

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) Docket Nos.
Milk in the Northeast,) AO-14-A78, AO-388-A23,
Appalachian, Florida,) AO-356-A44, AO-366-A52,
Southeast, Upper Midwest,) AO-361-A44, AO-313-A53,
Central, Mideast, Pacific) AO-166-A73, AO-368-A40,
Northwest, Southwest, and) AO-231-A72 and AO-271-A44,
Arizona Marketing Areas) DA-09-02, AMS-DA-09-0007

- - -
VOLUME IV
- - -

Public Hearing Administrative Law Judge
Before: Jill S. Clifton

Date: May 7, 2009

Time: Commencing at 8:01 a.m.

Place: Westin Cincinnati Hotel
21 East Fifth Street
Cincinnati, Ohio 45202

Before: Linda Mullen, RMR, CRR
Notary Public - State of Ohio

1 APPEARANCES:
2

3 On behalf of the United States Department of
4 Agriculture:

5 Garrett Stevens, Esq.
6 Heather Pichelson, Esq.
7 of
8 United States Department of Agriculture
9 Office of the General Counsel
10 Marketing Division
11 Room 2343 South Building
12 Washington, DC 20250
13 Phone: (202) 720-5707

14 On behalf of Continental Dairy Products and
15 Select Milk:

16 Benjamin F. Yale, Esq.
17 of
18 Yale Law Office, LP
19 527 N. Westminster Street
20 P.O. Box 100
21 Waynesfield, Ohio 45896
22 Phone: (419) 568-5751

23 On behalf of AIDA:

24 Alfred William Ricciardi, Esq.
25 of
Aiken, Schenk, Hawkins & Ricciardi
Suite 100
4742 North 24th Street
Phoenix, Arizona 85016
Phone: (602) 248-8203
Ryan K. Miltner, Esq.
of
The Miltner Law Firm, LLC
527 North Westminster Street
P.O. Box 477
Waynesfield, Ohio 45896
Phone: (419) 568-2920

1 APPEARANCES CONT'D:

2 On behalf of AIDA:

3 Nancy S. Bryson, Esq.
4 of
5 Holland & Hart
6 Suite 900
7 975 F Street NW
8 Washington, DC 20004
9 Phone: (202) 654-6921

10 On behalf of National Milk:

11 Kevin J. Brosch, Esq.
12 of
13 DTB Associates, LLP
14 Third Floor
15 901 New York Avenue, NW
16 Washington, DC 20001-4413
17 Phone: (202) 661-709718 On behalf of the Florida Milk Producers
19 Federation and Dairy Farmers of America, Inc.:20 Marvin Beshore, Esq.
21 of
22 Law Office of Martin Beshore
23 130 State Street
24 P.O. Box 946
25 Harrisburg, Pennsylvania 17108
Phone: (717) 236-0781

On behalf of Aurora Dairy Corporation:

Livia M. Kiser, Esq.
of
Latham & Watkins, LLP
Sears Tower, Suite 5800
233 South Wacker Drive
Chicago, Illinois
Phone: (312) 876-7700

1 APPEARANCES CONT'D:

2 On behalf of Prarie Farms Dairy, Dairy
3 Institute of California, Northeast Dairy
4 Farmers Association, Anderson Erickson Dairy
5 Company, Pennsylvania Association of Milk
6 Dealer's, Dean Foods Company, National Dairy
7 Holdings, LP, Shamrock Food Company, Shamrock
8 Farms, Partner Farms:

9 Charles M. English, Esq.
10 of
11 Ober Kaler
12 Suite 500
13 1401 H Street, NW
14 Washington D.C. 20005-3324
15 Phone: (202) 326-5009

16 On behalf of Mallories Dairy, et al.:

17 John H. Vetne, Esq.
18 of
19 Law Office of John H. Vetne
20 11 Red Sox Lane
21 Raymond, New Hampshire 03077
22 Phone: (603) 895-4849

23 On behalf of the Mountain Dairy, Monument
24 Dairy, Homestead Creamery:

25 John Benjamin Carroll, Esq.
of
Carroll & Carroll Lawyers, P.C.
440 South Warren Street
Syracuse, New York 13202
Phone: (315) 474-5356

Also Present:

Kate Fisher, USDA
Robert D. Yonkers, Ph.D., International
Dairy Foods Association
Jack Rower, USDA
Clifford M. Carman, UDSA

	I N D E X	PAGE
1		
2		
3	DIANE BOTHFELD and WILL HUGHES	
4	Voir Dire By Mr. Ricciardi	1093
	Voir Dire By Mr. English	1098
5	Cross-Examination By Mr. Miltner	1120
	Cross-Examination By Mr. Vetne	1127
6	Cross-Examination By Mr. Yale	1144
	Cross-Examination By Mr. Beshore	1149
7	Cross-Examination By Mr. Carroll	1152
	Recross-Examination By Mr. Yale	1165
8	Cross-Examination By Mr. Tosi	1168
	Recross-Examination By Mr. Beshore	1173
9		
10	MATT SHATTO	
11	Cross-Examination By Mr. Yale	1196
	Cross-Examination By Mr. Vetne	1199
12	Cross-Examination By Mr. Miltner	1204
	Recross-Examination By Mr. Yale	1213
13	Cross-Examination By Mr. Carroll	1214
	Cross-Examination By Mr. Ricciardi	1220
14	Cross-Examination By Mr. Tosi	1222
15	STEVE ROWE	
16	Direct Examination By Mr. Beshore	1251
	Cross-Examination By Mr. Vetne	1254
17	Cross-Examination By Mr. Miltner	1258
	Cross-Examination By Mr. Ricciardi	1264
18	Cross-Examination By Mr. English	1279
	Cross-Examination By Mr. Hughes	1282
19	Cross-Examination By Mr. Carroll	1287
	Redirect Examination By Mr. Beshore	1292
20		
21	J.T. WILCOX	
22	Direct Examination By Mr. English	1296
	Cross-Examination By Mr. Ricciardi	1318
23	Cross-Examination By Mr. Beshore	1336
	Cross-Examination By Mr. Carroll	1339
24		
25		

1 MICHAEL KRUEGER
 2 Direct Examination By Mr. English 1352
 3 Cross-Examination By Mr. Miltner 1371
 4 Cross-Examination By Mr. Ricciardi 1375
 5 Cross-Examination By Mr. Tosi 1381
 6 Redirect Examination By Mr. English 1384

7 GARY LATTA
 8 Direct Examination By Mr. English 1388
 9 Cross-Examination By Mr. Vetne 1403
 10 Cross-Examination By Mr. Carroll 1415

11	EXHIBITS	MARKED	ADMITTED
12	Exhibit 35	---	1081
13	Exhibit 36	1091	1105
14	Exhibit 37	1181	1225
15	Exhibit 38	1225	1293
16	Exhibit 39	1294	1317
17	Exhibit 40	1386	----

18 Motion to strike: Granted page 1256

19 - - -

20

21

22

23

24

25

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

2 JUDGE CLIFTON: We're now on record.

3 It's 8:01 on Thursday, May 7, 2009. This is day
4 four of the milk rulemaking hearing. I'd like
5 the transcript volume to be labeled as
6 volume IV, and I'd like the pages to be numbered
7 in sequence to those of yesterday.

8 With regard to what happened after we
9 went off record yesterday, I still had on my
10 stand the motion to exclude regarding the
11 testimony of Mr. Kastel and his exhibit that was
12 brought by the Attorney Livia Kiser. I
13 approached Ms. Kiser and I asked her if she had
14 any objection to my sealing the motion. I'd
15 like to seal it and leave it in that status
16 until I receive the response that I anticipate
17 Mr. Kastel will file. And once I have both the
18 motion and the response, I will engage the two
19 of them in a teleconference and determine how
20 I'll handle those with regard to the record of
21 this rulemaking procedure.

22 So I ask the USDA table to seal in a
23 separate envelope than the unredacted copy the
24 motion to exclude and memoranda in support.

25 Thank you.

1 I've been tendered now a copy of
2 Mr. Kastel's exhibit, the redacted one, and that
3 will go on the website. That is Exhibit 35
4 redacted. And it is exactly as I had asked.
5 Thank you so much for doing the technical work
6 to get that so that we could put that on the
7 website.

8 Now, the next item is to decide the order
9 of testimony for today. I'd like to start by
10 having those people who were not here yesterday
11 but who are here today and will participate come
12 forward to the podium. Would you please state
13 and spell your name?

14 MR. HUGHES: My name is William Hughes.
15 William is W-i-l-l-i-a-m, Hughes, H-u-g-h-e-s.
16 And my cohort is here, her name is Diane, and
17 that's with an e, and Bothfeld,
18 B-o-t-h-f-i-e-l-d (sic).

19 JUDGE CLIFTON: And tell me in what
20 capacity you'll be providing evidence?

21 MR. HUGHES: We are representing
22 states -- we're actually representing a
23 consortium of states and our proposal is to
24 jointly present the testimony.

25 JUDGE CLIFTON: Excellent. In

1 determining the order in which we'll proceed
2 today, I need to know when you need to leave.

3 MR. HUGHES: The honest answer to that is
4 we have all day.

5 JUDGE CLIFTON: Good.

6 MR. HUGHES: We'll able to go any time
7 you wish.

8 JUDGE CLIFTON: All right. And do you
9 have a desire to witness some of the other
10 testimony while you're here?

11 MR. HUGHES: Makes no difference.

12 JUDGE CLIFTON: Okay. So I can put you
13 in wherever it makes my day go best?

14 MR. HUGHES: Yes.

15 JUDGE CLIFTON: Thank you so much. All
16 right. Now, with regard to the others who will
17 be testifying today, Mr. J.T. Wilcox, are you
18 here now?

19 MR. ENGLISH: Yes.

20 JUDGE CLIFTON: If you'd come forward
21 with counsel? And, Mr. English, who are your
22 other witnesses today?

23 MR. ENGLISH: Mr. Krueger from Shamrock
24 Foods Company is here. And he just went up to
25 his room for a moment. And he is on our list

1 for today and he's available anytime today. He
2 just needs to be out of here by close of
3 business tonight. That is to say, he has a
4 flight first thing in the morning.

5 Mr. Wilcox --

6 JUDGE CLIFTON: Now, before you go on,
7 I'm spelling Krueger, K-r-u-g-e-r.

8 MR. ENGLISH: No, K-r-u-e-g-e-r.

9 JUDGE CLIFTON: All right. And his first
10 name is Mike?

11 MR. ENGLISH: Mike or Michael.

12 JUDGE CLIFTON: Michael. All right. Go
13 ahead.

14 MR. ENGLISH: Mr. J.T. Wilcox, whose
15 testimony was put out yesterday morning, is
16 available again anytime today. He was -- has
17 been here since Tuesday evening. He was
18 technically available anytime yesterday -- I'm
19 sorry, he's been here since Monday night.

20 At one time he might have been available
21 to Tuesday, but he was certainly available all
22 day yesterday. He was on the schedule for
23 yesterday and I believe fell off the schedule
24 because of certain events later in the day. But
25 he is available all day today.

1 JUDGE CLIFTON: I think he fell off due
2 to the exhaustion of everyone. I hope he was
3 equally exhausted and not disappointed that he
4 didn't get to go.

5 MR. KRUEGER: Not a bit disappointed.

6 MR. ENGLISH: I wouldn't necessarily
7 propose he go first. There might be one or two
8 that might be first.

9 I think we were discussing a couple of
10 potential dairy farmers, but I'll let you get
11 your schedule. Those are my two witnesses, your
12 Honor.

13 JUDGE CLIFTON: All right. Thank you,
14 Mr. English. You may be seated. And is Matt
15 Shatto here yet? All right. Is John Hornstra
16 here? I see no response for either. Is Steve
17 Rowe here?

18 MR. BESHORE: Yes.

19 JUDGE CLIFTON: If you'll come forward,
20 Mr. Rowe, please state and spell your name.

21 MR. ROWE: Steven Rowe, S-t-e-v-e-n,
22 R-o-w-e.

23 JUDGE CLIFTON: Mr. Rowe, what is your
24 preference with regard to when you're scheduled?

25 MR. ROWE: Preference would -- well, I

1 can work in anytime today.

2 JUDGE CLIFTON: All right. I do
3 appreciate that. But I really would like to
4 honor your preference, in addition.

5 MR. ROWE: I'll leave it to counsel also.

6 JUDGE CLIFTON: All right. Mr. Beshore.

7 MR. BESHORE: We're flexible, your Honor.

8 JUDGE CLIFTON: All right. Thank you
9 both. Mr. Beshore, what other witnesses would
10 be calling today?

11 MR. BESHORE: I do not have any other
12 witnesses today.

13 JUDGE CLIFTON: All right.

14 MR. ENGLISH: Your Honor, Charles
15 English.

16 JUDGE CLIFTON: Mr. English.

17 MR. ENGLISH: Proving that at least one
18 in the room is suffering from exhaustion, I
19 forgot Gary Latta, L-a-t-t-a, for the Northeast
20 Dairy -- I'm sorry -- Northeast Dairy Foods,
21 Inc. I don't see him here yet. My
22 understanding is he is available anytime today.

23 JUDGE CLIFTON: All right. Good. That's
24 good. Okay.

25 MR. HUGHES: Yes.

1 JUDGE CLIFTON: Yes.

2 MR. HUGHES: I started out on the right
3 foot as well as Mr. English. My cohort, who is
4 not here, Diane, the spelling of her last name
5 is B-o-t-h-f-e-l-d.

6 JUDGE CLIFTON: Ah, feld, f-e-l-d.
7 F-e-l-d.

8 MR. HUGHES: Thank you. Sorry.

9 JUDGE CLIFTON: Thank you. And that was
10 Mr. Hughes speaking. All right. Now, is there,
11 as part of the consortium presentation, the -- I
12 guess I'll ask you to come back, Mr. Hughes.

13 MR. HUGHES: Here's Diane now.

14 JUDGE CLIFTON: Is there a Roger Allbee?

15 MR. HUGHES: Yes. He is the Commissioner
16 of Agriculture in Vermont.

17 JUDGE CLIFTON: Will he be coming, do you
18 know?

19 MR. HUGHES: He will not. Is that
20 correct, Diane?

21 MS. BOTHFELD: That is true.

22 JUDGE CLIFTON: All right. And he will
23 not, because you are presenting what he is
24 interested in having heard?

25 MR. HUGHES: Diane is, yes.

1 JUDGE CLIFTON: Diane is. All right.
2 Ms. Bothfeld, would you come forward, please, to
3 the podium? And you bear gifts.

4 MS. BOTHFELD: Yes, I do.

5 JUDGE CLIFTON: That's good.

6 MS. BOTHFELD: I have lots of gifts.

7 JUDGE CLIFTON: First, state and spell
8 your name for us.

9 MS. BOTHFELD: Diane Bothfeld, B as in
10 boy, o-t-h-f, as in Frank, e-l-d.

11 JUDGE CLIFTON: And on whose behalf will
12 you be presenting evidence?

13 MS. BOTHFELD: I am here today to
14 present the evidence on behalf of the Secretary,
15 Roger Allbee, from Vermont, as well as the
16 states of New Hampshire, New York, Pennsylvania.
17 And Will Hughes is here from Wisconsin as well.

18 JUDGE CLIFTON: All right. And would you
19 please spell the name of the Secretary of
20 Agriculture of Vermont?

21 MS. BOTHFELD: Roger Allbee, A-l-l-b-e-e.

22 JUDGE CLIFTON: All right. And tell me
23 what documents you have in front of you.

24 MS. BOTHFELD: I have testimony, prepared
25 testimony, for you as well as copies for the

1 room.

2 JUDGE CLIFTON: Excellent. All right.
3 What some have been doing is putting --
4 reserving back enough for distributing when you
5 begin your testimony to the court reporter, me
6 and the USDA officials, keeping those with you,
7 and putting the remainder that are available for
8 everyone to come and pick up on the back table.
9 Some are not here yet this morning. They'll be
10 coming in later to get their copy. And even if
11 they miss your testimony, they'll want the
12 exhibit.

13 MS. BOTHFELD: Yes.

14 JUDGE CLIFTON: All right. Thank you.
15 You may do that.

16 MS. BOTHFELD: Okay, all right.

17 JUDGE CLIFTON: Thank you. I think
18 today is going to go very well. I don't think
19 today is going to be overburdened. I know
20 we can fill it with other things, but those are
21 the must-dos. So I'm heartened.

22 I think, given where we are, I would like
23 to begin with the testimony of Diane Bothfeld
24 and Will Hughes. And since they'll be
25 presenting theirs together, we'll go off record

1 while we set up the witness table
2 accordingly. So take a ten-minute stretch
3 break, if you will, and be ready to go on record
4 at 8:23.

5 (A recess was taken from 8:14 to 8:22.)

6 JUDGE CLIFTON: Let's go on record.
7 We're back on record. It's about 8:22, but I
8 can't wait any longer. I'm not positive I ever
9 enunciated very clearly that I admitted into
10 evidence redacted Exhibit 35. So just in case,
11 I hereby do that. I admitted into evidence
12 redacted Exhibit 35.

13 Now, Mr. Hughes, would you again identify
14 yourself?

15 MR. HUGHES: Yes. I am William Hughes.
16 I work for the Wisconsin Department of
17 Agriculture Trade and Consumer Protection. I am
18 representing the Secretary of Agriculture, Trade
19 and Consumer Protection in Wisconsin, Rad
20 Nilsestuen, N-i-l-s-e-s-t-u-e-n, and also
21 producer-handlers and order exempt plants in
22 Wisconsin that have signed the letters that are
23 part of our exhibit.

24 JUDGE CLIFTON: I need you to spell that
25 name one more time.

1 MR. HUGHES: H-u-g-h-e-s.

2 JUDGE CLIFTON: Nil --

3 MR. HUGHES: Oh, the Norwegian name?

4 JUDGE CLIFTON: Yes.

5 MR. HUGHES: N-i-l-s-e-s-t-u-e-n. Don't
6 ask me to say it.

7 JUDGE CLIFTON: Nilsestuen?

8 MR. HUGHES: Yes.

9 JUDGE CLIFTON: And that's Norwegian.

10 MR. HUGHES: Yes.

11 JUDGE CLIFTON: My maiden name is
12 Norwegian, but it's Sorenson. It's much easier.
13 All right. How would you like to proceed?

14 MR. HUGHES: Well, we want to -- we don't
15 have legal counsel, so if it's okay, if I could
16 just introduce ourselves and sort of get this
17 testimony on a roll, and then I will go up
18 there.

19 And the way we're going to do this is,
20 Diane is going to give the direct testimony
21 after I ask her a few questions that sets the
22 stage for our testimony. And then I'll be part
23 of cross-examination.

24 JUDGE CLIFTON: All right. That's very
25 fine with me. What I'll do now is have you be

1 sworn in together so that both of you are under
2 oath. And even though part of your role will be
3 asking questions, to the extent you are
4 making statements, they'll be under oath as
5 well.

6 MR. HUGHES: Correct.

7 JUDGE CLIFTON: All right. I now would
8 ask Ms. Rothfeld to identify herself so that
9 it's clear who is being sworn at the same time.
10 I'm sorry, Bothfeld. I said Rothfeld.
11 Bothfeld, with a B, as in boy.

12 MS. BOTHFELD: My name is Diane Bothfeld.
13 I'm with the Vermont Agency of Agricultural Food
14 and Markets.

15 JUDGE CLIFTON: Would each of you raise
16 your right hand, please?

17 DIANE BOTHFELD AND WILL HUGHES
18 of lawful age, being duly sworn, were examined and
19 testified as follows:

20 JUDGE CLIFTON: Thank you. Mr. Hughes,
21 you may proceed.

22 MR. HUGHES: Okay. Well, first off, I
23 want to thank you all for allowing us to testify
24 today, everyone, to indulge in the room.
25 Especially I want to thank USDA for the

1 information that they've provided for this
2 hearing. It's plenty adequate and has helped
3 serve our purpose. They provided us data and I
4 want to thank them.

5 JUDGE CLIFTON: Make sure you're very
6 close to the mic.

7 MR. HUGHES: Okay. How's that? I'll try
8 to speak up as well.

9 JUDGE CLIFTON: Good. I think that's
10 better.

11 MR. HUGHES: So did USDA hear that I
12 thanked them for their diligent work?

13 MR. STEVENS: They did. Thank you for
14 thanking us.

15 MR. HUGHES: So I think the first thing
16 we want to do is make it clear why we're here
17 and who we're representing. So Diane and I
18 worked with other states to compile this
19 testimony. And I'm going to ask Diane to
20 explain what we're doing here and on their
21 behalf and who we are representing. So, Diane?

22 MS. BOTHFELD: Thank you, Will. We are
23 here on behalf of the states of New Hampshire,
24 New York, Pennsylvania, Vermont and Wisconsin.
25 The states of New York, Vermont and Pennsylvania

1 have been working together since 2006 on dairy
2 issues. Our agencies and Departments of
3 Agriculture have a memorandum of
4 understanding to work collectively for our dairy
5 industry. So those states have been and do have
6 a history of working together on issues related
7 to dairy.

8 New Hampshire is geographically very
9 similar to Vermont in its location and its type
10 and sizes of dairy farms. So there's an easy
11 collaboration between our two states.

12 JUDGE CLIFTON: May I ask you to make the
13 microphone so -- you're looking at a slight
14 angle to your right. I would like the
15 microphone to be slightly to the right of your
16 mouth.

17 MS. BOTHFELD: There we go. Is that
18 better?

19 JUDGE CLIFTON: Thank you.

20 MS. BOTHFELD: The states have been
21 working together and did work on this testimony
22 jointly. We had several conference calls to
23 discuss this testimony. As well, each of the
24 states individually spoke to their
25 producer-handlers and exempt plants in their

1 states to discuss their concerns.

2 There are many letters of support from
3 Pennsylvania and Wisconsin, New York, Vermont
4 and New Hampshire. Those letters will be
5 forthcoming. The time line of getting those
6 letters in, they are forthcoming, but we are
7 testifying on behalf of our states as well as on
8 behalf of our producer-handlers and exempt
9 plants within those states.

10 MR. HUGHES: And this is Will Hughes. I
11 would like to just add that our producer-handler
12 exempt plants in Wisconsin, we had a telephone
13 conference call with them and they were part of
14 generating the position and are part of the
15 signed letters that -- and all of our
16 producer-handler and exempt plants in Wisconsin
17 have signed letters that are part of our
18 exhibit.

19 And the additional thing that I want to
20 add is, our Department works in the area of what
21 we call dairy development. We have lots of
22 farmers that -- in the state that are engaged in
23 the business of what I would call forward
24 vertical integration, processing their milk
25 mainly into cheese is where we've seen the most

1 activity.

2 And we have had an uprise in what we call
3 the producer-handler aspect of the business as
4 well. And as part of that process, we do get
5 involved in the business planning, financial
6 projection.

7 And then we've made loans. And as part
8 of the loan-making process, we get actual
9 financial statements. And upon
10 cross-examination, I'm prepared not to speak
11 about individual financial statements, but to
12 make a generalization that the kinds of
13 producer-handlers and exempt plants that we see
14 in Wisconsin are not the kind of profitable
15 enterprise that will attract a lot of entry in
16 that business at the size we are talking about,
17 which is quite small.

18 We will perhaps ask -- I may ask Diane a
19 few questions after our testimony, but I would
20 like to just set a broader tone that's maybe not
21 set in our direct testimony, have Diane add a
22 few key points that are very important to us as
23 states that I think is important to precede our
24 direct testimony. And then we will proceed to
25 that. So, Diane, would you summarize those key

1 points?

2 MS. BONFELD: Yes, I would, Will. This
3 is Diane. It is very traditional in our state.
4 We have very similar farm sizes. The
5 entrepreneurial spirit and the innovation from
6 our on-farm processing that has grown. Like
7 Wisconsin, Vermont has seen most of that growth
8 within on-farm cheese making.

9 But also our states are showing
10 significant interest from our consumers for a
11 buy local movement. They're looking for
12 locally-produced products. They're looking for
13 niche products. They really are expressing a
14 tremendous demand for that. And these
15 producer-handlers and exempt plants have been
16 meeting that demand.

17 Each of our states has had programs for
18 revitalizing and improving, strengthening our
19 dairy industry. And as Will mentioned, with the
20 grants and loans within Wisconsin, each of those
21 states -- Vermont has some similar programs
22 along with New York and Pennsylvania and New
23 Hampshire -- all working to strengthen and
24 revitalize our dairy industries.

25 So the producer-handler exemption and the

1 limit on the exempt plants is very important to
2 our collective states.

3 We're very committed to the
4 producer-handler exemption as well as our
5 farmers and our processing.

6 I think our testimony, in general, tries
7 to strike a balance in giving USDA some options
8 on the size limit and also looking at that
9 2 million pounds.

10 Some other things I'd like to add. We do
11 understand that the marketwide pooling is very
12 important to all of our dairy farmers. They're
13 crucial to our economies, the dairy, in all of
14 our five states.

15 The marketwide pool assures that all
16 producers, large and small, no matter where
17 located, receive an equitable portion of the
18 Class I proceeds of the sale of milk.

19 Marketwide pooling is specially important
20 for smaller producers who, on their own, have
21 limited ability to access the Class I market.

22 The largest producers will take care of
23 themselves. The Federal Order pools look out
24 for all producers. The Federal Order marketwide
25 pools are a classic case of the greatest good

1 for the greatest number.

2 Unlimited exemptions will do pooling.

3 The marketwide pools will not and cannot survive
4 with unlimited exemptions from pooling.

5 Continuation of an unlimited
6 producer-handler exemption will ultimately
7 destroy the Federal Order marketwide pools
8 because it erodes the twin foundations of equal
9 handler minimum prices and equal sharing by
10 producers of Class I proceeds.

11 For the pool to survive, the exemption
12 must be limited. Large producer-handlers will
13 arise in all areas there is an exemption. A
14 reasonable limit is the right solution.

15 We propose a limit of 2 million pounds on
16 the producer-handler Class I monthly sales.
17 This is equal to a farm size of at least a
18 thousand calves. This allows an exemption for a
19 very substantial operation but not an unlimited
20 exemption.

21 If a producer-handler wants to expand
22 beyond that size, it should become part of the
23 pool.

24 Our recommendations differ from National
25 Milk in that it is less in volume, 2 million

1 versus 3 million, but it allows for new entrants
2 and does not allow existing producer-handlers on
3 a grandfathered basis. We think this is a
4 reasonable compromise.

5 MR. HUGHES: Thank you, Diane. Okay.
6 Now, we are going to throw a little curve ball,
7 which is to -- I know it's setting a different
8 precedence here, but we are asking if it's okay
9 to not read our testimony, but rather to
10 summarize it, and have the Exhibit 36 entered
11 into the record as if it were read, including
12 the letter from the producer-handlers and exempt
13 plants, to spare the audience the pain of
14 reading.

15 But if you, your Honor, or the people in
16 this room want us to read that testimony, Diane
17 is prepared to do that. Otherwise she will
18 summarize it and shave off perhaps 10, 15
19 minutes.

20 JUDGE CLIFTON: All right. For this
21 portion of the proceeding, I'd like you to have
22 a seat at the witness at the witness stand, if
23 you would.

24 (Exhibit 36 was marked for
25 identification.)

1 JUDGE CLIFTON: Exhibit 36 has been moved
2 into evidence. I am aware that the letters that
3 are attached are written by people who are not
4 available for cross-examination.

5 This is a little different situation than
6 the one we had last night. This is a state
7 organization gathering input from constituents.
8 We know what prompted the letters and the
9 conference call, and other communications were
10 involved.

11 We know that the outreach may be somewhat
12 limited and that it was directed at
13 producer-handlers and exempt plants. I do not
14 know if people in the dairy industry who are not
15 producer-handlers or exempt plants were
16 contacted.

17 I'd like to -- at first, before we hear
18 any objections, I would like to invite any voir
19 dire that anyone has with regard to Exhibit 36.
20 Any questions that you'd like to ask the
21 witnesses about the exhibit at this point?
22 Mr. Ricciardi. And if you'll identify yourself
23 just as if we were on day one.

24 MR. RICCIARDI: I will, your Honor.

25 VOIR DIRE

1 BY MR. RICCIARDI:

2 MR. RICCIARDI: Good morning. My name is
3 Richard Ricciardi here on behalf of AIDA and
4 will have some questions about the letters that
5 are attached to Exhibit 36.

6 I noticed in my reading that they appear
7 to be identical -- the language in each one of
8 the letters -- in each one of the paragraphs,
9 other than changing the name of the dairy, is
10 identical. Who prepared the content of that
11 letter?

12 MR. HUGHES: I did.

13 MR. RICCIARDI: And were the people who
14 were signatories to the letter told that they
15 should simply sign on to the identical language
16 in each letter?

17 MR. HUGHES: We had a conference call in
18 which the substance of the letter was agreed
19 upon by a consensus. We told them that we would
20 like them to indicate their support by a letter
21 and we would provide a draft.

22 And if you know the world of
23 producer-handlers at the size we are talking
24 about and the nature of their business, you
25 would see that the most efficient way for them

1 to participate is for them to sign a letter
2 that's drafted for them. And that's what I did.

3 MR. RICCIARDI: So you drafted the
4 letter, you drafted the language, they simply
5 signed it?

6 MR. HUGHES: Correct. And I see nothing
7 wrong with that as indicating any more or less
8 commitment than what was agreed upon as a
9 consensus on the phone call.

10 MR. RICCIARDI: I understand that.
11 During the course of the discussion and the
12 phone call that you are talking about, did you
13 provide information with regard to any of the
14 other proposals that were noticed in the hearing
15 notice?

16 MR. HUGHES: Well, on the conference
17 call, no. The nature of the conference call is
18 to get the business done, what is the issue.
19 You know, we talked generally about what, you
20 know, the range of the proposals were. We did
21 not go through the individual ones.

22 Many of the producer-handlers listened on
23 the conference, or whatever the listening
24 session was that USDA -- they're fully aware.
25 They have been contacted by lots of people.

1 They're very astute business people, and so I
2 don't think there's any reason to think that
3 they didn't know about what the scope of the
4 proposals were at this hearing.

5 MR. RICCIARDI: Well, you are not in the
6 minds of any of those individuals. You don't
7 know what they exactly knew. You are assuming
8 that, based upon the conference call --

9 MR. HUGHES: Excuse me, but I work much
10 more closely than you do, sir, with those
11 particular producer-handlers.

12 MR. RICCIARDI: There's no doubt. I'm
13 not very close to them at all. I'd like to be
14 able to be closer to them today.

15 Did you specifically in the conference
16 call discuss with them the proposal that was
17 made for individual handler pools?

18 MR. HUGHES: No.

19 MR. RICCIARDI: Did you discuss with them
20 the proposal that was made for own-farm
21 exemption?

22 MR. HUGHES: Elaborate, please.

23 MR. RICCIARDI: Did you discuss -- I'll
24 be more specific. Did you discuss with them
25 specifically Proposals 23, 24 and 25?

1 JUDGE CLIFTON: Let me hand him that.

2 MR. RICCIARDI: If you would, Judge.

3 JUDGE CLIFTON: Help me as to what page
4 23 begins on.

5 MR. RICCIARDI: Since I don't have it in
6 front of me, Judge, I can't --

7 JUDGE CLIFTON: On -- I have 25.

8 MR. TOSI: Your Honor, I can help you out
9 on what page to find it. Proposal 23 is on page
10 16306.

11 JUDGE CLIFTON: Good. Thank you.

12 MR. TOSI: And it's cited in the very
13 bottom of the middle column.

14 JUDGE CLIFTON: So 23 is there and 24 is
15 two pages later.

16 MR. TOSI: 24 begins on the far
17 right-hand column on page 16308.

18 JUDGE CLIFTON: And 25 is --

19 MR. TOSI: And 25 begins on page 16310 in
20 the far left-hand column.

21 JUDGE CLIFTON: Okay. Let's go off the
22 record for five minutes while the witnesses have
23 an opportunity to digest those.

24 MR. RICCIARDI: Thank you, your Honor.

25 (A recess was taken from 8:40 to 8:42.)

1 JUDGE CLIFTON: We're back on record at
2 8:42.

3 Mr. Ricciardi, the witnesses have had an
4 opportunity to look at those three proposals.
5 Would you ask your question again?

6 MR. RICCIARDI: I will. Did you
7 specifically discuss in the conference call
8 Proposals 23, 24 and 25 with the people on the
9 call?

10 MR. HUGHES: No. And I want to add to
11 that, it's from the conference call itself --
12 and, again, the folks are not here for
13 cross-examination, but the principles that Diane
14 outlined before, marketwide pooling is crucial.

15 Unlimited exemptions will doom pooling
16 and a reasonable exemption is the core of what
17 our conference call substance was, and that --
18 that did not direct us into the world of
19 scrutinizing of every single proposal, but I can
20 tell you from the nature of that discussion that
21 it's my best judgment that those proposals would
22 not be supported by this group.

23 MR. RICCIARDI: But you don't know that
24 because you specifically did not discuss 23, 24
25 and 25 with them on that conference call

1 specifically --

2 MR. HUGHES: No --

3 MR. RICCIARDI: -- right?

4 MR. HUGHES: -- I would consider that a
5 technical, legal point, so --

6 MR. RICCIARDI: Technical -- technical
7 legal. Thank you, Judge.

8 JUDGE CLIFTON: Thank you, Mr. Ricciardi.
9 Mr. English.

10 VOIR DIRE

11 BY MR. ENGLISH:

12 MR. ENGLISH: Good morning.

13 MR. HUGHES: Good morning.

14 MR. ENGLISH: I'm going to follow up on
15 that.

16 Is this the first time, Mr. Hughes, that
17 you have appeared on behalf of Wisconsin Dairy
18 Farmers on a Federal Order proceeding?

19 MR. HUGHES: No. No, it is not.

20 MR. ENGLISH: Is it part of your official
21 duties to appear -- one of many duties, to
22 appear on behalf of your dairy industry at
23 proceedings such as this?

24 MR. HUGHES: Absolutely. It's actually
25 in our statutory charge.

1 MR. ENGLISH: The statutory charge says
2 that you are to represent the dairy industry in
3 public proceedings of this nature?

4 MR. HUGHES: Correct.

5 MR. ENGLISH: Ma'am, we've never met
6 before. My name is Charles English. I'm sorry,
7 Mr. Hughes and I go back. I represent a number
8 of fluid milk processors. One entity I
9 represent is the Northeast Dairy Foods, Inc.
10 organization, but also the Pennsylvania
11 Association of Milk Dealers, both with their --
12 dairy -- cover parts of this coalition, but a
13 number of entities.

14 And I would like to ask, is Vermont, the
15 state of Vermont, generally interested in the
16 dairy industry?

17 MS. BOTHFELD: Yes.

18 MR. ENGLISH: Very much so?

19 MS. BOTHFELD: Very much so.

20 MR. ENGLISH: Crucial, crucial industry?

21 MS. BOTHFELD: Very important to our
22 state.

23 MR. ENGLISH: It is part of your official
24 duties to appear at proceedings such as this to
25 represent the dairies in the state of Vermont?

1 MS. BOTHFELD: I was requested by
2 Secretary Allbee to attend this proceeding and
3 represent Vermont.

4 MR. ENGLISH: And as part of that, you
5 undertook to discuss both with your counterparts
6 in other states, you did do that?

7 MS. BOTHFELD: Yes.

8 MR. ENGLISH: And also you undertook to
9 discuss with potentially affected persons in
10 Vermont?

11 MS. BOTHFELD: Yes.

12 MR. ENGLISH: Mr. Hughes, Mr. Ricciardi
13 asked you questions about specific proposals and
14 then your response was, well, we have these core
15 principles. As I understood it, one core
16 principle was marketwide pooling should be
17 retained?

18 MR. HUGHES: Yes.

19 MR. ENGLISH: And to the extent
20 marketwide pooling is expressly and identical to
21 a proposal for individual handler pools, what
22 does that say to you about the position of the
23 group?

24 MR. HUGHES: The group would not support
25 an individual handler -- individual handler pool

1 proposal.

2 MR. ENGLISH: And in your capacity,
3 statutorily mandated to appear on behalf of
4 dairy interests in Wisconsin, are you confident
5 that that's the position of the group that you
6 represent?

7 MR. HUGHES: Yes.

8 MR. ENGLISH: You also said, I believe,
9 that the group, as a core principle, discussed a
10 need to not have -- I'm sorry -- unlimited
11 exemption, you need a limited exemption.

12 MR. HUGHES: Yes.

13 MR. ENGLISH: And within the context of a
14 limited exemption, that's where this 2 million
15 pound number came up?

16 MR. HUGHES: Correct.

17 MR. ENGLISH: And you're confident in
18 your statutory duties that that is what the
19 interests of the Wisconsin industry that you
20 represent here today want?

21 MR. HUGHES: Yes. And as Diane -- I just
22 want to add, as Diane pointed out, we're sort of
23 here in a double capacity, so to speak. One is
24 to try to prevent all the producer-handlers who
25 are struggling with their businesses day to day

1 to have to attend here.

2 And as importantly, because of our state
3 interests in the dairy industry, we are expected
4 to work on policy and effect policy that affects
5 the dairy industry at large in our states. And
6 this is what brings us to this position.

7 MR. ENGLISH: Okay. And, indeed --

8 MR. CARROLL: Mr. Hughes, may I ask him
9 to speak a little louder or closer to the mic?

10 JUDGE CLIFTON: Yeah, I think it's the
11 closeness to the mic, actually. You really need
12 to be almost two inches from it.

13 MR. HUGHES: Okay.

14 JUDGE CLIFTON: Oh, that's good. Thank
15 you, Mr. Carroll.

16 MR. ENGLISH: Hold onto it, Mr. Hughes.
17 Let me go back to that point for just one
18 moment.

19 In representing the dairy industry, part
20 of that is to allow the producer-handlers to
21 stay home so they can do their business and you
22 can be here for them?

23 MR. HUGHES: Correct.

24 MR. ENGLISH: What was in the third core
25 principle? I'm sorry, I lost one.

1 MR. HUGHES: Well, marketwide pooling is
2 crucial, number one. Unlimited exemptions will
3 doom pooling, number two.

4 MR. ENGLISH: Will doom pooling?

5 MR. HUGHES: Yeah, doom pooling, kill it.

6 MR. ENGLISH: Fine.

7 MR. HUGHES: A reasonable limit is the
8 right solution. And that's the -- where the
9 2 million pound limit is established under that
10 principle as a specific recommendation to USDA.

