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Agritourism, CSAs, and Direct to Consumer Sales

*Julie Bowling*²

*Rob Holland*³

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MR. WHITAKER: My name is Dan Whitaker. I'm a third-year staff editor on the *Tennessee Journal of Law and Policy*. I grew up on a farm over in Marshall County, Tennessee. That's just over in the heart of God's country. Our first panel discussion today is going to focus on some popular trends in food production and sales as well as agritourism operations. Producers who market to the public and invite them onto their farms, they face some unique legal challenges that other farmers may not, and each of our panel has had extensive experience in that area. First we have Ms. Julie Bowling. She is Assistant General Counsel and Manager of Payroll and Benefits for Farm Bureau Insurance of Tennessee. She graduated from University of Tennessee at Knoxville with a degree in agriculture, so it's good to have her back home. She received her JD with high honors from Emory University School of Law in 2006. She practiced in Atlanta, Georgia, for over three years focusing on tax controversy and litigation before moving to Columbia, Tennessee, in the spring of 2010, over near God's country.

Today, Julie enjoys working on a variety of legal issues that arise from Farm Bureau Insurance and the other Tennessee Farm Bureau Insurance Companies, including employment law, tax issues, litigation, insurance law and agricultural law. Julie has made presentations for CPE and

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CLE credits for CPAs and attorneys on tax issues, insurance law and agricultural law. She is licensed to practice in the states of Tennessee and Georgia. Julie and her husband Matthew are activity members of Graymere Church of Christ in Columbia. In her free time she enjoys old house restoration projects, running and spending time on her family's farm in Coffee County, Tennessee.

Next, we have Mr. Rob Holland, who has been the Director for the Center for Profitable Agriculture since September 2007. Prior to his appointment as Director, Rob served as the Center's Financial Feasibility Specialist from April of 1998 to August 2010, and served as the Extension Area Specialist in Farm Management from September 1993 to March 1998, covering ten counties here in East Tennessee. Rob received a bachelor's degree in Agricultural Business from University of Tennessee at Martin in 1991 and a master's degree in Agricultural Economics from University of Tennessee at Knoxville in 1993, so welcome home as well.

In 2007 Rob graduated from the Corporate Leadership Development Program at Belmont University in Nashville. He is a 2007 graduate of Leadership Murray, serves on the Board of Directors for the Tennessee Council of Cooperatives, is a member of the Murray County Alliance and a member of First United Methodist Church in Columbia, also over near God's country. Rob is a native of Giles County, Tennessee, where he grew up on a small family farm and was a National 4-H winner. He has two children, a daughter named Regan and a son named Clark.

Finally, we have Ms. Cari Rincker joining us again. Thanks again for being up here. I won't repeat her introductions since Laura already did such a good job with that, but I will add that Cari has frequently published on the

topics we are about to discuss, including a recent book entitled *FIELD MANUAL, LEGAL GUIDE FOR NEW YORK FARMERS AND FOOD ENTREPRENEURS*. Everybody join me in welcoming our panel.

MS. BOWLING: Well, good morning. I hope everyone got their coffee during the break and is ready for a fun topic, and that is agritourism. I've already had people say I don't even know, what is agritourism? What is this new thing that is emerging that we are hearing about? It's a fascinating topic. It's something that is near and dear to my heart. Since I came to UT as a student, as a college student, and now working as an insurance professional, I see this growing, not just in our state, but also across the country.

To start with, let's look at some pictures. That's one of the best ways to see this. Agritourism is an emerging trend for farmers looking for ways to increase their farm income, and one way to do that, when you have a job with raising crops and selling animal products, you are looking for ways to keep a steady income, even when the weather and other factors make that problematic. Some farmers have taken to inviting people onto their farms. Pumpkin patches in the fall are one big area you see a lot of this. Farmers have learned they can grow pumpkins, people will come buy them, have pictures made with their kids, and a lot of times they'll do these things and then they expand. From an insurance perspective, looking at this, you say okay, pumpkins, COOL, no problem. Looking at that photo, see that thing that looks like a platform on there? That's the kind of thing that starts getting you worried. You think, okay, people are coming out on the farm that maybe aren't on farms all the time, may not be aware of how animals act, may not understand you shouldn't climb on everything you see, and there's some risks involved with inviting people out to your farm. Another thing you are

seeing a lot of farmers doing is “pick-your-own” operations. In our country, people are becoming more and more concerned of where their food comes from, how it’s grown, and they are actually interested in knowing who grew it and how, so they are starting to look for ways where they can get food from farmers’ markets, CSAs, which Cari is going to talk about a little bit later, and going to the farm themselves, picking the crop and taking it out. So we are seeing a lot of these berry operations in particular big in Tennessee, for you to pick your own, as well as vegetable operations.

Another thing you may see a lot of is an entertainment-type thing and education activity with corn mazes. These have taken up all over the U.S. There’s one south of Knoxville that we will talk about a little more in detail that I remember going to as a student in college. We would get a group together, go out to the corn maze at night and have a fun time going through the maze. You could buy other agricultural products while you were there. They have some educational activities where you can learn about the farm. It was a way for the farmer to tell the story of their operation, to connect with their community, and to bring people out and see what’s going on on farms in our country. So a lot of states have gone into defining agritourism for various purposes in our laws, and what I put out here is a general definition.

The definitions in Tennessee, Kansas, South Carolina, lots of places are very similar to this one, but agritourism is generally defined in state law as an activity carried out on a farm or ranch open to the members of the general public for recreational, entertainment or educational purposes, to view or enjoy rural activities including farming, ranching, historic, culture, or harvesting. Well, that’s not broad, is it? That can

encompass a lot of things, and you will see throughout this presentation and looking at the materials that it can be anything from the pictures we have seen, to petting zoos, having things where people come and ride your horses or learn about cattle, how milk is produced and go through a whole operation like that, but for our purposes as attorneys and as people advising farmers who may be interested in these activities. What matters for you is that agritourism may include farming. It may also include other commercial activities, and that makes it in some circumstances a hybrid when you are looking at regulations, when you are looking at insurance and when you are looking at liability. For all of those areas, agritourism is more of a hybrid activity.

