -- again, Judge
16 Strother.

17 JUDGE STROTHER: Yes.

18 MS. CHILUKURI: Let me try a different
19 way. Okay. Is this a little bit --

20 JUDGE STROTHER: It's --

21 (Telephonic interference.)

22 MS. CHILUKURI: Is this a little bit

1 better?

2 (Telephonic interference.)

3 JUDGE STROTHER: It's pretty broken
4 up.

5 MS. MCGOWAN: Your Honor, I texted Ms.
6 Chilukuri to see if she could text back to me
7 what she would like to say if she continues to
8 break up. So --

9 JUDGE STROTHER: Okay.

10 MS. MCGOWAN: Okay.

11 JUDGE STROTHER: I mean, we could take
12 a break for lunch. But I think we're pretty
13 close to wrapping this up.

14 I guess I can turn to another item
15 while we're waiting to hear about that. And I
16 don't think we need to do anything more on
17 exhibits.

18 I just wanted to go over, I have
19 admitted into evidence exhibits, as set out on
20 the AMS web page, 1 through 30 except Exhibit 27
21 was withdrawn by Ms. Connelly. So that's not
22 admitted. But all other exhibits between 1 and

1 30 are now part of the record. Is that -- would
2 everyone agree that I have that correct?

3 MS. MCGOWAN: Yeah.

4 MR. HATCH: Yes, Your Honor.

5 JUDGE STROTHER: Okay. So that's the
6 record. Ms. Chilukuri, are you back with us?

7 MS. CHILUKURI: Can you hear me okay
8 now?

9 JUDGE STROTHER: Is that you, Ms.
10 Chilukuri? I could hear that.

11 MS. CHILUKURI: Yes.

12 JUDGE STROTHER: Okay --

13 MS. CHILUKURI: -- Rupa Chilukuri,
14 USDA. So I just wanted to talk briefly about the
15 briefs.

16 JUDGE STROTHER: Yes. Do you have a
17 proposal?

18 MS. CHILUKURI: So --

19 (Telephonic interference.)

20 MS. CHILUKURI: -- a brief, it doesn't
21 have to be a (telephonic interference) just
22 following up on --

1 JUDGE STROTHER: Oh, boy. We got all
2 the way to the end.

3 MS. CHILUKURI: -- what Ms. McGowan
4 had said or anything like that. It would just be
5 people, a legal brief if people would go that
6 route.

7 JUDGE STROTHER: This is completely
8 breaking up. We got this far. It worked pretty
9 well. But --

10 (Telephonic interference.)

11 JUDGE STROTHER: -- breaking up too
12 much for me to understand.

13 MS. HOAGLUND: Judge Strother? This
14 is Erin Hoaglund. If Ms. Chilukuri wants to
15 write her, what she wants to say in the chat
16 board, I can read it. It might be easier that
17 way, because it's very difficult.

18 MS. CHILUKURI: I actually did that to
19 Tracy. So, Tracy, did you receive --

20 MS. MCGOWAN: No, I have not received
21 --

22 MS. CHILUKURI: -- anything?

1 MS. MCGOWAN: I'm sorry. I apologize,
2 Your Honor.

3 MS. CHILUKURI: Maybe I'll send that to
4 you, Erin.

5 MS. MCGOWAN: Right. I can speak to
6 that. Ms. Chilukuri was trying to make the point
7 that a brief doesn't have to be a legal brief in
8 that form with an argument. It could be in the
9 form of a letter opining on the record.

10 And, yes, and I believe she is saying
11 just one round of briefing. But, please, bear
12 with me a minute, and I will confirm that with
13 her.

14 JUDGE STROTHER: Is Ms. Schmaedick on
15 the line?

16 MS. MCGOWAN: This is Tracy McGowan
17 again. And she did confirm, yes, just one round
18 of briefing, and the briefing could be, as I said
19 before, in whatever format the submitter would
20 like. It does not have to be a formal brief.

21 JUDGE STROTHER: All right. I agree
22 with that. I'm not sure I agree with one round.

1 Is Ms. Schmaedick on the line? Is Ms. Schmaedick
2 on Zoom here somehow? She's the one that's going
3 to write the recommended decision as I understand
4 it. And I want to be cognizant of what serves
5 her purposes.