11 MR. ENGLISH: And, ma'am, if you could,
12 having heard all those questions, if I asked the
13 same questions would you have the same answers
14 as Mr. Hughes?

15 MS. BOTHFELD: Yes, I would.

16 MR. ENGLISH: Ma'am, do you have any
17 pecuniary or financial interest in the outcome
18 of this proceeding individually?

19 MS. BOTHFELD: No, I do not.

20 MR. ENGLISH: You don't own a dairy farm?

21 MS. BOTHFELD: I do not.

22 MR. ENGLISH: You don't operate a fluid
23 milk plant?

24 MS. BOTHFELD: I do not.

25 MR. ENGLISH: You are not part of a dairy

1 farmer owned cooperative?

2 MS. BOTHFELD: I am not.

3 MR. ENGLISH: Mr. Hughes, do you have any
4 financial interest in the outcome of this
5 proceeding?

6 MR. HUGHES: No.

7 MR. ENGLISH: Do you own a dairy farm?

8 MR. HUGHES: No.

9 MR. ENGLISH: Do you own a milk plant?

10 MR. HUGHES: No.

11 MR. ENGLISH: Are you part of in any way
12 of a dairy farmer owned cooperative?

13 MR. HUGHES: No.

14 MR. ENGLISH: Your Honor, I think this is
15 a very kind of different document, given the
16 nature of the officials who are here, the
17 statutory and regulatory duties that they are
18 under, and the lack of a financial interest, and
19 that all of those combine to give this an
20 imprimatur, which allows it to be believed and
21 should be admitted as is.

22 JUDGE CLIFTON: Thank you. Any further
23 questions of the witnesses as a preliminary
24 matter before I ask for any objections?

25 All right. Are there any objections to

1 the admission into evidence of Exhibit 36?

2 There are none. Exhibit 36 is hereby admitted
3 into evidence.

4 JUDGE CLIFTON: And now, Mr. Hughes, and
5 you and Ms. Bothfeld may continue to testify.

6 MR. HUGHES: And we're okay with
7 summarizing the testimony?

8 JUDGE CLIFTON: You may, yes.

9 MS. BOTHFELD: Thank you. The summary of
10 our testimony is as follows:

11 Thank you for holding this hearing, and
12 thank you to USDA for the information you
13 provided, as Mr. Hughes has mentioned.

14 We are here providing testimony on behalf
15 of the states of New Hampshire, Vermont,
16 Pennsylvania, Wisconsin and New York -- make
17 sure I get all my five states -- where we will
18 speak of those states as the states in this
19 testimony. So not to be confused, we are
20 speaking on behalf of those five states.

21 We are testifying jointly in support of
22 Proposal Number 8 related to the status of
23 producer-handlers within the Federal Order
24 System and the part of Proposal Number 2 that
25 relates to exempt plants.

1 Specifically, the states propose to
2 retain the producer-handler exemption, establish
3 a 2 million pound per month exemption for all
4 Class I milk distributed in all Federal Orders
5 and to increase the limit for exempt plants from
6 150,000 to 450,000 pounds per month.

7 The states all have strong dairy
8 industries with dairy farmers, dairy processing
9 and proximity to consumers in a variety of urban
10 areas.

11 Each of these states has
12 producer-handlers and all but New Hampshire has
13 exempt plants. The states concur that having
14 producer-handlers and exempt plants is not a
15 threat to their overall dairy industries, but
16 that they are indeed a small but important
17 aspect of their respective industries. These
18 producer-handlers and exempt plants provide
19 viable choices to consumers in the states who
20 may seek to purchase more locally produced or
21 niche dairy products. Below in Table 1 is
22 information on numbers and volumes of
23 producer-handlers and exempt plants relative to
24 total milk production in our states.

25 Table 1, New Hampshire has two

1 producer-handlers and exempt plants. A yearly
2 volume of 11,000 -- 11,400,000 and a yearly
3 total volume for the state of 299 million. That
4 represents 3.8 percent of their production.

5 New York has 13 producer-handlers in
6 exempt plants with a yearly volume of 15,120,000
7 of their 12.4 billion-pound per year at a
8 percentage of .122.

9 Pennsylvania, 22 producer-handlers and
10 exempt plants. 47,280,000 volume for those
11 plants out of their 10,757,000,000 volume for
12 the year, or .44 percent.

13 Vermont, two producer-handlers and exempt
14 plants. 18,600,000 yearly volume out of the
15 2.575 billion, or .722 percent.

16 Wisconsin, 10 producer-handlers and
17 exempt plants, a yearly volume of 34,800,000 out
18 of their 24.472 billion pounds, or .142 percent.

19 This information demonstrates that the
20 milk volumes involved with producer-handlers and
21 exempt plants is very small relative to total
22 milk production in the state. It would be
23 difficult to argue that such small volumes,
24 collectively or individually, by handlers create
25 significant inequities or disorderly marketing.

1 The states acknowledge that one very large
2 producer-handler, greater than 3 million pounds
3 per month, could be disruptive.

4 The States propose that the
5 producer-handler exemption remain intact
6 throughout the Federal Order system with the
7 following limitations and clarifications:
8 First, the states propose a monthly volume limit
9 of 2 million pounds or less on all Class I milk
10 sold in all orders.

11 Second, the definitions and regulations
12 governing producer-handlers should be uniform
13 across the Federal Order System.

14 And third, ownership provisions should be
15 clear and concise and that the ability to
16 purchase a volume of milk to offset times of low
17 milk production should be allowed as stated in
18 the Northeast Federal Order 1, subpart B,
19 definitions Section 1001.10(b) and (c). The
20 States also support that the monthly limit on
21 distribution in all orders for exempt plants be
22 increased to 450,000 pounds per month.

23 The producer-handler exemption. The
24 States support a uniform producer-handler
25 exemption within the Federal Order System.

1 Producer-handlers in the respective states all
2 employ well under 500 people, and are by any
3 account small businesses. None of these
4 producer-handlers or exempt plants in the states
5 create disorderly marketing currently, nor will
6 they if they are able to grow moderately in the
7 future to the 2 million pound limit or 450,000
8 pound limit.

9 The 2 million pound limit for
10 producer-handler exemption. To insure
11 consistency throughout the Federal Order System,
12 the 2 million pound per month limit for
13 producer-handler exemptions should be
14 implemented in all orders. The States propose
15 -- excuse me.

16 The States proposed limit is based on the
17 need to allow the dairy farm part of the
18 producer-handler business to achieve most of the
19 economies of size in farming. The USDA-ERS
20 report entitled, Low Costs Drive Production to
21 Large Dairy Farms, Amber Waves Volume 5,
22 Issue 4, indicates that farms achieve most, but
23 not all, of their economies with herd sizes of a
24 thousand cows; both operational and in total
25 cost. A thousand cows at an average production

1 of 25,000 pounds per cow per year would achieve
2 the limit per month of the 2 million pounds.
3 The States believe this herd size level is
4 reasonable given today's operational standards
5 on dairy farms.

6 The states can acknowledge that a limit
7 of 3 million pounds had been set as precedence
8 in the Pacific Order and the Arizona-Las Vegas
9 Order, as well as the milk producer education
10 program, and the states consider this volume an
11 absolute upper bound for placing a cap on
12 producer-handler exemption.

13 Also, it may be useful for USDA to
14 consider a circuit breaker in individual orders
15 where producer-handler and exempt plant volumes
16 exceed 5 percent of the Class I pool volume.
17 The states want to leave ample room for
18 innovation and growth for producer-handlers
19 while not overly jeopardizing pool values for
20 all farmers. Milk prices as reported within the
21 Federal Order System and the cost of production
22 information collected by USDA show that seldom
23 does milk price, either statistical uniform
24 price or the Class I price, outpace the total
25 cost of production.

1 On the milk processing front, a two -- a
2 limit of 2 million pounds of milk per month does
3 not allow for economies of scale at a processing
4 facility.

5 The Grandfather Clause. The States
6 support a hard cap of 2 million pounds per month
7 for producer-handlers in all Federal Orders.
8 Attempting to add a grandfathering language adds
9 complexity to regulations and is not necessary
10 with a hard cap as The States propose. Audits
11 needs only to focus on volumes processed and
12 distributed.

13 Unique branding. The Producer-Handlers
14 in The States are marketing unique brands
15 produced at their farm and processing location.
16 These producer-handlers operate one farm and
17 processing facility and the products produced
18 are specifically labeled for sale in their local
19 communities. The States do not support
20 producer-handlers banding together across
21 geographic locations to produce a brand for mass
22 distribution.

23 Ownership and Proof of Location. The
24 States support the Milk Market Administrator in
25 the collection of adequate proof needed to

1 determine that the care and ownership of the
2 cows, ability to produce milk for Class I volume
3 and of the processing facility indicate
4 producer-handler status. This is well defined
5 within the Federal Order language and does not
6 need to be altered. The burden of proof is on
7 the producer-handlers to provide adequate
8 records for the Milk Market Administrator on
9 farm ownership and milk volume processed per
10 month.

11 Milk Volume Supplementation. The States
12 support the producer-handler's ability under the
13 current Federal Order in the Northeast as
14 referenced in subpart B, definition Section
15 1001.10 (b) and (c) and the Upper Midwest to
16 purchase up to 150,000 pounds per month of milk
17 that is fully subject to the pricing and pooling
18 provisions of the so mentioned Federal Orders or
19 any other Federal Order.

20 Exempt plants. The States support the
21 proposal to increase the limit for Exempt Plants
22 from 150,000 pounds to 450,000 pounds per month.
23 As stated by the National Milk Producers
24 Federation in their original proposal, quote,
25 given the growth in average farm size and the

1 growing economies of size in milk processing, it
2 is reasonable to increase the size exemption to
3 450,000 pounds per month, and we propose to do
4 so. For perspective, this is equal to the
5 production of about 260 cows, or twice the size
6 of the average dairy herd in the U.S. This
7 would exempt 30 to 35 plants that are now
8 regulated or partially regulated, as well as all
9 but the 10 to 15 largest current
10 producer-handlers. Plants this small cannot and
11 do not compete with large modern plants on cost
12 alone, with or without the pricing advantage
13 offered by producer-handler status; some 100
14 such plants already do compete in the Federal
15 Order markets primarily on the basis of
16 additional value added, end quotes.

17 That ends our summary. And, Will, would
18 you like to add anything?

19 MR. HUGHES: May I use this microphone?

20 JUDGE CLIFTON: I'd rather have you
21 address the group. I'd rather have them see you
22 face-to-face rather than with your back to them.

23 MR. HUGHES: Okay. Even though I want to
24 talk to Diane?

25 JUDGE CLIFTON: And pull that mic

1 close.

2 MR. HUGHES: Just very briefly. Diane,
3 you alluded to, before you made the direct
4 statement, the core principles that sort of
5 underwrite the legs we stand on in making this
6 testimony, and I don't think we need to repeat
7 those.

8 But I think we should -- I would like to
9 ask you a couple of questions related to the
10 specifics of the testimony.

11 Why has our group in this testimony
12 proposed the specific -- a specific limit?
13 2 million pounds in this case. Why do we think
14 that's necessary?

15 And then, secondly, why do we think
16 grandfathering is not helpful long term for our
17 producer-handlers?

18 MS. BOTHFELD: The two points that you've
19 asked, why the specific limit of 2 million
20 pounds -- and this is Diane Bothfeld -- and why
21 grandfathering would not be helpful.

22 The states reviewed the cost of
23 production data and talked to our farmers,
24 another discussion, and where are those
25 economies of scale starting to occur.

1 And it is really around that 800 to a
2 thousand cows where economies of size, economies
3 of scale start to provide some benefit, some
4 cost benefit to farms. And that's anecdotal
5 information.

6 So the limit of 2 million allows farms to
7 bump right up against that on the farm side of
8 the producer-handler. So they're making the
9 most benefit there. We think that's a
10 reasonable limit at the 2 million.

11 On the grandfathering size, the work --
12 the grandfathering provision, the work that our
13 collective states are doing to revitalize our
14 dairy industry, we would not like to limit farms
15 that wish to be innovative, entrepreneurial and
16 choose to produce the milk and market at the --
17 produce the milk on the farm, process it and
18 market that milk.

19 They are taking a large financial risk to
20 take over all aspects of their production from
21 the cow through to the market, and we want to be
22 able to support that and allow others to come in
23 to that -- that type of business.

24 MR. HUGHES: Thank you, Diane. And I
25 want to -- this is Will. I want to add one

1 additional comment related to this.

2 We have a very aggressive program to work
3 with what we would call the entrepreneurial
4 aspects of the dairy industry. It ranges from
5 producer-oriented businesses that, as I
6 mentioned earlier, vertically integrate forward
7 into processing of some sort, all the way to
8 fairly large cooperatives and proprietary farms
9 in the cheese business.

10 We have pretty much a world-class team
11 that works on that. Of course they don't work
12 for government. They work outside of government
13 and we can contract with them to do that
14 world-class work.

15 In those efforts, we do not -- let me
16 repeat -- not encourage producer-handler --
17 producers to enter the fluid milk business. And
18 the reason why we don't is because we, in our
19 analysis, financial judgment about markets,
20 don't feel like there is as much room to be
21 profitable as there are in some other
22 enterprises, such as cheese.

23 And so our -- if you look at our
24 statistics in growth in the cheese business in
25 terms of new entry, it's much more significant

1 than in fluid milk processing, although we do
2 have them. And once producers make a
3 decision -- we do have increasing
4 producer-handler numbers or exempt plant
5 numbers. And -- but once producers make that
6 decision to get into that business, then we
7 bring our resources to bear to try to help them.

8 But it's a much tougher business than of
9 the alternatives. So it's not something that we
10 see on the horizon that's going to disrupt and
11 create disorder in markets in the manner that
12 we're proposing they be regulated.

13 And we want some room for growth because
14 we think there'll be some. And our famous
15 example in Wisconsin is the Sassy Cow Creamery,
16 which is not yet up to the 2 million pound
17 limit. But in order for that business to be
18 sustainable longer term, you're going to have to
19 get there. And that's sort of a unique
20 perspective of Wisconsin, to try to make sure
21 those kinds of businesses that put a lot of
22 capital on the line can grow a little bit, and
23 that's what I -- we think our proposal does.
24 And that ends our direct statement.

25 JUDGE CLIFTON: Thank you. Who would

1 like to begin cross-examination? Mr. Miltner?
2 You didn't exactly say yes, but you looked more
3 ready than anyone else.

4 MR. MILTNER: And, Judge, because we have
5 a statement that we're reviewing and wasn't read
6 into the record, can we ask for a five-minute
7 recess?

8 JUDGE CLIFTON: I think that's a good
9 idea.

10 MR. MILTNER: Thank you.

11 JUDGE CLIFTON: In fact, let's take ten.
12 Please be back and ready to go at 9:15.

13 (A recess was taken from 9:07 to 9:15.)

14 JUDGE CLIFTON: We're back on record at
15 9:15. I want to re-open direct for --
16 Mr. Hughes has two copies with him of a document
17 that is mentioned in their exhibit. And I
18 believe he wants me to take official notice of
19 it. It looks to me like a valuable document.
20 There are only a couple of copies here.

21 But I want Mr. Hughes to identify what it
22 is and we'll see if anyone wants to make use of
23 the document during cross-examination.

24 MR. HUGHES: Thank you, your Honor. In
25 our direct testimony -- it's actually on

1 page 4 -- we referenced a USDA report called Low
2 Costs Drive Production to Large Dairy Farmer,
3 and it's from an ERS publication, actually a
4 popular press version of their economic work at
5 the Economic Research Service. It's in Amber
6 Waves and the citation's in the direct
7 testimony. I do have five copies here.

8 But because it speaks to and underwrites
9 our position for the volume limit that we're
10 proposing, I would like to ask that it be
11 part -- entered as part of the official record
12 and -- and that's the substance of the request.

13 JUDGE CLIFTON: All right. Would anyone
14 like to examine that document before I determine
15 whether there are any objections to my taking
16 official notice of it? Mr. Ricciardi --

17 MR. RICCIARDI: Yes.

18 JUDGE CLIFTON: -- Mr. Yale, would you
19 approach the witness and take a copy from him?
20 Do you have another one?

21 MR. HUGHES: Yeah, I've got another one,
22 three more here.

23 MR. CARROLL: Thank you.

24 JUDGE CLIFTON: All right. Let's go off
25 record for about five minutes while you

1 familiarize yourself with that document.

2 (A recess was taken from 9:17 to 9:23.)

3 JUDGE CLIFTON: All right. We're back on
4 record at 9:23. Does anyone have any questions
5 with regard to the document that Mr. Hughes
6 proposes I take official notice of? There
7 appear to be no questions.

8 Is there any objection to my taking
9 official notice of that document? There are
10 none. I take official notice of the document
11 referred to in the -- in the Exhibit 36 on page
12 4, which is a USDA ERS report entitled, Low
13 Costs Drive Production to Large Dairy Farms.

14 All right. Now, we're ready for
15 cross-examination. Mr. English, were you going
16 to begin, and where did you go? All right.
17 Cross-examination. Who would like to go next?
18 Thank you, Mr. Miltner.

19 MR. MILTNER: Ryan Miltner on behalf of
20 AIDA.

21 CROSS-EXAMINATION

22 BY MR. MILTNER:

23 MR. MILTNER: Thank you for coming in
24 today to testify.

25 MR. HUGHES: What's AIDI?

1 MR. MILTNER: AIDA.

2 MR. HUGHES: AIDA. What is that?

3 MR. MILTNER: It's the American
4 Independent Dairy Alliance. We're a group of
5 producer-handlers and exempt plants, including
6 one in Pennsylvania.

7 MR. HUGHES: Oh. Never heard of them.

8 MR. MILTNER: That's okay. I haven't
9 heard of you before today.

10 Can you say that for each of the states
11 that have signed on to this that they contacted
12 all the producer-handlers in their state and
13 exempt plants in their state to get their
14 position on -- on what the state has signed on
15 to?

16 MR. HUGHES: I know we did in Wisconsin.
17 I know we did in Vermont. Is that correct,
18 Diane?

19 MS. BOTHFELD: Yes. In Vermont, we did
20 contact the producer-handler and exempt plants
21 in our state.

22 MR. HUGHES: I believe the other states
23 tried to. I don't know if, in fact, they
24 included all of them. Do you know, Diane?

25 MS. BOTHFELD: This is Diane. I can

1 state that New Hampshire did contact their
2 producer-handlers.

3 MR. HUGHES: And we know the Pennsylvania
4 Department of Agriculture contacted many of
5 them, but I don't know about all of them.
6 Pennsylvania has a lot of interesting producer,
7 jugger, dealer dynamics that we did not discuss
8 all those dynamics on the phone, so I can't say.

9 MR. MILTNER: Pennsylvania is a pretty
10 unique animal --

11 MR. HUGHES: Yes.

12 MR. MILTNER: -- as far as milk?

13 MR. HUGHES: Yes.

14 JUDGE CLIFTON: And New York.

15 MR. HUGHES: As far as I know, they did.

16 MR. MILTNER: Do you know if any of the
17 five states that have signed on have any plants,
18 producer-handlers that would be affected by
19 the -- the proposals that you advocate here
20 today?

21 MR. HUGHES: I can speak specifically for
22 Wisconsin. The producer-handlers or exempt
23 plants are actually all quite small, serving
24 niche areas. The one with growth plans would
25 bump up against the 2 million pounds. I

1 referred to that earlier as Sassy Cow.

2 MR. MILTNER: Uh-huh. Okay.

3 MS. BOTHFELD: This is Diane from
4 Vermont. The two plants in Vermont are both
5 under the limits that we spoke of, the 2 million
6 and also the 450,000.

7 The producer-handler in Vermont is
8 currently a million five, a million point 75.
9 So the potential to bump up against that
10 2 million is there. They have some plans for
11 growth but not extensive growth. So the
12 2 million limit is acceptable.

13 MR. MILTNER: And can you speak to any of
14 the other three states?

15 MR. HUGHES: No.

16 MR. MILTNER: Okay. In looking through
17 the attached letters from the various plants, I
18 note that on some of them, the number 2 happens
19 to be handwritten over what appears to be
20 number 3 on the first, second, third, fourth,
21 fifth -- anyway, a number of them.

22 MR. HUGHES: Those are all in
23 Pennsylvania, correct?

24 MR. MILTNER: Those are all in
25 Pennsylvania.

1 MR. HUGHES: I would just -- can only
2 speak to what's indicated on the letter itself,
3 which is -- it's -- the way I read it is
4 2 million pounds. I'm not sure why that is.

5 MR. MILTNER: On some of them, actually,
6 it's not written over it. It states 3 million
7 pounds. Was there some discussion and debate
8 amongst the group as to whether the number
9 should be 2 or 3 million or --

10 MR. HUGHES: Oh, yes.

11 MR. MILTNER: Okay. Is it possible --

12 MR. HUGHES: I don't see that 3 million
13 pound --

14 MR. MILTNER: Well, it's on the -- I'll
15 start at the beginning.

16 MR. HUGHES: Okay. It's Pennsylvania.
17 Yes, there was discussion amongst the group as
18 to 2 versus 3 million. And at the -- you know,
19 you said you have an alliance, your group is an
20 alliance.

21 MR. MILTNER: I'm here on behalf of an
22 alliance of producer-handlers.

23 MR. HUGHES: In our work collectively in
24 the states, in preparing for this, our final
25 decision, and it was endorsed by all the states,

1 was 2 million pounds, and that's what the record
2 should reflect.

3 MR. MILTNER: Okay. And just so we're
4 clear on the basis for how you arrived at
5 2 million pounds, you looked at the -- it's
6 based essentially on farm size and farm data.
7 You determined a point at which you believe that
8 farms capture sufficient economies of scale,
9 that farms above that size should -- should have
10 to pay the pool if they collectively operate a
11 distributing plant?

12 MR. HUGHES: Correct.

13 MR. MILTNER: Okay. Now, the states that
14 you are here on behalf of and the states for
15 which you work, the farm sizes are very
16 different from farm sizes in many other parts of
17 the country, particularly southern and western
18 states, you would -- you would agree with that?

19 MR. HUGHES: Yes.

20 MR. MILTNER: And were you present for
21 any of the testimony yesterday?

22 MR. HUGHES: No.

23 MR. MILTNER: Okay. There was a farmer
24 from Florida who had recently opened a plant and
25 he testified that it's not economically feasible

1 to operate a farm at a 250-cow level in the
2 state of Florida. Now, I'm not asking you to
3 agree or disagree with that -- with that
4 position, but you've said that a national
5 standard should be adopted. Do you have any
6 statement as to how that might affect states
7 other than the five that you're representing?

8 MR. HUGHES: We have not analyzed all of
9 the other states, but as a general rule, size
10 economies -- I think it's characteristic of
11 western states as well, and we've built in our
12 2 million cap with a little precaution on size,
13 that at a thousand cows, thereabouts, you get
14 most of the economies, not all.

15 I don't know what a 20,000-cow operation
16 can generate, but I wouldn't worry about them
17 too much. And the effect on some of the bigger
18 principles that we put forward earlier
19 protecting marketwide pooling, which is
20 important to all our dairy farmers who are not
21 engaged in the kind of business, is why we
22 strike that balance.

23 MR. MILTNER: The gentleman in Florida
24 was not a 20,000-cow dairy, nor are the majority
25 of the farms there, but even the average farms

1 in other regions in the country.

2 Do you have any statement as to whether
3 there would be an opportunity to create and
4 explore, develop niche markets in areas where
5 the average farm size is significantly different
6 from Wisconsin and New England?

7 MR. HUGHES: Probably not at the caps
8 that we're talking about. And of course there
9 is the precedent of the 3 million pounds in the
10 Pacific Northwest. But that should be all --
11 that should be the upper bounds as we said in
12 our direct statement.

13 MR. MILTNER: Thank you.

14 JUDGE CLIFTON: Who will next
15 cross-examine this panel? Mr. Vetne.

16 CROSS-EXAMINATION

17 BY MR. VETNE:

18 MR. VETNE: My name is John Vetne from
19 Raymond, New Hampshire. I represent two
20 producer-handlers in the Pacific Northwest and a
21 producer-handler in Roswell, New Mexico. Thank
22 you for coming. I've been following your work
23 as we prepared for this hearing and the work of
24 the states, and I think that's hugely important
25 for everybody. Let me ask you a couple of

1 questions about your -- your basic premise.

2 First of all, marketwide pooling. Is
3 your -- in your testimony, the importance of
4 marketwide pooling and your rejection -- I think
5 you rejected individual handler pooling as part
6 of that, is that conditioned upon pooling access
7 being available to all producers on an equal
8 basis?

9 In other words, if marketwide pooling
10 were compromised so that some producers in
11 Wisconsin, for example, whose milk goes to
12 cheese every day would not have access to the
13 pool, would you have a different view on the
14 importance of marketwide pooling in your
15 testimony?

16 MR. HUGHES: No.

17 MR. VETNE: Okay. So it would be okay if
18 only half of Wisconsin producers could qualify
19 for a pool, you'd still have maintained the same
20 position?

21 MR. HUGHES: The subject of this
22 proceeding is not about pooling requirements,
23 per se, so that's a bigger subject area that I'm
24 not prepared to testify on.

25 MR. VETNE: Oh, it is, it is. But hasn't

1 Wisconsin in the past --

2 MR. HUGHES: Wisconsin is an open pooling
3 kind of state compared to other states.

4 MR. VETNE: That's true. So my questions
5 are more direct, if you will.

6 Wisconsin in the past has endorsed and
7 advocated eliminating of regulation so that
8 everybody operates in the free market, correct?

9 MR. HUGHES: The question is not really
10 relevant to this proceeding. It -- we're
11 talking about a very limited scope hearing and
12 we're not talking about deregulation.

13 MR. VETNE: Well, marketwide pooling is
14 the ultimate -- ultimate objective of
15 regulation, I think you testified.

16 MR. HUGHES: Yes.

17 MR. VETNE: And in your testimony you
18 supported that. So in order to -- in order to
19 weigh the significance of that for the state of
20 Wisconsin and the producers you represent, I
21 think it's -- I think it's useful to know
22 whether or not the state of Wisconsin, if it had
23 its druthers, would rather have no regulation?

24 MR. HUGHES: I'm not saying that.

25 MR. VETNE: Did you not say that in the

1 past? Did not the state of Wisconsin say that
2 in the past in legislative proceedings?

3 MR. HUGHES: Rulemaking proceedings?

4 MR. VETNE: No, legislative proceedings.

5 MR. HUGHES: Certainly not in rulemaking
6 proceedings.

7 MR. VETNE: That's why I said legislative
8 twice.

9 MR. HUGHES: Again, I don't know whether
10 this line of questioning helps us or not. I
11 don't have counsel to protect --

12 MR. VETNE: No, it's a simple question.
13 You don't have to know where it's going. You
14 just have to answer the question, if you want
15 to.

16 You know, this proceeding, there's no
17 compulsory process. If you decline to answer --

18 MR. BESHORE: Your Honor, may I?

19 JUDGE CLIFTON: Mr. Beshore.

20 MR. BESHORE: I think Mr. Hughes' comment
21 is worthwhile. I mean, the state of Wisconsin
22 has, over time, taken a position on all kinds of
23 things, I assume, as the Commonwealth of
24 Pennsylvania, states of New Hampshire, Vermont,
25 et cetera. To go into positions on other

1 issues, I think it's out of bounds, frankly.

2 JUDGE CLIFTON: Mr. Ricciardi.

3 MR. RICCIARDI: Let me weigh in on one
4 issue as a comment and a concern, Judge. We
5 have witnesses here who are supposed to be
6 neutral presenting information on behalf of
7 states. It is obvious that, for whatever
8 reason, Mr. Hughes appears to be acting in an
9 advocacy position and also position determining
10 whether it's relevant or not, whether we have
11 objections or any comment from you.

12 I think you need to make an instruction
13 to the witness to ensure that he's answering
14 questions, unless there's an objection or unless
15 he has a reason why he doesn't want to answer.

16 JUDGE CLIFTON: Mr. Carroll.

17 MR. CARROLL: I could be in error, and if
18 I am, I'll stand corrected. But I think these
19 excellent witnesses were of the opinion that
20 they were testifying on certain specific
21 proposals. I don't recollect them offering any
22 testimony on proposals for independent handler
23 pooling, which is where this is going.

24 JUDGE CLIFTON: Mr. Vetne? If,
25 Mr. Hughes, you object to being asked the

1 question and being expected to answer it, I do
2 not find the question objectionable.

3 MR. HUGHES: Okay.

4 JUDGE CLIFTON: I don't think it goes
5 that far afield. The premise on which your
6 entire opinion is based is that the orderliness
7 of marketing is ensured by these market orders.
8 And so I think Mr. -- Mr. Vetne's questions are
9 relevant. I agree that Wisconsin, of course, is
10 free to take different positions at different
11 times on different issues.

12 But if you have an answer to his
13 question, I would like you to give it. And you
14 may qualify it, if you can.

15 MR. HUGHES: Sure.

16 JUDGE CLIFTON: To answer it just yes or
17 no, we certainly would understand that you need
18 to explain.

19 MR. HUGHES: Okay. Mr. Vetne, could you
20 ask your question again?

21 MR. VETNE: The question was, in
22 essence -- I'm not sure I can put it in
23 identical words. In the past, has not the state
24 of Wisconsin advocated legislatively that if it
25 had its druthers, it would rather have no

1 regulation for anybody?

2 MR. HUGHES: You're talking about the
3 state of Wisconsin as it -- the constitutional
4 body?

5 MR. VETNE: I'm talking about the state
6 and its officials, and you would be one,
7 advocating or lobbying or somebody lobbying on
8 their behalf for -- for deregulation, such as in
9 the 1996 Farm Bill, which -- or '95, it turned
10 out to be '96.

11 MR. HUGHES: Yeah. Well, the legislative
12 process, as you well know, is different than an
13 administrative proceeding. And certainly there
14 are interests in Wisconsin, producers, some of
15 their organizations that have advocated total
16 deregulation eliminating the marketing orders.

17 To my knowledge, other than maybe some
18 press release rhetoric, I don't recall
19 testifying as a state official or any other
20 state official testifying to eliminate
21 regulations.

22 MR. VETNE: Okay. I did not intend to
23 limit my question to positions taken in
24 testimony. My question was intended to be
25 positions taken in any form, whether in writing,

1 rhetoric, press release, testimony, letters to
2 Congress, letters to Congressmen.

3 MR. HUGHES: Well, our objectives in the
4 1996 Farm Bill was to get reform. And in that
5 process, in the form of rhetoric and whether it
6 was in a letter or a press release, what have
7 you, we probably threatened de -- that we were
8 going to support deregulation if there wasn't
9 some reform.

10 But beyond that, we're not -- we're not
11 advocating deregulation at this point.

12 MR. VETNE: Okay. Has not the state of
13 Wisconsin maintained that Wisconsin producers
14 would be better off if -- if there was
15 deregulation?

16 MR. HUGHES: I think you are referring to
17 some modeling at the University of Wisconsin --

18 MR. VETNE: Yes.

19 MR. HUGHES: -- that suggests perhaps
20 that without regulations, Wisconsin would be
21 better off. I don't know, is that modeling
22 widely accepted as gospel, just like other
23 modeling that you might come across?

24 And certainly to your question about
25 legislative things -- and this speaks to the

1 heart of the states working together -- the
2 other states, to my knowledge, have not
3 advocated deregulation in the past in any form.
4 And so I don't want to drag in any way in this
5 proceeding the other states that we're working
6 with on this proceeding into this, so --

7 MR. VETNE: All right.

8 MR. HUGHES: So I would say I have no
9 more to say about that subject.

10 MR. VETNE: That's all I've got to say
11 about that, Forrest Gump. Okay.

12 The testimony -- this is directed to both
13 of you. I'll start with you, Will.

14 The testimony on the bottom of the page 7
15 and your elaboration about that discussed
16 2 million pounds as sort of a threshold where
17 farms achieve -- that you believe farms achieve
18 economies -- maximum economies of scale due to
19 size.

20 MR. HUGHES: You are on the bottom of
21 page 7?

22 MR. VETNE: I'm looking at the bottom of
23 page 7, the last paragraph. You talked about
24 the 2 million pounds and farm economies of scale
25 and so forth.

1 MR. HUGHES: Okay.

2 MR. VETNE: However, in that paragraph,
3 you assert the same conclusion with respect to
4 economies in processing and in distribution. Do
5 you have any studies, any reference, any data
6 upon which you lie -- rely to attribute a
7 threshold of economies at 2 million pounds on
8 the processing side of a producer-handler?

9 MR. HUGHES: Diane may elaborate, but the
10 answer to that is spoken to in the third
11 paragraph preceding the paragraph to which you
12 speak. And that is an objective, scientific
13 study using modeling that would suggest
14 economies of size in processing.

15 You have to be very large, like 3x, 4x,
16 5x times the size that we're talking about as a
17 limit for producer-handler processing functions.

18 So the point is that not only do you not
19 achieve full economies of size in the production
20 limit that we propose, you probably have
21 diseconomies in processing.

22 MR. VETNE: Okay. Do you have any --
23 have you analyzed and can you provide any
24 testimony concerning the point at which the
25 combined operations of farm and processing are

1 at a point where it would offset cost savings by
2 not paying into the pool? Your focus was on the
3 farm, correct?

4 MR. HUGHES: Well, it's really on the
5 combination. We put a little more focus on the
6 farm.

7 MR. VETNE: Okay.

8 MR. HUGHES: We're trying to protect
9 farmers of a certain size.

10 MR. VETNE: Okay. Combining both
11 processing and farm costs, you've said that
12 2 million pounds is -- is a -- is a good
13 threshold, that it would not produce cost
14 savings -- would not offset cost savings by not
15 paying into the pool. It is not your testimony,
16 is it, that you would make the -- the opposite
17 conclusion if the threshold were 3 million
18 pounds?

19 MR. HUGHES: Probably not.

20 MR. VETNE: Diane?

21 MS. BOTHFELD: Probably not.

22 MR. VETNE: Okay. Thank you.

23 MR. HUGHES: If you want to ask your
24 previous question again, I might have a good
25 answer for you.

1 MR. VETNE: You know what? You're free
2 to elaborate on a prior answer, if you want.

3 MR. HUGHES: That's okay.

4 JUDGE CLIFTON: Is the previous question
5 the one about a combined dairy plus processing?

6 MR. HUGHES: Yeah.

7 JUDGE CLIFTON: I would like to know your
8 opinion about that.

9 MR. HUGHES: Okay, opinion. He asked
10 specifically if we've done a study at a point at
11 which sort of economies or diseconomies wash out
12 with a pool, an advantage of not paying into a
13 pool.

14 As I mentioned earlier -- I don't know if
15 you were in the room, John, but we had -- the
16 Department of Agriculture in Wisconsin do look
17 at financial statements because we make loans to
18 the producer-handlers.

19 And I think we demonstrate adequately in
20 the testimony that there's diseconomies relative
21 to 3x, 4x size processing plants, and that our
22 2 million pound limit doesn't exhaust all of the
23 economies of size that a producer might have at
24 larger sizes.

25 So that in earlier testimony at this

1 hearing where there was talk about, you know,
2 the competitive advantage that might be realized
3 by a producer-handler that's not required to pay
4 into the pool, my opinion is that the
5 combination of economics on the farm and a
6 smaller-size processing scale still keeps
7 producer-handlers at the sizes we're talking
8 about from doing -- having any competitive
9 disruption to larger-scale bottlers, scaling
10 accounts, whatever you want to call it. That's
11 my opinion.

12 MR. VETNE: Okay. And it is competitive
13 bottling disruption that I want to focus on, not
14 the unavailability of a half a cent or a mill by
15 virtue of a small operation not paying into the
16 pool to producers.

17 When the state has -- has provided
18 financial assistance to producer-handlers, it
19 would examine, as part of its financial
20 analysis, the fact that producer-handlers do
21 have to pay into the pool, correct? You look at
22 the revenue stream and that would be part of the
23 revenue stream, correct?

24 MR. HUGHES: Correct.

25 MR. VETNE: Okay. Do you know enough

1 about that analysis to be able to say whether
2 those loans would be or would have been
3 available if that revenue stream were taken from
4 the producer-handler and required to be paid
5 into the pool?

6 MR. HUGHES: I don't know, John.

7 MR. VETNE: It would make a big
8 difference, however, wouldn't it?

9 MR. HUGHES: Yes.

10 MR. VETNE: And you -- and you don't know
11 at what size that would make a big difference in
12 the state's decision as to support the financing
13 of a producer-handler?

14 MR. HUGHES: Well, it's my opinion that
15 it's in that 2 to 3 million pound area.

16 MR. VETNE: You also talked about
17 producer -- producers that, instead of having a
18 bottling operation, have a cheese operation, a
19 similar kind of function, producer-handler.
20 Cheese makers are handlers, correct?

21 MR. HUGHES: Uh-huh, uh-huh.

22 MR. VETNE: Those producers who have
23 their own niche cheese operation do not draw
24 from the pool, is that correct? They don't
25 participate in marketwide pooling?

1 MR. HUGHES: Most of them don't.

2 MR. VETNE: Are there some that do? And
3 if so, how would they do that?

4 MR. HUGHES: Part of the pooling pyramid
5 is they do.

6 MR. VETNE: Through somebody else?

7 MR. HUGHES: Yes. I don't know -- I
8 didn't look at the list. I don't know if it's
9 available here in the records that's provided.
10 We didn't analyze the cheese side in the context
11 of this hearing.

12 MR. VETNE: Okay. Let me ask about
13 Vermont. Does Vermont also encourage producers
14 to get into niche operations by making their own
15 cheese and selling locally-produced own-farm
16 cheese?

17 MS. BOTHFELD: Vermont does support
18 value-added production.

19 MR. VETNE: Okay. And does Vermont
20 support the availability -- in the marketwide
21 pooling foundation, availability of a part of
22 the marketwide pool to those producers as it
23 would be available to everybody also?

24 MS. BOTHFELD: The -- the value-added
25 producers, the on-farm processing, the size

1 fluid, which are you --

2 MR. VETNE: Yes, yes, yes. The producers
3 that make milk and that it goes into a
4 manufacturing plant in Vermont, or receive a
5 blend price --

6 MS. BOTHFELD: Yes.

7 MR. VETNE: -- for as either diverted
8 milk or to a manufacturing plant that's pooled.
9 Do you know, first of all, whether the on-farm
10 cheese producers get the same benefit?