In my job, I'm in-house counsel, so what I love is when people come to me with something before they do it. It's always better that way. It makes my life easier and I try to make their life easier when they ask in advance, but that doesn't always happen. Let's look at a hypothetical, because this could happen in real life, and we will talk about what the result could be. Farmer Bo, and I chose Bob, specifically that name. If you look in demographics today, our farm population is aging. In the United States, most farmers are age 55 or older, and that's important to all of us in my age group, because we would like to eat for the next 50 years, so do be encouraging younger people. This is an area where there is opportunity and they need to be taking on this role, because we have a lot of aging farmers and need others to be producing food for our future. Bob is a common name for many farmers.

Farmer Bob raises corn, soybeans and wheat on his farm. He has his regular insurance. He has insurance on his home. He has insurance on his cars, and he has a policy for his farming operation as well, but he hears about this agritourism and decides to branch out and he grows a

pumpkin patch one year. It gives him some diversity in his operation, and he learns that people come out. They will come see these pumpkins, they'll buy them, they will come to his farm, they will buy other products he has there. He can sell jams and jellies from some of his neighbors. He does that. He opens it to the public. More people come. Next year, he says, you know, I can make the kids have even more fun if we add a hayride, so he adds a hayride. Hitches a wagon to the tractor, puts some hay bales on it and rides the kids around. Then he says, you know, if I add another ride, the kids can ride the ferris wheel while I do the hayride, and he buys a used ferris wheel from a carnival operator, adds that. Now, we have this farm and we have the pumpkin patch and we are adding more and more to it each year.

Well, of course, what happened – and this is completely made up. I do not know that this scenario happened from anywhere. I just pulled facts that I could find from various places. Let's say someone is injured. They are on the ferris wheel, and it breaks from lack of maintenance. The parents let Farmer Bob know they want the medical bills covered, and the child has pain and suffering, what do we do? Farmer Bob calls his insurance company and says, hey, I've got a problem. What do I do? Well, the company is going to investigate. They're going to look into it, and they are going to discover that their agent didn't know Farmer Bob had a ferris wheel, was inviting people to the farm and having hayrides and doing all these things, and they may not have the right coverage for all those activities, because they didn't know; Farmer Bob didn't tell them. We are going to talk about what the company may do in that situation. Those are all things that would be considered in something like that. Now, I laugh about this hypothetical, because every injury I've heard lately on a agritourism operation, it's never the kids. It's

always an adult doing something they shouldn't be doing: going down a slide, climbing a ladder. It's always the adults, never the kids. With that in mind, that's what I'm going to talk about, is some of the liability risks that people take on in having an agritourism operation.

Looking at our hypothetical, what the insurance company is going to do, just so you know from that perspective, they are going to look at, okay, of the policies Farmer Bob which ones could apply in this situation, he have any coverage from his auto or his homeowners or his farm policy? They are going to look at all those. They are going to see if the policy has any coverage for the activity that led to the injury, and they will look at that. If they can't determine that right away, they may defend Farmer Bob, but what they will do, because your insurance policies provide two things. They provide coverage for often your property, your business, that sort of thing. They also defend you from liability. Sometimes they will pay coverage for your liability. Sometimes they may just provide the defense. It depends on what is in the policy what is covered there. What they may do is defend Farmer Bob under Reservation of Rights, which says we're going to defend you because we're not sure if there's coverage, but we're reserving our rights in case there's not coverage. We're not going to pay that if it's not covered by the policy, but we're going to pay for someone to defend you in court over this activity.

They may file an action against Farmer Bob to say, hey, court, we don't know if this policy covers this or not, so here's what we think it is, you tell us whether we owe Farmer Bob or not for coverage. It is another option the company may take on. What I want to bring out to you today is, how do we avoid this hypothetical situation where farmers who are taking on new activities on their operation

and others can be not in that situation, what do we do avoid that, and obviously the big start business planning, especially extension professionals. I know there's several of you here today and attorneys. You will meet people in your communities, in your churches, in your activities in the community; you will know people who are doing these kinds of things. Talk to them. Learn what they are doing. This is an opportunity for you to give them that advice they need on the front end. What farmers need to consider before taking on agritourism activities is, what do they want to do, what do they want their business to be, what activities are they going to engage in to make a profit, how do they need to organize and how is it organized now?

I've seen several operations that will come in and they may have their farm separate from their harvest-their-own activities. They may do their big farming, their corn, their soybeans, those activities on one tract of land, have their harvest-your-own in a different area of town, maybe in a place where there is more traffic from the public so they see it more, and they may incorporate that separately, set it up as an LLC, do something different so that's separate from their other farm activities. One, to separate out the liability and, two, to have that where it may have fewer assets involved than their main farm operation. That is something to consider. I can't give you a blueprint for that, because it is going to be case-by-case based on what the person wants for their operation, what their assets are and what their other risks are.

One of the other things to look at for people starting a new agritourism operation is, how can you mitigate some of the risks from people bringing onto the farm and into this operation? One thing we're going to talk about today are some precautionary measures that farmers can take for these type of operations to, one, limit their liability and also

to keep the members of the public safer who are coming onto their land. Another thing they can do, obviously, is to purchase insurance for the risk. If there is insurance offered and it's affordable, that is something that can be done to mitigate some of the risks. Sometimes there may be activities for which insurance is not available or it's very expensive. Zip lining, roller coasters are things that come to mind that might not have as affordable coverage out there for those types of activities, because they are riskier. If someone wants to have that on their property, they may need to consider self-insurance or go to a company that specializes in those types of activities.

What are some of the potential risks a farm could face? All businesses face a lot of these risks, in particular I see these more in agritourism operations, because in lots of state laws, and in Tennessee in particular, farms have a lot of protection and in most cases you are not having members of the public out on your farm all the time. It's not like a Walmart or a Target or a Dollar General or a restaurant where people come in all the time. When people are branching out to raise their income from these activities, their risks increase. We have potential for liability claims if someone is injured or if their property is injured while they are on your farm. There's also the potential for employment claims. Farmers may be having more employees for some of these activities, particularly your corn mazes and your others where you need people to help herd the ones coming through, show them where to go. You may have more employees than you normally had. That could put you in a different category, and I think Cari is going to talk about some of those rules later today related to that. Also, loss or damage to your property from catastrophe. We have lots of farmers who are engaging in agritourism who have built new facilities. They may add an additional building for their on-farm market, for their

farmer's market. That's another thing you need to be able to protect. If you are putting money into that operation, the farmer would then have greater costs if something is damaged from the people coming onto the farm or something else.