6 (Telephonic interference.)

7 MS. HOAGLUND: Wasn't Ms. Schmaedick
8 calling through Rupa Chilukuri's line?

9 MS. CHILUKURI: I'll let Ms.
10 Schmaedick speak up if she is able. But if it's
11 breaking up, I'm not sure --

12 JUDGE STROTHER: Yeah. Our technology
13 has failed us.

14 MS. MCGOWAN: I'm texting Ms.
15 Chilukuri again, so perhaps she will respond. I
16 apologize for the delay.

17 MR. HATCH: This is Andy Hatch.
18 Melissa Schmaedick texted me saying one round is
19 fine. We customarily only do one she says.

20 JUDGE STROTHER: Okay. She is the one
21 who has to write the decision.

22 I will say this on the record. We can

1 do one round of briefs. But if somebody has
2 something they want to respond to, they can shoot
3 in an answer with a request to respond and we'll
4 deal with that when it happens, even with a
5 request for a, you know, quick ruling on that.

6 Same thing on the transcript
7 corrections. If transcript corrections are
8 submitted and somebody has some disagreement with
9 that, is there a provision for a particular time
10 to object? Somebody can always make their own
11 schedule, but it should be quick.

12 MS. MCGOWAN: Your Honor, this is Ms.
13 McGowan again. I'm a little confused. So we've
14 got the seven calendar days for the transcript
15 request. And if there's a disagreement, then we
16 would provide for that in the schedule. I
17 understand that. I think that could be resolved
18 fairly quickly.

19 But I wonder if we could get some
20 clarification. You said the one round is fine,
21 but if someone has a question or has a request
22 for someone else to respond, that you would

1 consider that if it happened. What would you,
2 would we have a call, a conference call to
3 discuss the timing of that or what do you
4 envision on that?

5 JUDGE STROTHER: Well, I think whoever
6 is got the problem should, you know, request what
7 they want me to do at the time.

8 An ideal thing to do would be to
9 submit an answering brief that says this is what
10 I want to respond to and this is why. This is
11 inaccurate, or I didn't get the opportunity to
12 raise this, or whatever the reason is why they
13 think they deserve the opportunity to answer.

14 Now, I would advise parties submitting
15 initial briefs, and normally I would say this
16 anyway even if there were answering briefs
17 provided for, don't sandbag. Don't assume you're
18 going to be able to get in your position on the
19 next round of briefs. Say whatever it is you
20 have to say in the first round of briefs.

21 So I'm a little, I'm frankly a little
22 skeptical that we just let people submit initial

1 briefs, because you don't have the discipline of
2 someone coming in and saying that's not right.

3 But if Ms. Schmaedick, who's writing
4 the recommended decision, can live with one round
5 and that is the typical way of doing this, I
6 agree with that. I think if that's what the
7 parties desire, that's fine with me. Make sense?

8 MS. MCGOWAN: It makes sense to me.

9 JUDGE STROTHER: I feel like I'm
10 yelling. I apologize if it seems that way. Ms.
11 Hoaglund, you're smiling. Does this make all
12 sense to us as OALJ on this case?

13 MS. HOAGLUND: Yes. I just thought it
14 was funny that you said you were yelling.

15 (Laughter.)

16 MS. HOAGLUND: You were.

17 JUDGE STROTHER: My wife tells me when
18 I work from home. I'm in an office now. Now, no
19 reason you should care about this. It's too much
20 information. But her office is right up above
21 from mine, and she says she can't work there
22 while I'm on one of these things because I'm

1 yelling. So I'll try to improve.

2 But, all right. It sounds to me.
3 Does anyone have any objections to one round of
4 briefs? Let's start with that. Hearing none,
5 we'll do one round of briefs.

6 Those briefs will be due 14 calendar
7 days, and by due I mean they'll be filed with the
8 Hearing Clerk's office. They can be sent in via
9 email, the usual filing arrangements. I'm sure
10 we could find out how to do that if somebody
11 that's working on this doesn't know. Before 4:30
12 by the way, 14 calendar days after I certify the
13 record.