11 MS. BOTHFELD: Most of on-farm cheese
12 producers in Vermont are utilizing all of their
13 volume of milk to make their value-added
14 product.

15 There are a few, limited to a very small
16 number, that are members of cooperatives that do
17 allow them to continue to ship a portion of
18 their milk and make value-added product out of
19 the other. So those folks that are splitting
20 their milk supply would be taking part in the
21 Federal Order System through the pyramid, I
22 guess as Will has mentioned it, through their
23 cooperative. They are taking part and pooling
24 on that portion of milk that they continue to
25 sell to their cooperative.

1 MR. VETNE: How about the portion for
2 which they make cheese, do you know whether --
3 whether the blend price is available to them for
4 any on-farm cheese production?

5 MS. BOTHFELD: I would want to research
6 that further. My opinion would be that no, they
7 do not, but I would want to research that
8 further and provide you further information to
9 -- to make sure that I'm providing the proper
10 testimony under oath.

11 MR. VETNE: Actually, I don't know was a
12 good answer for purposes of this.

13 MS. BOTHFELD: I don't know.

14 MR. VETNE: You can put it in one of your
15 e-mails to everybody, if you like. I received
16 that. And you do a great job. Thank you.

17 MS. BOTHFELD: Okay.

18 MR. HUGHES: John, I just want to add,
19 because Diane's answer illuminated your question
20 for me, which sometimes is needed.

21 To my knowledge, most of the producers
22 that have entered into the cheese side of the
23 business -- and I have the same answer as Diane.
24 For the milk that's not going through their own
25 cheese plant, is still pooled, and they're

1 generating the marketwide pooling uniform price
2 plus whatever they do in Wisconsin.

3 You know, many of them are members of --
4 you know, some of them -- they're foremost DFA,
5 EMPI producers, and they keep the milk, as they
6 did traditionally going in, that they're not
7 using in the cheese plant into the marketwide
8 pooling.

9 MR. VETNE: Let me ask you this. Do you
10 know whether there's an option available to
11 those producers who have on-farm cheesemaking to
12 have their milk, as part of a cooperative
13 supply, reported on the cooperative report as
14 diverted to their on-farm cheese, nonpool cheese
15 plant?

16 MR. HUGHES: I don't know. I think the
17 USDA people would know.

18 MR. VETNE: I don't have any more. Thank
19 you.

20 JUDGE CLIFTON: Thank you, Mr. Vetne.
21 Further cross-examination? Mr. Yale.

22 CROSS-EXAMINATION

23 BY MR. YALE:

24 MR. YALE: Good morning. Benjamin F.
25 Yale on behalf of Continental Dairy Products and

1 Select Milk. Good morning, Will, we go back.
2 And good morning, Ms. Bothfeld. I do get your
3 e-mails, so we are connected.

4 I want to talk about just a couple of
5 changes of thoughts here. The first one is, are
6 you opposed categorically to a 3 million pounds
7 cap, hard cap, as opposed to the 2 million?

8 MR. HUGHES: We've said in our direct
9 statement that it represents a maximum upper
10 bound. We prefer a 2 million pound cap.

11 MR. YALE: Now, you testified also that
12 you wanted one that was uniform throughout all
13 the Federal Orders, is that right?

14 MR. HUGHES: We promote uniformity.

15 MR. YALE: Okay. And you are aware --
16 you looked at the fact that there's a statutory
17 statement of 3 million pounds for the Arizona
18 Orders? Have you considered the fact of whether
19 that might not be changeable?

20 MR. HUGHES: No.

21 MR. YALE: The -- and I also take it just
22 by the location, you haven't looked at the
23 relative size of producers of markets such as
24 the Southwest, which might support a larger
25 producer, as opposed to the Northeast?

1 MR. HUGHES: We haven't spoken to that in
2 our -- and analyzed it in our testimony.
3 Generally aware of the size differences in
4 the -- regionally, and cost of production
5 differences.

6 MR. YALE: Okay. So the way I understand
7 it, you looked at that break in this report that
8 you had -- that you looked at that break of a
9 thousand cows because that seemed to take you
10 into a new level of efficiency, right?

11 MR. HUGHES: Uh-huh.

12 JUDGE CLIFTON: That was a yes?

13 MR. HUGHES: Yes.

14 MR. YALE: And an average production of
15 65 or 70 pounds per cow would get you somewhere
16 in the neighborhood of about 2 million pounds
17 per month on a 30-day month, is that about --
18 kind of the math that was used?

19 MR. HUGHES: That's close enough.

20 MR. YALE: Okay. I want to talk about
21 the issue of the grandfathering for a moment.
22 And is it a concern of the grandfathering that
23 it would not permit new industries? Is that the
24 fundamental reason that you oppose the
25 grandfathering?

1 MR. HUGHES: I'm going to ask Diane to
2 help me on this, but I think it's the main
3 reason.

4 MR. YALE: Okay. Are there other
5 reasons?

6 MS. BOTHFELD: That is the main reason.
7 But the other being the concern of -- for USDA
8 of recordkeeping, auditing that keeps it very
9 clean with a hard cap. All you need to know is
10 pounds. You don't need to know current status
11 or prior status, just the pounds per month.

12 MR. YALE: So it makes a simpler, cleaner
13 proposal?

14 MS. BOTHFELD: Yes.

15 MR. YALE: And if you set the cap at
16 3 million pounds, it effectively grandfathered in
17 those that are lower than 3 million anyhow,
18 right?

19 MR. HUGHES: That's one way to interpret
20 it.

21 MR. YALE: So we get grandfathers and
22 grandsons?

23 JUDGE CLIFTON: The response was smiles.

24 MR. YALE: Yes. Okay. Now, my other --
25 on that grandfathering, did you have any

1 concerns about any vesting of rights or anything
2 that that would have created? Was that ever a
3 part of your discussion?

4 MR. HUGHES: Not particularly relevant to
5 our analysis, no.

6 MR. YALE: I kind of want to look at that
7 report that you had from Amber Waves. It also
8 references an ERS. This Amber Waves oftentimes
9 will have kind of a newsy article that describes
10 something a little more academic that comes out
11 of its reports, right?

12 MR. HUGHES: (Nodding head.)

13 MR. YALE: Is that correct?

14 MR. HUGHES: Yes.

15 MR. YALE: All right. And so this Amber
16 Waves really is a summary of a more specific
17 study that was done by ERS, is it not?

18 MR. HUGHES: Yes.

19 MR. YALE: And the name, just for the
20 record here, it's Profits, Costs and the
21 Changing Structure of Dairy Farmers, and it's
22 ER -- Economic Research Report Number 47 dated
23 September 2007.

24 I will try to get a copy here to be
25 looked at, but we would request official notice

1 of that as being the background report to this
2 study that was done.

3 JUDGE CLIFTON: And I presume profits is
4 spelled p-r-o-f-i-t-s?

5 MR. YALE: Yes. Yes.

6 JUDGE CLIFTON: Thank you.

7 MR. YALE: I think most dairy farmers
8 have failed in their p-r-o-f-i-t-s, in their
9 profits. There are not very good profits in
10 their profits.

11 JUDGE CLIFTON: So did you -- you, at
12 some later moment, will be asking me to take
13 official notice?

14 MR. YALE: Yes. I just wanted to get it
15 out in front here.

16 JUDGE CLIFTON: All right. Good.

17 MR. YALE: I think that's the scope of my
18 questions. Thank you very much.

19 JUDGE CLIFTON: Thank you, Mr. Yale.

20 Other cross-examination of this panel?

21 Mr. Beshore.

22 CROSS-EXAMINATION

23 BY MR. BESHORE:

24 MR. BESHORE: Thank you, your Honor. I
25 just have one or two questions. First of all,

1 on behalf of National Milk Producers Federation,
2 I want to thank you and the states you're
3 representing for your efforts in putting
4 together a joint position and for coming to this
5 hearing.

6 I would just note in a Federal Order
7 hearing, that's extraordinarily refreshing to
8 see the state of Wisconsin and the states of the
9 Northeast together on something. I hope it's
10 not the last time.

11 MR. HUGHES: It won't be.

12 MS. BOTHFELD: Should we smile and shake
13 hands?

14 MR. BESHORE: Okay. Just one question
15 area.

16 With respect to your position stated on
17 page 8 of Exhibit 36 on unique branding, do I
18 understand that your thought is that
19 producer-handlers at the size that you're
20 discussing here should be able to -- do have
21 unique brands, their own brands, they have local
22 brands and that's, of course, good and what you
23 want to see, correct?

24 MR. HUGHES: Yes.

25 MR. BESHORE: Okay. And in some cases,

1 they may have multiple labels that they would
2 use. You favor their ability to have more than
3 one label?

4 MR. HUGHES: Yes.

5 MR. BESHORE: Okay. So, I mean, the last
6 sentence says you support the ability of these
7 so-defined producer-handlers to market product
8 under various labels to meet the current market
9 demand and distribution. But you also say that
10 you did not support producer-handlers banding
11 together across geographic locations to produce
12 the brands for mass distribution.

13 So that if I understand that, you don't
14 think they should -- a group of them should have
15 the same brand -- be able to have the same brand
16 and use it in a mass distribution fashion?

17 MR. HUGHES: I think our point is that if
18 there's any kind of franchising, to bundle, it
19 would probably not be the entities that we're
20 talking about, some new entities that might
21 enter the business that have a different modus
22 operandi. That's not something we're advocating
23 to sort of make a big dent in the marketwide
24 pooling, so --

25 MR. BESHORE: I think Dr. Cryan's

1 testimony put forth, fortunately, the
2 possibility of integrators coming into -- an
3 integrator model being potentially used in the
4 dairy industry to assemble producer-handlers in
5 the fashion -- in that fashion. That's
6 something that you're not supporting, am I
7 correct?

8 MR. HUGHES: I did not hear the testimony
9 of Mr. Cryan, but -- and you can help me if --
10 but my answer would be something we wouldn't
11 favor.

12 MS. BOTHFELD: I concur.

13 MR. BESHORE: Thank you. Thank you very
14 much.

15 JUDGE CLIFTON: Thank you, Mr. Beshore.
16 Mr. Carroll.

17 CROSS-EXAMINATION

18 BY MR. CARROLL:

19 MR. CARROLL: Good morning.

20 MR. HUGHES: Good morning.

21 MS. BOTHFELD: Good morning.

22 MR. CARROLL: I'm John Benjamin Carroll
23 of the firm of Carroll & Carroll Lawyers, PC.

24 For over 40 years I have defended
25 producer-handlers in various markets of the

1 United States. It has been a lonely way to
2 spend your life.

3 And I want to say in the beginning that I
4 have waited a long time to see two such
5 qualified people putting their resources of the
6 government behind these people who have in the
7 main been orphans for a long period of time.

8 We have survived by hard work,
9 legislative activity, all kinds of barriers,
10 both on commerce or otherwise, to get even the
11 small number you have today.

12 I started in New York state with 127 --

13 JUDGE CLIFTON: Mr. Carroll, I appreciate
14 the introduction to your first question, but if
15 you'd get to it.

16 MR. CARROLL: Yeah, I'm starting it.

17 JUDGE CLIFTON: Okay.

18 MR. CARROLL: I started in New York --

19 JUDGE CLIFTON: This is a question?

20 MR. CARROLL: Yes -- with 127
21 producer-handlers. Do you know how many there
22 are today?

23 MS. BOTHFELD: The information that is
24 within the Federal Order in New York state, the
25 table in our testimony states that there are 13

1 producer-handlers and exempt plants combined.

2 MR. CARROLL: Thank you for the
3 information.

4 Directing your attention to the
5 grandfather situation -- clause that you have
6 talked about, are you -- you are apparently
7 aware of the fact that the major industry
8 representatives are seeking to only allow the
9 present producer-handlers to remain in business?
10 Do you understand that is the proposal you've
11 talked about?

12 MS. BOTHFELD: Yes.

13 MR. CARROLL: Sir, do you understand
14 that?

15 MR. HUGHES: Yes.

16 MR. CARROLL: And when you made your
17 recommendation that that not be followed, can
18 you tell me why you did so?

19 MR. ENGLISH: Asked and answered.

20 MR. HUGHES: Was there static in the
21 background?

22 JUDGE CLIFTON: Yeah, there are
23 objections because your whole talk today has
24 been in answer to that question. But I'll hear
25 you, Mr. English.

1 MR. ENGLISH: I believe that they have
2 answered that question repeatedly, your Honor.
3 And I think at some point, you don't have to
4 have the same question asked just because a
5 different attorney comes up.

6 JUDGE CLIFTON: Well, I'm sure
7 Mr. Carroll either --

8 MR. ENGLISH: Or even the same attorneys
9 up.

10 JUDGE CLIFTON: I'm sure Mr. Carroll is
11 getting at a subpart of that.

12 MR. CARROLL: That's correct, your Honor.

13 JUDGE CLIFTON: So could you jump right
14 to the subpart?

15 MR. CARROLL: Directing your attention to
16 the grandfather recommendations that you made,
17 can you tell me why you made those
18 recommendations?

19 MR. HUGHES: We -- I think this is
20 repetitive, but I'll repeat it. That we
21 proposed a hard cap, volume cap, without
22 grandfathering. And the reason why we don't
23 support grandfathering, although I think
24 somebody talked about grandchildren, we do not
25 want to foreclose -- I'll just give you an

1 example.

2 In Wisconsin, we've had an increase in
3 producer-handlers over the last six or seven
4 years, from two to nine -- to ten, actually, two
5 to ten. And some of them are exempt plants, and
6 that's another story.

7 MR. CARROLL: Right.

8 MR. HUGHES: And we don't want to
9 foreclose new ones coming in and some growth for
10 those that are already in. And that's why we
11 have taken the position on grandfathering that
12 we have.

13 MR. CARROLL: Did you give any
14 consideration to the right of that -- of the new
15 entrants, as independent business people, the
16 right to engage in that occupation if they
17 wanted to do so?

18 MR. HUGHES: Yeah, we're -- yeah.

19 MR. CARROLL: I would ask each of you.

20 MS. BOTHFELD: Yes.

21 MR. CARROLL: Directing your attention
22 to the subject of labeling that you talked
23 about, did you recognize that the right to make
24 a decision on how to mark your product is an
25 important right on the part of a

1 producer-handler, how to label your product?

2 MS. BOTHFELD: Yes.

3 MR. CARROLL: Did you see that it was
4 a -- not only an important right, but an
5 economic decision that the producer-handler
6 ought to be free to make on his own?

7 MS. BOTHFELD: Yes.

8 MR. HUGHES: (Nodding head.)

9 MR. CARROLL: Directing your attention to
10 the definition of a producer-handler. You re --
11 do you recognize that that present definition,
12 at least in Order 1, is a -- not just ownership,
13 but operation. That if you were an operator,
14 you were able to be a producer-handler, although
15 there's diversity in ownership? Did you
16 recognize -- do you support that as a concept?

17 MR. HUGHES: Do you understand the
18 question? I don't. I don't understand your
19 question.

20 MR. CARROLL: All right. Let me start
21 again. May I give a little background for a
22 minute as to why -- as to the background for it?

23 Do you recognize that in producer-handler
24 operations, they're frequently family
25 operations, there is -- members of the family

1 are frequently working in it?

2 MS. BOTHFELD: Yes.

3 MR. CARROLL: And in every family a time
4 comes when someone dies, usually the owner, and
5 he makes a will out. And all of a sudden
6 there's no ownership unity because he wants to
7 treat his children under his will in the way he
8 thinks he wants to distribute his own assets.

9 So my question is this, would you accept
10 the tests of operation if that family gets
11 together and operates those facilities together?
12 Would you accept that as a reasonable basis for
13 the definition?

14 MR. HUGHES: You know, I'm going to
15 answer that because I --

16 JUDGE CLIFTON: Get close to the mic.

17 MR. HUGHES: I'm going to answer that I
18 don't know, because I don't -- I can't tether
19 out of your questioning what -- how I want to
20 answer it.

21 MR. CARROLL: That's fair.

22 MR. HUGHES: I think it's a general --
23 your question -- line of questioning, do
24 families run these businesses? Yes. Do they
25 have mechanisms to protect the transition from

1 one generation to another? I think they have
2 adequate tools to do that.

3 And we go back to the -- the reason why
4 we want to preserve the producer-handler
5 exemption is to allow that interface. And
6 there's different business structures to do
7 this, where the owners and operators of the
8 dairy farm can also own and operate plants. How
9 you twist that around, you know, that -- that
10 linkage needs to remain. And the specific
11 business arrangements, you know, I think that's
12 what you're asking.

13 MR. CARROLL: Yeah.

14 MR. HUGHES: And it's beyond what I'm
15 prepared to testify today about.

16 MR. CARROLL: I understand. I just
17 wanted to see if you considered it.

18 For consumers, did you -- you made -- the
19 word consumer appears in your report one or two
20 places. Can you state what you think the
21 consumer interest is in these proposals?

22 MS. BOTHFELD: I think the -- this is
23 Diane from Vermont. I believe the consumer
24 interest in these proposals is the availability
25 and knowledge of where milk is produced, the

1 local -- the buy local programs.

2 Vermont has a program around buying local
3 and identifying -- consumers are desiring the
4 knowledge of who and where their food is coming
5 from, and that includes dairy products as well.
6 Sometimes dairy products are a little more hard
7 to define as local when you have milk from
8 multiple states being pooled and put into a
9 gallon jug. It's very hard to say exactly where
10 that came from.

11 The producer-handler and exempt plants
12 provide that in many -- in our cases, in our
13 states that one-to-one connection of here is the
14 farm, here is the bottling facility, here is the
15 milk we put in the jug. And consumers identify
16 with that and are supportive of those entities.

17 MR. CARROLL: Thank you. And the
18 gentleman from Wisconsin, Mr. Hughes?

19 MR. HUGHES: Ditto.

20 MR. CARROLL: Okay. I want to ask you
21 about the cost pattern of -- that you see for
22 the future. Have you considered what the cost
23 of production in the future might be and also
24 costs of processing in the future? Have you
25 given that any consideration?

1 MR. HUGHES: Well, you always want to
2 think about the consequences of things that you
3 support in the current in the future, so you
4 have to at least broadly consider those things.
5 But in terms of analytically forecasting, no, we
6 haven't, but it's one of the reasons why we were
7 building a little bit of -- relative to our
8 current producer-handler and exempt plants -- a
9 little bit of room for growth and for new
10 entrants to come in.

11 And so, you know, the costs depend on so
12 many things. It seems that there are trends in
13 costs. But I don't envision on-farm processing
14 ever having -- at the sizes we're talking about,
15 having cost advantages that would interrupt the
16 market.

17 MR. CARROLL: All right. And directing
18 your attention to the rate of increase in costs
19 in the past in production, can you tell us
20 approximately what you think that has been over
21 the last few years?

22 MR. HUGHES: I -- no. The -- the --
23 obviously energy and feed costs have gone up.
24 But if you look at the tables on the direct
25 testimony --

1 MR. CARROLL: Right.

2 MR. HUGHES: -- depending on how you
3 calculate costs -- and those costs aren't
4 perfect, but that's what we have as secondary
5 data from USDA.

6 MR. CARROLL: Right.

7 MR. HUGHES: It suggests that costs keep
8 going up, and we know they've gone up the last
9 couple of years.

10 MR. CARROLL: All right. Did you
11 recognize in your deliberations that this might
12 be the last time for several years that the
13 Secretary visits the question of
14 producer-handlers? Did you consider that this
15 might be a long-term definition of size?

16 MR. HUGHES: I don't know as we chewed on
17 that for too long. If we look at the history of
18 changing the regulations in the Federal Milk
19 Marketing Orders, it's not stealth-like, but
20 we're hopeful in the future that it could be
21 more adaptive. I think that's one of the
22 reasons why we asked for reforms. Whether that
23 will occur, I don't know.

24 MR. CARROLL: Okay. I understand. And I
25 may be in error, that at least in the state of

1 Vermont and New Hampshire, the first figure for
2 the volume size was 3 million. Am I correct in
3 that assumption?

4 MS. BOTHFELD: In the proposal we entered
5 in March, yes, the limit was 3 million.

6 MR. CARROLL: Right. And I understand
7 from your paper, if I read it -- your -- your
8 exhibit, if I read it correctly, that you
9 consider 3 million to be the upper limit?

10 MR. HUGHES: Yeah.

11 MR. CARROLL: And you're all agreed on
12 that?

13 MS. BOTHFELD: Yes.

14 MR. CARROLL: Directing your attention to
15 Order Number 1, that would be the New England
16 Order, can you tell me if you're familiar with
17 the marketing conditions in the states that you
18 haven't contacted in that area? Are you
19 familiar with Massachusetts and Maine and
20 Connecticut and New Jersey, for example?

21 MS. BOTHFELD: Somewhat familiar.
22 Depends on how much in-depth you're looking at.

23 MR. CARROLL: Would you think that your
24 testimony would be referable to the same
25 conditions in those states, generally?

1 MS. BOTHFELD: I would defer to have the
2 chance to speak to those states. I would not
3 want to speak without contacting them.

4 MR. CARROLL: Right. Am I correct in
5 reading your report to state that you don't know
6 of any disorderly conditions in Order Number 1?

7 MS. BOTHFELD: In the states that we have
8 contacted and discussed, I would concur with
9 that statement.

10 MR. CARROLL: Okay. And am I correct
11 that at page 5 of your exhibit, that, as a
12 matter of general intent under the first
13 paragraph, second sentence, you state, The
14 States want to leave ample room for innovation
15 and growth for producer-handlers while not
16 overly jeopardizing pool values for all farmers.
17 Can I assume from that that you are in favor of
18 -- of not just new entries, but innovative new
19 entries and innovative ideas on how to market?

20 MS. BOTHFELD: Yes.

21 MR. HUGHES: You might want to add to
22 that, except for horizontal integration,
23 aggregation, syndication.

24 MR. CARROLL: I understand. I
25 understand. I think that's all. Thank you.

1 JUDGE CLIFTON: Thank you, Mr. Carroll.
2 Mr. English, did you have an opportunity to
3 cross-examine?

4 MR. ENGLISH: I have no questions, your
5 Honor.

6 JUDGE CLIFTON: All right. Is there any
7 other cross-examination? Mr. Yale.

8 RECROSS-EXAMINATION

9 BY MR. YALE:

10 MR. YALE: Just two issues that were --
11 one of which was just brought up and another
12 issue.

13 The first issue has to do with the
14 150,000 pound -- the ability of a
15 producer-handler to purchase 150,000 pounds of
16 milk per month from other sources without
17 jeopardizing the PD status. You are aware of
18 that, right?

19 MR. HUGHES: (Nodding head.)

20 MR. YALE: You are aware that some Orders
21 do not have that capability?

22 MR. HUGHES: (Nodding head.)

23 MR. YALE: Are you aware of that? Is
24 that a yes?

25 MS. BOTHFELD: Yes.

1 MR. YALE: But as I understand, your
2 proposal would be to make that uniform and allow
3 that in all those other orders as well?

4 MR. HUGHES: In the spirit of uniformity
5 and simplicity of regulation, yes.

6 MR. YALE: Okay. The other issue has to
7 do with the branding, and I guess coming back to
8 the issue of simplicity.

9 At what point would you determine that a
10 label is a -- is not unique, and how would the
11 Market Administrators enforce uniqueness of
12 labels?

13 MR. HUGHES: Other than the concern about
14 syndication, integration, I don't think labeling
15 should be under the purview of the Federal
16 Orders. It has to do with ownership, structure
17 and size limit. Those that exceed the size
18 limit are not -- I mean, they -- they can still
19 stay in business and can operate, do what they
20 want, but they're subject to regulations. We
21 reserve, under the size limit, the exception.

22 MR. YALE: Are you --

23 MR. HUGHES: Labeling doesn't seem to be
24 particularly relevant. We're just acknowledging
25 the fact that most of the producer-handlers have

1 some unique label. It's their identity, it's
2 their brand, it's their creative force in the
3 marketplace. And it speaks to the buy local. I
4 think that's what's driving the increase for
5 organic.

6 MR. YALE: So the real -- the real
7 challenge, I think, was Mr. Beshore's question,
8 has to do with the idea of integrating or
9 aggregating, and sometimes syndicating is an
10 issue, is that right? Is that the concern that
11 you would share, right?

12 MR. HUGHES: Yes.

13 MR. YALE: But the syndication doesn't
14 necessarily require that everybody have the same
15 label, does it? I mean, syndicator could still
16 syndicate an aggregate with using different
17 labels, right?

18 MR. HUGHES: Presumably.

19 MR. YALE: So the single label issue
20 doesn't really address the aggression or
21 integration, per se.

22 MR. HUGHES: I don't think that it has
23 to, no.

24 MR. YALE: So that's part of the reason,
25 in your simplicity, you just don't address the

1 labeling issue as part of your proposal?

2 MR. HUGHES: I think that's fair to say.

3 MR. YALE: All right. I have no other
4 questions.

5 JUDGE CLIFTON: Thank you, Mr. Yale.
6 Mr. Tosi.

7 CROSS-EXAMINATION

8 BY MR. TOSI:

9 MR. TOSI: Good morning, Mr. Hughes,
10 thank you for coming. I appreciate the
11 efficiency of the panel of having two government
12 witnesses.

13 A few questions just to be clear. In
14 your written statement there are times when
15 you -- and I want to make sure that the intent
16 is really clear because there's a lot of subtle
17 differences between this great number of
18 proposals.

19 When you are speaking about the --
20 putting the limit on producer-handlers, you want
21 the regulation to be the measure of -- the
22 regulation to be that amount of -- that number
23 of pounds of milk, for example, 2 million pounds
24 of Class I milk, that's distributed within the
25 marketing area, or total?

1 MR. HUGHES: We discussed that, and I
2 think maybe we've contradicted that in the
3 statement, but I think if you look at the first
4 statement, it's in all markets. So that limit
5 applies to all markets. So it's constraining
6 that producer-handler exemption to the local
7 market.

8 MR. TOSI: I'm sorry, say that again,
9 please. It's constraining --

10 MR. HUGHES: Well, we're limiting the
11 exemption to sales in all marketing orders, but
12 I think the reality is that it constrains the
13 sales and distribution from the producer-handler
14 in a more local market. I don't -- is that --

15 MR. TOSI: Let me just give you a
16 hypothetical situation, but let's assume that we
17 have -- the Department would like to adopt your
18 proposal.

19 MR. HUGHES: Okay.

20 MR. TOSI: Okay. And we have a
21 producer-handler that's at, for example,
22 1.8 million pounds of Class I route
23 distribution, okay? That may be his route
24 distribution within the marketing area that he's
25 distributing most of his milk.

1 But, let's say, for example, he also
2 disposes of another 2 million pounds outside of
3 the marketing area, somewhere else.

4 MR. HUGHES: In a regulated area?

5 MR. TOSI: Well, I'm trying to ask, when
6 do these other considerations become important
7 to your proposal?

8 MR. HUGHES: Our proposal was
9 2 million pounds of fluid milk distribution per
10 month in all markets with marketing orders.

11 MR. TOSI: So you would like the measure,
12 then, to be regardless of where they're
13 distributing, or just --

14 MR. HUGHES: Yes.

15 MR. TOSI: -- or just if they're
16 distributing within a Federal Order area?

17 MR. HUGHES: In a Federal Order area is
18 what we are --

19 MR. TOSI: Okay. And then the other
20 thing here, at times -- the written statements
21 to me, at first blush, seem to suggest that one
22 of the criteria for determining someone as a
23 producer-handler seemed to be based on farm
24 production, that farm production becomes a --
25 the level of farm production.

1 MR. HUGHES: The point of the regulation
2 is fluid milk disposition.

3 MR. TOSI: Okay. And would it be
4 accurate, then, for us to interpret when you're
5 making references to size, farm size, farm
6 production, that we -- there are times when you
7 actually mean that to mean route distribution,
8 and there are other times when you're trying to
9 rationalize why you chose the number, where
10 you're examining the productive capacity of the
11 farm size of the operation? Would that be
12 accurate?

13 MR. HUGHES: Yes.

14 MR. TOSI: Okay. Do you all have a
15 position on Proposal 24? I can summarize it
16 quickly for you.

17 Proposal 24 seeks to -- or to leave
18 unbounded producer-handler sales, provided
19 they're sold through their own stores or -- and
20 included in that store would be if they're doing
21 home delivery. Do you have a position on that?

22 MR. HUGHES: You mean there's no volume
23 limit?

24 MR. TOSI: Doesn't seem to be any volume
25 limit, but we haven't had the benefit yet of its

1 presentation.

2 MS. BOTHFELD: And no distribution, other
3 than their own farm store or home delivery?

4 MR. TOSI: Yes. Store or stores.

5 MR. HUGHES: I don't know. Diane, I
6 don't think we talked about that specifically,
7 so my answer would be that the volume limit
8 should apply to those as well.

9 MR. TOSI: Okay. Thank you. I
10 understand from some of the past questioning
11 you're not here to offer any opinion, then, on
12 proposal -- the proposal that speaks to moving
13 away from or to adopt the individual handler
14 pooling as a method to address the
15 producer-handler issue. It'd be Proposal 25.

16 MR. HUGHES: We see that as a conflict
17 with our proposal.

18 MR. TOSI: Okay. That's all I have.
19 Thank you very much.

20 MR. HUGHES: Thank you.

21 JUDGE CLIFTON: Is there anything that
22 either of you would like to add to clarify your
23 position? This would be by way of -- oh,
24 Mr. Beshore, did you have more
25 cross-examination?

1 MR. BESHORE: One follow-up of Mr. Tosi's
2 question.

3 JUDGE CLIFTON: Certainly. The court
4 reporters are looking out for you. They saw
5 you, tried to get my attention.

6 REXCROSS-EXAMINATION

7 BY MR. BESHORE:

8 MR. BESHORE: I just want to explore the
9 volume, how the volume limit would work, might
10 work, might best work, a little bit. If I
11 understood your responses to Gino Tosi's
12 questions, you are looking at the 2 million as a
13 aggregate amount in Federal marketing areas,
14 correct?

15 MR. HUGHES: Correct.

16 MR. BESHORE: Now, some parts of the
17 country, such as Wisconsin, for instance -- a
18 producer-handler in Wisconsin has got to go to
19 the Black Hills of North Dakota or to the donut
20 in Missouri or somewhere to get outside of a
21 Federal marketing area. So that the 2 million
22 there would be a practical limit, period,
23 correct?

24 MR. HUGHES: Yes.

25 MR. BESHORE: Other parts of the country,

1 including, say, the Pacific Northwest, you don't
2 have -- you know, you can go from the state of
3 Washington to the state of Idaho, and you are in
4 or out of Federal regulation. Or the Northeast,
5 where you can go -- parts of the state of
6 Pennsylvania are regulated, parts aren't. Parts
7 of the state of New York are regulated, parts
8 aren't.

9 The 2 million would work quite
10 differently, as you've described it, in this
11 those areas. So that, you know, a
12 producer-handler situated somewhere in the
13 Northeast could very possibly have 2 million in
14 a Federal Order and have another X million of
15 sales outside the Federal area. Is that really
16 what you want, or would the 2 million aggregate
17 not work better, period, wherever?

18 MR. HUGHES: Would it be possible to take
19 a break?

20 JUDGE CLIFTON: This is a good time for a
21 break. I think I'm getting a little fatigued.
22 That is a very important question.

23 MR. HUGHES: That's a very important
24 question, and I don't want to take it lightly.

25 JUDGE CLIFTON: Let's take a 15-minute

1 break. Please be ready to go at 10:45. That's
2 13 minutes.

3 (A recess was taken from 10:32 to 10:47.)

4 JUDGE CLIFTON: All right. Let's go back
5 on record. We're back on record at 10:47.
6 Mr. Hughes, do you want that question repeated?

7 MR. HUGHES: No, I don't think we need it
8 repeated.

9 JUDGE CLIFTON: All right. You may
10 respond.

11 MR. HUGHES: I'm very pleased that Gino
12 asked the question and Marv helped me re-think.
13 I think what the -- it's the old saw, that if
14 your seat can't bear it, your mind can't.
15 Sitting here too long, so --

16 Our efforts were really focused on
17 Federal Orders in our territories, and we didn't
18 pay attention particularly to these donuts that
19 have been described this morning, the Missouri
20 donut, the Pennsylvania donut, the Idaho donut.
21 I don't know if we'd call that a donut, but you
22 know what I'm saying, unregulated areas.

23 And I think what -- Diane and I have
24 conferred, and we think that limit should be for
25 all disposition out of a plant, regardless of

1 where it's sold. And we would like our opinion
2 to reflect that in the statement here on the --
3 today on the record.

4 MR. BESHORE: Thank you very much. I
5 have no further questions.

6 JUDGE CLIFTON: Thank you, Mr. Beshore.
7 All right. Now, I'm going to go to your
8 redirect. Anything else that has been triggered
9 in your mind that you want to express so that
10 there's no question, your position?

11 MR. HUGHES: I think we're fine. And I
12 want to thank everyone for indulging.

13 MS. BOTHFELD: I concur and thank you
14 very much for your time this morning.

15 JUDGE CLIFTON: We thank you. While
16 they're stepping down, I just want to tell you
17 the order in which I plan for the remaining
18 witnesses for today, so that if I need to
19 reshuffle this, you can tell me.

20 I'm planning that the next witness that
21 will be called is Matt Shatto. And following
22 him, J.T. Wilcox. Following him, Steven Rowe,
23 following him, Gary Latta. And following him,
24 Michael Krueger. And I'm happy to adjust that.
25 It was a little arbitrary.

1 MR. ENGLISH: I think we are -- I think
2 we would like to flip two of those, if possible,
3 your Honor, and I think Mr. Beshore is in
4 agreement with me. I think we would like
5 Mr. Rowe to go ahead of Mr. Wilcox.

6 JUDGE CLIFTON: Okay.

7 MR. BESHORE: Yes.

8 MR. ENGLISH: And Mr. Latta has
9 indicated -- and I think Mr. Krueger would not
10 like to go last, so I think Mr. Latta would go
11 last. So if you could just make those two
12 adjustments. Excuse me.

13 JUDGE CLIFTON: Let me re-read my list.
14 I have Matt Shatto followed by Steven Rowe,
15 followed by J.T. Wilcox, followed by Michael
16 Krueger, followed by Gary Latta. Good.

17 Now, there's one other possibility that I
18 know about already for today and that is John
19 Hornstra. What we had is he'd be here either
20 today or tomorrow. So he may come tomorrow.
21 I'd like him to come today.

22 And let me tell you what I think I have
23 for tomorrow. I think I have Mr. Carman giving
24 the reminder of the USDA statistics. I think I
25 have Willard Stearns and John Rooney, who are

1 with Mr. Carroll. And I think I have someone
2 from Dean Foods, and I don't have a name.

3 MR. ENGLISH: Yes, your Honor. And,
4 actually, if he could go first tomorrow, that
5 would be preferable. Gene Carrejo.

6 JUDGE CLIFTON: G-e-n-e?

7 MR. ENGLISH: Yes. Would you like to
8 come up?

9 JUDGE CLIFTON: Good. You're here. You
10 can tell me in person. Even better.

11 MR. CARREJO: Good morning.

12 JUDGE CLIFTON: Good morning. If you
13 would state and spell your name?

14 MR. CARREJO: G-e-n-e, Gene, Carrejo,
15 C-a-r-r-e-j-o.

16 JUDGE CLIFTON: Now, I don't know if I
17 can roll my Rs like you do. Carrejo. No, wait.
18 Carrejo.

19 MR. CARREJO: Yes, ma'am. Perfect.

20 JUDGE CLIFTON: Thank you.

21 MR. ENGLISH: I'll just call him Gene.

22 MS. PICHELMAN: Your Honor, Steve Rowe is
23 here.

24 JUDGE CLIFTON: Yes, he is. Yes, he
25 would be next after Matt Shatto. Steven with a

1 V. Okay, good.

2 Later today, I want to begin to visualize
3 the lineup for Monday. Monday will be very
4 important because I know we'll have the two
5 expert witnesses. One, we've had his direct,
6 but not his cross. The other we need to have
7 both direct and cross.

8 I know that we are expecting Kathie
9 Arnold and Tony Shilter. I don't know who else.
10 So be thinking so that you can help me put
11 together Monday's lineup at a later time today.

12 All right. Good. Then, Matt Shatto, if
13 you'd come forward, and you may go directly to
14 the witness stand. And you may use the
15 comfortable chair and put the other chair down,
16 if you will. We'll go off record for just a
17 moment.

18 (Off the record.)

19 JUDGE CLIFTON: Let's go back on record.
20 We're back on record at 10:54. Mr. Shatto,
21 would you please state and spell your name for
22 me?

23 THE WITNESS: Sure. Full name is
24 Robert, R-o-b-e-r-t, middle name Matthew,
25 M-a-t-t-h-e-w, last name Shatto, S-h-a-t-t-o.

1 JUDGE CLIFTON: Thank you. Would you
2 raise your right hand, please?

3 MATTHEW SHATTO
4 of lawful age, being duly sworn, was examined and
5 testified as follows:

6 JUDGE CLIFTON: Okay. Thank you. Tell
7 us about the statement that you have prepared
8 and the copies that you have.

9 MR. SHATTO: Sure. Actually, I'm here on
10 behalf of my family, who own Shatto Farms,
11 Incorporated. And more specifically, on behalf
12 of my father, who is in the audience and has
13 joined us this afternoon -- or this morning.
14 And I am prepared to provide some verbal
15 testimony. I have a copy, a written copy, of
16 that testimony, if the Court would like.

17 JUDGE CLIFTON: All right, good, I would.
18 I'm going to have your statement be identified
19 as Exhibit 37 and what I would like you to do
20 now is distribute copies to the court reporter,
21 to me and to the USDA table and put -- you can
22 help distribute the rest of them through the
23 rows of people and the excess please put on the
24 back table. We'll go off record while that's
25 done.

1 (Off the record.)

2 (Exhibit 37 was marked for
3 identification.)

4 JUDGE CLIFTON: All right. Let's go back
5 on record. We're back on record at 10:56.
6 Mr. Shatto, you may proceed.

7 THE WITNESS: Thank you. I've never been
8 so popular. I guess.

9 JUDGE CLIFTON: And you need to be two
10 inches from that mic.

11 THE WITNESS: We can do that.

12 A. As I mentioned, I'm here representing our
13 family. We actually own a dairy farm north of Kansas
14 City. We have a dairy farm in our family.