Loss of key employees. I talk to businesses about this a lot. If you have a dairy operation and have one foreman who knows how to do everything when you're gone, the farmer needs to plan for what do I do if that person leaves, if they get another job. We need to be planning for that as well. Business interruption and loss of income. A lot of agritourism activities work really well when the fall weather is nice and sunny and people are coming out, but on a day like today, you may take an income hit. Farmers may want to consider business interruption insurance or some other method for maintaining their income if that's a problem.

Another thing to be concerned with for agritourism operations is different regulatory regimes, and we are going to talk a little bit about that too, is, what other regulations apply, not just what you would have normally. With this type of operation, you can have zoning issues. Some agritourism activities may be considered commercial in nature; there might be some zoning issues with that that you wouldn't have with regular agricultural operations, with production farming. That is something to consider. When you are advising people, you will have to ask lots of questions about what the operation is going to be, what are you interested in doing, and where do you see this going in several years. Some of the other things to consider, potential nuisance claims. We have heard for years in the agricultural community about the concern for nuisance from your normal production activities, the smells associated with pigs and chickens and other agricultural

commodities, feedlots. Those are things we have heard about in the nuisance land. Well, agritourism can bring other types of nuisance issues, traffic, with lots of people coming out to rural areas that they may not normally have as much traffic. Noise. Trash and pollution from visitors coming and maybe not treating the land the way the rest of us would want it to be done. Those are things to consider as well.

Injuries or illnesses caused by animals. One thing I see especially at fairs throughout the state and other places, when you are bringing people in contact with animals who aren't normally around them, there is a chance of injury and illness in those areas. That's another thing to consider, and the fact that a lot of agritourism operations are seasonal operations is one thing we want to look at as well. I would encourage you, with farmers considering moving into an agritourism operation, conduct cost benefit analysis before starting the new activity. There are lots of increased costs that could come with some these increases in your activities. I know I have talked with some farmers who have moved into — especially with the on-farm market, they have had to go through zoning and building codes and all this to make sure they didn't do certain things that would cause them to go into another category and they would have — especially in some of your larger metro areas, they would be in constant contact with the codes people and the zoning board, and that is part of going through this, is looking at that, and there's a cost involved. Some of them have had to hire attorneys to do that, and they need to plan for that before moving into this type of business.

On the insurance front, I think farmers need to consider what is the cost of my insurance going to do if I take on this new agritourism activity? Is it going to

increase? Are there things I can do to make my costs less, and if I find out on the front end, I might be able to do that. Also, from your perspective as an advisor to these people who are taking on this risk, we need to make sure that they are finding things they can afford, coverage that is affordable for that type of operation. One thing I have seen that's happened several times, people don't understand insurance as well as you think, and part of that is because it's something we purchase that we hope we never have to use. You pay for it, you write a check, you have your policy and you hope you never need it, but you do it because it's a way to avoid risks and to transfer that risk onto someone else. One thing I have learned over the years, a few people have said, well, I was trying to be extra careful so I bought two commercial policies of insurance and I have one with this company and one with this company, and I said whoa, whoa, whoa, let's step back. If you buy a million in coverage from company X, a million in coverage from company Y, you may not have two million in coverage. You may have a million in coverage, half from company X and half from company Y and it costs you twice as much. I tell people beware of that, talk to an agent, get with someone, make sure they understand your operation and get what you need without that. If someone wanted two million in coverage, you get your commercial policy from your first carrier and then you purchase an excess or umbrella policy on top of that. That's how you get additional insurance coverage for that purpose. We advise people about that and make sure they understand that.

One other thing that's important on the business plan side is considering who and what entity needs to be covered by the policy. For farmers who set up their agritourism operation separately, they may want to get a policy just for that entity and the people involved in it and

not include that with their main farming operation. It might be one way to save costs to set it up properly that way. That is something to consider as well.

One of the other things to do would be to take precautionary measures. Some of our underwriters I know work with farmers and agritourism operations to tell them here are some of the things you need to consider. One example on a hayride, I know we have some farmers who have hayrides in the fall with pick your own and pumpkin patch and corn maze. There are rules about that. One, don't drive the hayride on the public roads, only on the farm, make sure there are sides on the wagon up to X height, there needs to be a chain connecting the wagon to the tractor so if the hitch came loose, it's still attached. They have all these criteria that will help them mitigate their risks and take some precautions to avoid some of the potential injuries.

The last thing, this is one that is really important to advise people about because you can do this on the front end. Lots of states have limited liability statutes for agricultural activities, for agritourism activities. Those statutes will say your liability is limited for this activity if you post this warning sign in this type this close to the activity. We need to be telling people about that and make sure they have those warning signs up and posted. That protects them a lot, and if they haven't done that, they don't have the benefit of those statutes. In Tennessee in particular there are limited liability statutes for bovine activities, activities involving cattle, equine activities, activities involving horses, and agritourism activities. Tennessee has a special law for agritourism activities that provides liability protection to agritourism professionals, if they have posted the signs and are not grossly negligent in the operation of their activity. Be aware that that is something

to make sure we advise farmers of and other people taking on these activities.

One thing I encourage people to do is to review their insurance coverage every year. Make sure they have not engaged in any new or expanded activities that aren't covered and go over that and make sure they have what they need for that operation each year. Another thing to do is to review safety and security measures each year. I do some work with one of the fares in Tennessee. I'm on the Tennessee State Fare Association Board, and one of the things this year we had a new rule about was not letting strollers go through our animal areas. People could not take a stroller through the livestock barns this year. You think, okay, what's the deal with that? Well, one of the things that has come down recently is with strollers, parents will roll them through, take the kids through, see the animals, and there's animal waste in barns, there's no way around it, it's there somewhere, take the stroller home, take the kid home, no one ever washes the wheels on the stroller, baby crawling around later, touches wheel with their hand, hand goes where? We all know. That is a potential risk of illness from being in contact with animals. There's one safety and security precautionary measure that we implemented, was no more strollers in those areas, and that is something a farmer may want to consider, if they are having people out on their farm, where would you allow strollers to be, that kind of thing.