14 MS. HOAGLUND: Judge Strother?

15 JUDGE STROTHER: Yes.

16 MS. HOAGLUND: What if the calendar
17 day -- I haven't looked at it. But if the
18 calendar day falls on a Saturday, Sunday, or
19 federal holiday, you want to move the deadline
20 the next business day, like the Rules of Practice
21 provide?

22 JUDGE STROTHER: Yes, yes, go by the

1 -- we could just say that in front. But the
2 usual procedural rules would state that if the,
3 if a day falls on a Saturday or a Sunday or a
4 federal holiday, that automatically moves the
5 deadline to the next business day. And that's
6 what I would expect to follow here.

7 And if something, of course -- well,
8 it's actually an interesting point when you
9 actually consider it more before. It seems to me
10 that the presiding judges have ruled on motions
11 to extend those deadlines in the past.

12 But one could also argue that the
13 rules provide that this case is out of my hands
14 once I certify the record, and the administrator
15 ought to be doing that. But let's just cross
16 that bridge when we get there.

17 I would expect if someone seeks an
18 extension of the deadline for some reason that
19 since I'm the one that set that deadline, I would
20 be the one to extend it. I know that's just a
21 statement. I'm not asking for anyone to agree or
22 disagree.

1 All right. Hearing no objections,
2 seven calendar from the posting of the transcript
3 that we receive from the reporter on the AMS
4 website. USDA will submit proposed transcript
5 corrections to me that had been vetted with other
6 participants in the proceeding.

7 Then 14 calendar days after I certify
8 the record, initial and the sole briefs, and the
9 brief can be in any form. It could be a letter.
10 It could be any kind of comment. Ms. Schmaedick
11 is okay with this. The rules actually say
12 argument or proposed findings of fact.

13 We're not going to put any pages
14 limits on those briefs. We're not going to put
15 any limits on the format. Just tell us your
16 position as supported by the record.

17 I will say that, as the rules provide,
18 the record will be closed at that point. Any
19 factual evidence can only come from the record.
20 It can't come from something outside. Now there
21 are rules on official letters and things like
22 that.

1 But, and also I would say that as far
2 as reply briefs or answering briefs, I mean, if
3 somebody submits something with a bunch of
4 attachments, that could be objectionable.

5 It could be a motion to -- it's not
6 really a motion to strike, because it's not
7 testimony. It would be a motion to disregard
8 that portion of a brief. And I guess really that
9 motion might, that motion might go through the
10 administrator. So I think we have a procedural
11 schedule.

12 I guess I should loop in the court
13 reporter. Mr. Stroman, I understand that, or at
14 least my recollection is that the Agency asked
15 for a five business day turnaround on the
16 transcript. Is that doable?

17 COURT REPORTER: Your Honor, all of
18 those details are handled through our office. So
19 I wouldn't be able to tell you, unfortunately.

20 JUDGE STROTHER: Okay. So you don't
21 have, you have no projection of when the
22 transcript --

1 COURT REPORTER: No, Your Honor. I
2 don't have any information pertaining to that.
3 But if anyone gives our office a call, they would
4 be able to direct you on that.

5 JUDGE STROTHER: Give me a moment. I
6 think that's all I have. Anyone else have
7 anything substantive, procedural, housekeeping,
8 anything at all?

9 Okay. Hearing none, I appreciate
10 everyone's participation in this. It was a very
11 professionally done rulemaking hearing. I
12 appreciate everybody's input.

13 I thought that the -- not that anyone
14 should go by my opinion on this, but I thought we
15 did well through this electronic means given the
16 situation. And it seems like a supportive record
17 to me. Anyone else have anything to say?

18 Okay. With that, we'll close this
19 hearing. Have a good day. Stay safe. Off the
20 record.

21 (Whereupon, the above-entitled matter
22 went off the record at 3:38 p.m.)

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C E R T I F I C A T E

This is to certify that the foregoing transcript


In the matter of: Walnuts Grown in California
Amendment to Marketing Order No. 984

Before: USDA

Date: 04-21-20

Place: teleconference

was duly recorded and accurately transcribed under
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Court Reporter

NEAL R. GROSS

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