15 JUDGE CLIFTON: I'm sorry. Slow down.
16 You may be a bit nervous and you're four inches
17 from that mic.

18 A. Yeah, don't let the tie fool you. We're
19 dairy farmers, not professionals, as it relates to this
20 and nerves are a bit of an issue.

21 We own a dairy farm north of Kansas City,
22 Missouri. We've owned the farm, had it in our family
23 for more than 70 years. And I guess that's what brings
24 us here today. My dad has been a dairy farmer for more
25 than 30 years. And we are in opposition to the original

1 petitions submitted by National Milk and IDFA and felt
2 like it was necessary for us to come here today and
3 provide our thoughts, both related to those -- that
4 petition.

5 And then also we've worked to put
6 together our own proposal as it relates to this effort,
7 trying to find an opportunity for a middle ground that
8 we believe will -- will help the small guys, help them
9 stay in business, like us, but also maybe try to get at
10 the issue that's been proposed, even though it's not
11 necessarily something that we agree with.

12 With that said, if it's okay, I would
13 really like to do two things. And most of that would be
14 from prepared statements. First and foremost, to give
15 you a little background about our family farm; second,
16 to address the proposal that I was speaking of from
17 National Milk and IDFA; and then, third, to kind of
18 illustrate our proposal and kind of why we think that
19 maybe it's something that the Department should
20 consider.

21 With that, I'll start with the
22 background.

23 We are a small family of business owners,
24 who own a family farm and on-farm bottling facility that
25 employs just over 20 people in the Midwest. Our family

1 had been in the dairy business for more than 70 years.
2 For the majority of that time, we sold our milk to a
3 national cooperative. This method of making a living
4 was no longer an option in the 1990s as the price that
5 we were being paid for our milk did not cover the cost
6 to produce it. We had no choice as it related to who we
7 sold our milk to or the price we could get for our milk
8 as DFA has a monopoly on the milk supply in our area.
9 Having no competition vying for our milk, we had to
10 either go out of business or try something new.

11 In June 2003, we took a risk. We built
12 an on-farm bottling facility whereby we wanted to add
13 value to our product and sell a farm fresh premium
14 product directly to our neighbors. Today, we milk
15 nearly 300 cows and sell the milk from those cows to the
16 wonderful customers that we have in the Kansas City
17 area. We offer something that no other dairy offers in
18 our area, we truly serve a niche market in a variety of
19 ways. We offer milk in glass bottles, we offer milk
20 flavors ranging from orange dream milk and root beer
21 milk to banana and strawberry. We also offer our
22 customers the opportunity to purchase milk from local
23 cows that they can come see, touch and milk. Becoming a
24 producer-handler has allowed us to survive and continue
25 to do what we enjoy doing, and that's farming.

1 With debt up to our ears and uncertainty
2 related to the economy, we have been very cautious over
3 the past five years attempting to keep our farm viable,
4 while at the same time making improvements to our dairy
5 facilities that were long ignored in the '90s due to the
6 fact that we lost money each year.

7 In 2006, we were named the small business
8 of the year for the state of Missouri and later named
9 small business of the year runner-up by the National
10 Small Business Administration. These awards were
11 directly in response to the efforts to save our family
12 farm and add value to the product that we had been
13 selling to cooperatives for the past half century.

14 We never anticipated becoming a
15 producer-handler. It was nothing that we ever thought
16 about 15 years ago, never anything that we wanted to do.
17 We were forced to consider this as an option as we had
18 to find a way to keep our farm viable. Now that we are
19 a producer-handler and in the process of paying off past
20 debt and making the improvements to our farm that were
21 never an option in the past, the petitioners are now
22 wanting to change the rules and use the Government to
23 keep us small guys from doing what we inherently set out
24 to do, save our family farm and continue to do what we
25 love, farm.

1 That's kind of the background as it
2 relates to who we are, what we are, what brings us here
3 today.

4 Specifically relating to our response in
5 opposition to the National Milk petition and proposal.

6 The National Milk Producers Federation
7 petition submitted on January 30 makes it very clear
8 that they are seeking to end the producer-handler
9 exemption due to large producer-handlers that create
10 market disruption, obtain a price advantage due to their
11 large size and that cannot balance their own supply.
12 The petition that was submitted will not only impact
13 those large producer-handlers that they are referring
14 to, but also those of us that milk 300 or so cows on our
15 local family dairy farms. Thus, the petition would
16 negatively impact those of us that do none of the above.

17 I can factually state that our small
18 dairy does not create market disruption; that it does
19 not obtain any price advantage over any other
20 cooperative or any cooperative or any similar sized
21 producer-handlers, and would not even do so if we
22 produced 1 million pounds per month; does not have a
23 problem balancing supply with demand. We were told up
24 front by the co-op that if we became a producer-handler,
25 they would not be willing to balance our supply. This

1 has never been an option and we would never ask for such
2 assistance.

3 Our small family farm does not compete
4 with any other organizations serving our area. Pricing
5 is not comparable. Our pricing is higher across the
6 board. The product is not offered instead of another.
7 We offer only a premium product as an option. We do not
8 want to become large, we just want to maintain and grow
9 with our customer base for the next generation. We are
10 basically a boutique dairy that is in touch with our
11 neighbors, who happen to be our customers.

12 Our small family farm does fill a niche
13 market not served by anyone else. We offer unique
14 product selection. As I stated before, we offer banana
15 milk, root beer milk, orange dream milk, strawberry milk
16 and chocolate milk. We offer a true farm to market
17 alternative. We offer milk from cow to store in 24
18 hours or less. We offer customers the opportunity to
19 come see the cows and see where their milk comes from.
20 Overall, we do not have the ability to absorb the cost
21 of regulation associated with the National Milk
22 proposal.

23 The facts above show both that we do not
24 fit the description of, quote, a large producer-handler
25 outlined in NMPF's petition, and that their petition

1 will negatively impact small businesses across the
2 country, and more specifically our family dairy farm.

3 We will do all we can to address each
4 component of the aforementioned proposal and show how
5 such a proposal will dramatically impact small family
6 operations like ours.

7 Due to this point, we feel it is
8 necessary to submit our own proposal for consideration
9 as there must be a way to work to ensure small family
10 farms like ours are not impacted by the change -- by
11 this change and are allowed to survive. The state of
12 Missouri, like many other states -- I just heard that
13 from Wisconsin -- promotes value-added agriculture as it
14 is more sustainable and provides small regions of the
15 state with high-quality, locally-produced goods. Any
16 action by the Department to support a petition like that
17 of National Milk would negate any effort by the state or
18 local governments to grow their economy with the help of
19 value-added dairy producers.

20 Overall their proposal penalizes us and
21 those like us for taking the steps to save our small
22 family farm and create an on-the-farm bottling facility.
23 It changes the rules on the small guys like us for no
24 reason. It would make us pay into the pool to use the
25 milk that comes from the cows that we own on our

1 long-standing family farm. The proposal will keep small
2 family farms like ours, that are near the proposed
3 production limit, from being able to expand to meet the
4 increased customer demand and from being able to grow to
5 the point that is necessary in our business plan to make
6 a profit that justifies being in business.

7 The rationale used in the aforementioned
8 NMPF petition relies solely on dairy farm size and the
9 economies of scale. That is misleading and unjust when
10 considering actual costs related to production. A farm
11 can reduce its costs of production a great deal by not
12 feeding their cows good feed, by neglecting to get their
13 cows checked and treated by a veterinarian, and with
14 other similar methods.

15 Farms like ours, small family-owned farms
16 that are committed to selling the absolute best and
17 freshest milk, take the time to put forth the effort to
18 expend more money on other dairy operations to ensure
19 their cows are happy and safe. We treat our cows as
20 well as our family pet, and others like us do the same.
21 We feed our cows the best possible feed (which typically
22 is not the cheapest), we build the buildings and oversee
23 them to ensure that our cows have a nice place to stay
24 warm in the winter and cool in the summer. We also make
25 sure that we have good quality pasture space for them to

1 roam and eat grass as they would like. All of these
2 things are not necessary, but they represent a few of
3 the ways that we do business. They are what makes us
4 different and what costs us more money in production.

5 Costs such as these take us out of the,
6 quote, milk cost of production by size graph that was
7 referenced in the National Milk proposal. Things like
8 this reduce and eliminate the ability to suggest that a
9 limit should be based upon some average economies of
10 scale. Such a reliance does nothing other than negate
11 the extra efforts and extra thousands of dollars that
12 are spent every year by us and others like us to ensure
13 our cows are well taken care of and produce the best
14 possible milk. I am confident to say that our cost per
15 hundredweight on our farm of more than or of nearly 300
16 cows is well above the \$18 noted on the chart and likely
17 much closer to the 25 to \$30 level.

18 With this in mind, we are at a
19 significant cost disadvantage compared to not only those
20 dairies of a similar size, but also cooperatives of all
21 sizes. We likely spend in direct costs 50 to 75 percent
22 more per hundredweight than the vast majority of
23 cooperatives nationwide. Therefore we have no financial
24 ability to compete with these processors on price and
25 have never attempted to do so. Thus, we believe that

1 their proposal to eliminate the producer-handler
2 provision is unjust and flies in the face of the
3 original intent to exempt producer-handlers that serve
4 small niche markets not served by the large producers
5 and those that do not impact the overall market. In
6 fact, this proposal will eliminate many small dairies
7 like our own and reduce one of the exact things that the
8 USDA says is necessary for perfect competition to be met
9 on the, quote, spectrum of market structures, end quote,
10 a large number of small producers. This is evidenced in
11 the U.S. PowerPoint presentation prepared by the Market
12 Administrator's office.

13 If the National Milk petition is
14 considered and enacted, the impact on the industry will
15 be that a large number of producer-handlers,
16 specifically those under 600 cows, will be out of
17 business. This would shift more sales to large,
18 multistate operations and cooperatives.

19 Our proposal. We do not believe there
20 exists a disorderly market condition. Our proposal is
21 to address the reduction in competition, negative impact
22 on small businesses, overall over-regulation of the
23 dairy industry by the National Milk petition, which is
24 considered strongly and put into effect.

25 If, and only if, the Department decides

1 some change should occur, we would propose the
2 following:

3 The producer-handler exemption be kept in
4 place with a limit of the exemption to be set at
5 1 million pounds per month, as we believe a small
6 producer under this limit is not disruptive to the
7 market and they would be unable to survive the financial
8 impact of such regulation based upon their limited
9 profit margin.

10 And if the producer-handler exemption is
11 removed, we would propose the regulatory exemption for
12 small distributing plants be increased to 1 million
13 pounds per month as small producers under this limit are
14 not disruptive to the market.

15 The purpose of our proposal is to find a
16 solution to ensure that small operations like ours are
17 not unfairly burdened by regulation which was originally
18 designed with large enterprises in mind, and to continue
19 to allow operations like ours to exist, provide products
20 for niche markets and continue to have the ability to
21 work to offer a premium product instead of a product
22 that is produced solely to limit costs.

23 If our proposal is enacted, those
24 producer-handlers over 1 million pounds per month would
25 be impacted. They would be forced --

1 JUDGE CLIFTON: I'm sorry. Go back to
2 your over 1 million pounds per month and read
3 that again.

4 THE WITNESS: Bullet one or bullet two?

5 JUDGE CLIFTON: 1 million hundredweight
6 per month.

7 THE WITNESS: 1 million. I'll start at
8 if. If the department decides some changes --

9 JUDGE CLIFTON: If our proposal is
10 enacted. That's where I am.

11 A. Oh, I'm sorry. If our proposal is
12 enacted, those producer-handlers over 1 million pounds
13 per hundredweight per month would be impacted.

14 JUDGE CLIFTON: Is it -- is what you are
15 saying there, over 1 million hundredweight per
16 month?

17 THE WITNESS: 1 million pounds. I'm
18 sorry. 1 million pounds of Class I milk per
19 month.

20 JUDGE CLIFTON: No, I --okay, all right.
21 So the hundredweight should just be stricken and
22 it should just say pounds?

23 THE WITNESS: Correct.

24 JUDGE CLIFTON: Okay. Good.

25 THE WITNESS: I'm sorry.

1 JUDGE CLIFTON: Go ahead and read it
2 again from the beginning.

3 THE WITNESS: Sure. If our proposal is
4 enacted, those producer-handlers over 1 million
5 pounds per hundredweight per month would be
6 impacted.

7 JUDGE CLIFTON: Okay. Now, you confused
8 me.

9 THE WITNESS: 1 million pounds per month
10 of Class I distribution.

11 JUDGE CLIFTON: Okay. Go ahead and start
12 it again. Read it.

13 A. If our proposal is enacted, those
14 producer-handlers over 1 million pounds of distribution
15 per month would be impacted. They would be forced to
16 pay into the pool for milk for which they are currently
17 shouldering the burden of production. This would be a
18 substantial change and would likely create stress for
19 those producer-handlers. It is anticipated that a
20 regulation could be dealt with by operations of this
21 size, unlike those smaller operations below
22 1 million pounds per month. Those producer-handlers
23 under the 1 million pounds per month will not be
24 impacted.

25 On the other hand, when looking at the

1 distribution plants that currently sell 150,000 pounds
2 per month, or up to 1 million pounds per month, they
3 would be positively impacted as they would no longer be
4 regulated and forced to pay into the pool.

5 Our proposal will assist smaller, those
6 under 1 million pounds per month, distribution plants as
7 it will expand their ability to grow and increase their
8 net revenue. Producers overall will not be impacted.
9 Consumers will maintain their ability to choose small,
10 local producer-handlers when shopping at local markets.

11 The effects of our proposal on small
12 business is much more appropriate and much more
13 tolerable than that of National Milk's proposal. Our
14 proposal will allow smaller family operations the
15 opportunities to stay in business and not be faced with
16 burdensome regulations that was originally and still is
17 in place with large businesses in mind. Our proposal
18 realizes that price per hundredweight, when looking at a
19 producer-handler, is not clear-cut. It understands that
20 these producer-handlers often have much greater costs
21 per hundredweight as they either choose to or are called
22 on to spend more money per hundredweight to ensure their
23 cows are provided with the best possible environment,
24 care and health. This also takes into consideration
25 that small operators like ourselves have an additional

1 built-in cost of building a business based upon
2 providing customers with the freshest milk possible, not
3 allowing for the milk to be pooled and processed only a
4 few times per week, not to mention the additional cost
5 associated with family friendly practices of personally
6 connecting with our consumer.

7 All of these items that yield a niche
8 product cost more money in production, processing and in
9 the promotion of the products. Because of these
10 additional costs, this proposal realizes a cap any
11 smaller than 1 million pounds per month is much too low
12 and will result in the loss of many family operations
13 that will be unable to pay the regulatory fee.

14 We stand in opposition to the National
15 Milk proposal of eliminating the producer-handler
16 provision. We have outlined a number of the reasons
17 that farms like ours should not be treated like the
18 large producer-handlers noted in the National Milk
19 petition. Regulation as proposed by National Milk would
20 effectively put us and others like us out of business.

21 If, and only if, strong consideration is
22 given to the National Milk petition or any other
23 proposal that would effectively change the way
24 producer-handlers are treated, we would like our
25 proposal considered as an alternative.

1 With that said, I thank you very much for
2 your time and would be happy to answer any questions.

3 JUDGE CLIFTON: Thank you very much,
4 Mr. Shatto.

5 I'm wondering. Do you think it
6 advisable, Mr. Tosi, that before the record copy
7 goes up on the website, that I ask the witness
8 to initialize and change those hundredweights to
9 pounds?

10 MR. TOSI: Yes, your Honor, that would be
11 fine.

12 JUDGE CLIFTON: Okay. I think I'll do
13 that. So don't leave when your testimony is
14 over, Mr. Shatto. We'll just take care of that
15 little housekeeping.

16 THE WITNESS: Sounds good.

17 JUDGE CLIFTON: Now, cross-examination.
18 Who would like to begin? Mr. Yale.

19 CROSS-EXAMINATION

20 BY MR. YALE:

21 Q. Benjamin F. Yale on behalf of Continental
22 Dairy Products and Select Milk. Good morning.

23 A. Good morning.

24 Q. By the way, if -- which I'm sure you do
25 you run your businesses as impressively as you made your

1 presentation, you probably deserve to be the national
2 small business, not the runner up.

3 A. Oh, I appreciate that. Obviously, I need
4 to slow down a little bit. We can deal with that.

5 Q. It's just that intelligence sometimes
6 happens to come out at speeds much faster than the mouth
7 allows.

8 A. I've never been told that before, but
9 thank you.

10 Q. You used the words 1 million. Are you
11 opposed to a 3 million pound cap as opposed to the
12 1 million you chose? Or do you have any thoughts --
13 you've heard some of the testimony today, and I think
14 the Department's proposed 2 million. I mean, do you
15 have any thoughts with regard to 1, 2 or 3 as the
16 number?

17 A. Sure. Let me be clear. I think if -- if
18 we had our preferences we wouldn't be here and there
19 would be no change.

20 Q. Okay.

21 A. I think, assuming that, or if the
22 Department feels like some change should occur, we think
23 the minimum cap should be 1 million pounds. By stating
24 that, I assume you can infer that we would be neutral to
25 anything above 1 million pounds.

1 Q. Okay. The other issue has to do --
2 you're aware that National Milk put out a Proposal 26 as
3 part of their package, there's a grandfather clause.
4 Are you aware of that?

5 A. I'm not aware of it based upon calling it
6 Proposal 26. I'm aware of the second proposal that
7 included a 3 million pound cap. As it relates to the
8 grandfathering, if you could provide me with a little
9 more information?

10 Q. The grandfathering part of the
11 requirement was -- there's a number of restrictions, but
12 the primary one is that it would be only for plants that
13 were in existence at the time or during -- as
14 producer-handlers during 2008. And I mean --

15 A. Selfishly, we would have no problem with
16 that. I mean, it's nothing we've talked about.

17 Q. Okay. Does that change your position
18 vis-a-vis National Milk's Proposals 1, 2 and 26, or do
19 you still think -- I guess your statement is, no
20 regulation, or if you are going to do it, protect me,
21 right?

22 A. That's one way to take it. Yes, we
23 are -- we are adamantly opposed to the initial proposal
24 put forth by National Milk. Again, if the Department
25 feels like there needs to be some change, then we would

1 support or we would be neutral to any change of a cap
2 over 1 million pounds.

3 MR. YALE: I have no other questions.

4 JUDGE CLIFTON: Thank you, Mr. Yale. Who
5 would like to go next? Mr. Vetne.

6 CROSS-EXAMINATION

7 BY MR. VETNE:

8 Q. Mr. Shatto, my name is John Vetne. I'm
9 an attorney from New Hampshire. I represent two
10 producer-handlers in the Pacific Northwest and one in
11 New Mexico.

12 I have a question about your discussion
13 on page 1, 2 -- 3. On the third page at the bottom, you
14 talk about costs from your farm, the farm component of
15 your producer-handler operation, correct?

16 A. Correct.

17 Q. Okay. And down at the bottom of the
18 page, you say you have a significant cost disadvantage
19 compared not only to those dairies of similar size --
20 and by dairies, you mean farms?

21 A. Dairy farmers.

22 Q. Dairy farmers -- but also cooperatives of
23 all sizes who -- the reference to cooperatives there
24 refers to cooperatives in what function? How would --
25 why did you make the effort to -- to assert a comparison

1 between your farm costs and cooperative costs?

2 A. It's my understanding, and correct me if
3 I'm wrong, that a lot of the conversation is related to
4 competition and the amount that we can produce our milk
5 for compared to what anybody else can buy milk from a
6 dairy producer that is just selling milk to a
7 cooperative.

8 I think it's evidence in our original
9 statement that we lost money every year in the '90s,
10 that there was not a way that we could survive on the
11 amount of money that a cooperative, at that time DFA,
12 was paying us for our milk.

13 So what I'm suggesting to you is the
14 amount that we're actually -- it costs us to produce
15 that milk on a dairy farm is substantially greater to
16 dairy farms around us, as well as to any amounts that a
17 cooperative could purchase that from a producer.

18 Q. Okay. And the last complete sentence on
19 that page, therefore, we have no financial ability to
20 compete with these processors on price. You made no
21 prior reference to processors. You talked about
22 cooperatives and dairies, which you intended to be
23 farmers. When you say, these processors, what is the
24 reference back, if there is one?

25 A. Sure. And there's probably not. I think

1 it's semantics. I think that our position is that
2 whenever we're talking about our ability to compete, or
3 the lack thereof in our case, with anybody that is -- is
4 producing, buying milk or reselling milk, we have no
5 opportunity to compete. We have never attempted to do
6 so. We will never attempt to do so because we just
7 can't, based upon the costs that we experience in our
8 whole operation.

9 We are nothing like the dairy farmers --
10 or I mean the -- the cooperatives or anybody else out
11 there. I mean, we -- we have a unique situation.

12 Q. Okay. You focused primarily on your --
13 the costs of producing milk at your farm and comparing
14 those to other farms. Is it not the case that at
15 whatever point the milk you produce leaves your farm and
16 enters your processing plant, that your costs from there
17 to the packaged product are also substantial and make
18 you unable to compete with large processors?

19 A. I would make that assumption, yes.

20 Q. And do you blow your own bottles? Do you
21 use plastic bottles?

22 A. No, sir, we do not. We use glass bottles
23 as I referenced in my statement.

24 Q. Okay. So you don't have any?

25 A. No, sir.

1 Q. And do you make your own caps or buy
2 caps?

3 A. We buy it all, sir. We don't make
4 anything other than milk.

5 Q. Okay. You talked a little bit about your
6 recent investment in the operation, both farm and plant
7 operation, correct? You have made recent investments?

8 A. Sure. I mean, we started this whole
9 thing in June of 2003. And we've -- we've made
10 substantial investments every year. I mean, I think
11 it's safe to say my dad doesn't pay himself a salary
12 because all the money that we get from the farm goes
13 back into the farm, trying to make up for the capital
14 improvements that should have been taking place over the
15 time when we were selling to a cooperative, and also
16 those today.

17 Q. Okay. And when you say, all the money
18 goes back into the farm, when you use the term farm
19 there, do you intend to mean both the farm and the plant
20 as a unitary operation?

21 A. Yes, sir.

22 Q. Frequently you referred in your testimony
23 to farm, you did not intend to exclude the plant part of
24 your producer-handler operation when you did that?

25 A. Our bottling facility is 250 feet from

1 our milking facility. And, to me, when I go home, I go
2 home to the farm.

3 Q. Okay. And a lot of your improvements,
4 farm and plant, your unitary operation --

5 A. Correct.

6 Q. -- have been made from bank loans. You
7 say you are in debt up to your ears?

8 A. We have substantial debt, yes, sir.

9 Q. And that was to make those improvements,
10 correct?

11 A. That was to buy the equipment to start,
12 which that was all used to do everything that we have
13 done to this point.

14 Q. Okay. And when you went to the bank, you
15 provided some information on cash flow and anticipated
16 cash flow, and that would include the money that you
17 projected to receive from selling milk, without any
18 projection of having to pay part of it to other
19 producers, correct?

20 A. That is correct. I'll also say that the
21 way you make it sound is very easy. We went to dozens
22 of banks before we were ever allowed to get that money,
23 but yes, sir.

24 Q. Okay. If you were required to pay to the
25 Market Administrator a good portion of your revenue from

1 the sale of fluid milk, would you be able to repay those
2 loans?

3 A. No, sir, and we'd probably have some cows
4 for sale.

5 MR. VETNE: Thank you.

6 JUDGE CLIFTON: Who will next
7 cross-examine Mr. Shatto? Mr. Miltner.

8 CROSS-EXAMINATION

9 BY MR. MILTNER:

10 Q. Good morning, Mr. Shatto.

11 A. Good morning. How are you, sir?

12 Q. I'm fine. Thank you. My name is Ryan
13 Miltner and I represent an alliance of producer-handlers
14 and exempt plants of various sizes. And I was looking
15 at your website and your packaging is extremely unique,
16 and I would say entertaining.

17 A. Well, thank you. We do our best.

18 Q. Tell me a little bit about how you -- how
19 you acquire your packaging.

20 A. As far as the purchase?

21 Q. Yeah.

22 A. There is one glass bottling milk supplier
23 that we're aware of, and we've searched far and wide to
24 find another. And they are available through a company
25 called Stanpak out of Canada. And we have to place our

1 orders, give them artwork, and we have to order them
2 through that specific company and take them to them.

3 Q. And it appears that these are all
4 custom -- custom printed bottles for your operation?

5 A. The bottles themselves are just a mass
6 produced bottle that I think is available to everybody
7 throughout the country, including some of your clients.
8 But as far as the printing, yes, it's unique to the
9 specific dairy.

10 Q. I know you stated your preference that
11 there be no changes to the current regulations, but I
12 don't know that you really explained why you feel that
13 way. If you have -- if you want to expand a little bit,
14 I'd like to offer you that opportunity.

15 A. Well, I think -- I will. And, really, it
16 boils down to two things. And maybe I will become a bit
17 more passionate about this than in my first statement.

18 My dad has worked for 30 years to try to
19 build something that he could enjoy and sustain. And
20 the cooperatives that -- the cooperative that we sold to
21 either was never in a position or never chose to provide
22 him the money to sustain his farm.

23 And so instead of him giving up and going
24 to the city and getting a real job -- excuse me -- he
25 decided to give it his all and try to make it and do

1 something new, something innovative and something
2 different. So he's done that.

3 And I think that -- you know, I think
4 that what brings more joy to him than anything is the
5 customers, not the dollar amounts that come back to the
6 farm that he can put back into the farm. It's the
7 customers. So he's created something in our family that
8 has put pride back into what he does.

9 And now it seems like that what's taking
10 place, there is a group -- whoever is involved in that
11 group, so be it -- has decided that these small, little
12 guys that have tried to make a way for themselves is
13 inappropriate or it is in some way competing with them,
14 which there's in no way an opportunity to suggest that
15 what we do, we compete with anybody else.

16 And so we believe that utilizing a
17 petition like this and the government in the way that
18 it's perceived to me to be utilized, to try and to
19 squash us, to keep from saving our family farm, as my
20 dad has attempted to do, is not correct, and is
21 something that we will not stand for, and that's why
22 we're here. Therefore, for that reason, we think the
23 status quo is appropriate.

24 I think the second reason comes down to
25 the opportunity -- well, there's three. Let me add one

1 more.

2 The second reason has to do with dollars
3 and cents. There's just absolutely no way that we can
4 survive if the proposal put forth by National Milk is
5 put into place. No way.

6 And then the third is probably more on
7 behalf of the customers that I mentioned to you. We
8 have a mailing list of about 27,000 people that we send
9 out an e-Moosletter to. Kind of chuckle, funny,
10 newsletter, every month. And those people rely on us in
11 some fashion or another to provide our milk to them
12 because they, for whatever reason, have -- believe in
13 us, believe in who we are, the Shatto milk brand and our
14 local family farm. So those are the reasons that we
15 would oppose it.

16 Q. Thank you.

17 A. Yeah.

18 JUDGE CLIFTON: What's your distribution
19 on your newsletter?

20 THE WITNESS: About 27,000 people.

21 JUDGE CLIFTON: Wow. That's like a small
22 city.

23 THE WITNESS: Yeah. It's kind of great,
24 isn't it?

25 JUDGE CLIFTON: It is.

1 BY MR. MILTNER:

2 Q. That's more than many newspapers that
3 aren't doing so well right now.

4 A. Maybe we should start offering ad space.

5 Q. Speaking of models that aren't
6 necessarily working. Do you have a chance still to
7 converse and talk with other dairy farmers in your area?

8 A. Oh, absolutely. I say that, but there's
9 not many left.

10 Q. How about just generally in your region?

11 A. Sure.

12 Q. And are they of various sizes, as far as
13 herd size?

14 A. Yeah. I mean, definition of various.
15 But yeah, I mean, the small guys just aren't left. I
16 mean, the bottom line is, the small guys aren't left.
17 So --

18 Q. Those that are left, what size herds do
19 they have, generally?

20 A. Boy. I'd say 180, 350ish.

21 Q. Okay. And those that are -- if there are
22 new start-ups in your area, how big are those
23 operations?

24 A. There's not been any in our direct area.
25 The ones that we're aware of are thousands of cows.

1 Q. Of those that you talk to, how are they
2 doing, financially?

3 A. The smaller ones?

4 Q. Anybody you speak to.

5 A. We only speak to the smaller ones because
6 that's really the only ones that are around us that we
7 have intimate knowledge of. And they wish milk prices
8 were up.

9 Q. Would you say their situation is similar
10 to what your family went through?

11 A. Absolutely.

12 Q. And would your family like to see the
13 opportunities that you had available to -- to those
14 farms, should they choose to take on the risk that you
15 have taken on?

16 A. It's a double-edged sword. We don't have
17 a position on that.

18 Q. There are multiple proposals being
19 considered here and they've all been published in the
20 Federal Register. I don't know if you've had a chance
21 to read through that.

22 A. Which I don't understand.

23 Q. Light reading.

24 MR. MILTNER: Judge, do you have a copy
25 of the hearing notice that --

1 JUDGE CLIFTON: I do. And I can
2 understand why he says he doesn't understand.

3 MR. MILTNER: And I'll grab mine while
4 you're doing that.

5 BY MR. MILTNER:

6 Q. I apologize that I didn't mark this
7 before I came up here. But if you would turn,
8 Mr. Shatto, to page -- it's 16299 in the upper
9 right-hand corner.

10 A. I'm there.

11 Q. If you look at the bottom of the third
12 column, it says, proposed by Shatto Farms, Inc. That's
13 Proposal 11. And then carried over to the next page is
14 Proposal 12. Those are your proposals you've discussed
15 today, correct?

16 A. Unless there's some legal terminology
17 that I'm not catching, I think that mirrors kind of what
18 I'm thinking.

19 Q. Okay. And then if you -- there are a
20 number of other proposals, and three of which have been
21 proposed by the American Independent Dairy Alliance.
22 And I wanted to talk with you about those proposals just
23 briefly.

24 A. Sure.

25 Q. One of those proposals offers options for

1 exempting milk produced on a handler's own farm from
2 pricing and pooling similar to the current
3 producer-handler regulations. Would that be something
4 that would work for Shatto Farms?

5 A. Can you say that one more time just so I
6 make sure?

7 Q. Sure. It would allow a handler that also
8 owns a dairy farm and uses milk from that farm in its
9 own operation to have those volumes exempt from pricing
10 and pooling.

11 A. That, to me, sounds like the status quo.
12 Is that not correct?

13 Q. There are some nuances, but yes.

14 A. We would be supportive of the status quo.

15 Q. Okay. Another proposal would allow a
16 handler that has processing volumes from its own farm,
17 who sells that milk in a retail outlet that is for home
18 delivery, that's controlled by the handler to be
19 exempted on those volumes. Would that -- would that be
20 consistent with how your operation is set up?

21 A. It would be consistent of how our
22 operation is set up. I guess I would have a question
23 about the home delivery component. Would that be a
24 hundred percent of that milk is used for home delivery
25 or would that be that a portion of that milk is used in

1 home delivery?

2 Q. As it's drafted, it would be any
3 deliveries to a retail customer that would not have to
4 be exclusive. So that would be consistent with at least
5 part of your operations?

6 A. Correct.

7 Q. The third option, third proposal, deals
8 with individual handler pools. Are you familiar with
9 that?

10 A. I am not.

11 Q. Okay. Then I don't want to discuss that
12 issue with you.

13 A. Okay. Fair enough.

14 Q. In addition to the home delivery sales
15 that you guys have, where else can people find your
16 milk?

17 A. Well, let me be clear, we have two home
18 delivery customers that my parents drive the milk to
19 right now, so --

20 Q. Okay.

21 A. We don't have a widespread home delivery
22 service. We're thinking about that. But as of right
23 now, our population is two. And, I'm sorry, the second
24 part of your question?

25 Q. Where can people find your milk?

1 A. In about 50 stores in the Kansas City
2 area that range from coffee shops and -- and cupcake
3 shops to local grocery stores, those kind of things.

4 Q. Okay. Thank you.

5 A. Yeah.

6 JUDGE CLIFTON: Thank you, Mr. Miltner.
7 Who would next like to cross-examine this
8 witness? Mr. Yale. You'll recognize this one.

9 THE WITNESS: Yes. I must have
10 disappointed him the first time.

11 REXCROSS-EXAMINATION

12 BY MR. YALE:

13 Q. Did you bring any samples of your -- of
14 your root beer flavored milk?

15 A. You know, the last time that we took
16 samples on a plane was to George Bush. And we have not
17 been able to get milk on a plane since then, so
18 unfortunately we did not. But I'm certain that you
19 would enjoy it.

20 MR. YALE: Thank you.

21 MR. STEVENS: That's it?

22 MR. YALE: That's it.

23 MR. STEVENS: Good question.

24 JUDGE CLIFTON: All right. Are there
25 other cross-examination questions? Mr. Carroll.

CROSS-EXAMINATION

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

BY MR. CARROLL:

Q. You have told us this is a family business.

A. Correct.

Q. Who are the members of the family that are engaged in it?

A. My mom, my dad, myself, I'm an only child. My aunt, my sister -- my mom's sister, and my wife.

Q. And are you all employed there?

A. We don't all draw a salary there, no.

Q. Right. But you're working there, the family --

A. In some way or another, but yes, absolutely.

Q. And you say you received some awards. Would you tell us about those again?

A. Sure. Actually, I probably should let my dad do that. But we've been very fortunate since we started. We were named the small business of the year by the state of Missouri, through the United States Small Business Association or the Missouri Small Business Association.

Q. Could you slow down a little bit?

1 Because I don't hear too good.

2 A. Okay. And I'll talk louder. We were
3 named small business of the year by the Missouri Small
4 Business Association for the state of Missouri.

5 Once we received that award, we were
6 notified that we got to go -- we were able to go to
7 Washington, D.C. to be a part of this overarching United
8 States Small Business Administration ceremony where they
9 pick the national small business of the year.

10 Q. Right.

11 A. During that we were notified we were the
12 runner-up for the small business of the year.

13 In addition to those awards, we received
14 a variety of other awards based upon the quality of our
15 products; based upon the design of our bottles that
16 Mr. Miltner acknowledged, and a variety of other things
17 that are very subordinate to the idea of getting the
18 small business award.

19 Q. Could you tell us a little more about the
20 awards on your products?

21 A. Sure. Whether it be products that are
22 submitted to the national or annual dairy convention in
23 Madison or whether it be at the Missouri State Fair or
24 wherever it may be, we've received numerous awards for
25 both our milk and our butter and those kinds of things.

1 Q. And did I understand that you
2 originally -- your father, at any rate, was originally a
3 producer, a member of a cooperative?

4 A. He's still a producer. And yes, he is --
5 was a member of a -- yes. Well, member of a
6 cooperative.

7 Q. And whatever happened, he had -- he felt
8 he had to do something in order to change the way he did
9 business?

10 A. He didn't think, he knew. Balance sheet
11 was telling him that. So he had to make a change.

12 Q. Had to make a change. And the name of
13 that cooperative was?

14 A. DFA, Dairy Farmers of America.

15 Q. And are you aware that they -- that the
16 proposal that you have testified about is supported by
17 DFA today?

18 A. I'm aware of that and I'm saddened by
19 that.

20 Q. All right. Now, directing your attention
21 to the financial situation. Do you have loans on that
22 with the Small Business Administration? I thought that
23 might possibly --

24 A. We do.

25 Q. You do.

1 A. I mean, some of our loans are in that
2 way. Others are just basic loans.

3 Q. And do you have roughly any idea how much
4 your loans are?

5 A. I do not.

6 Q. All right. Would you think they're in
7 excess of a hundred thousand?

8 A. Yes, sir.

9 Q. And perhaps in excess of a million?

10 A. I -- I don't know that.

11 Q. All right. And they're guaranteed by the
12 Small Business Administration?

13 A. A portion of those are.

14 Q. And then does your father or someone in
15 the family have to guarantee that loan to the Small
16 Business Administration?

17 A. That's my understanding.

18 Q. And if there's default on that loan,
19 ultimately your father would be responsible -- or
20 whoever signed that guarantee would be responsible, is
21 that correct?

22 A. I believe that's my mother and father,
23 yes.

24 Q. All right. If you lose this exemption,
25 would you be forced into default on those loans?

1 A. Without doubt, yes.

2 Q. Do you believe as a fundamental principle
3 of American business that everybody should have a right
4 to enter into a business of their own choosing?

5 A. This is not a trick question, is it?

6 Q. Yeah. Do you believe it's a fundamental
7 right of business of every American, the right to enter
8 into a business of his own choosing?

9 A. I do.

10 Q. And that would include, I hope, the dairy
11 business as well?

12 A. I -- of course.

13 Q. And I take it, therefore, that you would
14 not support anything that said that an American's right
15 to do that would be cut off by government direction?

16 A. That is correct.

17 Q. Now, directing your attention again to
18 your experience on the farm, have your costs increased
19 considerably in the last, say, two to three years? Has
20 there been a considerable increase in costs?

21 A. I don't know the definition of
22 considerable you are working from, but in my terms, yes.

23 Q. Right. What would you think -- can you
24 percentage it or are you able to do that?

25 A. It wouldn't be fair to anybody if I were

1 to guess.

2 Q. Do you understand that that's a
3 possibility for the foreseeable future, that whatever
4 levels are set here, ultimately costs are going to creep
5 up to those levels?

6 A. That's expected, yes.

7 Q. Would you like to see a level that would
8 be sufficiently in the future so that you would not be
9 up against it sometime down the road and have the same
10 problems that you are talking about today in surviving
11 because then you would lose your exemption?

12 A. I'm assuming you're talking about a level
13 as it relates to a cap?

14 Q. Yes.

15 A. Well, again, I go back to my original
16 statement. I'd like to see nothing take place. I'd
17 like to see the status quo held in place.

18 Q. I understand. But there are people who
19 have a contrary position.

20 A. So I've heard.

21 Q. Should that position prevail, would you
22 like to see an arrangement or a level which would allow
23 you to carry on your increased costs of production as
24 time moves on?

25 A. Yeah. I mean, our basic premise as

1 stated in my testimony is that we would like for the
2 opportunity to ensure that we're able to continue to
3 meet the demand of our customers today and any demand
4 that they -- they desire in the future.