Some other examples of precautionary measures, if you have members of the public on your operation, safety and CPR training for staff may be something to consider, depending on the time of day, having first aid stations and kits available. If there are thousands of people coming through a farm that aren't normally there, these are things they need to consider before doing that. I also recommend

having a process for handling injuries. Have someone on staff that is the go-to person if someone is injured, this is who you call. Obviously if someone is in dire need, you call 911 immediately, but you need to have a process in place for who responds, how you respond and getting everyone taken care of. If someone is injured, it's also good to have a simple witness form of what happened, what did you see and get pictures of the area before it's changed. That way you know exactly what happened, what was in place at the time. Specific measures for a particular activity, anywhere you have petting zoos, you want hand-sanitizing stations. You want hand washing so people don't get sick – the kids probably can handle it, but the adults who aren't around germs all the time will be the ones who will get sick a lot of times, so we want to be careful about that.

What happens when you do have a claim? What should farmers do to protect themselves when someone is injured at their agritourism operation? Obviously take care of them, do the best you can to handle the situation right at the time and report the claim to your insurance carrier in accordance with the policy. Most of them will require reporting very quickly. I know in the workers' comp world, a lot of times those require reporting within 24 hours. Depending on the type of claim, they need to report it in accordance with the policy, cooperate with the insurance company in the course of the investigation, and they may need to decide early on if the insurance company indicates there may not be coverage for something, they may want to hire their own counsel as well. That is something to consider.

There are other regulatory issues for agritourism operations and we are going to talk about some of these, but in particular, in Tennessee, one of the things that I think

people need to understand is, we have some exemptions in the zoning laws for agricultural activities that is particular to agriculture. Then the question comes up with agritourism, is this activity agriculture or is it something else? And I think wineries are a good example of something that – you may have a farm that was growing grapes and now they have started a winery. Where does it fit in the regime? It's kind of a hard issue to tell, and a lot of times they will go to the zoning board in their local areas and follow all those rules and then it may turn out later it wasn't what they thought it was.

We want to be very careful about that and help people on the front end and make sure they get what they need. Zoning is an area that is particularly important for agritourism. From my perspective, forgiveness is not easier than permission. Other attorneys may disagree, and I've talked with some who feel differently about that. In general I think you are better off to work it out on the front end, get in writing the information from the regulator. In local areas, a lot of these particular issues are local-based regulations, and regulators on the local level change, they change jobs, they don't get re-elected or they get elected to higher office and they move on, and it's important to make sure your person is protected, the person you are representing and advocating for, based on what they were told the first time when they started expending money to meet the regulations they were told about. Zoning, fire codes, health department rules, relating to serving food or selling food products, food labeling rules, property taxation. That's another area that could come into play with agritourism operations. If property is considered agricultural, it's taxed in a different way than commercial property. I have seen some cases where a farmer took on an agritourism operation, did everything they thought correctly, and once it was all done and the operation was going well, the local taxing authority

decided they had some commercial property now, and it's awful to expend money expanding your operation, do all this, start making money, and then have to turn it all over to your government in taxes. That's another area for business planning; look on the front end, what would this do to your property taxes and make sure you have the arguments in place to keep your tax level where you want it to be. I think one of our other speakers later today is going to talk about Greenbelt taxation and how that works in Tennessee. I'm not going to go deeply into that. I don't want to steal anyone's thunder there.

There's a recent Tennessee Supreme Court case, and a full disclosure, I was involved in this case as counsel for amicus parties. The Farm Bureau Federation, Tennessee Cattlemen's Association and several other organizations, the Tennessee Agritourism Association as well, were involved and we wanted to present our views on the laws for agritourism in Tennessee to the Supreme Court. We did that. So I want you to be aware of this case, but what it really shows what can happen when someone expands their operation and all the things that can stem from that. A lot of the cases you will see with farms and farm operations start out as disputes with neighbors, and it's a very hard thing for people to understand, but getting along with your neighbors can save you a lot of trouble in the end, but sometimes it's hard to do, because sometimes they are not reasonable either, so you've got both sides of that issue in a lot of farm cases. Sometimes they try to get along and sometimes they don't and you don't know what can happen from that.

In this particular case, what started out as a regulatory proceeding morphed into seven years of I believe still ongoing litigation related to an agritourism operation. It started out this farmer had a beef cattle

operation and I think grew corn, soybeans, some other products as well, expanded into a corn maze, also added a pumpkin patch, added a spring festival for strawberries and then started having concerts as well. There were all kinds of things going on on this farm, and what happened, a neighboring property – it was not directly adjacent, but a neighboring landowner did not enjoy the noise coming from the concerts, and that was what led to this particular lawsuit. The concerts in particular were raised, although early in the case there was a lot more. As it got to the Supreme Court, the amplified music concerts were the issue at that point.

The farmer argued that two laws protected his activity: The Tennessee Right to Farm Law and the Exemption from Zoning Rules for Agriculture. Our Supreme Court considered the case. Now, the farmer won on a motion to dismiss in the trial court, which means the farmer never presented his own evidence. He had the case dismissed at the end of the plaintiff's proof. He never presented his own evidence in the trial court, and that was the record on appeal up to the Court of Appeals and then the Tennessee Supreme Court.

The Court of Appeals affirmed the decision in favor of the farmer, dismissing the nuisance lawsuit, saying that the Right to Farm Law covered the concerts as well as the other agritourism activities and that the zoning regulations also were not covering that particular farm because it was an agricultural activity. The Tennessee Supreme Court took the case. It was the first time the Tennessee Supreme Court had considered the Right to Farm Law in Tennessee. They did uphold the Right to Farm Law and it is still in place to protect farming activities, but they determined that it did not extend nuisance protection to every activity that occurs on a farm. In particular the law did not use the word

marketing to describe the activities that it was covering, and to the extent the amplified music concerts could be considered marketing of ag products, that wasn't covered by the Right to Farm Law, so the nuisance proceeding could go forward under the Right to Farm Law, and the Right to Farm Law did not kick it out.

They also determined that amplified music concerts were entertainment, and in Tennessee, under the zoning laws, like I said, there is an exemption for agricultural. Well, that definition of agricultural in Tennessee includes your normal production of farm product on the farm, the noise, the plowing, the dust, all the things typically associated with a farm. It also included, at this time, educational and recreational activities on a farm. That was part of the definition of agriculture, but the Supreme Court said, well, educational and recreational does not equal entertainment, so they said since it did not include entertainment, that did not qualify as agriculture and the particular concerts at issue here were not exempt from zoning.

Now, that's a little preview. Theresa Denton will be talking about some changes in the law that happened after this case in a later panel, but I'm not going to tell you what they are yet, because I don't want to steal her thunder and will give her an opportunity to tell you what happened after this case. With that I'm going to let Rob get started, and we will have time for questions at the end, I think.

MR. HOLLAND: Thank you, Julie. I appreciate the opportunity to be here, and I also want to extend my appreciation to the folks who put this day together. I think it's very important. It's a very important topic for those of us that work on a daily basis with farmers, and I appreciate your interest in being here as well. I want to disclose I

guess from this point that I did hear some of the previous speakers who requested that folks go ahead and get their coffee, so I am fully caffeinated and kind of ready to roll through some of these slides. I don't recognize a lot of faces in the audience, so a lot of new folks that are new to me. I see a few faces that I do recognize. For those of you who may have heard me speak before, you knew I would be here today and you came anyway. Thank you very much. I appreciate that. We don't always have a lot of repeat consumers for some of these topics, so I appreciate the opportunity to make some comments.

I am here representing the Center for Profitable Agriculture. That was mentioned in the introduction. Our role in our center is to work primarily directly with farmers who are considering what we call value-added enterprises on the farm. If a farmer is considering processing or packaging product from their farm and marketing that direct to the public, we consider that value-added agriculture. They are adding value to the production and making that product more attractive for the consumer. We also include in value-added direct marketing and we also include agritourism. That's one of the things I think that brings me here today, is to talk to you about some of those experiences that our farmers have had as it relates to on-farm processing, packaging, direct marketing and agritourism. The Center for Profitable Agriculture is a joint venture between the Tennessee Farm Bureau and the University of Tennessee Extension, so we have got great parents, we have great partners that are involved in the work that we do. Many of the legal issues that we encounter with the farmers that we work with come about as a result of some changes, and it's probably not a surprise to you that many times business practices, in our case farm practices, may change quicker than laws do, and that's one of the things that we encounter as we work with farmers

that have become interested in processing on the farm and marketing direct to the public. So many of those practices that they implement on the farm today are changing quicker than some of the laws are. As you know and as you are no stranger to, many of the laws that we have in the state authorize departments within state government to develop and enforce rules and regulations. The laws are important, the rules and regulations are important, but both of those may be slow to change, and that sometimes causes frustration for some of the farmers that we work with.

Julie mentioned earlier that old law basically defined farming as the land, buildings and machinery used in the commercial production of farm products and nurseries. For a long time, the laws involving farming and agriculture were very specific to production. Today's agriculture involves a lot more than producing crops. Management is a big part of what goes on on the farm. There are a lot of management practices that have to be in place and are important. Production is still a key part of the agricultural environment and a key part of the farming process, but so is marketing. Some argue if you are going to produce something on the farm but you don't market it, then you are really minimizing the opportunity for profitability on the farm. To us marketing has always been a part of production, but because the law was specific to production, there were some folks who may have taken a very narrow view of that and did not include marketing as an agricultural practice, and then in recent years we have seen a great increase in the number of farms involved in adding value to crops and products from the farm, and that has created another opportunity for confusion and maybe a place where the laws have not kept up with the practices.

Let's talk just a little bit about how things have changed to make sure that we realize that some of these

new technologies and new marketing methods are actually being implemented on the farm. In Tennessee, we have seen over a 36% increase in the number of farms with direct sales to consumers. That is pretty significant. The value of those products sold to consumers has increased by 130%. Now, we are getting into the bottom line, and that's probably one reason we have seen such an increase in the number of farmers involved in adding value, is because there is a financial opportunity there for them to develop new income streams on the farm and to increase the bottom line. Almost a 21% increase in the number of farms with agritourism and recreation-related sales, 83% increase in the value of those sales, over a 30% increase in the number of farms producing and selling those value-added products, and a 6% increase in the number of farms marketing products through CSAs, and we are going to hear a little bit more about community-supported agriculture a little bit later on, but CSAs are an important marketing method for many folks. Many times this change brings confusion as we implement more and new marketing techniques direct from the farm. We have new marketing methods that brings into a lot of question whether or not those activities are actually part of and protected by the laws related to agriculture. Certainly when farmers start processing food products on the farm for sale, that really kind of removes them even further from the traditional laws of agriculture, puts them more in line with more of the commercial food processing law, but they're farmers. The activities they are now engaged in may or may not be directly included in the law, then we've heard a lot about agritourism activities as well.

I want to focus just a little bit very briefly on some of the zoning and property tax classification issues that we have encountered and some of the situations around that for farmers, and then I want to get into a little more detail about community-supported agriculture and some of the

legal or regulatory issues that come with that. First, let's just talk real briefly and real broad about some of the situations we have encountered with agritourism operations as it relates to local classifications for zoning and property tax. If you've got a very traditional farm, all they are doing is producing traditional crops that pretty easily fit into most agricultural zoning classifications. If you are not involved in agriculture in any way but you have a commercial business, that pretty well fits into commercial operations. If you are not really involved in commercial but you are in more an industrial plant or an industrial facility, that pretty well fits into the category of industrial zoning classifications. If you are developing a neighborhood, that pretty well fits into residential.

When the activities we have fit really nice and neat into these categories, there's not much question, but when, as Julie was talking earlier, you have a traditional farm who starts moving into nontraditional agricultural activity, such as agritourism, hayrides and a corn maze and now we've got concerts, that doesn't fit as neatly. The farmer argues it fits fine, it fits neatly in agriculture. The zoning folks may not feel that way. They may read the definition that says that farming and agriculture involves the production of crops, and obviously an agritourism venture, maybe a hayride does not fit production, so they look for another classification. In most every case, the classification they find is commercial, and many times they will hand the farmer the codes of commercial requirements and say here's what you have to comply with and all of a sudden you have got some mismatch in terms of things that don't seem realistic for a farmer to be implementing on their farm, but this is where a lot of our problems arise. This is where a lot of the miscommunication starts, kind of at the local level.

How do we proceed when the farm activity is not a natural, if you will, fit? Many times we will go back and look and we want to say what does the law say? If the law kind of directs for regulations to be developed and implemented at a departmental level, we want to look to see what the regulations say. That wording becomes very important. It's what the Supreme Court case did in terms of looking back to see what the language of the law was and interpret that, so we look at the law, and we look at what the regulations are. We also look to see how the regulations have been implemented in the past, because sometimes there's already been a little bit of wiggle room that's been implemented, and sometimes that's either in favor or not of the farmer, so it's important to look at and see how those regulations have been implemented in the past, and that helps us to identify what part of this does fit and what part of this does not fit, and it kind of allows us to focus on what is not fitting.