5 I mean, obviously, I have some selfish
6 belief in the idea that I would like to see our farm be
7 viable for the next generation, because I happen to be
8 it, so yes.

9 Q. Are you married yourself?

10 A. I am.

11 Q. And do you have children?

12 A. I do not. I'm still a child.

13 Q. That's all. Thank you.

14 A. Thank you.

15 JUDGE CLIFTON: Thank you, Mr. Carroll.

16 Mr. Ricciardi, no? Yes?

17 MR. RICCIARDI: I just want to talk to
18 him.

19 CROSS-EXAMINATION

20 BY MR. RICCIARDI:

21 Q. Mr. Shatto, I'll be brief. I'm Al
22 Ricciardi. Like Mr. Miltner, I represent AIDA. And
23 rather than thanking you at the end, I'll thank you in
24 advance for coming and spending the time to provide us
25 with the information for you and your family.

1 A. Sure. Thank you very much.

2 Q. I thank you for that. A couple of
3 things.

4 You indicate in your statement on page 2,
5 you say specifically, the first full paragraph under
6 background, we had no choice -- about the third or
7 fourth sentence -- we had no choice as it related to who
8 we sold our milk to or the price we could get for our
9 milk as DFA has a monopoly on the milk supply in our
10 area. That was true back when you decided to become a
11 producer-handler, correct?

12 A. (Nodding head.)

13 Q. Yes?

14 A. Yes.

15 Q. Is that true today?

16 A. Yes.

17 Q. And -- okay. This is probably
18 self-evident, let me see if I can --

19 A. You are not going to make me cry again,
20 are you?

21 Q. I'm going to make myself cry. It
22 happens, but I'm an easy audience.

23 National Milk bills itself and has billed
24 itself at this hearing -- and hopefully I'll get it
25 close to what they say -- as a, quote, Voice of

1 America's Dairy Farmers, close quote. Are you a dairy
2 farmer?

3 A. Yes, sir, my family is.

4 Q. You live in America?

5 A. Yes.

6 Q. Are they your voice?

7 A. No, sir, they're not in this case.

8 Q. Thank you.

9 JUDGE CLIFTON: Would anyone else like to
10 cross-examine Mr. Shatto? Mr. Tosi.

11 CROSS-EXAMINATION

12 BY MR. TOSI:

13 Q. Mr. Shatto --

14 A. Yes, sir.

15 Q. -- are you aware of -- are you going to
16 take a position about any of the other proposals that
17 have been noticed in the hearing notice?

18 A. No, I'm not. And I think that goes back
19 to my original comment to Mr. Miltner, that I don't know
20 that I could really understand the Federal Register and
21 how it was set out. So I don't have the intellectual
22 capabilities to respond to all of those.

23 I will just say in the event that the
24 Department thinks that there's some change necessary,
25 that we would ask that our proposal be the minimum as it

1 relates to any cap that is placed on any
2 producer-handlers, if a cap is considered.

3 Q. Okay. Are you familiar with the term
4 individual -- excuse me, individual handler pool?

5 A. No, but if you could explain it to me,
6 maybe I can get up to speed.

7 Q. I'll pass on that. That would take a
8 long time.

9 A. Okay. I hope because it's a complex term
10 and not because of my intellectual capabilities overall.

11 Q. No. It's just a complicated term.
12 There's also a proposal, the notice is Proposal
13 Number 24, and we have not yet had the benefit of having
14 it presented like we're hearing your proposal right now.

15 But what it seeks to do, in terms of how
16 we read it right now, is that --

17 JUDGE CLIFTON: I'm going to let him read
18 the opening paragraph and then I'd ask you to
19 continue.

20 A. Okay. I think this is a question that
21 maybe you asked those that were -- preceded me.

22 Q. Do you have a position regarding
23 Proposal 24?

24 A. I don't know that we have a position.
25 Thinking about our two home delivery customers, I think

1 that, you know, with the opportunity to expand that, we
2 would be interested in that.

3 But it's my understanding that this
4 proposal would basically only be relevant if 100 percent
5 of that milk was distributed through a home delivery
6 channel, is that correct?

7 Q. That's how it appears to read right now.

8 A. Yeah, we don't have a position on that.

9 Q. Okay. Thank you very much. And by the
10 way, it was a pleasure having you here. I'm awful glad
11 that you took the time.

12 A. Thank you. And you've been very helpful
13 throughout this process. We appreciate the Department's
14 help.

15 MR. TOSI: Thank you.

16 JUDGE CLIFTON: Thank you for your
17 excellent testimony. I do want to meet with
18 with you to make those minor corrections.

19 It's about quarter to noon. Would you
20 like to take one more witness before we have
21 lunch. Yes? The majority say yes. Let's take,
22 right now, just a ten-minute break and we'll
23 come back for Mr. Rowe's testimony.

24 (A recess was taken from 11:50 to 11:57.)

25 JUDGE CLIFTON: We're back on record at

1 11:57. Mr. Shatto has initialed those little,
2 minor corrections from hundredweight to pounds.
3 Is there any objection to the admission into
4 evidence of Exhibit 37, which is his statement?
5 There is none. Exhibit 37 is hereby admitted
6 into evidence.

7 JUDGE CLIFTON: All right, sir. Would
8 you please state your full name and spell it for
9 me?

10 THE WITNESS: I'm Steven Rowe,
11 S-t-e-v-e-n, R-o-w-e.

12 MR. BESHORE: Your Honor, we have
13 distributed and I would ask Mr. -- we have
14 distributed, made available Mr. Rowe's
15 statement, which is seven pages in length. I
16 would ask that it be marked for identification
17 purposes as the next exhibit, which is 38, I
18 believe.

19 (Exhibit 38 was marked for
20 identification.)

21 JUDGE CLIFTON: That's correct.
22 Mr. Rowe's statement has been marked as
23 Exhibit 38.

24 MR. BESHORE: And when he has been sworn,
25 I would ask him to proceed to deliver the

1 statement.

2 JUDGE CLIFTON: Mr. Rowe, would you raise
3 your right hand, please?

4 STEVEN ROWE
5 of lawful age, being duly sworn, was examined and
6 testified as follows:

7 JUDGE CLIFTON: Thank you. You may
8 proceed.

9 MR. RICCIARDI: Your Honor --

10 JUDGE CLIFTON: Mr. Ricciardi.

11 MR. RICCIARDI: -- while you were doing
12 that, I didn't want to interrupt you at that
13 moment. But I do have a preliminary matter that
14 I would like to address regarding this
15 statement.

16 JUDGE CLIFTON: All right.

17 MR. RICCIARDI: It'll be brief.

18 JUDGE CLIFTON: Mr. Beshore, please
19 return to the area of the podium.
20 Mr. Ricciardi.

21 MR. RICCIARDI: I've had the opportunity
22 to now at least quickly read the statement from
23 Mr. Rowe, who is an attorney and general counsel
24 for Northwest Dairy Association. And I note in
25 a number of places that there is legal argument,

1 discussions about meaning of the Regulatory
2 Flexibility Act, for example, on the bottom of
3 page 2; discussion about what the previous
4 recommended decision might have meant at the
5 bottom of page 3; discussion at the bottom of
6 page 4 about what the nonstatutory exemption
7 under the AMAA might have meant on page 4. And
8 I apologize, Judge, since I've just gotten this
9 thing that I can't give you a total review of
10 it.

11 My concern is twofold. First, to the
12 extent we have a lawyer trying to tell the
13 Secretary what the law means, the Secretary has
14 his own counsel and can determine what the law
15 is or will apply to this once the facts are in.

16 Two, we should not have legal argument.
17 We're here to collect facts. In fact, that's
18 what the whole process is supposed to be about.

19 Three, we have one briefing opportunity
20 for all of us at the end. We should not have,
21 as set forth in the guise of statements, legal
22 argument so that one side gets the opportunity
23 more than once to argue legal points.

24 MR. BESHORE: If I might respond?

25 JUDGE CLIFTON: Before you do, let me

1 just look through it quickly. And come back,
2 Mr. Ricciardi, I have a question for you first.

3 MR. RICCIARDI: Sure.

4 JUDGE CLIFTON: Mr. Ricciardi, you are
5 aware that at least two of the lawyers who have
6 been participating in the hearing plan to
7 testify, is that -- are you aware of that?

8 MR. RICCIARDI: Well, I understand that,
9 Judge.

10 JUDGE CLIFTON: And when they testify,
11 they will not be able to separate their legal
12 analysis from their -- their recitation of
13 history. I'm just sure of that. And their
14 testimony will be valuable.

15 Now, I agree with you, it's the Secretary
16 that decides what happens. It's the Secretary
17 that decides what impact all those things that
18 have happened have on this proceeding. But
19 there's a reason why the most important decider
20 goes last, and that is to benefit from the
21 ingredients in the mix.

22 I think a lot of times it's difficult to
23 separate argument from fact. I haven't totally
24 digested this, but how is this witness coming
25 and testifying different, for example, from

1 Mr. Vetne testifying? And I don't remember
2 whether it was Mr. Carroll or Mr. Yale who also
3 intends to testify.

4 MR. RICCIARDI: I haven't heard their
5 testimony yet, nor seen it, Judge. I just point
6 out to your attention that it's really a
7 question of fairness. It's also a question of
8 whether we're gathering facts.

9 I understand at some point you're --
10 you're correct. There is a -- not a fine line
11 nor a bright line between fact and opinion
12 occasionally; nor a fine line nor a bright line
13 between statements sometimes and argument.

14 I just want to make it fair for all of
15 the participants, obviously including the people
16 that I represent, that if there's going to be
17 more than one opportunity to set forth our legal
18 opinions, then everybody should be given that
19 opportunity if that's what we're going to do.

20 JUDGE CLIFTON: You know, you raise a
21 good point. When -- when there was first
22 introduced in the U.S. Supreme Court a brandized
23 brief, that was a revolutionary concept. And if
24 we are going to have a revolutionary concept, we
25 have to let everybody do it. So I understand

1 your concern.

2 Okay. Let me hear from some other
3 people.

4 MR. RICCIARDI: Thank you, Judge.

5 JUDGE CLIFTON: Mr. Beshore.

6 MR. BESHORE: Yes. First of all,
7 Mr. Rowe -- Mr. Ricciardi misstated Mr. Rowe's
8 offices and position. He is senior vice
9 president for Northwest Dairy Association, which
10 is a marketing cooperative. He is also, as his
11 statement indicates, general counsel to
12 Darigold, Inc., which is the operating company
13 that is affiliated with the cooperative.

14 So his first stated position, and that
15 most directly related to dairy farmer, is as
16 senior vice president of Northwest Dairy
17 Association.

18 Secondly, there is no more, quote,
19 argument in this brief than in much of the
20 testimony that has been presented here by
21 persons, executives of associate -- of
22 associations or employees, officers of
23 companies. There's no more legal argument in
24 here stating the company's position with respect
25 to the act that's involved here and the

1 regulation they're under than anything else.

2 There's nothing in here, actually, that
3 I -- in Mr. Rowe's statement that I would say
4 is -- is legal briefing whatsoever. He is legal
5 counsel, he's a member of the bar, he has a law
6 degree. He's made that clear. But this is not
7 in any way a legal brief.

8 JUDGE CLIFTON: All right. Thank you,
9 Mr. Beshore. Mr. Vetne.

10 MR. VETNE: Your Honor, I get up now in
11 hopes of avoiding a spectacle in the future.

12 JUDGE CLIFTON: You have our attention.

13 MR. VETNE: Okay. I've been in
14 Mr. Rowe's seat and presented similar testimony
15 myself when I've represented clients who
16 unfortunately did not have employed on-staff
17 attorneys or economists or market analysts.
18 And -- and my testimony, like Mr. Rowe's, you
19 know, it's not just similar to what I might
20 present later, it's very similar to what
21 Mr. Cryan has already presented.

22 One does not need to be a lawyer to
23 appear in these proceedings, nor need to be an
24 economist to testify. There seems to be a
25 suggestion that what anybody else can do, as far

1 as combining facts, history, analysis,
2 regulatory policy, anybody can do except a
3 lawyer. And a lawyer cannot get up there and do
4 that. That would be fundamentally unfair.

5 I don't expect that kind of response when
6 I present, you know, testimony on how proposals
7 fit into the scheme of things or may fit into
8 the future, which I think is what Mr. Rowe is
9 doing. I certainly don't do it for Mr. Rowe.
10 That is the function of somebody who has more
11 knowledge, who is hired to present that
12 knowledge and tie it to facts.

13 Mr. Rowe probably isn't in operations.
14 He may not have a lot of information about
15 operations. I don't know firsthand what my
16 clients do. And they will come and describe
17 what they do. And I, hopefully, will be able,
18 if there are questions, to fit that into the
19 scheme.

20 So I think what Mr. Rowe is trying to do
21 here is perfectly proper, and it's not just
22 proper because I might do it in the future, it's
23 exactly what Mr. Cryan has done in the past.
24 Thank you.

25 JUDGE CLIFTON: Mr. English.

1 MR. ENGLISH: Good afternoon, your Honor.
2 I want to note a slightly different angle for a
3 moment because I disagree with the
4 characterization that -- that legal argument is
5 somehow limited only to one time or has been
6 limited or it's somehow unfair that one person
7 is getting this advantage.

8 There has been a ton of legal argument,
9 not just in this proceeding but before the
10 proceeding was noticed. In fact, counsel for
11 AIDA ably -- if maybe incorrectly, but ably made
12 a great amount of legal argument to the
13 Secretary for not even holding the hearing.

14 So to suggest that somehow there's this
15 time and place for legal argument, it's a
16 continuum. And so I don't -- I disagree with
17 that comment especially.

18 JUDGE CLIFTON: I have to say as a
19 judicial officer that I am benefited
20 tremendously by other people's ideas as I try to
21 grapple with the law. And it -- the law is
22 difficult. Very often it's very difficult to
23 determine the facts. And then struggling with
24 the law is difficult, and having some ideas to
25 work with is helpful.

1 So I agree. I don't want to -- I don't
2 want to exclude comments on the law or the
3 history of how we got here from this proceeding.

4 MR. STEVENS: Your Honor?

5 JUDGE CLIFTON: Who is speaking?
6 Mr. Stevens.

7 MR. STEVENS: I want to make this short,
8 and I hope it's to the point. This gentleman is
9 here as others to testify, to relate a factual
10 recitation to the Secretary as other witnesses
11 have done.

12 He's representing his constituency here.
13 That's what the hearing is about, to take
14 evidence from interested parties, to hear what
15 they have to say, to make this record as fulsome
16 as it can be and needs to be for the Secretary
17 to make a decision on this matter.

18 So he should be able to give his
19 testimony and let his testimony be judged and be
20 cross-examined and let the Secretary consider
21 what he's testifying to in conjunction with
22 everything else. Let him testify.

23 JUDGE CLIFTON: You are a very valuable
24 attorney to have in this room, and I have
25 appreciated it often. I want to tell you that

1 while I have this opportunity to do it, that I
2 think you made all the difference last night
3 when we were having a difficult time when you
4 assured the witness he would be heard. And
5 every witness does have that valuable
6 opportunity here. And I appreciate that.

7 MR. STEVENS: I totally agree with your
8 Honor and that's the whole purpose of this
9 hearing.

10 JUDGE CLIFTON: All right. Thank you.
11 Mr. Ricciardi, one more comment and then we'll
12 go on.

13 MR. RICCIARDI: Yeah. It is a brief one,
14 Judge. To the extent -- sorry, Al Ricciardi,
15 AIDA. To the extent that anyone somehow took my
16 objection as attempting to preclude Mr. Rowe
17 from testifying, that was not the basis for it
18 at all. It was simply a comment and a caution
19 to you about the legal argument.

20 Obviously, he needs to be here, be
21 available and to give his testimony, and we
22 weren't trying to preclude him from doing that.

23 JUDGE CLIFTON: Thank you. I think the
24 other half of your concern was, Mr. Ricciardi,
25 that if there's going to be an opportunity to

1 inject legal argument in the proceeding, you
2 also want to do it as early as possible. I
3 think that was your other concern, and I
4 appreciate that concern. All right.

5 Mr. Beshore.

6 MR. BESHORE: May Mr. Rowe proceed?

7 JUDGE CLIFTON: Let's see, I've sworn him
8 in. He may proceed.

9 MR. BESHORE: Thank you.

10 A. Thank you, your Honor. Thanks,
11 Mr. Beshore.

12 My name is Steve Rowe. I'm appearing at
13 this hearing on behalf of Northwest Dairy Association
14 and its operating company, Darigold, Inc.

15 NDA is a cooperative association of
16 approximately 530 dairy producers located in Washington,
17 Oregon, Idaho, Utah and Northern California. NDA acts
18 as a handler in the Pacific Northwest Federal Order 124.
19 A portion of our producers are located in the
20 unregulated areas of Idaho and Utah.

21 Darigold Inc., which is wholly owned by
22 NDA, owns and operates eleven processing facilities.
23 Four bottling plants and three manufacturing plants are
24 located in the PNW FO 124. The bottling plants are
25 located in Seattle and Spokane, Washington, Portland and

1 Medford, Oregon. The manufacturing plants are located
2 in Lynden, Chehalis and Sunnyside, Washington. Darigold
3 also operates a bottling plant in Boise, Idaho and
4 manufacturing plants in Caldwell and Jerome, Idaho.

5 I have been Darigold's general counsel
6 since 2005 and also NDA's Senior Vice President since
7 2007. I received my Bachelor of Science Degree in
8 National Resources from the University of Michigan and
9 my Juris Doctorate from the University of Utah.

10 During the 2003-2006 producer-handler
11 hearings for the PNW and Arizona, NDA and Darigold were
12 major proponents and appreciate very much the
13 Secretary's decision to address this issue nationally at
14 this time.

15 I am a relative newcomer to the industry,
16 but I understand there is quite a history in the Pacific
17 Northwest involving the producer-handler exemption. I
18 have discussed this history with Doug Marshall, who
19 preceded me on our staff, and with Dan McBride who is
20 one of the key members of my staff today and who has
21 more than 30 years' involvement with Federal Orders.
22 Both Doug and Dan helped me prepare this testimony to
23 this hearing.

24 During the early years of milk marketing
25 regulation in our PNW region, and especially the 1960s,

1 the cooperatives tried several times to get the
2 Department to end or limit the producer-handler
3 exemption. There were several contentious hearings, but
4 the co-ops were unable to persuade the Department to
5 significantly tighten the rules governing the
6 producer-handler operations, even though as a group they
7 were taking about 10 percent of the Class I sales in the
8 market.

9 During the 1960s, '70s and '80s, the
10 Dairy Division's basic position was that the
11 producer-handlers were small business -- small
12 businesses, which they were not inclined to regulate
13 without good reason. I'm told that during those years,
14 most producer-handler operations were still focused on
15 home delivery or farm-owned retail stores, and the
16 Department felt that they were typically too small to
17 disrupt the business of regulated handlers who
18 increasingly were focused on wholesale rather than home
19 delivery business.

20 Many producer-handler operations grew in
21 size during the 1980s and 1990s, and that led up to our
22 request in 2003 for a new hearing to address this issue
23 in the Pacific Northwest as well as in Arizona. The
24 2006 result of that -- of that proceeding was to add an
25 additional qualification for producer-handler operations

1 to be exempt from regulation, and that is today's 3
2 million pound per month limitation.

3 By the time the last hearing process was
4 requested during 2003, the typical size of
5 producer-handler operations had grown. Even though the
6 aggregate Class I share of the producer-handler
7 operations hadn't increased much from what it had been
8 during the 1960s (roughly 10 percent of the total), the
9 market had many more people and there were fewer
10 producer-handler operations. They had become quite
11 large, relative to the situation in the 1960s. Moreover
12 they were aggressively competing for wholesale business,
13 using their exemption from regulation to their full
14 advantage and to what we saw as an unfair disadvantage
15 of regulated plants.

16 All this was demonstrated in detail in
17 the 2003-2004 hearings, and I ask that in this
18 proceeding we take official notice of the recommended
19 final decision of that proceeding, which accepted our
20 argument that was this that this was evidence of
21 disorderly marketing.

22 Another thing that had changed by 2003,
23 from the early producer-handler rulemaking decades
24 earlier, was development of more formal Federal policies
25 to protect, quote, small, end quote, businesses,

1 including the 1980 passage of the Regulatory Flexibility
2 Act. As applied by the Secretary to Milk Order
3 proceedings, the term "small business" includes a
4 producer who markets less than 500,000 pounds per month,
5 and a plant which has less than 500 employees. During
6 the 2003-06 proceedings, NDA argued that the 3 million
7 pound figure was so large, relative to this "small
8 business" criterion, that our proposal would not impact
9 small businesses.

10 Because we are now asking in effect to
11 lower the 3 million figure to a figure just under the
12 500,000 pound per month threshold used for small
13 businesses, I want to review how that 3 million pound
14 figure came to be proposed originally, rather than
15 something smaller. I understand that there were several
16 considerations:

17 1: I am told that the 3 million pound
18 figure was picked in part because it already had been
19 used as a "small plant" threshold for exemption from
20 participation in the fluid milk promotion assessment
21 known as MilkPep. That was a precedent that was
22 helpful, but MilkPep had no relationship to the
23 statutory mandates which govern Milk Orders.

24 2. Another factor which led to proposing
25 a 3 million pound threshold, rather than some other

1 size, was that it takes more than a thousand cows to
2 produce that much milk. As is still the case today, a
3 thousand cow farm was considered a "large" dairy, and
4 not a small business. Again, I see that as a
5 "political" argument intended to address in advance any
6 possible criticism from "small business" advocates.

7 3. Another factor was that there were
8 several regulated plants in the Pacific Northwest Order
9 which were then smaller than 3 million pounds, and we
10 felt it made no sense to regulate them but not the
11 producer-handler operations given the statutory emphasis
12 on competitive equity among handlers. (I refer to the
13 requirement for uniform pricing, which I will discuss --
14 discuss further at a later point in my testimony.) By
15 the way, we estimate that one of those fully regulated
16 plants is still today well under 3 million pounds per
17 month, Eberhard Dairy, in Bend, Oregon.

18 4. NDA also liked the 3 million pound
19 figure because it regulated three larger
20 producer-handler operations, but it would not impact
21 several others who were still operating in a more
22 traditional manner. One might say that the intended
23 effect was to grandfather Lochmead and Country Morning
24 Farm as long as they remained under 3 million pounds.
25 Today we can accept Proposal Number 26 because there

1 seems to be little market disruption in the way those
2 producer-handler operations market their products. We
3 support "grandfathering" those operations only as long
4 as they remain under 3 million pounds.

5 5. Another factor in NDA's thinking was
6 our judgment that a plant of 3 million pounds or more
7 typically had economies of scale that allowed it to
8 compete effectively without being exempt from
9 regulation.

10 During the producer-handler hearings in
11 our region decades ago, the producer-handler operators
12 had emphasized that, due to their smaller size, they did
13 not enjoy the operating efficiencies of the larger pool
14 plants. It was argued that these inefficiencies offset
15 some of the cost advantage which accrued from their
16 exempt status, and therefore there was not as much
17 damage to the concept of uniform price as the regulated
18 handlers were arguing.

19 In reading the Recommended Decision in
20 those proceedings, we noted with interest that the
21 Department did not even mention the concept that the
22 producer-handler milk price advantage was offset by
23 inefficiencies of production at levels below 3 million
24 pounds. Indeed, the Decision hints that a lower
25 threshold would have been more appropriate, indicating

1 that the Department did not find our arguments for
2 3 million pounds persuasive, and did not adopt them. We
3 conclude that this cost of production concept is no
4 longer part of the rationale for the producer-handler
5 exemption, if it ever was. We now see it, instead, as
6 solely a basis for establishing an appropriate threshold
7 for a grandfathering concept and nothing more.

8 In this 2009 proceeding, NDA and Darigold
9 now urge the Secretary to phase out using 3 million
10 pounds as the maximum size operation which can be exempt
11 under a producer-handler concept. We feel this
12 phase-out can best be accomplished through a
13 "grandfathering" concept which protects those
14 producer-handler operations which currently are exempt,
15 but establishes new rules for everyone else going
16 forward.

17 We support Proposal Number 26 only out of
18 some sympathy for operators who may have invested in
19 their current level of production based on the
20 producer-handler exemption as it has existed in the
21 past. I emphasize that this concept of "reliance" upon
22 the past exemption is in our opinion the only real
23 justification for this proposal. As long as they
24 continue to operate under the restrictions that existed
25 when those investments were made, we can accept their

1 continuing to enjoy a preferential exempt status.

2 That said, however, I would like to point
3 out that such "grandfathering" represents unusually
4 special treatment - by comparison, all of our plant
5 operations are subject to future Federal Order changes
6 which impact their profitability. And let's also think
7 about the perennial make allowance debate -
8 manufacturing plants are subject to reduced
9 profitability or even forced losses if make allowances
10 are not increased to match increases in production costs
11 (even though the plant investments may have been made
12 when economic conditions were more profitable); and
13 similarly, every producer member of our cooperative is
14 subject to reduced profitability whenever the make
15 allowances are increased (even though their farm
16 investments may have been made when economic conditions
17 were more favorable). My point is that "Life isn't
18 always fair," and the Federal Order system simply cannot
19 (and generally does not) protect producers or plants
20 from economic change by "grandfathering" their status.

21 We urge the Secretary to phase out the
22 general producer-handler exemption, and instead to treat
23 all small processors uniformly through the exempt plant
24 provisions. Our cooperative is a member of both IDFA
25 and NMPF, and we fully support the joint efforts of

1 those two organizations in developing an impressive
2 industry compromise around Proposals Number 1 and 2. We
3 urge the Secretary to adopt those proposals.

4 As we understood it, small size was the
5 traditional basis for the non-statutory exemption which
6 producer-handler operations have enjoyed, in spite of
7 statutory language in the Agricultural Marketing
8 Agreement Act that seems to apply equally to all
9 handlers. Most recent statutes and policies intended to
10 promote small business flow now must be considered,
11 also, including the Regulatory Flexibility Act which I
12 described earlier.

13 We urge the Department to make clear in
14 its decision whether small size is the appropriate
15 rationale behind each and every one of the exemptions
16 which may emerge from this hearing process, whether for
17 exempt plants or grandfathered producer-handlers
18 operations. If there are other rationales, they should
19 of course be clearly identified, as well, in the spirit
20 of transparency. We suggest that the "small business"
21 rationale is important to identify for three reasons:

22 1. If promoting small business is the
23 criterion for Federal Order language, then it should be
24 drafted to ensure that it aids only small business. For
25 example, it would not make sense for the Secretary to

1 exempt from milk pricing conglomerates which may own a
2 milk plant, but who might be very large businesses
3 overall. The Secretary's traditional interpretation of
4 the Regulatory Flexibility Act acknowledges principle.

5 2. If "small" is the criterion, then we
6 see no obvious reason to distinguish between small
7 plants which use their own farm production, versus those
8 who do not. It is for that reason that we believe the
9 "exempt plant" provision should be the only basis for
10 exemption going forward, other than the specifically
11 "grandfathered" producer-handler operations.

12 3. If "small" is the criterion, there
13 is -- then there simply is no basis for the so-called
14 "soft cap" approaches put forth in various proposals.
15 Those proposals seek an advantage for a processor which
16 (by definition) would be larger than the exemption
17 threshold for "small" businesses, by allowing them to be
18 larger than threshold while still enjoying preferential
19 pricing on milk from their own farm in quantities up to
20 that threshold. Whatever rationales will be offered in
21 support of those "soft cap" proposals, promoting small
22 business cannot be an acceptable rationale because there
23 is no size limitation in the proposals.

24 Accordingly, the size limitation of
25 450,000 pounds per month and 3 million pounds per month

1 which we advocate should represent the entire volume of
2 milk processed by the operation (that is, a measure of
3 its overall processing size) if it is to be exempt under
4 Proposals Number 2 and Number 26, which we support,
5 are -- or under any other concept with which the
6 Secretary may conclude should be implemented.

7 I would like to emphasize something here:
8 We have seen disorderly marketing from producer-handler
9 operations prior to the 2006 Final Rule, and we can
10 envision disorderly markets occurring in the future even
11 from a producer-handler operation which remains under
12 3 million pounds per month in size. While we do not
13 currently observe disorderly market conditions resulting
14 from activities of the four producer-handler operations
15 in the Pacific Northwest Market which remain under
16 3 million pounds per month, in the event we should see
17 disorder develop in the future we would then ask the
18 Secretary to reconsider that threshold.

19 I would like to formally state our
20 cooperative's opposition to the proposals involving
21 handler pools and so-called soft caps. The latter would
22 provide more advantages to being a producer-handler,
23 even beyond the limitations established in the 2003-2006
24 proceedings. There is no justification for doing so.

25 The concept of a handler pool is not new

1 to Federal Orders, but as I understand it the Dairy
2 Division's thinking evolved away from that direction
3 many decades ago. In our view, a handler pool would do
4 great damage to the concept of marketwide pooling that
5 is key to producer support for the milk order program.

6 We respectfully urge the Secretary to
7 reject these two concepts. Neither should be adopted,
8 in any form.

9 I would like to finish my testimony by
10 putting into evidence a few points about the importance
11 of this issue, and the approaches we urge the Secretary
12 to take.

13 As a fluid milk processor, Darigold has
14 been able to observe first hand the changes in our
15 region's market for Class I products, since the 2006
16 implementation of the 3,000 pound threshold for
17 regulating producer-handler operations.

18 JUDGE CLIFTON: Let me have you read that
19 again from the beginning.

20 A. Sure. As a fluid milk processor,
21 Darigold has been able to observe first hand the changes
22 in our region's market for Class I products, since the
23 2000 implementation of the -- 2006 implementation of the
24 3 million pound threshold for regulating
25 producer-handler operations. We no longer see the sort

1 of disorderly markets and "unfair competition" that we
2 complained about at the hearings that led up to that
3 change. The three producer-handler operations impacted
4 by the change all have continued in operation and each
5 seems to be doing well even in today's challenging
6 economic climate. One has sold its farm and cows. The
7 producers in the market now receive a slightly higher
8 blend price. Clearly, market conditions are more
9 positive, and it is important that the Department
10 continue improving the Federal Order system to ensure
11 that new producer-handler operations do not disrupt milk
12 markets in the future.

13 Darigold believes that the Pacific
14 Northwest is a very, very competitive market with very
15 sophisticated buyers of both raw and packaged milk.
16 Those buyers have watched the producer-handler situation
17 carefully, and shared their strong concerns. When we
18 initiated the last rulemaking in 2003, we had been told
19 things that led us to fear that some might solicit
20 producer-handler operations, if only to protect
21 themselves from similar actions by their competitors.
22 We think it is very likely that had action not been
23 taken in 2006 to limit the producer-handler exemption,
24 we would have seen greater producer-handler volumes
25 today and many reactions to that which would have --

1 which would be "disorderly" in nature. More
2 importantly, we sincerely believe that had the situation
3 worsened, support for the Federal Order system would
4 have been seriously eroded.

5 We suggest that Proposals Number 1 and 2,
6 and the concept of treating producer-handler operations
7 under the exempt plant provisions, are totally
8 consistent with the AMAA provisions which provides that
9 minimum pricing in Federal Orders "shall be uniform as
10 to all handlers," subjected only to the potential
11 adjustments for factors such as volume. Let's focus on
12 the threshold size for regulating plants, without
13 drawing a distinction among handlers based solely on
14 whether they produce their own milk. While we can
15 accept Proposal Number 26, we note that it is not
16 consistent with the uniformity of pricing that we
17 advocate. We support "grandfathering" the
18 3 million pounds or less threshold for its current
19 beneficiaries, only as a politically acceptable way to
20 phase out that threshold and move to the 450,000 pound
21 threshold for exempt bottling plants from regulation.
22 To me, that is the only way to be fair to the currently
23 regulated plants which process less than 3 million
24 pounds per month.

25 I thank everybody for listening to this

1 testimony. And I am prepared to answer questions.

2 DIRECT EXAMINATION

3 BY MR. BESHORE:

4 Q. Thank you, Mr. Rowe. I have just one,
5 one question for additional -- on additional direct
6 testimony. The National Milk proposal, the proposal
7 language as it's combined Proposals 1, 2 and 26 had a
8 provision relating to labeling, which you have heard
9 discussed here at the hearing, but you didn't
10 specifically address that in your statement.

11 Do you have any comments that you care to
12 make with respect to your position on that particular --

13 A. I do. I do, thank you. And it would --
14 it would mirror what was said earlier today, that we
15 would want to avoid allowing integrators to avoid what I
16 believe this rulemaking is trying to accomplish.

17 Q. Thank you.

18 MR. BESHORE: I have no further questions
19 for Mr. Rowe. And he is available, your Honor.

20 JUDGE CLIFTON: Let me first call
21 everyone's attention to page 2 of his statement
22 where he asks me to take official notice. This
23 is in the third full paragraph, the last
24 sentence. Sentence I'm referring to reads, all
25 this was demonstrated in detail at the 2003-04

1 hearing, and I ask that in this proceeding we
2 take official notice of the recommended final
3 decision of that proceeding, which accepted our
4 argument that this was evidence of disorderly
5 marketing.

6 Is there any objection to my taking
7 official notice as requested?

8 MR. BESHORE: We would supply the Federal
9 Register citation for that, your Honor.

10 JUDGE CLIFTON: Mr. Vetne.

11 MR. VETNE: I do not object to that.
12 However, I object to the -- the request for
13 official notice here is not isolated. It
14 actually asks for two things. It asks for
15 official notice of a decision and it asks
16 implicitly for official notice of a connection
17 between the arguments made and the contents of
18 the decision, and without the arguments made we
19 can't reach that same rational conclusion,
20 except by the assertion of the witness.

21 JUDGE CLIFTON: Now, I don't think he's
22 asking me to take official notice that USDA
23 accepted their argument.

24 MR. VETNE: That's the way I read it.

25 JUDGE CLIFTON: I think that's his --

1 that's his comment here. And what he asked me
2 to take official notice of was the recommended
3 final decision.

4 MR. VETNE: Okay. I don't have any
5 problem with that. But I would sure like to add
6 to that, so we have context -- official notice
7 of the content of the proponents' briefs in that
8 proceeding so that we can compare how closely
9 the Secretary followed those arguments.

10 JUDGE CLIFTON: You're expanding a lot on
11 what he's asking me to take official notice of.

12 MR. VETNE: I am, I am. Well, I just
13 don't have time. Mr. Rowe has to leave, I don't
14 have time --

15 THE WITNESS: I can clarify, if it helps.

16 JUDGE CLIFTON: Let's do that on cross,
17 and I'm not quite ready for that yet. So I will
18 come back to that in just a minute.

19 THE WITNESS: I may be able to save time.
20 I accept what Mr. Vetne is saying. Perhaps
21 the -- the period should have moved up a clause.
22 I'm really asking, if it has not been done
23 already, that we accept that final decision and
24 make sure that's part of this record.

25 JUDGE CLIFTON: All right. It has not

1 been done already.

2 THE WITNESS: All right. Good.

3 JUDGE CLIFTON: All right.

4 MR. BESHORE: We'll provide the citation.

5 JUDGE CLIFTON: All right. That's good.

6 All right. There were no objections, so I will
7 take official notice of the recommended final
8 decision. That's all I'm taking official notice
9 of.

10 All right. Now, cross-examination. Who
11 would like to begin? Mr. Vetne, would you like
12 to begin?

13 CROSS-EXAMINATION

14 BY MR. VETNE:

15 Q. Okay. Mr. Rowe, a very large part of
16 your testimony and the basis for your testimony has a
17 foundation in the small business analysis of what
18 constitutes a small farm for Regulatory Flexibility Act
19 purposes, correct? Is that a fair characterization?

20 A. Yes.

21 Q. And on the bottom of page 2, you refer to
22 the Secretary's milk order. As applied by the Secretary
23 to milk order proceedings, small business includes a
24 producer less than 500,000 pounds.

25 With respect to that assertion and the

1 whole content of your comments, observations, arguments
2 and facts relating to that, are you aware that it is the
3 Secretary's position as affirmed by a federal appellate
4 court, that the Secretary does not need to consider the
5 impact of Federal milk orders on small business dairy
6 farmers?

7 A. I would rely on someone like you to tell
8 me that.

9 Q. Okay. I will tell you that there's a
10 case called the White Eagle Cooperative versus Conner
11 that was decided in January and published at 553 F 2nd,
12 467, cited by the United States Court of Appeals for the
13 Seventh Circuit and rehearing denied on March 25, I
14 believe of this year, in which the Court of Appeals
15 decided, agreeing with the Secretary and agreeing with
16 argument of Dean Foods, that the Secretary doesn't need
17 to consider small business dairy farmers in his Federal
18 Milk Order rulemaking determinations. That a dairy
19 farmer is not regulated by milk orders and therefore
20 does not fall under the requirement that small farmers
21 be considered by the Secretary.

22 I would also note that Dairy Farmers of
23 America was party to that proceeding and did not make
24 that same argument, but also did not stand up and argue
25 to the contrary. So there's a problem for which DFA was

1 part of the solution. Do you think --

2 MR. BESHORE: Just a minute. Just a
3 minute. Just a minute. Your Honor, I object to
4 that and move to strike it. I mean, to get into
5 a collateral debate about -- discussion about
6 positions taken in unrelated litigation is --
7 it's completely off, inappropriate. And I --

8 JUDGE CLIFTON: Your motion to strike is
9 granted. Go ahead, Mr. Vetne.

10 Q. Okay. Is it your belief that the
11 Secretary will or should in this proceeding take into
12 account the impact of Federal -- this Federal Milk Order
13 proceeding and others on small business dairy farmers?

14 A. I'm not taking a position as to the
15 question you're asking. This was -- if you read the
16 testimony carefully, it was -- this is my organization's
17 thinking of how they've reached these volume thresholds.

18 Q. I see.

19 A. And it's how we've pieced together how
20 they've reached those numbers and if they're going to
21 rely on size that's reasonable, a reasonable way to
22 approach it, and that's the extent of our testimony.

23 Q. Okay. And you provide -- you provide
24 no -- no discussion or suggestion to the Secretary with
25 respect to the small business impact on dairy plants;

1 that is -- that is, handlers, including the plants
2 operated by producers. That also has a small business
3 definition, correct?