Many times these issues can be worked out at the local level. Many times what seems to be a real big miscommunication issue with the local zoning officials really just turns into maybe one part of the agritourism operation that doesn't fit, and instead of having to apply the entire book of codes for commercial zoning, maybe they only have to apply a little bit of that, and that could be a good meeting in the middle and a good way to do that. We encourage folks, before they kind of overreact, encourage folks to develop good working relationships. Communication can be key to either creating a hostile environment in that situation or not, but many times we don't find that middle ground and we have to proceed and work on actually making changes, and again, that's where good relationships come into play.

Let me transition quickly and talk a little bit about

community-supported agriculture. Some of you may not be aware of what we mean when we talk about CSAs. It's a form of marketing products from the farm. It's a really different way of doing that, some of the basic concepts of that. Community-supported agriculture ventures really kind of started and are still mostly focused on produce, farmers who have produce on their farm. What they do is, they find consumers who are interested in buying and paying in advance for a certain amount of produce that they will receive during the year, and this provides a shared investment from the consumer with the farmer, so the consumers pay up front for produce that they expect is going to be produced and will be delivered at a later date. They sign an agreement in most cases basically committing to part of the production and taking on some of the risks. If it's a bumper crop, they get a bumper delivery of produce. If it's not a bumper crop, they get less. The hope is that the farmer that is selling this CSA share will have a very diversified operation so they will have a lot of different produce coming in at different times, so when the person who purchased the CSA picks up that product or that box of goods, it will have a variety of things in it. If eggplant is the only thing they produced that year, they may box of eggplant, but that is kind the risk that they are taking on.

Now, it's working. It works for consumers. They make a connection with the farmer. The farmer gets paid in advance so they have funds to operate with. These work very well in many cases, but they don't always conform to what I refer to as some of the old laws that we deal with. For example, state law requires that produce sold in the state can only be sold in certain units. Our Tennessee Department of Agriculture follows the allowable units of sale from the National Institute of Standards and Technology, and there is this chart that exist that says tomatoes can only be sold in certain amounts. The

predominant units for produce are weighed by the head or certain dry measures. Few, if any, of those can be sold commingled with other produce by the box. The CSAs exist in terms of folks to be able to pay in advance for a delivery of products and they are not sure what the quantity is. They are good with that, but the laws don't always support that, which creates a little bit of an issue.

For those products that are required to be sold by weight, then that weight has to be determined for the benefit of the consumers on inspected scales. If you are selling by the box and you are not weighing but you have products in there that are required to be sold by weight, it creates a little bit of an issue. I mentioned that the CSAs are mostly implemented by produce farmers, but now we are having farmers who are adding more products to that mix: Meat products maybe that are derived from their farm, processed products, jams, jellies, honey, other types of products that they are including, and those products are not exempt from the other labeling and laws that are required for those products, especially those that have been part of the food processing facility. Modern marketing does not always conform to what the law says and creates some issues for us to deal with. First and foremost, developing relationships with your consumers, with your consumers is always important, having regular communication with them so they know what they are purchasing. Sales tax becomes a little bit of an issue as it relates to selling products, farm products, produce and other products as part of a CSA. Is sales tax applied, is it not, are some of the products exempt, how do you do that? There are some issues that have to be worked out.

Delivery. Many times these shares will be pre-sold and then during the season when the produce is coming in, they will be delivered for pickup. We have run into some

situations where the delivery points require a little bit of forethought, because if you are meeting your consumers on property that you don't own and somebody has an accident, whose liability coverage is going to do that? What if you are in the parking lot of a business that didn't know you were delivering products, that's turned into a little bit of an issue as well. Some of our farmers' markets don't allow for CSA deliveries on site, so some of the folks are coming to the farmers' markets and parking right outside the gate for delivery, and that turns into some issues as well. Again, we mentioned some of the standard food regulatory issues, whether you are dealing with just raw produce or processed goods or meat products, becomes important as well. Julie mentioned earlier legal business entity of your operation is important. Sometimes folks will have a sole proprietorship for the farm, they will set up an LLC for the other part of the business. That may be an excellent way to kind of protect the liability of some of the assets of the farm, but there are other issues that are involved in making that decision as well.

My point I want to make here is, all of these previous bullets I talked about can be heavily addressed with a written agreement, a strong written agreement with your consumers so that they know what they are purchasing and then all of those details about your operation can be worked into that written agreement so that you are in compliance with the law as well. Some of those key things that may be involved, certainly the terms, the price, the frequency of delivery, what will or will not be included in the product mix that they are obtaining, the details regarding delivery in terms of the times of the day and the days of the week and the times of the year. The agreement should also include how and when the payment is due for the product, if there is a refund clause or a way for them to opt out, that should be included as well. There should

always be some type of written language in the document that mentions shared risk. The consumers need to know they are paying in advance. They don't know exactly what products are going to be produced that year, but that needs to be included as well as other language that may limit the liability of the producer.

A lot of issues have come up over the years as it relates to new trends and new marketing techniques, trying to comply with some old laws, so we don't want to leave without maybe giving at least some opportunities to correct some of that. Many of the folks in the industry would like to see some type of a greater acceptance of agritourism as part of agriculture. We are going to hear a little bit about that, and some of the laws have been changed and that's been positive; however, this issue of zoning has not fully been addressed. Julie mentioned earlier maybe that these agritourism operations represent a hybrid between traditional agriculture and commercial, so many folks are pushing for some type of hybrid classification that would better meet what agritourism operations are doing.

Many of our farmers also look for greater consistency from one county to the other. They will run into some laws or issues or regulations or interpretation in one county that is different from another. They would like to see more consistency across the county lines within the state. They would like to see better permitting processes, those that are more straightforward, quicker and less expensive. They are not against complying with the law. They just want to be able to understand it. They want to be able to comply with it as quickly and painlessly and as at least expense possible. There have been pushes for fewer and more flexible laws and regulations involving more modern agriculture as it relates to direct marketing of farm products. So with that I will stop and Cari has some more

comments to make, and then we will be glad to address some questions.

MS. RINCKER: So, of course, I'm wordy and I have a big outline for this one too, which is basically a compilation of other publications that I've written in this area of law, so hopefully there will be nice research for you guys after you leave this event. I've already gabbed for an hour. You guys already know who I am, so I'm now going to give you an overview today of just a couple of miscellaneous things dealing with direct farm marketing. I'm going to be speaking primarily on statistics. I know we just talked a little bit about Tennessee statistics. I want to talk about statistics from the national perspective. Then probably skip a little bit over the CSA agreements, because it was just discussed, and then get into volunteer farm labor, which I think is an important issue to address with direct farm marketing and the local food movement.

This material on statistics today is coming from two big publications. This one here is the Direct to Intermediated Marketing of Local Foods in the United States. It's based on the 2007 Census of Agriculture. Then the second publication is newer, Trends in U.S. Local and Regional Food Systems, USDA publication based on the 2012 Food Census of Agriculture. I'm going to be referring to these two studies here today, and I think these publications were very, very well done. If you are interested in knowing some trends statistically on what's happening here with direct farm marketing, I highly suggest looking at those two documents. Something that I wanted to point out is that there's no definition of local food, but for the purpose of today's presentation, I'm going to be referring to it as it being two things. I'm not making this up. I'm using it because that's what these two studies refer to as the local food, is the direct to consumer

marketing and then a direct to an intermediate channel. That would be a farm to restaurant, farm to school, farm to grocery store, which would be the intermediate channel.

Let's look at some historical trends. Between 1978 to 2007, only 5.5% of farms sold food direct to consumer. This is less than one percent of total farm sales, during the peak in 1982 due to the 1976 Farmer to Consumer Direct Marketing Act. Then between 1982 and 2007 – we can see the last ten years and ten years before that, just really increasing – there was a 58% increase during that time period. We already talked about these different types of direct to farm marketing. Out of curiosity, who here has participated in a CSA? That's a good chunk of you. What was your experience like?

UNIDENTIFIED SPEAKER: Good.

MS. RINCKER: I actually participated in one in New York City. So I would go every week to this church on the upper west side and come and get my produce, and some of the CSAs actually deliver the produce as well. I haven't been able to find one in New York, but I know there are some in DC that do that and different areas you have some that deliver and some don't. Looking at the 2008 study, so that's based on the 2007 Census of Agriculture, there were a little over 71,000 farms that participated in direct to consumer outlets, but 81% of these were actually small farms. The USDA defined a small farm. It basically is a farm with gross sales of \$75,000 or less. Only 5% of large farms, \$250,000 or less, participated in direct to consumer marketing. As food and agricultural lawyers, and the statistics have changed a little bit with the 2012 Census of Agriculture, that tells us that by and large the clients that are needing legal assistance for direct to consumer are going to be the small farmer. Gross sales of

\$75,000 a year, not talking about net, but gross, that is not a big operation.

Looking at the 2012 statistics, we now have 115,000, so it increased from 71 to now 115, based on the 2012 Census of Agriculture, but again, 85% of those are still going to be small farms, so we have a whole lot more, but they're still small farms. 10% medium size farms, 5% large farms. USDA in this publication changes the definition from 250,000 to 350,000 on what it considers to be a large farm. In comparison to the 2007 data, we have got a big increase, 72% increase in the number of farms participating in direct to consumer. Thinking about the intermediate outlets, again we're talking direct to restaurant, farm to school, farm to grocery, farm to government, a little over 13,000 farms participating with 2.7 billion in sales, but wanted to compare that to the direct to consumer, which in 2007 was 877 million. The intermediate outlets are, from an economic standpoint, multiples of the total number of sales. Looking at the intermediate outlet data, 22,600 farms sold solely to intermediate channels. In comparison, there was a 68% increase from 2007 to 2012. There are farms that do both. They sell direct to consumer and they also sell maybe farm to school. In 2012, a little less than 26,000 farms sold through both methods, and that equated to about \$1.1 billion of sales.

I like charts. Let's look at this chart and see what this tells us. This is from the 2007 data. The number of farms with local sales, about 86,000; medium farms, 15,000; large farms, a little over 5,000. I wanted to know that the average dollars marketed, you can see here in this column, about 352. Compare that to the small farms here, a little less than \$10,000 of their income is coming from direct to consumer. That's not very much money; right?

But if your farmer is only grossing less than 75,000, that's an important diversification of income, but really good money here for these larger farms.

Here's a few summary points that I took home. The small farms are more likely to market direct to consumer, because it's more difficult for them to generate enough volume for distributors and institutions, farm to school. They demand higher volumes of food and more consistent time lines. Intermediate outlets require less labor. Roadside stands on farmers' markets accounted for about 80% of direct to consumer outlets. Here's an interesting statistic; farmers on average traveled about 30 miles to the farmers' market. I thought that was interesting. I wanted to also note that this is the whole idea here, is that consumers equate the public face with local food to farmers using these methods. I'm from New York City and I'll tell you that my city slicker friends, they love farmers' markets, they love the idea of farmers' markets. They might not go every week, but they want to have as many as possible, and New York City has a lot of farmers' markets, not only in Manhattan, but also in lower income neighborhoods like Brooklyn, Bronx, and Queens. Here is another table, and this is based on the 2012 data, so a couple points I wanted to note. We have had an increase in the small farms, a significant increase in the numbers there, and the large farm data also an increase. We have had a decrease, though, a slight decrease in the percentage of total local food sales from the small farm. A big increase with the large farms, though. The rest of the statistics were approximately the same, no large differences there.

Looking at the marketing channels, in 2007, with the small farms, about 34% of them – these were the farms that participated in direct to consumer marketing, so I'm not looking at all farms. I'm only looking at the ones that

are participating in direct to consumer. 34% of them participated with roadside stands, which are really popular in New York, especially if you go out to the Hamptons. You see a lot of roadside stands in the Hamptons. About 35% participated in farmers' markets. Only 1.1% participated in CSAs, which I think were surprisingly low, and 22% in intermediate channels. In contrast, let's look at the large farm data. 23% focused on roadside stands, 23% on farmers' markets, 45% on intermediate channels. That tells me that the smaller farms are more focused on the farmers' markets and the CSAs and the roadside stands and the larger operations are more focused on the farm to school, farm to institution, farm to restaurant channels. As was previously mentioned, the types of commodities that are being produced were primarily talking about vegetables, but also to a lesser extent, livestock and meat products, and I also wanted to mention that I think there's an increased trend with value-added products. I have a friend in Philadelphia who is in a CSA for pies, so every week she goes and she gets her apple pie and her cherry pie, so that's my kind of CSA.