4 A. If you say so.

5 Q. You don't know that?

6 A. Well, I -- to the extent I testified to
7 it, that's what I would go on, yes, sir.

8 Q. Okay. That's it. Oh, yeah, and
9 finally -- let's see. Are you going to be around here
10 so you might identify the arguments, if I copy them,
11 that you made in the -- I wasn't there at the Pacific
12 Northwest hearing a few years ago.

13 A. I'll be here through the day.

14 Q. Through the day?

15 A. Throughout the day.

16 Q. Okay. Thank you.

17 JUDGE CLIFTON: Thank you, Mr. Vetne.

18 For the court reporter's purposes, the portion
19 of that question or colloquy that I strike comes
20 immediately after the sentence that says, DFA
21 was a party to that proceeding. That's still
22 in. And what comes after that is stricken.

23 Next cross-examiner. They just don't
24 want to go first. Mr. Miltner, thank you.

25 CROSS-EXAMINATION

1 BY MR. MILTNER:

2 Q. Hello, Mr. Rowe.

3 A. Hello.

4 Q. The Darigold plant you reference on the
5 first page of your statement in Boise, is that not a
6 regulated plant?

7 A. It's in an unregulated area.

8 Q. Okay. Is it partially regulated under
9 any Federal Order or fully regulated under any Federal
10 Order?

11 A. No.

12 Q. On page 2, and I want to look at the
13 first paragraph. It begins, during the 1960s, '70s and
14 '80s, your characterization of the producer-handler
15 operations in the Pacific Northwest during those three
16 decades, is that characterization information that was
17 provided to you by either Mr. Marshall or Mr. McBride?
18 Or is that something that you have knowledge of
19 yourself?

20 A. I was two at the time. And I rely
21 heavily on the sort of institutional knowledge of my
22 organization. A lot of people I work with have been
23 there many decades and are much older than I am. I
24 don't know if that answers your question. So I relied
25 on others.

1 Q. Okay, that's fine. That's fine.

2 A. I don't mean to be glib. I'm sorry.

3 Q. I didn't take it as such. On the next
4 page, I want to talk about what's numbered paragraph 3.
5 And I don't have the record from that proceeding in
6 front of me. But you referred to the previous
7 proceeding on the Pacific Northwest Order. Do you see,
8 we estimate that one of those fully regulated plants is
9 still well under the 3 million pounds per month level.
10 And you refer to Eberhard Dairy in Bend, Oregon.

11 How many plants were smaller than
12 3 million pounds that were referenced in that
13 proceeding?

14 A. I don't know.

15 Q. Is it your understanding that that is the
16 only one of the plants that were referenced that is
17 still under 3 million pounds?

18 In other words, there were -- if there
19 were seven, for instance, and I don't -- like I said,
20 I'm throwing that number out there. Is that the only
21 one that's left under 3 million pounds?

22 A. I don't know which ones were cited in
23 that hearing and have continued under -- under
24 3 million. I can think of one that reduced their volume
25 to get under 3 million and then continued to operate at

1 that level.

2 Q. So your understanding is there's one
3 regulated plant in Order 124 that regularly has volumes
4 under 3 million pounds, and that's Eberhard Dairy?

5 A. Regulated, yes.

6 Q. What is the average size of a producer of
7 a member of NDA?

8 A. It changes, but it's larger than the
9 national average of about 150. We have -- Pacific
10 Northwest has a very interesting mix of dairies
11 ranging -- I can tell you in my membership they range --
12 I think my smallest member now has ten cows, and I think
13 my largest is probably approaching 70,000.

14 Q. 70,000?

15 A. Correct.

16 Q. Is that a cooperative member?

17 A. Yes.

18 Q. All right. I mean, is that a -- is that
19 member with 70,000 cows, is that -- that's an individual
20 dairy farmer?

21 A. Family-owned.

22 Q. A family farm?

23 A. Well, it depends on how you describe it.
24 They are multiple farms. But the way we identify it,
25 that's a single member.

1 Q. Okay.

2 A. One vote.

3 Q. Well, what is the average? Do you know
4 what the average size herd is in the area, generally?

5 A. Again, it depends on the region.
6 Dramatic shifts from the coast, which tend to be
7 smaller, more what we think of -- what I think everyone
8 here would think of as traditional family farms with
9 only a few approaching a thousand cows.

10 East of the Cascades, you have a larger
11 mix with many farms having 5,000 cows. And then Idaho
12 has shown some extraordinary growth on many farms above
13 5,000 cows. I don't know if we even have an average
14 number that I can give you offhand.

15 Q. Okay. When you say that if they're -- if
16 we don't make changes to the producer-handlers
17 regulation we'll see disorderly marketing, what is the
18 disorderly marketing that you're anticipating would
19 occur?

20 A. Are you referring to the comment that if
21 we had not -- I think there was a statement in there
22 where I had said, if there had not been some
23 limitations, there would likely have been disorderly
24 marketing. Is that what you're getting at?

25 Q. There is that statement. There is also,

1 we can envision disorderly markets occurring in the
2 future.

3 A. Yes.

4 Q. So what would we anticipate seeing?

5 A. As I mentioned, the buyers in that region
6 are quite sophisticated and they are extremely price
7 conscious. And I believe that given the opportunity for
8 a reduction in the Class I price for milk, we would see
9 what we call in our building a race to the bottom in
10 terms of price, if you understand what I mean. That
11 there would have to be competition that would drive that
12 price below a commercially reasonable level. And I
13 consider that disorderly.

14 Q. Okay. And what was -- what were the
15 disorderly conditions that had preceded the 2003
16 hearing?

17 A. I was not there at the time. I can
18 testify directly to conversations I have had with
19 current customers that have -- they're fairly unabashed
20 about their commitment to low -- paying as little as
21 they can for their milk.

22 And that has led me to my conclusion
23 that, given the opportunity with unregulated
24 producer-handlers, that it would create disorderly
25 marketing.

1 Q. Well, aren't all buyers in all markets --
2 regardless of whether they're producer-handlers or
3 exempt plants or regulated plants or no regulation
4 plants, all buyers want their products at a low price,
5 is that not right?

6 A. Yes, but --

7 Q. And the unabashed --

8 MR. STEVENS: Let him finish.

9 A. Let me finish. Yes, but when we are
10 talking about regulations that put the -- put otherwise
11 similarly situated sellers working on an uneven playing
12 field, to me, that creates a disorder and a dysfunction
13 within the market.

14 Q. And then still the goal of any buyer is
15 to acquire product at a low price regardless of whether
16 there's a producer-handler involved or not?

17 A. It's not the goal. But it's a goal.

18 Q. How are your members doing right now in
19 these -- these -- in the milk business today with the
20 prices where they are?

21 A. These are -- this is an extraordinarily
22 difficult year for my members and attacking everybody at
23 every size, really creating some extraordinary hardship.

24 Q. Their costs of production are well in
25 excess of anything they're receiving from the sale of

1 their milk?

2 A. I'd say for the most part, yes.

3 Q. I think that's all I have right now.

4 Thank you.

5 A. Thank you.

6 JUDGE CLIFTON: Thank you, Mr. Miltner.

7 Mr. Ricciardi.

8 CROSS-EXAMINATION

9 BY MR. RICCIARDI:

10 Q. Good afternoon. I'm going to focus, if
11 you need the exhibit in front of you, a little bit on,
12 right now, the first portion of Exhibit 38, your
13 testimony. And before I get to those issues, let me ask
14 you just a little bit more background.

15 You have stated that you have been
16 Darigold's general counsel since '05. How long have you
17 been with that company?

18 A. That's when I started.

19 Q. Okay. And with respect to your vice
20 presidency at NDA since 2007, is that when you started
21 with -- with them? Or had you been -- been a senior
22 vice president with NDA before that?

23 A. It's a -- let me -- let me explain if I
24 might.

25 Q. If you would.

1 A. It's a little confusing. The two
2 operations really operate -- if you were to walk into
3 the building, you would not know that these two entities
4 were there. But they are very distinct entities for
5 very important business reasons to separate out the
6 cooperative from the C Corporation that is Darigold,
7 with its only shareholder being the cooperative.

8 And so I came in originally as Darigold's
9 general counsel, and then about a year later was asked
10 to also, the way I would describe it, run the
11 cooperative. And so I put on two hats.

12 Q. Thank you for that clarification, it's
13 helpful. When in '05 did you start with Darigold? Do
14 you remember the time of year or month?

15 A. It was the very end of the year.

16 Q. Okay. So after -- with regard to the
17 previous producer-handler hearing that we're talking
18 about, after that had been completed, correct?

19 A. Yes.

20 Q. So all of the information that you have
21 in your statement referencing that comes from the two
22 sources that you mentioned, correct?

23 A. It's more than those two. Those were the
24 two primary, but yes, I would describe it as
25 institutional knowledge that was brought to me through a

1 series of conversations and meetings we had.

2 Q. So not your own personal knowledge?

3 A. Correct.

4 Q. Okay. You indicate -- and now I'm going
5 to get back to the first portion of your statement. You
6 indicate that NDA has 530 dairy producers and a portion
7 of those are located in Idaho and Utah, correct?

8 A. Correct.

9 Q. What portion, if you know, percentagewise
10 or number?

11 A. I don't count them that way. I can tell
12 you that we are the extremely dominant co-op in
13 Washington, approaching 90 plus percent of the milk. In
14 Idaho, at last count -- things change quickly -- but I
15 believe that we represented about 25 percent of the
16 milk. And in Oregon, about 20 percent of the milk.

17 Q. In Utah?

18 A. In Utah, very small. A couple of
19 producers.

20 Q. Now, the producers that are located in
21 Idaho and Utah, you mentioned that they're in an
22 unregulated area, what used to be part of the Western
23 Order. With regard to their milk, is that pooled on any
24 Federal Order?

25 A. At times.

1 Q. And is there a pool payment made?

2 A. Into the pool?

3 Q. Yes.

4 A. There could be. I -- it depends on the
5 month, the direction of the milk, which Order, whether
6 it's a pool activity or a depool activity that we look
7 at regularly.

8 Q. Okay. What do you mean by a depool
9 activity?

10 A. We will sometimes depool out of 124 as
11 well.

12 Q. And when you do that, when you depool,
13 that means that the milk that may have pooled on 124 in
14 one month is then pulled out and there's a reduction,
15 ultimately, in the blend price of the producers in 124,
16 correct?

17 A. Depends -- it depends on how the class is
18 structured, but yes, that can happen.

19 Q. And can you tell me, is that in the range
20 of 5 cents? Since you have 90 percent of the milk
21 there, is that going to be in the range of 25 to 50
22 cents on that particular month when you depool?

23 A. Over the last year, it's actually varied
24 dramatically. And for what it's worth, what we do is we
25 actually -- in those activities, at least in the recent

1 several months, I believe a year or so, we -- we make
2 our members pool, so the impact that we have on the pool
3 is corrected within the membership.

4 Q. With regard to the other people who are
5 not members, however, you don't make them pool?

6 A. Correct.

7 Q. Okay. Can you tell me, then, in the
8 range in the last year of what the impact has been on
9 the blend price in 124 from your depooling activities?

10 A. It varies every month. I think the last
11 couple of months it was just a couple of cents.

12 Q. Can you give me a range in the last year?

13 A. I think it's been anywhere from 2 cents,
14 I think our -- our most extreme may have been 20 cents.

15 Q. And do you find that to be a disorderly
16 marketing condition in your definition?

17 A. I'm not sure I draw the connection.

18 Q. You stated that it's disorderly for
19 people who are producer-handlers not to pay into the
20 pool because of the fact that there's been potential
21 reduction in the blend price because they don't pay into
22 the pool.

23 My question is, was the activity of your
24 organization in depooling milk, which may impact the
25 blend price up to 20 cents, disorderly marketing, in

1 your opinion?

2 A. No.

3 Q. It's not?

4 A. Correct. In my opinion, it's not.

5 Q. So if, in a particular marketing area, a
6 Federal Order area, if the producer-handlers in my
7 hypothetical had a penny impact on the blend price, and
8 the activity of an organization like yours had a 20 cent
9 impact on the blend price, would the producer-handler
10 activity be disorderly and the activity of an
11 organization like yours not?

12 A. That's what I was saying earlier, I don't
13 draw the two -- I don't think it's a fair analogy. The
14 rationale and thinking is very different in those two
15 events, certainly is on our part.

16 Without getting into a long conversation
17 and making this into a hearing where I could make a plea
18 to -- to expand the Western Order and re-regulate Idaho,
19 which is a -- something that we struggle with in working
20 our member -- with our membership, in both the regulated
21 and deregulated area, we have had long discussion in our
22 region about the rationale for this, why it's not
23 disorderly. And I'm happy to get into that, if you
24 would like. But I see it as very different than where
25 we are today.

1 Q. I understand you see it different. I
2 understand you have different rationales. Take my
3 hypothetical again.

4 Make the assumption in a Federal Order
5 area that in this hypothetical there's a 1 cent impact
6 on the blend price because producer-handlers haven't
7 paid into the pool and there's a 20 cent impact on the
8 blend price that same month because an organization like
9 you has decided to depool. In that hypothetical, is the
10 producer-handler activity disorderly and the activity of
11 the organization not, in your opinion?

12 A. I think I've answered that, and I
13 don't -- I don't -- in my opinion, the conduct that we
14 do with regard to pooling and depooling is not
15 disorderly, but yet the activity of the
16 producer-handlers above the threshold that is in place
17 today, I would say is disorderly or can be -- or can
18 create a disorderly market.

19 Q. You answered the question with the
20 assumption that you're answering it about 124. Let me
21 change it now.

22 We agree that, currently, leaving out
23 Arizona and the Pacific Northwest and all the other
24 remaining Federal Order areas that have the
25 producer-handler status, that there is no route

1 disposition limit on producer-handlers, correct?

2 A. Okay.

3 Q. Do we agree on that?

4 A. In other areas where there's no limit?

5 Q. Yes.

6 A. Okay.

7 Q. There isn't --

8 A. Yes, I understand.

9 Q. -- under the law as it currently states.

10 Okay. So my question is, then -- if you were answering
11 on 124, I'll go back to another area.

12 In an area where there is no current
13 Class I route disposition for producer-handlers per
14 month, my hypothetical again, in that Federal marketing
15 area, a 1 cent impact on the blend price because
16 producer-handlers didn't pay in, 20 cents because an
17 organization like yours decided to depool. In your
18 opinion, under those circumstances, is the
19 producer-handler activity disorderly and the activity of
20 the organization not disorderly?

21 A. I have a problem connecting the -- the
22 two results because they come about for very different
23 reasons. And so I'm struggling with the hypothetical.
24 I understand what you're asking. And are they
25 disorderly in the way the producers are paid? I think

1 it depends.

2 If the pooling activity occurs because
3 there are services being provided to the region -- and
4 I'm going to take you back to 124. We, for the most
5 part, as a processing company, in essence we act as the
6 balancing organization for the region. So if that were
7 happening elsewhere, there are -- there's an exchange of
8 services for the opportunity to pool.

9 So I understand what you're saying.
10 And -- and what I'm getting at is, there would have to
11 be more facts behind the hypothetical for me to really
12 reach a conclusion as to what's disorderly or not.

13 Q. Let's move out of law school and let's go
14 to a couple of other things here, because I do have some
15 other questions.

16 Have you looked at the proposal,
17 individual handler pools, that is part of this
18 proceeding?

19 A. Briefly, yes.

20 Q. And your position, as I understand it as
21 an organization, is that you're opposed to it?

22 A. Yes.

23 Q. All right. Before I get to my next one,
24 I have another question I want to ask.

25 You told Mr. Miltner that it's been a

1 difficult economic year for all of your producers,
2 wherever they're located.

3 A. (Nodding head.)

4 Q. Correct?

5 A. Correct.

6 Q. Okay. Is it less difficult for those
7 people who are located in Idaho and Utah?

8 A. We run our -- my members -- I will tell
9 you that I have -- there are 532 members. I think as of
10 today, those really -- I have -- I have come to learn
11 that those are 532 different businesses. And the
12 characteristics of them and the struggles of each one
13 are unique. And I'm hesitant to -- to make a blanket
14 statement. They are all having a hard time.

15 We as a business and a company did much
16 better the year before, and prices were much better in
17 the -- in the recent past, so --

18 Q. Let me put a finer point on it because
19 that was a more general comment.

20 A. Okay.

21 Q. Are they receiving, those people who are
22 producers located in the unregulated areas of Idaho and
23 Utah, more for their milk than a producer located in
24 Washington -- or Oregon, excuse me.

25 A. Actually within the regulated area?

1 Q. Yes.

2 A. We pay different rates within the --
3 within the PNW Order, we have a cooperative blend that
4 we pay. In Oregon -- or, I'm sorry, in the unregulated
5 areas in Idaho and Utah, we pay on a different formula.

6 The reason I'm hesitating is because we
7 also use a lot of contracting within our cooperative,
8 and I can't answer for sure whether on a net basis who's
9 getting more money on a hundredweight, Oregon or the
10 PNW.

11 Q. Because they're located --

12 A. Idaho or PNW.

13 Q. I'm sorry. I apologize.

14 A. That's all right.

15 Q. Because they're located in the
16 unregulated areas of Idaho and Utah, in effect aren't
17 those producers in that area being treated as individual
18 handler pools? Isn't that the effect?

19 A. You know, I don't know enough about how
20 individual handler pools would operate to answer that
21 question. I'll leave that to you.

22 Q. That's -- that's fair. That's fair. You
23 started with Darigold in '05. When did you actually
24 start in the dairy business itself?

25 A. Then.

1 Q. So if I were to ask you some historical
2 information that went beyond '05, you wouldn't be in a
3 position to really answer it?

4 A. I have the luxury of saying, I don't
5 know.

6 MR. RICCIARDI: I do have a couple of
7 points, Judge. And once again I'm going to need
8 Exhibit 13 for this witness, if you don't mind.

9 JUDGE CLIFTON: I don't mind at all.

10 MR. RICCIARDI: Thank you. I'm going
11 apologize because my mind went somewhere else.

12 BY MR. RICCIARDI:

13 Q. Before I ask you a question about this, I
14 have something else, Mr. Rowe. Let me identify for you,
15 before we get -- so you understand what that is.

16 Exhibit 13 is the producer-handler regulatory status
17 list from '05 through 2009. If you haven't had a chance
18 to take a look at that before, I will give you that
19 opportunity. But let me ask you another question that I
20 declined -- that I failed to ask you before.

21 What marketing areas does your
22 organization sell into? And I meant Federal Marketing
23 Orders and also unregulated areas, if that's true.

24 A. The extent of our finished product?

25 Q. Yes, sir.

1 A. We are -- I'm trying to think if there
2 are any western states that we don't sell into. I can
3 say, I think, we're in all the western states, Alaska,
4 China, Philippines. We are a major exporter of product.

5 Q. When a sale is made into an area of a
6 finished product by your organization -- and let's
7 use -- use an example, and I don't care which Federal
8 Order you pick. How do you -- does your organization
9 determine whether a pool payment is required and to what
10 pool?

11 JUDGE CLIFTON: Mr. Beshore, I'll hear
12 your statement.

13 MR. BESHORE: Well, yeah, I will just --

14 JUDGE CLIFTON: I need you to be closer
15 to the microphone.

16 MR. BESHORE: I'm trying to be helpful in
17 this colloquy. Finished product needs to be
18 defined, because I think Mr. Ricciardi is
19 talking about fluid products and the witness is
20 talking all kinds of products. It's going to
21 get -- it's already confusing, it's going to be
22 even more confusing.

23 MR. RICCIARDI: I'm not confused at all.
24 If Mr. Rowe is confused, let me make sure we're
25 on the same page. And I'm really concerned that

1 I confused you, Mr. Beshore. I'll see if I can
2 clarify it.

3 Q. When you were describing your packaged
4 products, what you were talked about?

5 A. I'm thinking of the whole array of
6 products. Everything from powder products, Class I, II,
7 III and IV.

8 Q. Let's break them down so we can stop any
9 confusion. Let's talk about a Class I product, and pick
10 any -- any area that you're -- that you want to. But
11 assume for me it's a -- it's a Federal Order area that
12 it's sold into. How do you determine, one, whether a
13 pool payment is required, and two, into what pool?

14 A. The way I determine it is I ask Dan
15 McBride to work that out for me and he does.

16 Q. Okay. So your answer is, go talk to Dan
17 and Dan tells you?

18 A. Correct.

19 Q. That's correct. And I'll take that. You
20 support, as I understand it, your organization does,
21 Proposal Number 26, correct?

22 A. Correct.

23 Q. And you gave us an explanation in your
24 statement about grandfathering. And essentially while
25 you're willing to accept it, you don't necessarily want

1 to go beyond that, is that fair?

2 A. Sure.

3 Q. Okay. Do you have any -- know any reason
4 why, under Proposal 26, that in order to be eligible for
5 the so-called grandfathering provision, that the
6 distributing plant had to be operating during 2008 by a
7 producer-handler?

8 A. I'm not sure I understand your question.
9 You are asking, do I know why that was part of the
10 proposal?

11 Q. Yeah.

12 A. I'm not sure why that became part of the
13 proposal as offered. I personally think that that's a
14 reasonable way, so you don't get a run on the bank, if
15 you will, if it looks like that's the direction that the
16 regulations may go. So it just seemed like a reasonable
17 approach to that.

18 Q. Then why not make it a provision for some
19 period of time prior to the enactment if there's a
20 change in the regulation? As opposed to 2008.

21 A. No. I think that's -- that's the point
22 I'm trying to make, is I would not want there to be a
23 quick shift in the market to -- I would not want two or
24 three producer-handlers popping up at this point to make
25 it in before the rules change. I think that would

1 undermine what we're trying to accomplish.

2 Q. Well, you understand the investment
3 required in this economic environment to be a
4 producer-handler?

5 A. Yes.

6 Q. Okay. And you seem -- actually, take a
7 look at it because I asked you to have it in front of
8 you. You've actually seen, if you go through
9 Exhibit 13, that rather than there be an increase in the
10 number of producer-handlers, there's been a decline.
11 And that sitting here in 2009 we have 37 of them.

12 A. Okay.

13 Q. Now, to the extent there was going to be
14 a run on the bank, at least the information as reflected
15 in the USDA statistics doesn't establish that, right?

16 A. Okay.

17 Q. Yes?

18 A. Yes.

19 Q. Thank you very much.

20 JUDGE CLIFTON: Thank you, Mr. Ricciardi.

21 Mr. English.

22 CROSS-EXAMINATION

23 BY MR. ENGLISH:

24 Q. Charles English. Good afternoon,
25 Mr. Rowe.

1 A. Good afternoon.

2 Q. Let me start where Mr. Ricciardi left
3 off. Even if the numbers may be going down, that
4 doesn't mean there's not a shift, does it?

5 A. That's correct.

6 Q. Some of those, you could have a reduction
7 of ten but you could have five new entries in there that
8 are efficient operations trying to take advantage of the
9 loophole, right?

10 A. Correct. I look at the number of
11 cooperatives, in general, dramatically dropped, but yet
12 still very influential.

13 Q. Now, let me just keep it as short a time
14 on -- on an issue that Mr. Ricciardi raised. And that
15 is -- and I'm going to try not to do a comparison. I
16 just want to understand the differences. And that is
17 the question of depooling.

18 Are you able to depool Class I milk?

19 A. Are we able to? Yes.

20 Q. You can depool -- you can't depool
21 Class I, can you? You don't know?

22 A. I need Dan. I have a firm grasp of my
23 limitations, so --

24 Q. Isn't it a fact, sir, that Class I milk
25 is required to be pooled?

1 A. That's correct, yes.

2 Q. So that means you can't depool it if it's
3 required to be pooled?

4 A. Correct.

5 Q. It must be pooled?

6 A. Correct.

7 MR. MILTNER: Your Honor, I want to
8 object.

9 MR. ENGLISH: I asked the question
10 differently. Is it required to be pooled, and
11 he understood that to be yes.

12 JUDGE CLIFTON: Mr. Miltner, if your
13 objection is that he has changed his testimony,
14 I don't think there's any problem with that.

15 MR. MILTNER: The objection is -- never
16 mind. The record will reflect my objection.

17 JUDGE CLIFTON: It will. Go ahead,
18 Mr. English.

19 BY MR. ENGLISH:

20 Q. And your concern of disorderly marketing
21 regarding producer-handlers is as to the Class I market,
22 correct?

23 A. Correct.

24 Q. And this race to the bottom, that can
25 occur when there is regulated Class I milk competing

1 against nonregulated Class I milk, correct?

2 A. Correct.

3 Q. If -- I'll be very careful here. If milk
4 can be depooled, that is to say, non-Class I volumes can
5 be depooled, any dairy farmer or farmer organization
6 whose milk is not going to a Class I plant and is not
7 associated with a Class I plant has the same opportunity
8 to depool that milk as any other entity, correct?

9 A. Correct.

10 Q. Thank you.

11 JUDGE CLIFTON: Yes.

12 CROSS-EXAMINATION

13 BY MR. HUGHES:

14 Q. And I'm Will Hughes. And, Mr. Rowe, I
15 just have a couple of questions.

16 The way I understand your testimony, you
17 relied on the small business definition as sort of a
18 size threshold, that would be reasonable?

19 A. Correct.

20 Q. Okay. Do you have an idea of how many
21 cows that represents in terms of annual milk production?

22 A. The -- the --

23 Q. Small business definition that is used in
24 the Notice of Hearing?

25 A. Using the 450 or 500,000 as the

1 threshold?

2 Q. Yeah -- no, no. \$750,000 annual gross
3 revenue.

4 A. Oh, no, I --

5 Q. Which would -- which would equate to
6 about -- or equate to about 450, 500,000 pounds. That
7 you agree with?

8 A. Yes.

9 Q. Okay. Have you done any analysis of what
10 the cost structure would be for farms of that size?

11 A. Not independent. Many conversations with
12 many members.

13 Q. Okay. Would you agree that the larger
14 the herd size, the lower the costs, in general?

15 A. In general, yes.

16 Q. Okay. Would you agree that a -- my
17 calculation says that the small business definition is
18 around 300 cows, depending upon the milk price.
19 Probably a reasonable number, correct?

20 A. Yes, that is.

21 Q. In our testimony earlier today from the
22 states, we did look at cost structure. And we were
23 looking at costs to try to provide farms some economies
24 of size, and at least keep them in the ballgame if they
25 were to choose to enter the processing side of the

1 business. And you've testified that the 3 million pound
2 exemptions in the Pacific Northwest is not -- is not
3 currently creating disorder?

4 A. Correct.

5 Q. And I assume from your testimony that you
6 believe that a 300-cow dairy would not create disorder
7 if they entered the producer-handler business model?

8 A. Correct.

9 Q. Okay. Would you agree that there is a
10 point which, based on cost, will determine whether they
11 can be competitive with you as a supplier to a major
12 bottler?

13 A. Yes.

14 Q. Okay. But you have not done studies to
15 determine what that number might be in terms of herd
16 size?

17 A. No, no. Correct, I have not.

18 Q. Okay. One other question, which is, of
19 the producer-handlers in the areas in which your milk is
20 regulated, are any of those producer-handlers members of
21 your cooperative?

22 A. No.

23 Q. Okay. Thank you.

24 JUDGE CLIFTON: Thank you, Mr. Hughes.

25 Let me get a consensus from the group.

1 Mr. Carroll would now like to cross-examine. I
2 don't know, I'm thinking it might be wise --
3 it's about 1:20. It might be wise to interrupt
4 this witness's testimony and have lunch. I'm
5 getting a little brain fatigue. Are you
6 available to come back for continued
7 cross-examination after lunch?

8 THE WITNESS: I am, your Honor.

9 JUDGE CLIFTON: All right. Let's do
10 that. And then following this witness, the next
11 witness would be J.T. Wilcox. And I don't think
12 we have a lot of cross left. I just -- I'm just
13 fading.

14 MR. ENGLISH: Your Honor, I appreciate
15 that. I want to emphasize that we do have three
16 witnesses for this afternoon and every one of
17 them has to leave by tomorrow morning. They
18 have to done by today.

19 AUDIENCE MEMBER: Who are the other two?

20 MR. ENGLISH: Mr. Wilcox, Mr. Krueger and
21 Mr. Latta. Those are the three.

22 MS. PICHELSON: Your Honor, before we go
23 off record, I wasn't sure that Exhibit --
24 Heather Pichelman, USDA. Was Exhibit 37
25 received into evidence? Before we go too much

1 further into the testimony.

2 JUDGE CLIFTON: It was. And it was at an
3 odd time because I did it when we first
4 reconvened rather than before the witness left
5 the stand. And it was because we had him
6 initial those changes. But it is in, and thank
7 you for checking. All right. Please be back at
8 2:22.

9 (A recess was taken from 1:22 to 2:23.)

10 JUDGE CLIFTON: We're back on record at
11 2:23. We will continue the cross-examination of
12 Mr. Rowe. Mr. Carroll wanted to cross-examine,
13 he's not back from lunch yet.

14 Is there anyone else with
15 cross-examination questions?

16 Does anyone else have any
17 cross-examination questions for Mr. Rowe? Okay.
18 We'll good off record. I'll go back on record
19 in one minute at 2:25. If no one is here who
20 wants to cross-examine, the witness may step
21 down. But we'll give them a minute.

22 (Off the record.)

23 JUDGE CLIFTON: Let's go back on record.
24 We're back on record at 2:25.

25 Mr. Carroll, you may cross-examine.

1 CROSS-EXAMINATION

2 BY MR. CARROLL:

3 Q. Good afternoon, sir.

4 A. Good afternoon.

5 Q. On your grandfathering provision, what is
6 the purpose of that provision?

7 A. Our provision or the --

8 Q. Well, the one you're supporting.

9 A. Our view of it is -- may be different
10 than why it was proposed. But our feeling is, if you're
11 in the game, we're not looking to hurt small businesses
12 or businesses that are already in this game. I'm
13 looking to avoid dramatic shifts in the regulation. And
14 I think it makes sense that we avoid that kind of
15 collateral damage in the rulemaking process.16 Q. And under the -- your grandfathering, I
17 take it you're accepting that concept?

18 A. (Nodding head.)

19 Q. Under that concept, what would happen if
20 the producer-handler had a fire and they couldn't
21 rebuild until except after some time?22 A. It depends on what some time is. We run
23 into similar situations with our members and our -- our
24 rule within the co-op, though not a perfect analogy, is
25 that if they can't deliver milk for a certain amount of

1 time, they have to reapply.

2 And then another analysis is taken as to
3 whether they come back as a member. So, for me, it
4 would depend a little bit on the circumstances. If they
5 had a fire, loss of facility, but were reasonably
6 diligent in coming back, I would hope that there would
7 be a way for them to continue to operate.

8 Q. And what would happen if there was a
9 death in the -- in the owner business?

10 A. I -- I -- I think I understand where
11 you're going and I would not want that to end the
12 business. It's getting -- at least in our corner of the
13 world and I assume everywhere, it's getting increasingly
14 complicated to identify who a member is as businesses
15 shift from what used to be obviously family businesses
16 now to LLCs or complicated partnerships.

17 We were just mentioning within our
18 cooperative, we rely on the tax identification number as
19 a place to identify an entity, so --

20 Q. So in the case of a producer-handler,
21 would you think it would be equitable to do the same
22 thing?

23 A. I think that's a reasonable approach. If
24 the structure changes too dramatically and the kind of
25 ownership changes, that changes the nature of the

1 ownership, it's something that I would want -- want us
2 all to be aware of.

3 Q. How about the producer-handler that sells
4 within the family, sells through a brother or a sister
5 or a son?

6 A. I would have no problem with that.

7 Q. Now, if we look into the future and we
8 have your -- your level, which I think is
9 450,000 pounds, otherwise for the future
10 producer-handler --

11 A. Yes.

12 Q. -- there comes a time on that if they go
13 a pound or two over they become a fully regulated
14 handler?

15 A. (Nodding head.)

16 Q. Can you see any leeway in that concept as
17 to how that could be administered?

18 A. I would leave that to the -- to the
19 details of the rules on how the DMA would want to watch
20 that. For me, for an incidental change, that's fine,
21 but there is a point at which markers in volume or size
22 or whatever ends up being the measure. As long as it's
23 a bright line and plans can be made and we're all
24 upfront about what that is, then that becomes a rule of
25 the game.

1 Q. All right. Speaking of the game, if I
2 were a farmer and I had 750,000 pounds of milk and I
3 looked at your regulations, assuming that -- you know,
4 they came in effect the way you think they should, I
5 really couldn't be a -- a producer, I just couldn't get
6 in the business, could I?

7 A. I haven't run those numbers. I don't
8 know.

9 Q. Okay. All right. I think you said you
10 were -- you had done some marketing; that is, you get
11 the phone calls from the happy or unhappy customers?

12 A. On occasion, yes.

13 Q. Do you fix prices and set prices and
14 discuss prices occasionally, or have you?

15 JUDGE CLIFTON: Do you object to the
16 word, fix, Mr. English?

17 MR. ENGLISH: He's not my witness and
18 he's a lawyer, but I object to the question.

19 JUDGE CLIFTON: Could you reword your
20 question so it doesn't have the word fix in it?

21 Q. I don't mean to say that you're doing
22 something wrong. On occasion, have you determined what
23 a price is to be for a customer and discussed with them
24 the price?

25 A. I sit on my organization's senior

1 management team. We, on occasion, as a -- as a group
2 discuss how we might handle pricing with a particular
3 customer or a particular product line. I'm trying to
4 think if -- I don't think I have ever communicated that
5 to a customer. I may have been with a customer -- with
6 a customer in a meeting when that may have been
7 discussed.

8 But other than my participation as being
9 a part of the senior team, I have little to do with
10 pricing.

11 Q. All right. Are you generally familiar,
12 though, with the fact that your business is a
13 competitive business?

14 A. Very.

15 Q. And on occasion you may take a product --
16 sell a product even at a loss in order to obtain or hold
17 onto a customer?

18 A. When we have to, yes.

19 Q. That's all.

20 JUDGE CLIFTON: Thank you, Mr. Carroll.
21 And I appreciate your being brief.

22 All right. Mr. Tosi might have some
23 questions for you. Mr. Rower?

24 MR. ROWER: We don't have any questions
25 for this witness.

1 JUDGE CLIFTON: All right. Very fine.

2 Redirect.

3 REDIRECT EXAMINATION

4 BY MR. BESHORE:

5 Q. I have just -- he may have answered it in
6 response to Mr. Carroll, I want just to clarify. How is
7 it that you can have one member with 70,000 cows?

8 A. It's a complicated member.

9 Q. With one vote?

10 A. Yeah. This is a -- an owner. And it's
11 actually more than one that have -- let's just say tens
12 of thousands of cows. But within our cooperative, if --
13 we look at tax identification as the numbers -- as the
14 marker to determine who the member is. And as needs to
15 be the case, every member has one vote.

16 So depending on their structure, even the
17 largest of farms, I -- the few that I'm thinking of have
18 multiple farms, but they're organized with fewer tax IDs
19 than there are actual farms.

20 So there's common ownership and they will
21 have one vote for each tax identification number within
22 the co-op.

23 Q. Okay. So a tax identification number
24 means a legal entity?

25 A. Correct.

1 Q. A single, legal entity?

2 A. Or social security number, if you're a
3 sole proprietor.

4 Q. Okay. I have no other questions.

5 MR. BESHORE: Your Honor, I would like to
6 provide the citation for the final decision from
7 the proceeding involving the Pacific Northwest
8 and Arizona Orders for which official notice was
9 requested. 70 Federal Register, 74165,
10 December 14th, 2005.

11 JUDGE CLIFTON: Let me read that back.
12 70 Federal Register, 74165, December 14, 2005?

13 MR. BESHORE: Yes.

14 JUDGE CLIFTON: Good. Thank you so much.

15 MR. BESHORE: Thank you.

16 JUDGE CLIFTON: And that ties together
17 with the paragraph on page 2 of Exhibit 38.

18 Is there any objection to the
19 admission into evidence of Exhibit 38? There is
20 none. Exhibit 38 is hereby admitted into
21 evidence. Thank you, Mr. Rowe. You may step
22 down.

23 THE WITNESS: Well, thank you.

24 JUDGE CLIFTON: And would Mr. Wilcox come
25 forward, please? I'm going to mark Mr. Wilcox's

1 testimony as Exhibit 39.

2 (Exhibit 39 was marked for
3 identification.)

4 JUDGE CLIFTON: Would you state and spell
5 your name, please?

6 THE WITNESS: J.T. Wilcox, J, period, T
7 period, W-i-l-c-o-x.

8 J.T. WILCOX
9 of lawful age, being duly sworn, was examined and
10 testified as follows:

11 JUDGE CLIFTON: Thank you.

12 MR. ENGLISH: Your Honor, I have two
13 extra.

14 JUDGE CLIFTON: All right. Who else
15 would like a copy? Ben Yale would.

16 MR. YALE: I think I have one.

17 JUDGE CLIFTON: Do you have one
18 already?

19 MR. ENGLISH: It was out there since
20 yesterday morning, your Honor, and I just handed
21 one out to each of the members of the
22 government as well as to yourself and the court
23 reporter.

24 JUDGE CLIFTON: All right. Very fine.
25 Thank you. Mr. English, you may proceed.

1 MR. ENGLISH: Sure. Your Honor, the
2 witness, in his prepared statement, will
3 reference but not ask for official notice of an
4 ERS study and a University of Florida study. In
5 case people have questions about those, the
6 witness has one with him.

7 I'm going to give one of each of those to
8 you. I'm going to keep one for myself in case
9 there's questions, and I will leave one copy of
10 each at the front table. I don't think they're
11 controversial, very simple thing. But we have
12 copies for reference.

13 JUDGE CLIFTON: I appreciate that very
14 much, thank you.

15 MR. ENGLISH: And we don't expect for ask
16 for judicial notice. We don't expect to mark it
17 as an exhibit. Others may feel differently.
18 But they're there in case someone wishes to ask
19 a question.

20 Before Mr. Wilcox proceeds with his
21 statement, my name is Charles English. I
22 represent a coalition of fluid milk processors
23 who are subject to the pricing and pooling
24 provisions of a number of -- if not mostly all
25 of the Federal -- of the Federal milk marketing

1 orders.