The law is going to change from state to state on what can be sold via direct marketing, and for the sake of time, I'm going to go ahead and breeze through this a little bit since it's already been discussed. But here in New York there's a list of specific products that can be sold direct to consumer as is also in the state of Tennessee, and there's also specific products that are prescribed that are not allowed to be sold direct to consumer unless certain requirements are met. We only have five minutes left and I do want to leave time for questions. I'm going to go ahead and skip through this community-supported agriculture agreement section. I have a lot of information in your outline about that, so I encourage you to go ahead and check that out.

For those of you that had your hands raised and had participated in a CSA, out of curiosity, who had to sign an agreement? Wow, so two of you. Out of all the hands for CSA again? Keep your hands up if you had to sign an agreement. This is what is happening, right? CSAs are gaining popularity, but the frequency of actually using a written agreement is very low, which is not surprising. We are a handshake culture, we are very trusting people, the food and agriculture industry, but I think it makes sound business sense, and I think us, as a community as agriculture attorneys, we really need to collectively have this voice that it's not about not trusting the subscribers or the members of the CSA, but we just need to put all these myriad of issues down in writing that are already discussed and are also enumerated in your materials.

I'm going to go ahead and very briefly touch on volunteer farm labor and close with a few minutes of questions, but this is a real problem, I think, in the industry, because I think culturally a lot of these CSAs are using — and farms in general are using volunteer farm labor and they think if they call them an intern or if they are a community volunteer, then they're fine, but the problem is, with labor law violations is, there's no statute of limitations. A farm can wake up in 20 years from now and have a problem and all the violations; everything gets opened up for the last 20 years.

To be very brief on the topic and then we will go ahead and move on to questions, whether or not a volunteer should be considered an employee or not, here's essentially the four questions the court is going to ask: This is a volunteer for any type of organization. Is the volunteer working in expectation of compensation? That might not necessarily apply; right, especially if somebody is coming

onto a farm and just wanting to spend a Saturday afternoon picking weeds. Question two, is the volunteer displacing employees? Is that farm not hiring people because people from the community are coming and picking weeds? Probably. Question three, does the volunteer give the food business a competitive advantage? Well, if Farmer Jane has 20 volunteers to come every weekend to help her weed and Farmer Joe does not, is there a competitive advantage? Absolutely. Is the farm offering educational benefits? By and large, these farms that are having volunteers that come to them, they will typically be classified as an employee under the Fair Labor Standards Act. Now, the plot thickens. It's really not that simple, because there are various exemptions for farms, such as the 500 man-hour rule, which my outline does go into more detail. I guess my summary point is this. When a client comes to you and says I have volunteers that are on my farm, you need to stop, and that is a red flag, because there needs to be further inquiry and research in this area. It is not that straightforward, and a lot of farms I think are not in compliance with the law in this area. Without further ado, let's go ahead and move on to questions.

MR. WHITAKER: Any questions?

UNIDENTIFIED SPEAKER: Regarding compensation of volunteers, is the share of the produce considered compensation?

MS. RINCKER: It is actually. So that would be what is called in-kind compensation, and that comes into a whole other layer of compliance issues, because then the farm needs to look at the number of hours that the volunteer is working, how much is the share, is the share \$500, and look at the minimum hour requirement in that state to see if they are in compliance, but, yes, it is in-kind

compensation, and that is above the board when it comes to a volunteer.

UNIDENTIFIED SPEAKER: Community farming, like there's I know at least two or three in Knoxville, but community farming people have a plot of land or they go and just go work the farm and maybe the food goes to the school, does that fit into all this?

MS. RINCKER: Let's play out that example, because I don't think I quite understand. When you say community farming, would that be like maybe 20 people, as an association or an organization, that they own the farm?

UNIDENTIFIED SPEAKER: Well, the city gives them the land to farm in a park, in a depressed neighborhood.

MS. RINCKER: The lessee, they're leasing the land basically from the government, and then they are selling the produce?

UNIDENTIFIED SPEAKER: They may or may use it in school, they may use it for themselves.

MS. RINCKER: Okay. I'm just thinking like how I would analyze that. I would look at that very similarly that I would like a for-profit operation on the rules of selling direct to consumer or direct to institution.

MR. WHITAKER: Is that about it? I like that last slide on volunteer farmers, because it feels like my father volunteered me for farm labor, and anytime I would have a friend come over to stay the night, he would try to volunteer him the next day too. It's very near and dear to

my heart.

UNIDENTIFIED SPEAKER: I have one quick question. Rob, you mentioned like the eggs and things like that, is that statutory exemptions, or where would you find those?

MR. HOLLAND: Most of the regulations for both of those are through the Department of Agriculture.

UNIDENTIFIED SPEAKER: So it's not necessarily a statutory thing you find?

MR. HOLLAND: There is some specific language on exemptions for egg sales, and there is some specific language in the law regarding labeling for hunting. There are some things that are specific and then there are some that are broader as it relates to food products that are just under the food regulatory enforcement. It may depend on the details. There's some of both, but generally the Department of Agriculture is given the responsibility of overseeing regulations for food manufacturing, and that's pretty broad. There are some specific things, as I mentioned, the hunting marketing. We may want to visit if you've got some specific examples, but there is some of both.

UNIDENTIFIED SPEAKER: I've got one related to the eggs. I do a lot of work with a company that sells supplies to backyard poultry growers. Do we have any backyard poultry growers in this state that are actually selling eggs in their backyard poultry operation? I guess do you see any added potential liabilities for those operations, from my understanding, for the seller or the purchaser?

MR. HOLLAND: I'll take a stab at it. Yes, I think

we have a lot of egg sales from hobbyists or backyard operations. I can't quote what all the regulations are. At one time there was some basic regulations dealing with a certain quantity of egg sales. You couldn't reuse cartons. They had to be sanitary and new cartons. There are some other regulations, and those may have changed; I'm not sure what all of those are, but, yes, I think there's a lot of hobbyists, backyard flock operators that are selling eggs.

MS. BOWLING: And, yes, there could be potential liability from the sales. From an insurance perspective, a lot of policies do not cover biologic or microbial-type injuries if they are not specifically looking for that kind of coverage. That's a common exclusion on a lot of policies.

MR. WHITAKER: All right. Well, Ms. Julie, Rob, Ms. Cari, thank you so much for coming and doing this today, and we have got a little gift bag here for each of you. Thank you guys so much again.