2 DIRECT EXAMINATION

3 BY MR. ENGLISH:

4 Q. And, Mr. Wilcox, my firm has retained you
5 as a consultant, correct?

6 A. Correct.

7 Q. And we retained you officially last
8 month, in the month of April?

9 A. That's correct.

10 Q. And you're appearing as a paid
11 consultant, correct?

12 A. Correct.

13 Q. And before you agreed to be retained, did
14 you condition your retention in any way?

15 A. Yes, I did.

16 Q. And what was the condition that you
17 placed before I was allowed to retain you?

18 A. The conditions that I placed had to do
19 with identification of specific customers and their
20 actions, and also discussion of details of closure of
21 Wilcox Farms, LLC, Wilcox Dairy Farms, LLC.

22 Q. And as to the customer issues with
23 respect to -- that is because of why, sir?

24 A. I'm a stockholder in Wilcox Farms,
25 Incorporated and we still do business with some of those

1 customers, and it would be improper for me to discuss
2 details of those customers, and I have them.

3 Q. You do your business with respect to
4 products other than dairy?

5 A. Correct. It's an egg and egg product
6 company.

7 JUDGE CLIFTON: A what and egg?

8 THE WITNESS: An egg, e-g-g, egg and
9 egg product company --

10 JUDGE CLIFTON: Egg and egg?

11 THE WITNESS: Yeah, eggshell and liquid
12 egg products.

13 JUDGE CLIFTON: Okay. Oh, I've got it.

14 MR. ENGLISH: Mr. Wilcox, it might be
15 helpful -- I think everybody's experience is you
16 may have to pull the mic up a little bit.

17 Twist.

18 MR. BESHORE: Tilt. Tilt.

19 MR. ENGLISH: It pulls up.

20 JUDGE CLIFTON: With that -- that one we
21 cannot, can we?

22 MR. ENGLISH: It can move like this.

23 JUDGE CLIFTON: But it can't get higher?

24 MR. ENGLISH: I don't believe it goes
25 higher, your Honor.

1 JUDGE CLIFTON: I didn't realize this one
2 could go higher.

3 MR. ENGLISH: Well, we learned something.

4 JUDGE CLIFTON: Day 4.

5 BY MR. ENGLISH:

6 Q. Mr. Wilcox, there was a second condition
7 you mentioned, and that had to do with the shutting of
8 the Wilcox dairy operation.

9 A. That's correct.

10 Q. And what was the rationale behind that
11 condition?

12 A. I've been advised by my own counsel that
13 I shouldn't discuss details of that, and also there have
14 been confidentiality agreements involved with the sale
15 of that -- of assets of that company.

16 Q. With that preface, would you please
17 deliver your prepared statement?

18 A. Sure. I was employed by Wilcox Farms,
19 Incorporated and later by Wilcox Dairy Farms, LLC, from
20 1985 until 2008 when certain assets of Wilcox Dairy
21 Farms were sold. Before 1985, I was intimately involved
22 in the family business as a high school and college-age
23 employee and trainee.

24 From 1985 until 2008, I filled a variety
25 of management and staff positions including: Manager of

1 an 800-cow dairy production operation that was
2 integrated with a milk plant, first as a
3 producer-handler and later as a supplier of a regulated
4 fluid plant held under the same ownership as the herd;
5 manager of a regulated fluid milk plant producing
6 approximately 10 to 15 million pounds per month; project
7 manager responsible for the business plan and
8 construction of a 200,000 bird integrated laying
9 operation incorporating feed processing, layer
10 operation, egg processing and distribution; project
11 manager responsible for business plan and construction
12 of a new regulated milk plant near Spokane, Washington,
13 designed for streamlined and efficient processing of
14 relatively low volumes of milk for a small market;
15 director of Inland Northwest for Wilcox Dairy Farms LLC
16 responsible for plant operations, distribution, and
17 local sales and marketing with a new regulated fluid
18 processing plant producing between 2 1/2 and 7 1/2
19 million pounds per month; Corporate Director of
20 Operations for Wilcox Dairy Farms LLC responsible for
21 plant operations with three regulated fluid plant
22 processing between 30 and 60 million pounds per month
23 and distribution in a five-state area and CFO of Wilcox
24 Dairy Farms LLC responsible for accounting, finance, and
25 human resources.

1 I also served on a variety of industry
2 boards, including terms as: Commissioner on the
3 Washington Egg Commission, Commissioner on the
4 Washington Dairy Products Commission, President of the
5 Washington State Holstein Association, President of the
6 Washington Poultry Industry Association, and Chairman of
7 the National Fluid Milk Processor Promotion Board, also
8 known as MilkPep.

9 Wilcox Farms, Incorporated is a
10 100-year-old family agribusiness located near Roy,
11 Washington. The company's primary products have been
12 liquid and shell eggs and milk. In 1960, the company
13 entered the dairy cattle business as a producer for a
14 local dairy cooperative.

15 In 1974, the company held discussions
16 with a large regional grocery chain regarding a proposal
17 that Wilcox Farms build a milk processing plant, become
18 a producer-handler and supply this chain with their
19 fluid milk needs. The grocer was aware of the
20 advantages of the producer-handler exemption and was
21 able to use their alternative supplier to balance supply
22 with demand. As a result, Wilcox Farms built a fluid
23 milk processing plant and operated as a producer-handler
24 until approximately 1987.

25 In 1987, Wilcox Farms was serving several

1 rapidly growing grocery chains. The growth occurred in
2 steady increments rather than one large quantum leap.
3 In the case of one of the grocers, Wilcox was gradually
4 replacing an incumbent supplier. In the case of another
5 grocer, Wilcox was simply growing with that grocer's
6 rapidly increasing corporate volume. For several
7 quarters, Wilcox maintained their status as a
8 producer-handler, but eventually, in order to meet the
9 demand of its customers, Wilcox management elected to
10 become a fully regulated handler.

11 In 1998, Wilcox Dairy Farms LLC was
12 formed as a separate company with Dairy Farmers of
13 America holding a minority position in ownership and
14 Wilcox Farms contributing some of their dairy assets.
15 In the years following, Wilcox Dairy Farms, LLC grew to
16 be one of the largest dairies serving the Pacific
17 Northwest.

18 In early to mid 2000s, Wilcox Dairy
19 Farms, LLC found that the increasing concentration of
20 grocery chains created a situation where only a few
21 large grocery retailers, cooperative grocery warehouses
22 and food service chains purchased the majority of the
23 packaged fluid milk products sold in the marketing area.
24 Milk suppliers based their capital and cost structure on
25 the status quo volumes. The result of this situation

1 was that Wilcox felt the need to respond to downward
2 pressure on milk processing margins in order to maintain
3 critical volume. Wilcox felt that the consequences of
4 losing a large customer would bring into question the
5 viability of the company. After several years of losses
6 due to shrinking margins, the decision was made to sell
7 certain assets of Wilcox Dairy farms LLC and close the
8 business.

9 The market for milk through grocery and
10 food service outlets has become increasingly
11 concentrated. Most of the volume is purchased by large
12 regional and national chains or by warehouse operators
13 that serve chain and independent outlets. Most milk
14 processors serve one or more of these customers and many
15 of these grocers, food service operators or food
16 warehouses purchase their dairy needs from several
17 suppliers, even in the same region.

18 Milk is considered one of the critical
19 grocery items. It's an extremely serious issue if a
20 store or restaurant is out of fluid milk products and it
21 is equally serious for them that their fluid milk
22 products are competitively priced. It is very common
23 for gallons of milk to be a featured promotion on weekly
24 grocery advertisements.

25 Because of the size and scale of the

1 grocery and food service chains and because of the
2 nature of fluid milk, buyers of this commodity have
3 become extremely sophisticated and aggressive. To
4 protect their companies, buying departments have
5 developed very strong quality and inspection programs,
6 sophisticated sales data analysis, and because they deal
7 with so many fluid milk processors, they have become
8 very knowledgeable about costs and regulations dealing
9 with fluid milk. Major chains often employ staff or
10 consultants that are well-versed in Federal Order
11 regulations and some are former staff members of the
12 USDA. It is possible that some large buyers of fluid
13 milk are as well informed regarding dairy price
14 regulations as some milk processors.

15 Large grocery and food service chains are
16 very aware of the producer-handler exemption. They are
17 also aware of the historical disadvantages involved in
18 that status. In the past, the need to balance
19 production of milk, which can be relatively level in a
20 modern, well-managed dairy herd, with milk demand, which
21 varies during the week, seasonally, and in response to
22 promotions, worked to diminish the milk cost advantage
23 that the producer-handler exemption provides to the
24 producer-handler. Now, however, as grocery and food
25 service distribution centers have grown in size and

1 management sophistication, it's possible to take care of
2 the balancing more readily. It is much easier for the
3 warehouse operator to balance a producer-handler's milk
4 production with milk demand by using other regulated
5 processors. For instance, the operator of a large
6 distribution center routinely receives milk from a
7 variety of milk processors. Even chains which do not
8 use their warehouse for milk distribution are capable of
9 balancing a producer-handler, as was done by several of
10 Wilcox Dairy Farms chain customers. Because of the
11 limited number of large buyers of milk, it's very likely
12 that a regulated supplier could be found that would
13 agree to vary his volume to accommodate the needs of the
14 warehouse operator in balancing producer handlers.
15 Although it's easy to demonstrate how balancing a large
16 producer-handler can be done through the use, in a large
17 warehouse, of multiple suppliers, it's also a reality.
18 Because Wilcox Farms had a history as a
19 producer-handler, early in this decade, the suggestion
20 was made by a large milk purchasing company that Wilcox
21 Dairy Farms LLC convert to producer-handler status. The
22 origin of the suggestion was a sophisticated
23 understanding of the producer-handler exemption, the
24 ability of the milk purchasing company to balance milk
25 at the customer level, and a desire to secure the

1 advantage of lower cost milk for their own customers.
2 Although Wilcox Dairy Farms LLC had the expertise to do
3 this, the offer was declined because of the specific
4 circumstances faced by Wilcox Dairy Farms. It was felt
5 by Wilcox management that the producer-handler exemption
6 would be quickly eliminated through regulation if such a
7 major disruption in the milk business occurred in the
8 Pacific Northwest, and Wilcox was unwilling to take the
9 risk. In any event, this was a wise choice since the
10 exemption was limited in the PNW Federal Order in 2006.
11 In addition, at that time Wilcox was packaging milk from
12 approximately 15-20,000 cows. Unlike large dairy farms,
13 which already have made the investment in infrastructure
14 and cattle, that would have all been incremental
15 investment for Wilcox Dairy Farms. The capital for that
16 farming infrastructure was beyond the reach of Wilcox
17 Dairy Farms in light of the risk that the exemption
18 would be limited. It is interesting to note that at
19 large size levels, the investment in cows and dairy farm
20 infrastructure is far greater than processing
21 infrastructure for the same capacity. It would be
22 comparatively easier in terms of capital, for an
23 existing dairy farm with 10,000 cows to add a processing
24 plant than for an equally-sized processor to add the
25 dairy cattle capacity. A recently reviewed University

1 of Florida capital budget for a large dairy farm
2 estimated capital costs at over \$400,000 per head.

3 MR. ENGLISH: I'm sorry?

4 THE WITNESS: Excuse me. And I want to
5 correct. That really should be estimated cap X
6 at over \$4,000 per head.

7 BY MR. ENGLISH:

8 Q. So you are correcting your testimony to
9 say cap X?

10 A. Yes.

11 JUDGE CLIFTON: And does that mean
12 capital expenses?

13 THE WITNESS: Yes.

14 JUDGE CLIFTON: And how is that different
15 from costs?

16 THE WITNESS: I was afraid there might be
17 confusion with cost of capital.

18 JUDGE CLIFTON: Okay. Capital expenses
19 at the bottom of page 6, and --

20 MR. ENGLISH: It's correct in the
21 statement at 4,000. He read a number other than
22 4,000 per herd.

23 JUDGE CLIFTON: So at the top of
24 page 7 -- just reread your sentence that ends at
25 the top of page 7.

1 THE WITNESS: I recently reviewed
2 University of Florida capital budget for a dairy
3 farm estimated capital expenditures at over
4 \$4,000 per head. Wilcox Farms built a milk
5 plant near Spokane with capacity for milk from
6 around 5,000 cows for less than \$7 million. The
7 investment to double that capacity would have
8 likely been less than \$3 million. The capital
9 required for a 10,000-cow herd would be about
10 \$40 million according to the University of
11 Florida study.

12 In my opinion, it makes sense for large
13 grocers or food service companies to seek out
14 producer-handlers.

15 JUDGE CLIFTON: I'm sorry. You might
16 have to explain this to me. Let's go over that
17 again.

18 THE WITNESS: Sure.

19 JUDGE CLIFTON: Start with the top of
20 page 7, Wilcox Farms.

21 THE WITNESS: Wilcox Farms built a milk
22 plant near Spokane with capacity for milk from
23 around 5,000 cows for less than \$7 million.

24 JUDGE CLIFTON: And that was in about
25 what year?

1 THE WITNESS: Late '90s.

2 JUDGE CLIFTON: Okay.

3 THE WITNESS: The investment to double
4 that capacity would have likely been less than
5 \$3 million.

6 JUDGE CLIFTON: And does that also relate
7 to the late '90s?

8 THE WITNESS: Well, sure.

9 JUDGE CLIFTON: Okay.

10 THE WITNESS: The capital required for a
11 10,000-cow herd would be about \$40 million
12 according to the University of Florida study.

13 JUDGE CLIFTON: And that would represent
14 what year?

15 THE WITNESS: Well, the study was written
16 in -- original publication date, February 1994.
17 Revised May 1997 and reviewed March 2009.

18 JUDGE CLIFTON: So in ten years' time?

19 MR. ENGLISH: One is the plant. One is
20 the farm.

21 JUDGE CLIFTON: That's where I'm missing
22 it.

23 THE WITNESS: Well, yeah.

24 JUDGE CLIFTON: Okay. Fine. Now, I
25 understand. Thank you.

1 A. In my opinion, it makes sense for large
2 grocer or food service companies to seek out
3 producer-handlers. There are major advantages in doing
4 this and the disadvantages are not difficult to mitigate
5 in today's marketplace. The major obstacle in doing
6 this is uncertainty regarding the longevity of the
7 exemption. If it appeared very likely for the exemption
8 to remain, then I would certainly be interested in
9 consulting for a producer-handler, and if asked, to
10 invest my own resources in one because the prospect for
11 success would be good given the exemption and other
12 advantages listed below.

13 A producer-handler, by its nature does
14 not need any special exemptions. This is a business
15 model with inherent efficiencies and it should and will
16 survive based upon those efficiencies. This is
17 especially true if the producer-handler has a strong,
18 contractual relationship with large milk buyers, as was
19 the case when this possibility was proposed to Wilcox
20 Dairy Farms.

21 A dairy herd produces milk at a much more
22 consistent rate than is seen in customer demand. If a
23 large milk buyer was able to balance the production of a
24 producer-handler, then the consistent weekly volume
25 would result in a more efficient plant in both capital

1 and operational terms.

2 Within a range, it's possible through
3 management and feed to customize the butterfat contents
4 of a herd's milk. Doing so would provide a more nearly
5 optimal component level resulting in better net returns.

6 Raw milk storage tanks can be minimized
7 because the same tanks are used for plants and raw herd
8 storage. Raw milk storage tanks are a major capital
9 cost for both milk processors and dairy farmers, and
10 washing tanks is an operational cost for both. Wilcox
11 Farms used common raw tanks for herd and processing when
12 it was a producer-handler.

13 Wilcox Farms has operated three
14 large-scale, vertically integrated laying hen
15 operations. The egg industry, like some other
16 agricultural industries involving livestock, has evolved
17 into an industry that is dominated by integrated
18 enterprises, similar in nature to the exempt
19 producer-handler. The reason is that the operation is
20 much more efficient when production is linked directly
21 to processing. Eggs are a fresh, perishable product
22 similar to milk. If the producer-handler exemption was
23 considered to be secure for the long term, it seems
24 reasonable, based on other livestock-based commodities
25 and on my experience at Wilcox Farms to expect that the

1 vertically integrated producer-handler would be the most
2 efficient and dominant business model.

3 Of course, the producer-handler exemption
4 provides the greatest incentive, however, under the
5 right circumstances the above efficiencies can serve to
6 add to the advantage of the producer-handler. There is
7 another way in which a small producer-handler is used to
8 reduce price and margins to the detriment of regulated
9 fluid milk plants.

10 When Wilcox Farms began serving one of
11 its first national grocery accounts around 1985, it was
12 still a producer-handler. The grocer's milk buyer
13 understood the production constraints and the advantages
14 of the exemption and allowed Wilcox to begin serving his
15 stores at the level of only four stores at a time. This
16 was efficient for Wilcox because at that time Wilcox had
17 surplus milk and because the volume of four stores fit
18 well into a full -- into full truckload deliveries.

19 Wilcox was under the impression that
20 their price was lower than the incumbent's price.
21 Wilcox was not aware what the incumbent was told
22 regarding Wilcox pricing, however, it is not uncommon in
23 the dairy business for a supplier to be informed when a
24 competitor's pricing is more favorable. In many post
25 1987 cases, Wilcox was told by its customers that its

1 (Wilcox's) pricing was not competitive in an area.
2 Sometimes the low priced competitor was a
3 producer-handler. Normally, Wilcox, as the incumbent,
4 was asked to lower the price to meet a competitor's
5 price, even when the competitor was able to serve only a
6 small number of stores in a limited region, such as the
7 four stores that Wilcox began serving around 1985. In
8 some cases, Wilcox was allowed to respond only for that
9 region. In others, Wilcox was asked to reduce its price
10 in the entire service area.

11 It is very important for grocers and food
12 service wholesalers that their fluid milk prices be seen
13 as highly competitive. In general, when a milk buyer
14 has an opportunity to buy milk at a cheaper price than
15 he is currently getting, the incumbent supplier is
16 informed and has a -- excuse me -- has a chance to match
17 the lower price. If the incumbent declines the
18 opportunity to match prices, then it is usually
19 understood that his status as the incumbent supplier is
20 at risk, either in individual stores or in a region.

21 Although producer-handlers have not
22 become a major issue in some regions, it seems more
23 likely that this is due to uncertainty regarding the
24 longevity of the exemption rather than because there are
25 insurmountable business obstacles to more companies

1 taking advantage of the exemption. Over the last two
2 decades a number of trends exist that would make it
3 more likely for a producer-handler to be viable than in
4 the past.

5 The size of dairy farmers has grown
6 rapidly. There are a number of dairy farming companies
7 that already have enough companies to produce the milk
8 needed to supply one of Wilcox Dairy Farm LLC plants.
9 The advantages of linking production and processing of
10 agricultural products have been well established in
11 other livestock based commodities, such as beef,
12 chicken, and eggs.

13 If there were a level of uncertainty --
14 excuse me. If there were a level of certainty regarding
15 the longevity of the producer-handler exemption and a
16 long-term contract, as was offered to Wilcox Farms in
17 the past, a producer-handler would be an attractive
18 investment. Wilcox was offered investment resource as
19 an inducement to change status. In my real estate
20 auction work, my broker and I are in every day contact
21 with the investors with the cash resources to back this
22 kind of enterprise, and in my opinion, a solid
23 regulatory advantage such as producer-handler exemption
24 would provide a positive inducement to invest. Greatly
25 increased concentration of grocery and food service

1 chains, together with the consolidation of warehouses,
2 serving independent grocers and food service outlets
3 provides more milk buyers with the size necessary to
4 have multiple milk suppliers and provide balancing for a
5 producer-handler.

6 Fierce price competition between very
7 large grocers that often promote milk based on price
8 means that no milk buyer can afford to ignore any
9 potential price advantage for his company or his retail
10 customers. Buyers are much more sophisticated and aware
11 of regulatory advantages and actively seek out dairies
12 to be producer-handlers.

13 Until now, uncertainty about how the USDA
14 would react to a very large producer-handler's entry
15 into the market has, in my opinion, constrained
16 companies from investing in this business on a large
17 scale. Certainly, this was a major constraint to Wilcox
18 Dairy Farms LLC. If this national hearing definitively
19 rejects the opportunity to modify the exemption, then I
20 have little doubt that major efforts will commence to
21 create large fluid milk processors that operate as
22 producer-handlers. As mentioned above, I am confident
23 enough in their success to seek consulting engagements
24 or to invest in them myself. Thank you.

25 Q. Mr. Wilcox --

1 MR. ENGLISH: First, your Honor, did we
2 mark the statement?

3 JUDGE CLIFTON: Yes, this is Exhibit 39.

4 MR. ENGLISH: Thank you, your Honor.

5 Q. Mr. Wilcox, as I was following along, I
6 noted a statement on page 10 about the size of dairy
7 farms growing rapidly. Is that an example of where you
8 may have been relying on the ERS study that I handed
9 out, Profits, Costs, and the Changing Structure of Dairy
10 Farming, ERR-47.

11 A. Yeah, that's correct. And particularly
12 the last page where it talks about over 40 large farms,
13 each with a thousand to 5,000 cows, were built in
14 Michigan, Ohio and Indiana between 1998 and 2006.

15 Q. You've been here now since Monday
16 evening?

17 A. Correct.

18 Q. And you've heard, I believe, some
19 discussion about what others view may or may not be the
20 advantage that a producer-handler has over regulated
21 handlers, correct?

22 A. Correct.

23 Q. Do you have a direct, personal knowledge
24 as to that issue?

25 A. Yes.

1 Q. All right. What do you know as a fact
2 from your own information?

3 A. Well, I would say that anybody that
4 converted from a producer-handler to a regulated plant,
5 as we did, has a great example because on month A, for
6 example, you are a producer-handler who is not writing a
7 check to the Market Administrator. And on month B you
8 are a regulated plant, and you write a large check. You
9 may only have increased your process quantity by a small
10 amount. However, you are writing a check to the MA then
11 that is equivalent to the difference between Class I
12 and the blend price.

13 Q. And the plant blend price --

14 A. Yeah.

15 Q. -- or uniform price --

16 A. Yeah.

17 Q. -- not the plant price?

18 A. Yeah. Sorry.

19 Q. I'm sorry, uniform price, not the plant
20 price?

21 A. That's correct.

22 Q. Now, do you have any other direct
23 information as to what buyers know about that?

24 A. Buyers are very, very aware of the price
25 advantages, price of milk advantages between the two

1 statuses. And, in general, the discussion about
2 producer-handler status with a sophisticated buyer would
3 start with the buyer quoting the difference between
4 Class I and uniform blend.

5 Q. And you've been in the room when those
6 discussions have been held?

7 A. Absolutely, yes.

8 Q. Now, you have not, it appears, testified
9 with respect to any proposal before the Secretary?

10 A. That's correct.

11 Q. Are you taking any position on any
12 proposal before the Secretary?

13 A. I'm not. I'm just reporting facts as I
14 have observed them.

15 Q. And you weren't asked to comment on any
16 proposal?

17 A. No.

18 MR. ENGLISH: Your Honor, I move the
19 admission of Exhibit 39. The witness is
20 available for cross-examination.

21 JUDGE CLIFTON: Thank you, Mr. English.
22 Is there any objection to the admission into
23 evidence of Exhibit 39? There is none. Exhibit
24 39 is hereby admitted into evidence.

25 Who will begin the cross-examination of

1 Mr. Wilcox? Mr. Tosi, do you have any questions
2 for Mr. Wilcox.

3 MR. TOSI: (Shaking head.)

4 JUDGE CLIFTON: He nodded no.

5 Mr. Ricciardi?

6 MR. RICCIARDI: I don't want Mr. Wilcox
7 to feel bad.

8 JUDGE CLIFTON: You are doing this just
9 for Mr. Wilcox?

10 MR. RICCIARDI: I am. Because he's been
11 here this long and prepared all of that
12 information. And to not ask a question would
13 just not be the nice thing to do.

14 CROSS-EXAMINATION

15 BY MR. RICCIARDI:

16 Q. I'm Al Ricciardi. I'm here on behalf of
17 AIDA.

18 Let me find out what the scope of my
19 cross-examination is going to be and ask you some
20 questions. You are consulting with whom, sir?

21 A. With -- I was retained by Chip English
22 and his group of clients, which I can name if you're
23 interested in it.

24 Q. My next question.

25 A. Okay.

1 Q. Go ahead.

2 A. All right. The Northeast Dairy Foods
3 Association, PAMD, Anderson Erickson Dairy, Dean Foods,
4 Prairie Farms Dairy, National Dairy Holdings, Shamrock
5 Foods, Shamrock Farms, Dairy Institute of California and
6 Parker Farms.

7 Q. Okay. Tell me when you were retained.

8 A. I was retained in April.

9 Q. Of this year?

10 A. Correct.

11 Q. And tell me the -- the scope of your
12 engagement, sir?

13 A. To provide testimony and advice on the
14 issues to be covered in this hearing.

15 Q. Okay. And who have you worked with on
16 that engagement?

17 A. I've worked directly with Chip English.

18 Q. Anyone else?

19 A. I have spoken once or twice with Marvin
20 Beshore. And then various people while at the hearing
21 this week.

22 Q. Were you provided with any assistance in
23 preparing your statement which has been marked and
24 admitted as Exhibit 39?

25 A. There has been discussion about minor

1 points and grammar. However, I've written all of it.

2 Q. And the discussion -- you sent a draft of
3 the statement to Mr. English and Mr. Beshore also?

4 A. That's correct.

5 Q. And they provided you with comments?

6 A. Brief comments.

7 Q. Okay. What is -- what are the terms, the
8 financial terms, of your scope of engagement?

9 A. Well, I provided a budget and then I will
10 provide them with an ending bill based on hours that I
11 have put into the engagement.

12 Q. And how much are you charging per hour
13 for the consultation?

14 A. That seems like private information to
15 me, my pricing.

16 Q. So you're not going to tell me?

17 A. No.

18 Q. Will you tell me whether it's more than a
19 thousand dollars an hour or less?

20 A. It's less.

21 Q. Good. Thank you. Tell me specifically
22 the sophisticated buyer that you had any discussions
23 with regard to their understanding of the Federal Order
24 System.

25 A. I'm not sure that I heard a question.

1 Perhaps I missed it.

2 Q. I didn't, I think. But let me make sure
3 my notes are right. I think Mr. English asked you about
4 whether you had knowledge concerning whether
5 buyers/customers were aware of the producer-handler
6 exemption and the difference in pricing. And I believe
7 that you said that you had been in the room with
8 sophisticated buyers.

9 A. Yeah.

10 Q. So who were they and when?

11 A. Well, that would be part of the
12 information that I wouldn't supply.

13 Q. So you're not going to answer that
14 question?

15 A. I'm not going to name names or provide --
16 name the names of individuals that worked at customers.

17 Q. Tell me the name of the customers.

18 A. I'm not going to provide that.

19 Q. Tell me when it occurred.

20 A. Those discussions have occurred over the
21 course of many years, and most recently probably in
22 2005.

23 Q. 2005, you were still in an LLC -- excuse
24 me, in a joint venture, your LLC was, with Dairy Farmers
25 of America?

1 A. That's right.

2 Q. And when did that joint venture start?

3 A. I've got to consult my testimony because
4 I think that I quoted that and I want to be sure that
5 I'm right.

6 Q. I think your discussion started in 1998?
7 You don't know if that's when the JV started?

8 A. In 1998, Wilcox was formed as a separate
9 company with Dairy Farms of America.

10 Q. Now, there have been assertions made in
11 the first 3 1/2 days that there is a -- an alleged price
12 advantage that producer-handlers have over the regulated
13 community. Do you agree with those assertions?

14 A. Yes.

15 Q. Okay.

16 A. We -- I'm sorry, let me rephrase. It
17 would depend on what assertion was made -- was made. I
18 would agree that there's an advantage. I'm not agreeing
19 to any specific number that was quoted.

20 Q. Okay. And I didn't ask you for one.

21 A. Okay.

22 Q. But let me be more pointed. There's also
23 been assertions made that with regard to competing with
24 a producer-handler, that the regulated community cannot
25 compete on price for customers with the

1 producer-handler. Do you agree with that?

2 A. Well, I think that in many circumstances
3 that's a true statement.

4 Q. But in other circumstances, and you've
5 had the experience of this when you were a part of the
6 regulated community, you competed directly with
7 producer-handlers and took business away with regard to
8 large warehouse stores, correct?

9 A. Yeah. I think that that has happened.

10 Q. And that occurred in 2005, 2006 and 2007,
11 correct?

12 A. It would be difficult for me to recall
13 specific incidences when we took, you know, a customer
14 from some competing handler. Certainly it's happened.
15 I don't know if it happened in those years.

16 Q. You did take the entire national
17 warehouse chains' stores in Washington and Oregon away
18 from a producer-handler in 2007, correct?

19 A. I'm drawing a blank in trying to
20 determine which customer you're talking about.

21 Q. Well, are you going to talk about
22 customers? I'll give you the name.

23 A. I would answer that question if you
24 supplied the name.

25 Q. Costco.

1 A. Wilcox Farm -- Wilcox Farms and then
2 Wilcox Dairy Farms was the original supplier for Costco
3 when they were formed. We took them from nobody.

4 Q. And then with regards specifically to
5 organic milk, when Costco was using a producer-handler
6 source, you took the business from them, correct?

7 A. That would be a true statement.

8 Q. Okay. So you were able to, as a
9 regulated -- part of the regulated community, compete
10 directly for warehouse store sales with a
11 producer-handler on price?

12 A. I would say that there are many other
13 factors besides price involved in that, and probably the
14 largest factor involved in that customer is the fact
15 that we were the foundation supplier of virtually all of
16 their dairy products from the time that that company was
17 organized, as well as shell egg and liquid egg products.
18 And that probably had a far greater impact than any
19 other factor.

20 Q. And I'm glad you brought that up, because
21 that gives us another point to discuss. People,
22 customers, whether they be large warehouse stores or
23 smaller regional grocery chains or whoever, they may
24 decide to switch suppliers, whether from a
25 producer-handler or a regulated community, on a number

1 of factors, which include price, right?

2 A. There are a number of factors that are
3 part of the decision.

4 Q. Let's talk about some of them. Service
5 is important, right?

6 A. (Nodding head.)

7 Q. Yes?

8 A. Yeah.

9 Q. Thank you. Quality of product is
10 important to customers, correct?

11 A. That is true.

12 Q. And in some places, and particularly now,
13 a local source of product may be important to customers,
14 is that correct?

15 A. That is correct.

16 Q. Also for some customers, being able to
17 actually trace the product back to the supplier so
18 there's accountability for the product may be important?

19 A. That's true. And I think that the
20 current state of regulations would make that true in
21 every case.

22 Q. So if, for example, we hear that a
23 regulated -- a member of the regulated community has
24 lost a customer to a producer-handler, we would actually
25 need to know the specific facts regarding that

1 occurrence to understand whether it was based on price,
2 service, accountability, local quality, whatever, in
3 order to determine what occurred there, right?

4 A. I would agree that circumstances are
5 important. There's not one factor that is the only
6 issue.

7 Q. And included in that, to be able to
8 really determine what happened on price, for example, it
9 would be helpful to actually have purchase orders or
10 actual invoices to show the information, correct?

11 A. I don't think that it would be at all
12 realistic to expect anyone's testimony to be revealing
13 private information between the supplier and the
14 customer.

15 Q. Whether it's realistic or not is not my
16 question. In order to be able to confirm the details as
17 to whether, for example, it was price, having those
18 documents, invoices, purchase orders, actual documents
19 showing the reality of what occurred would be the best
20 evidence?

21 A. Well, I would hope that my sworn
22 testimony would be sufficient evidence.

23 Q. I understand that you have a lot of
24 hopes. But what I'm asking you again is, in order to
25 confirm things, to be able to have the best evidence, to

1 have the documents, like purchase orders, et cetera,
2 that would be helpful, wouldn't it?

3 A. You know, there are so many other things
4 involved in that transaction. If you showed me a
5 purchase order, for example, I don't know I would
6 consider that to be perfect evidence.

7 In fact, I would consider my testimony to
8 be better evidence of the price relationship than having
9 a purchase order.

10 Q. I understand. We'll -- we'll leave the
11 fencing on that one alone. Let's go on to something
12 else.

13 So I understand this, and I think I do,
14 Wilcox Farms became a producer-handler at some point and
15 then decided to change that status and become regulated,
16 correct?

17 A. That is correct.

18 Q. And one of the reasons was that you --
19 you wanted to grow larger and you felt that the
20 producer-handler status was curtailing the growth?

21 A. We would have much preferred to maintain
22 producer-handler status. That was our strong
23 preference. And as I mentioned in my testimony, there
24 was some specific circumstances at that time that pushed
25 us towards being a pool plant.

1 The first was speed. Our customers grew
2 quickly, more quickly than we could add cows. And by
3 the way, we spent several months attempting to add
4 enough cows to do it.

5 I would also say that our concern about,
6 again, the longevity and the security of the
7 producer-handler exemption has always constrained us
8 from adding large quantities of dairy infrastructure.

9 Q. Well, let's stop there for a second.

10 MR. ENGLISH: Was he finished? Were you
11 finished with your answer, sir?

12 THE WITNESS: Yeah.

13 MR. RICCIARDI: I thought he was.

14 MR. ENGLISH: I wasn't sure. I just want
15 to make sure.

16 MR. RICCIARDI: If I jumped in too early,
17 I would apologize, as I always do.

18 Q. Let me see if I can understand a couple
19 of things in your testimony. The decision to become a
20 regulated handler occurred when, what year?

21 A. It occurred about 1985.

22 Q. So is your testimony, then, that at that
23 point, one of the reasons you decided to become a
24 regulated handler, in addition to needing more
25 expansion, was a concern that the regulatory status of

1 producer-handlers might be a problem in the future?

2 A. Our concern, in connection with the
3 amount of investment that would be needed to add to our
4 cattle infrastructure, was that the exemption is always
5 subject to regulatory risk and we were reluctant to make
6 the very large investments that I mentioned in my
7 example at that time out of concern that the exemption
8 would go away at some point.

9 Q. I assume that the entity in 1985 was a
10 profit-making venture?

11 A. That is true.

12 Q. It wasn't a not-for-profit?

13 A. It's been nonprofit due to circumstances
14 many times.

15 Q. Yeah, well --

16 A. Never a registered non-profit.

17 Q. Never intentional, I understand.

18 A. No.

19 Q. So the decision -- the factors as to
20 going from the producer-handler status to the regulated
21 status, a regulated handler, one of those was profit.
22 You thought that, in fact, the company could do better,
23 make more money in being a regulated handler than a
24 producer-handler, correct?

25 A. The short-term impact was not positive,

1 as you can imagine, because of the large nature of the
2 payment that's made. Because we, at that time, were a
3 company that was much larger in the egg business, our
4 concern to grow with our customers who were also egg
5 customers had a major impact on our decision to go into
6 the pool as well.

7 Q. I understand that. But -- and I'll pick
8 up a -- a response that you made so that I understand
9 your testimony.

10 You did write a pool payment check when
11 you converted over, whatever size it was. But you knew
12 that before you made the conversion, right?

13 A. Yes.

14 Q. You knew you were going to have to pay
15 into the pool?

16 A. Absolutely right.

17 Q. And you made that decision anyway as a
18 profit-making entity with the idea that you would make
19 more money with that status versus the producer-handler
20 status?

21 A. We felt that that was the right choice
22 for the company. However, I do want to make the point
23 that part of our decision was because of our egg
24 business and the growth in the same customers that
25 supported the egg business.

1 Q. Okay. I understand. In 1998, when you
2 had the joint venture relationship with DFA, you stated
3 at the bottom of page 3, that in the years following,
4 that Wilcox Dairy Farms, LLC grew to be one of the
5 largest dairies serving the Pacific Northwest. How many
6 cows did you have?

7 A. I'm using dairy in the sense of milk
8 processor.

9 Q. Okay. What's -- what was the size? You
10 had one processing facility or more than one?

11 A. We had three processing facilities.

12 Q. And they were located where?

13 A. They were located in Roy, Washington;
14 Spokane; and Salem.

15 Q. And how much did each of those plants
16 process per month?

17 A. Our volume ranged from a low of about
18 30 million. I'm going to review.

19 JUDGE CLIFTON: And let us know what page
20 you go to.

21 THE WITNESS: Okay. I'm on page 2.

22 A. 30 to 60 million pounds per month.

23 Q. Combined?

24 A. Combined.

25 Q. And do you know what percentage of the

1 milk was pooled on Order 124 that those plants
2 comprised?

3 A. I used to do a calculation that showed
4 something in the neighborhood of 20 to 30 percent of the
5 Class I, depending on the month.

6 Q. Okay. Does Wilcox still have any joint
7 ventures with DFA?

8 A. Wilcox Farms, LLC has not been legally
9 closed. That company still exists. There's no other
10 joint venture with DFA.

11 Q. Are you currently or is anyone in the
12 Wilcox family receiving any type of monthly payments
13 from DFA as a result of the sale of assets in 2008?

14 A. I can't think of any payments that are a
15 result of that sale. However, it's possible that there
16 are some very, very small checks being issued as a
17 result of a small herd that we had that was a member of
18 DFA for several years.

19 Q. In addition to any confidentiality
20 agreements that may be current regarding the sale of the
21 dairy company, is there any cooperation clause required
22 as a result of the sale of the dairy assets with DFA?

23 A. I believe that we're getting into the
24 area that I would have -- that I have been advised not
25 to discuss.

1 Q. So do you know the answer to my question
2 and you're not going to tell me or do you not know?

3 A. I'm not going to answer the question.

4 Q. I'm not asking you about the terms. I'm
5 just asking whether or not you know if the terms -- if
6 there's cooperation clauses that exist?

7 A. This sounds like splitting hairs to me.

8 Q. Well, you know, I understand it and I
9 am -- I won't belabor the point.

10 A. If you're asking, you know, whether my
11 testimony would be less than honest because of -- of an
12 agreement, the answer is absolutely not.

13 Q. Didn't ask that question, sir --

14 A. Okay.

15 Q. -- at all. But I'm entitled to probe
16 into who you are as a witness.

17 A. I understand. And I just want to clarify
18 who I am as a witness.

19 Q. I am trying to get there, too. Have you
20 ever testified as a consultant before in any type of a
21 proceeding?

22 A. This is the first time I've done that.

23 Q. And do you have currently any interest in
24 any dairy-related business?

25 A. No.

1 Q. Now, I don't want to get into too
2 sophisticated of an economic analysis because one thing
3 is I can't figure it out anyway. But I'm going to ask
4 you some questions.

5 You, in the past, have invested in a
6 number of companies and your testimony reflects at least
7 some knowledge with regard to investment and investment
8 theory, right?

9 A. My degree was history, but I've -- I've
10 operated as a CFO and as a -- as a nonprofessional, I've
11 got some exposure.

12 Q. I understand. And we -- what we
13 understand is at least if things are rational. I
14 realize we find out here sometimes that things aren't
15 rational. But if we have a rational market, that there
16 will be investment dollars that will flow towards any
17 type of an investment that may have an advantage.

18 For example, if there was a perceived
19 advantage to being a producer-handler, would we assume
20 that rational money would flow towards that type of
21 investment?

22 A. That's a -- I think that's a reasonable
23 assumption, as long as it's coupled with an evaluation
24 of the risk involved.

25 Q. Okay. Go ahead, I'm sorry.

1 A. Well, and the point that I have been
2 trying to make is -- and I can testify to this
3 personally as to how it impacted the decisions at Wilcox
4 Farms, Wilcox Dairy Farms, LLC, is that producer-handler
5 status was very attractive but was constrained because
6 of the regulatory risk that we perceived.

7 Q. And how long has that regulatory risk
8 been out there?

9 A. Well, I can recall going to hearings
10 involving the status of producer-handlers when I was a
11 teenager.

12 Q. And each time, while the regulated
13 community has tried to limit the producer-handler
14 status, until most recently, there was no limitation,
15 right?

16 MR. ENGLISH: Object.

17 JUDGE CLIFTON: Mr. English, I'll hear
18 your objection.

19 MR. ENGLISH: It assumes that decisions
20 were made that did not adopt any restrictions
21 whatsoever, and this witness may or may not know
22 what was done. And I think that the best
23 evidence of that, so to speak, would be the
24 decisions of the Department.

25 MR. RICCIARDI: And I'll get into those

1 decisions, Judge. My probing of this is simply
2 to deal with the issue of the amount of risk and
3 what knowledge is out there in the community.
4 And the witness has talked about that and I'm
5 just trying to probe the issue. And I'm almost
6 done, by the way.

7 JUDGE CLIFTON: Good, because he's almost
8 exhausted that topic.

9 MR. RICCIARDI: Okay. You know what?
10 Then I am done. Thank you.

11 JUDGE CLIFTON: Thank you, Mr. Ricciardi.
12 Are there any other questions of Mr. Wilcox?
13 Mr. Beshore.

14 CROSS-EXAMINATION

15 BY MR. BESHORE:

16 Q. Good afternoon, Mr. Wilcox. I just want
17 to explore briefly the aspects of competition between
18 regulated handlers and producer-handlers.

19 And in particular what I want to get to
20 is the -- following up Mr. Ricciardi's questions, the
21 question of statements sometimes being made, we can't
22 compete on price. That is, regulated handlers can't
23 compete on price with producer-handlers and what that
24 statement might mean, okay?

25 Now, Mr. Ricciardi, in colloquy with you,

1 identified a number of aspects of competition, a number
2 of areas in which handlers and producer-handlers could
3 compete for customers, service being one, okay? Are you
4 with me?

5 A. Yes, sir.

6 Q. Now, with respect to service, if you're a
7 regulated handler competing with a producer-handler, are
8 you free to enhance your service in whatever way may be
9 necessary to provide desirable service to your
10 customers?

11 A. Yeah. I'm not aware of restrictions
12 other than, you know, the normal legal and illegal acts
13 that, you know, either class is constrained from.

14 Q. Assume we're talking about within the
15 constraints of the law. You can compete on service,
16 correct?

17 A. Sure, absolutely.

18 Q. Okay. Quality?

19 A. Absolutely.

20 Q. That's an area of competition?

21 A. Uh-huh.

22 Q. Between regulated plants and
23 producer-handlers?

24 A. Yeah.

25 Q. Can you compete on quality?

1 A. Yes.

2 Q. Okay. Are there any constraints other
3 than -- well, there are some legal constraints, but they
4 apply the same to the producer-handler and the regulated
5 handler?

6 A. That's correct.

7 Q. Okay. What other areas -- besides price
8 now, what other areas of competition might there be?
9 What other reasons might account -- might customers pick
10 one versus another, setting aside price?

11 A. Oh, I think advertising and promotion is
12 one area.

13 Q. Can a regulated handler compete with a
14 producer-handler in those areas?

15 A. Absolutely. In fact, they have some
16 inherent advantages, perhaps, in those areas when it
17 comes to their ability to present themselves as a local
18 community supplier.

19 Q. Are there any other categories of
20 competition other than price?

21 A. Well, there's, yes, a whole universe. A
22 personal relationship that you would have with a
23 customer, the quality of your, you know, delivery
24 personnel, the flavors of milk or the sizes that you
25 offer, the packaging that you provide. All those things

1 are subjects of relatively equal competition between the
2 two different classifications.

3 Q. But price is different?

4 A. Price is the one that one has a clear
5 advantage over the other.

6 Q. And that's because the regulated handler
7 has a legally required minimum price that it must pay --

8 A. That's true.

9 Q. -- for its raw product?

10 A. That's true.

11 Q. And the producer-handler has no legally
12 mandated minimum price?

13 A. That's the way I understand it.

14 Q. And when somebody says they can't compete
15 on price, that means they've got a legal floor they
16 can't go under?

17 A. That is correct.

18 Q. In terms of costs?

19 A. In terms of their cost of milk, yeah.

20 Q. Okay. Thank you.

21 JUDGE CLIFTON: Other questions for
22 Mr. Wilcox? Mr. Carroll.

23 CROSS-EXAMINATION

24 BY MR. CARROLL:

25 Q. Mr. Wilcox, I'm John Benjamin Carroll, I

1 represent the New England Producer-Handlers Association,
2 a couple of producer-handlers in the Northeast and I've
3 got some questions for you.

4 I missed this, so if you've covered it,
5 please forgive me. Your present occupation is what?

6 A. I am consulting now.

7 Q. And what does that mean?

8 A. Well, it means that I provide advice to
9 several companies. I also -- my largest company -- my
10 largest customer at this point is my family at Wilcox
11 Farms where I do real estate consulting.

12 Q. Right. And what other kind of
13 consultings do you do, sir?

14 A. Mainly business planning.

15 Q. And do you do that with any people
16 engaged in the grocery business or any of the subjects
17 we have here in milk marketing?

18 A. I have provided some advice to an NGO
19 that is working with a start-up of small agricultural
20 businesses.

21 Q. Including milk businesses?

22 A. That hasn't come up.

23 Q. You're available for that subject, I take
24 it?

25 A. That would be a possibility, yeah.

1 Q. Okay. Now, I listened to the story of
2 the Wilcox family. I want to congratulate either your
3 ancestor or yourself or both. I don't know which. But
4 it's a remarkable story.

5 A. Well, thank you. And it's all the
6 ancestors.

7 Q. And I take it that along the way the
8 producer-handler exemption was of some benefit to them
9 in -- in the evolution of their story?

10 A. We thought that that was the case, yes.

11 Q. All right. And are you familiar with any
12 other operations where they start off as a
13 producer-handler, went on to become -- eventually to
14 evolve into a different marketing arrangement than
15 producer-handlers? Are you familiar with that?

16 A. I've been in some plants where there was
17 a parlor still attached in some way and so that's
18 perhaps how they evolved. And there's a couple in
19 Washington that, after the regulatory change, seemed to
20 be successful as regulated plants.

21 Q. Right. And it's kind of an evolution.
22 They start off in one thing and as times change or
23 circumstances change, they're in a position to evolve
24 and move on. In your case, you became a successful and
25 major processor from that humble beginning. Isn't that

1 true?

2 A. In general, that's true. Sometimes we
3 were not as successful.

4 Q. Right. And so isn't the producer-handler
5 exemption a seed bed for the industry, for the
6 development of new people and new ideas and evolution
7 within the industry?

8 A. Well, I can see -- I can see why you
9 would say that. I've also run a very small plant in
10 Eastern Washington that was similar in size to many
11 producer-handler operations. And in that -- but it was
12 a regulated plant. In that case, it had, you know, the
13 size disadvantage of a lot of producer-handlers without
14 the milk cost advantage.

15 Q. Right.

16 A. So in that case, producer-handler
17 competition, if it was there in a major way, would have
18 been a major stumbling block for a regulated plant.

19 Q. For a regulated plant?

20 A. Yeah.

21 Q. Do you -- do you think that the
22 producer-handler exemption ought to be used by people
23 who work for the United States Department of Agriculture
24 that want to retire to be producer-handlers? Did you
25 say that somewhere in here?

1 A. I don't have an opinion about that. I've
2 never heard that.

3 Q. Okay. I want to ask you about the
4 consumer, okay? I take it you couldn't have done what
5 you did at Wilcox Farms -- which is really remarkable.
6 You couldn't have done that without benefiting the
7 consumer.

8 In other words, the day you don't take
9 care of the consumer, you're not in business, isn't that
10 right?

11 A. Well, among a lot of factors, you know,
12 your ability to serve the consumer is important.

13 Q. Right. And the consumer has an interest
14 in maintaining competition in the product of milk?

15 A. Well, yeah. I think it's easy to say
16 that that's a public interest. The behavior of the
17 consumer doesn't always communicate that.

18 Q. Yeah. But in general, that's the theory,
19 anyway?

20 A. Okay.

21 Q. You talked about the producer-handler
22 exemption being at risk. And you may know or not know,
23 I've been around a long time in representing
24 producer-handlers and I've been to a lot of hearings.

25 A. I gathered that.

1 Q. And there -- they're not infrequent.
2 Let's put it that way. Is that a factor, you think, in
3 exposing a potential person to enter the arena, that at
4 any moment there could be a change and he would have had
5 an investment that couldn't be paid for?

6 A. Well, that was, as I've testified, a
7 constraint for my company in terms of -- although there
8 was attractive offers by food purchasing companies to
9 facilitate that shift. The uncertainty is what kept us
10 from making it.

11 Q. Okay. Are you aware of any grocery
12 stores that decided to go backwards and become a
13 processor of milk? Do you have any experience with
14 that?

15 A. I'm aware of some grocers that have done
16 that.

17 Q. And are you aware of the fact they
18 weren't there for a long -- a very long time, that they
19 dropped that part of the business?

20 A. Well, the ones that I'm most familiar,
21 with, and I'll mention them because they're not
22 customers, Kroger and Safeway --

23 Q. Yeah.

24 A. -- are very prominent processors in the
25 Northwest.

1 Q. But in the East, at least in the East
2 they tried and failed, but -- you don't -- you're not
3 familiar with that?

4 A. I don't have any experience there. But
5 they are exceptionally strong in the Northwest.

6 Q. Okay. On marketability at the store
7 level, have you consulted or are you familiar with any
8 studies on grocery store marketing of milk?

9 A. Well, I've been exposed to those studies,
10 yeah.

11 Q. And can you cite to us any that you are
12 relying on for your opinion here today?

13 A. I didn't rely on studies for my opinion
14 today. I think most, if not all, of the opinions I
15 expressed were the result of my interaction with grocery
16 and food service customers.

17 Q. Okay. And I take it then, did you -- you
18 didn't do any studies on producer-handler marketing of
19 their products, or read any?

20 A. Yeah, other than having been in that
21 business myself, I -- I guess I would say that I relied
22 on the same sources, which is experience, that I did on
23 the grocery.

24 Q. Your personal experience?

25 A. That's correct in -- yeah.

1 Q. Are you aware of any studies on the
2 processing and processing costs?

3 A. I've looked at those studies.

4 Q. Okay. Are you relying on any of those
5 today for your opinion?

6 A. I really don't recall expressing an
7 opinion about processing costs.

8 Q. Okay. I take it you're -- you know how
9 to handle financing of businesses. That's one of your
10 expertises?

11 A. Yeah, I'm certainly not a professional
12 level accountant because my degree is history. But
13 that's what I've done in my work history.

14 Q. Yeah. You can learn a lot from history,
15 though, can't you?

16 A. We hope so.

17 Q. You gave us an illustration of the cost
18 of processing plants with 5,000 cows at 7 million at
19 page 7 of your report.

20 A. Yes.

21 Q. Do you know what date that event
22 occurred?

23 A. Yeah, I believe it'd be around 1997.

24 Q. Right. Now, can you give us your best
25 estimate on an updated basis what that plant would cost

1 today?

2 A. You know, I don't think that I have a --
3 an inflation factor to apply. I would say that if I
4 were -- since that example had to do with, you know,
5 sort of comparing that to what a producer-handler would
6 do --

7 Q. Right.

8 A. -- especially in the context of one who
9 might be solicited by a large grocer.

10 Q. Right.

11 A. I'm sure that there would be an inflation
12 factor to apply to that 7 million. However, I would
13 build a much more simple plant that would reduce the
14 cost, the cap X involved, if I was involved in the
15 scenario that was pitched to us, where I assume a grocer
16 would ask for a much more limited product line than that
17 small plant was designed to do.

18 So I -- I don't think that there would be
19 a -- a large net increase in the cap X required.

20 Q. Do you -- are you aware of any studies
21 that would show the cost of a milk plant on erection
22 that's current today?

23 A. I haven't seen that.

24 Q. Okay. Have you helped people or
25 consulted with people getting financing at any time in

1 your recent career?

2 A. I haven't consulted professionally, but
3 I've been involved in a number of finance-related
4 discussions.

5 Q. Now, in view of that, if you wanted to
6 build a milk plant as a producer-handler, and if the
7 lender was faced with the fact that at any point in time
8 whatever benefit that was coming from the pool exemption
9 could be lost, would that -- would that lender, in your
10 opinion, have to seek some additional security of some
11 kind besides the producer-handler exemption in order to
12 finance that plant safely, from their viewpoint?

13 A. Well, I think that would depend, you
14 know, on the sophistication of the lender. As we've
15 seen, there's lots of them that are not real
16 sophisticated. But I don't think I'd go beyond what
17 I've already said when -- if I said that in my opinion,
18 there's more risk. There's a considerable amount of
19 risk involved in the regulatory change, and you would
20 think that that might be the case.

21 Q. Is the Small Business Administration an
22 agency established for the purpose of helping farmers
23 and other people get -- small businesses get loans?

24 A. You know, I've never done anything with
25 them, but from the name one would expect that that's the

1 case.

2 Q. That seems reasonable. Are you familiar
3 with the fact that it's not free money and that they
4 require guarantees?

5 A. Yes.

6 Q. And therefore, if you were to build a
7 milk processing plant as a producer-handler and you
8 would -- you went to the SBA to get a loan -- which
9 would be government assured?

10 A. Uh-huh.

11 Q. -- that you would have to sign some kind
12 of a personal guarantee on that loan?

13 A. Okay.

14 Q. Okay. And do you think that would be a
15 disincentive to building a processing plant?

16 A. Well, it would for me under the
17 circumstances that we're talking about, yeah.

18 Q. Thank you. Now, in --

19 JUDGE CLIFTON: Mr. Carroll, are you
20 about done?

21 MR. CARROLL: Yes. Actually, I'm not too
22 far from it.

23 JUDGE CLIFTON: Okay, good.

24 MR. CARROLL: Would you like me to stop?

25 JUDGE CLIFTON: I would like you to move

1 quickly because of the pressure of the other
2 testimony we still need to take.

3 MR. CARROLL: All right. I'll try to do
4 that.

5 JUDGE CLIFTON: Thank you.

6 BY MR. CARROLL:

7 Q. Were you involved when you were in the
8 milk business with customers at the grocery store level
9 negotiating for price or discussing price?

10 A. I've been involved in those, although
11 that wasn't my primary responsibility.

12 Q. Okay. And on occasion, isn't it so that
13 you or anyone would cut your pricing below your costs in
14 order to get a -- an in with a customer or at least to
15 hold onto the customer?

16 A. Yeah, that's a possibility.

17 Q. What areas did your operation market
18 their products in? You may have said it, I just didn't
19 get it.

20 A. Washington, Oregon, Alaska and a little
21 bit of Montana and Idaho. Did I say Oregon?

22 Q. Did you market overseas over -- outside
23 the continental United States?

24 A. Not that I can recall.

25 MR. CARROLL: That's all. Thank you.

1 JUDGE CLIFTON: Thank you, Mr. Carroll.
2 I appreciate your cutting it a little short.
3 All right. Is there any other cross-examination
4 for Mr. Wilcox? There is none. Redirect?

5 MR. ENGLISH: None, your Honor.

6 JUDGE CLIFTON: Thank you, Mr. English.
7 I appreciate that as well. Thank you so much,
8 Mr. Wilcox. You may step down.

9 THE WITNESS: Well, thank you.

10 JUDGE CLIFTON: Our next witness is
11 Michael Krueger. I'd like to go right into that
12 if everyone's comfortable.

13 MR. ENGLISH: I'm mostly comfortable.

14 JUDGE CLIFTON: Five minutes.

15 MR. ENGLISH: I would like a five-minute
16 break because there is going to be a traditional
17 direct.

18 JUDGE CLIFTON: Sometimes five means ten.
19 Let's take ten so that everyone has time to
20 refresh. Please be back and ready to go at
21 4:03.

22 (A recess was taken from 3:53 to 4:03.)

23 JUDGE CLIFTON: We're back on record at
24 4:07. Would you state your full name and spell
25 it for the record, please?

1 THE WITNESS: Sure. It's Michael
2 Krueger, M-i-c-h-a-e-l, Krueger, K-r-u-e-g-e-r.

3 MICHAEL KRUEGER
4 of lawful age, being duly sworn, was examined and
5 testified as follows:

6 JUDGE CLIFTON: Thank you. Mr. English,
7 you may proceed.

8 MR. ENGLISH: Thank you, your Honor.

9 DIRECT EXAMINATION

10 BY MR. ENGLISH:

11 Q. Mr. Krueger, what's your business
12 address?

13 A. It's 2228 North Black Canyon Highway,
14 Phoenix, Arizona.

15 Q. And could you please provide a brief
16 professional background?

17 A. Sure. I was born and raised and educated
18 in Toledo, Ohio. Relocated to Arizona and joined
19 Shamrock Foods Company in 1978. Began on the food
20 service side of our business, which I can explain in
21 more detail, if you'd like.

22 But I've been associated with the dairy
23 side of the business since the end of 1990.

24 I became senior vice president and
25 general manager for that business in 1994, a position

1 I've held since.

2 Q. And what are your duties as a general
3 manager of Shamrock Foods?

4 A. I have full functional responsibilities
5 for the entire operation, and that includes everything
6 downstream in the supply chain from milk production to
7 serving a variety of customers in all the chains of
8 trade in we do business.

9 Q. Including having direct contact with
10 buyers?

11 A. Yes.

12 Q. Could you give me just a brief background
13 of Shamrock Foods?

14 A. Shamrock Foods Company was started and
15 continues today as a family business, since 1922. It
16 began in Tucson as a dairy business. The family has had
17 both dairy farming as well as milk processing as really
18 core components of their business.

19 Since then, there was a separation of the
20 farming from the processing operations, that occurred
21 back in the 1950s. And they've continued through today
22 as separate entities.

23 On the processing side, which is legally
24 a part of Shamrock Foods Company, an Arizona
25 corporation, the company expanded into broadline food

1 service distribution in the late 1960s, early 1970s.
2 And we have three large distribution centers in Phoenix,
3 Denver, and Albuquerque, New Mexico, supplying about
4 15,000 different items to a full variety of food service
5 operations, meaning restaurants, hotels, hospitals,
6 schools, anywhere away from home where food is served.

7 Q. And does Shamrock also have any farms?

8 A. The family continues to -- to have a
9 farming operation. We're their customer for the milk.
10 It is a separate corporate entity from Shamrock Foods
11 Company, of which the fluid processing plant is the
12 business component.

13 Q. And that's Shamrock Farms?

14 JUDGE CLIFTON: Bless you.

15 Q. That's Shamrock Farms. Sorry.

16 A. Bless you. Shamrock Farms Company is the
17 producing dairy farm operation. Shamrock Foods Company
18 includes the processing business, which I manage as well
19 as the food service distribution businesses of which I
20 referred.

21 Q. Now, turning to the primary issue for
22 this proceeding, which is issues regarding
23 producer-handlers, why are you here today?

24 A. First and foremost, to preserve the
25 limit -- to limit on the exemption to producer-handlers,

1 which was achieved through -- through the hearings that
2 took place in 2003, 2004 and the final rule that was
3 issued by the Department in 2006.

4 Secondly, because of one competitive
5 entity that has been limited by that ruling but has now
6 moved on to another geography that's adjacent to ours
7 and opened a new producer-handler operation, taking
8 advantage of the -- of the exemption that he has there,
9 that that gives that entity potentially a great deal of
10 strength which can be channeled back against us in our
11 market.

12 So I don't have a particular problem with
13 the -- with the existence of a -- of a producer-handler
14 exemption, but I -- I find it to be absolutely
15 incompatible with -- with having a market order system
16 that all the other players are required to operate
17 under. So there is a competitive advantage that exists
18 with being exempt that makes it untenable in the long
19 run, in my opinion, for entities to operate under the
20 system, to co-exist with entities which are exempt from
21 the system.

22 Q. And what is the nature of that advantage?
23 We've heard a lot about it, but from your testimony what
24 is the nature of that advantage?

25 A. The nature of the advantage is cost. The

1 reality for every entity that operates under the system
2 is that their cost for fluid milk is at a minimum, the
3 Federal Order Class I.

4 And the cost of milk for an exempt entity
5 is their cost of producing milk at the farm. And, you
6 know, the current situation is pretty interesting,
7 because currently it would not favor producer-handlers.
8 The cost of producing milk at the farm is -- is less
9 than -- certainly less than the blend is providing in
10 most orders.

11 But on a historical basis, whenever
12 there's profit -- which -- which there has to be in
13 order to sustain milk -- milk production.

14 I mean, let me back up. If the current
15 situation were to continue for the long run, we could
16 all go home because there wouldn't be any milk for any
17 of us to process, because nobody is being rewarded by
18 the current marketplace for the production of that milk.

19 But if -- if there is a profit to be made
20 on the producer's side, the exempt producer-handler
21 entity has a lower cost for that milk than a regulated
22 handler that's paying the Class I minimum price.

23 Q. Let me just go back just for a second. I
24 think you may have meant something else. I think you
25 said in the present circumstance the cost of production

1 is less than the blend. Did you mean to say that the
2 cost of production is less than the blend?

3 A. No, I did not. Cost of production
4 currently is greater than the blend.

5 Q. Okay.

6 A. Excuse me.

7 Q. Even when the cost of production is
8 greater than the blend, does the producer-handler
9 nonetheless have any kind of advantage on the processing
10 side versus regulated entities because of the nature of
11 its -- it's unregulated?

12 A. I'm sorry, ask -- ask the question again.

13 Q. Even when the cost of production at the
14 farm is higher than the blend price, is there
15 nonetheless an advantage for the producer-handler over
16 regulated entities?

17 A. Well, there could be depending on what
18 the -- on what the relationship is between the cost of
19 production in the blend versus the Class I price. So
20 there still could be an advantage. There could be less
21 of a loss in that case for -- for a producer-handler.

22 Q. Do you have any reason to believe that
23 your costs of production on your farms, Shamrock Farms,
24 are any different from the farms of similar size in the
25 Arizona market?

1 A. No.

2 Q. Now, to be clear, when you said that
3 there's this inequity, what is threatened here? What
4 ultimately is threatened here?

5 A. I believe the Order itself is threatened.
6 Again, I think Mr. Wilcox testified accurately that --
7 that consolidation has taken place in the primary
8 industry that milk processors serve and the primary
9 segment of the industry where most fluid milk is sold.
10 Buyers are -- for the large grocery stores and mass
11 merchandisers are very sophisticated.

12 And as has been testified previously
13 today, they have as great of an understanding of the
14 cost components that we have in our businesses as many
15 of us in the processing business have.

16 There's also a reality that none of the
17 relatively few players in the retailer supermarket
18 business and the mass merchandiser business can afford
19 to allow any of their competitors to gain a significant
20 competitive advantage.

21 And whenever they identify, through
22 whatever means, whether it's in this particular case or
23 whether it's because of better business practices or
24 whatever the case may be, whenever they identify that a
25 competitor has been able to gain an advantage in cost,

1 the reality for their own respective survival is that
2 they have to move quickly to -- to mitigate that
3 advantage. No one -- no one can compete in today's
4 world and accept paying a higher cost than their primary
5 direct competitors, whether you are in the mass
6 merchandising business or the supermarket business or in
7 the milk processing business.

8 Q. And to be clear, is that actually what
9 happens in the dairy business?

10 A. That is exactly what happens in the dairy
11 business.

12 Q. Now, let's just briefly discuss the
13 Arizona area, marketing area, for a moment. And I mean
14 in terms of your competition and what the market looks
15 like. Who are the processing entities in Arizona?

16 A. There are four primary fluid milk
17 processing entities. Kroger, under the Fry's and
18 Smith's banners, is a processor supplying essentially
19 their own stores.

20 Safeway is a significant player in the --
21 in the Arizona market. They have a fluid milk
22 processing plant. They have been able to develop some
23 external business in addition to that which they supply
24 to their own stores.

25 There's Sarah Farms out of Yuma, which up

1 through April of 2006 was an exempt producer-handler.
2 And there's Shamrock Foods Company, doing business as
3 Shamrock Farms, in the Arizona market.

4 Q. Just to be clear, Sarah Farms was
5 operating as a producer through March of 2006, correct,
6 and then April 2006 it became regulated?

7 A. Correct.

8 JUDGE CLIFTON: May I get the spelling of
9 Fry's?

10 THE WITNESS: Well, F-r-y, apostrophe s.

11 JUDGE CLIFTON: Thank you. And I think I
12 know Kroger. Is it K-r-o-g-e-r?

13 THE WITNESS: That's correct.

14 JUDGE CLIFTON: Thank you.

15 A. No "e" in that one.

16 Q. Now, who do you view as your main
17 competition in Arizona?

18 A. The primary competitor that we have is
19 Sarah.

20 Q. And why is that?

21 A. Both the Kroger plant as well as the
22 Safeway -- Safeway plant are primarily focused on their
23 own stores. Safeway has been successful in developing
24 some limited business beyond that which goes into their
25 stores. But it's relatively limited. And so all of the

1 other opportunities for milk sales to include both the
2 balance of the retail supermarket channel, the mass
3 merchandiser channel, the convenience store channel, the
4 food service channel, Sarah Farms and Shamrock are the
5 primary competitors seeking that business.

6 Q. And you're vigorous competitors?

7 A. Very vigorous.

8 Q. Now, prior to the adoption of the
9 regulation effective April 2006 there was a
10 rulemaking -- I'll make it very short. There was a
11 rulemaking and you testified at that proceeding
12 yourself?

13 A. I did.

14 Q. And did you express a concern about a
15 level playing field at that proceeding?

16 A. I did.

17 Q. And what was it you were concerned about
18 at that proceeding?

19 A. Again, the awareness of the largest
20 customers in the -- in the marketplace, of the
21 advantages which an exempt entity would have over the
22 long haul against a regulated entity, and the fact that
23 all of the customers had become aware of that
24 competitive inequity and were putting pressure in order
25 to -- to make certain that they were buying milk at or

1 below any of their respective competitors, that they
2 were seeking to take advantage of the fact that there's
3 a better way of doing it.

4 Q. And you believed and testified then that
5 at that time you were losing business to Sarah Farms
6 based on price, is that correct?

7 A. That is correct.

8 Q. Now, USDA, as we noted, adopted for
9 April 2006 a limitation on the size of producer-handlers
10 in this market and also the Pacific Northwest, correct?

11 A. That is correct.

12 Q. At the time did you hear testimony -- at
13 the time of the hearing, did you hear testimony that
14 adoption of a 3 million pound limit would put
15 producer-handlers in Arizona and the Pacific Northwest
16 out of business?

17 A. I did.

18 Q. What, in fact, has happened in those
19 markets, to your knowledge?

20 A. Well, the only market that -- that I can
21 speak with -- with any firsthand knowledge of is the
22 Arizona market. I am aware that the Hettinga family has
23 two different processing businesses there. I think it's
24 called -- G&H was set up to supply milk into California.
25 I really have no direct awareness of how G&H is doing,

1 whether their business is growing. I don't know. I
2 can't testify to that.

3 But, again, Sarah Farms, the -- the other
4 plant in Yuma, we are vigorous competitors with each
5 other on a daily basis. And I'm quite aware that
6 they've continued to -- to be every bit as vigorous a
7 competitor today as they have at any time in the past.

8 Q. Now, have you done any kind of analysis,
9 maybe static or otherwise, with respect to your view in
10 the industry of what size Sarah Farms is, approximately?

11 A. Yes.

12 Q. And, first, what data have you relied on
13 in that study?

14 A. First of all, we use the market
15 administrator reports that are issued on a monthly basis
16 to -- to identify the overall Arizona market, both pool
17 plant business, the other plant business, which is
18 primarily coming in from California. It's about
19 5 million pounds a month. And we keep very close tabs
20 on every customer in the marketplace in terms of who's
21 supplying them and what's happening with them and what
22 the store counts are.

23 We call on every customer in the
24 marketplace, whether we have their business or not. We
25 have a relationship with every single entity that's

1 selling milk in the Arizona marketplace.

2 Q. I'll get back to that piece in just a
3 moment and I'll try to keep it relatively short. Is it
4 true that the market administrator publishes monthly
5 data that you could look at, and did look at, for a
6 change between March and April of 2006?

7 A. Yes.

8 Q. And what did you look at -- first, what
9 did you look at from that data?

10 A. We looked at the difference in -- in the
11 other plant volume, which previously had included the --
12 the producer-handler volume as well, and looked at the
13 change that occurred in that volume going from March to
14 April.

15 Q. And what was that -- that change?

16 A. The change was approximately a 17 million
17 pound reduction in April as compared to what had been
18 reported for March.

19 Q. Now, did you look at any other public
20 information that may have been made available by Sarah
21 Farms in the public record?

22 A. The other awareness I have that -- and
23 the 17 million pounds was -- was approximately what we
24 had identified through being in the marketplace, doing
25 business in the marketplace, knowing the marketplace,

1 knowing who the customers were and who was serving them
2 and making reasonable estimates as to what kind of
3 business each of those respective retail outlets was
4 doing.

5 I believe in the previous record I
6 testified that we estimated Sarah Farms to be doing
7 about 17 million pounds a month. And so that was
8 confirmed.

9 And then Sarah Farms has filed a suit
10 wanting to reclaim the -- the payment that they were
11 required to make under the -- under the final rule into
12 the market order for the month of April. And that was,
13 if I remember, 340,000 something dollars.

14 Q. 324,000, if that's what the record shows?

15 A. Right. And if you divided that amount by
16 the \$1.91 differential that existed between the blend
17 for the orders and Class I for that particular month,
18 which would have been their operation, it was about
19 17 million pounds.

20 Q. That's a quick calculation that may
21 actually be conservative, correct? It could actually be
22 higher than that?

23 A. Potentially, yes.

24 Q. So for your part, you now have three data
25 points, one from the market administrator's reports

1 showing a drop of other order plant volume, which --
2 from March to April -- meant that the Sarah Farms'
3 operations is no longer at that volume of around 17
4 million, correct?

5 A. Correct.

6 Q. Your prior testimony, based upon your
7 market intelligence, was that it was 17 million,
8 correct?

9 A. Correct, correct.

10 Q. And a lawsuit that Sarah Farms filed
11 seeking a refund of the producer settlement amount, when
12 you did the math on that, that came out to about
13 17 million?

14 A. Correct.

15 Q. So you conclude what?

16 A. At that time they were doing about
17 17 million pounds a month.

18 Q. Now, did you have a view that you
19 testified about with respect to why you lost business to
20 Sarah Farms prior to adoption of the rule effective
21 April 2006?

22 A. Yes.

23 Q. And what was that view?

24 A. The loss of business was always due to
25 price. Because at no time did we lose business -- did

1 we lose the entire customer relationship. We continue
2 to maintain relationships with every one of those
3 customers. But we lost pieces of business, particularly
4 on private-labeled gallons of milk, because of price.
5 We were not able to meet the price that they were
6 offering.

7 Q. Have you -- did you -- did you, prior to
8 the change in the rule effective April 2006, get
9 business back from Sarah Farms?

10 A. Yes, we did.

11 Q. And did you have a view about why you got
12 business back from Sarah Farms?

13 A. Yes.

14 Q. And what is that view?

15 A. That there were instances where Sarah
16 Farms was not able to meet the customers' expectations
17 for either quality or service, which enabled us to
18 recover the business, even though our price was not as
19 low as the price that Sarah Farms was then selling those
20 particular customers.

21 Q. And as you've testified, you obtained a
22 solution for the Arizona market, correct?

23 A. Correct. Both a regulatory solution as
24 well as a legislative solution.

25 Q. There has been some discussion at this

1 proceeding with respect to what some call a soft cap
2 solution. First, could you describe what you understand
3 a soft cap to be?

4 A. I understand a soft cap to be a -- I
5 understand it really to be a compromise solution whereby
6 there would be an award or an allowance for some
7 increment of milk to be either exempt or -- or cost at
8 less than the obligation to the -- to the pool should be
9 for that particular month. And that in no way would
10 have limited the size of the entity that would realize
11 the soft cap.

12 So, you know, in the case of this
13 particular entity that we're talking about, if their
14 business were still at 17 million pounds a month, if
15 there were a soft cap of 3 million pounds or
16 5 million pounds or a million pounds, it doesn't matter,
17 that there would still be -- for that increment, there
18 would be an advantage that they would have by edict or
19 decree on every other regulated entity in the market. I
20 would describe that as being slow death rather than
21 sudden death.

22 Q. And even if the 3 million pounds would be
23 own exempt milk and there was no allocation issue that
24 had adversely affected you, given that Shamrock has its
25 own farms, what would Shamrock's position be about such

1 a provision?

2 A. That -- that it's still an inequitable
3 attempt to solve a problem that we do not favor at all.

4 Q. Again, how is your market, milk market,
5 working together in terms of competition?

6 A. It's vigorously competitive.

7 Q. What does that say about the need for the
8 producer-handler exemption above a 3 million pound
9 level?

10 A. It would strongly suggest that it's not
11 necessarily certain to maintain benefit at the consumer
12 level or at the customer level. And having a vigorous
13 competitive market with a great value opportunity for
14 buyers of milk.

15 Q. Are you advocating -- leaving aside
16 whether change can happen in the Arizona market for the
17 MREA, but are you even advocating that there be a
18 change? That is to say, eliminate the cap or a
19 modification of the cap with respect to Arizona?

20 A. We are advocating for change to the
21 current limit of 3 million pounds that exists for
22 Arizona.

23 Q. And why -- that's a position a little
24 different from some others in the room that might
25 otherwise be where you are as a fluid milk entity. Why

1 do you take that position?

2 A. I listened to the testimony this morning
3 from the folks from Wisconsin and Vermont and I listened
4 to the producer-handler from Missouri. And I really --
5 I really see their situation as being different from --
6 from one that is -- is seeing the exemption as an
7 opportunity to exploit the market and to -- to
8 really take advantage of that for unlimited market
9 growth.

10 I see that -- that, you know, there have
11 existed for, I guess nearly 80 years now,
12 producer-handlers that have been small family
13 operations. And we don't have -- we at Shamrock don't
14 see any particular need nor desire to eliminate that
15 exemption opportunity for them to continue.

16 I was intrigued by -- by the circuit
17 breaker clause in there that would -- would also prevent
18 someone from scheming or gaming any exemption which
19 continued to exist, and aggregating some number of
20 producer-handlers somehow in order to aggregate a
21 significant market share position.

22 But I see that as really an entirely
23 different application of the -- of the exemption and the
24 history of -- of producer-handlers than I see entities
25 that are -- that are looking to fully exploit and take

1 advantage of the -- of the cost advantage that being
2 exempt from the order system provides to -- to grow
3 their market at the expense of those entities that are
4 operating within the system.

5 Q. Do you have anything further to say at
6 this time?

7 A. No.

8 MR. ENGLISH: Your Honor, that completes
9 my examination of the witness. He's available
10 for cross-examination.

11 JUDGE CLIFTON: Thank you.
12 Cross-examination for Mr. Krueger. Who would
13 like to begin? Mr. Miltner.

14 CROSS-EXAMINATION

15 BY MR. MILTNER:

16 Q. Good afternoon, Mr. Krueger.

17 A. Good afternoon.

18 Q. Were you here to hear Mr. Rovey's
19 testimony yesterday?

20 A. I was not.

21 Q. Okay. You testified that there was a --
22 a lengthy process going back several decades to address
23 producer-handlers in Arizona. And since you detailed
24 your lengthy experience with Shamrock Foods Company,
25 have there -- have there always been larger

1 producer-handlers in that marketing area even predating
2 Sarah Farms?

3 A. You know, I don't know if there have
4 always been. I'm aware of -- there was an entity back
5 in the -- in the early '90s that was operating as
6 Heartland Farms. And there was a hearing about their
7 existence. And they ended up, I believe, if memory
8 serves correctly, losing that status because they
9 were -- they were buying milk on the outside. And then
10 Sarah Farms is really the only other entity that I've
11 been aware of in the near 20 years now that I've been
12 involved with the -- with the dairy business.

13 And we've been aware of them since --
14 since the mid '90s. And as the people in USDA will --
15 will be able to attest, we had a very long, drawn-out
16 effort to bring to hearing the whole matter of the --
17 but what we were describing was the disruptive marketing
18 that was resulting from Sarah Farms' existence in the
19 Arizona market.

20 Q. And would you describe the Arizona milk
21 market as relatively stable in terms of the -- the
22 number of players involved?

23 A. You know, I'm not sure, especially if you
24 take a longer-term view, that I would describe any --
25 any market or any competitive set as being stable. I

1 mean, consolidation is -- you know, particularly in
2 markets with -- with maturity, I don't care whether you
3 are talking about fluid milk or the number of grocers
4 that are operating or the number of breweries that are
5 operating. I mean, you name it, particularly from a --
6 from a mature consumer goods standpoint, consolidation
7 is -- is reality. And so we have fewer customers that
8 we're able to sell to today. There are fewer of us in
9 the processing business today than there were back in
10 the early '90s when I started.

11 So, you know, I don't know what stable
12 is.

13 Q. Just as the number of farms and
14 cooperatives have gotten fewer and larger, the number of
15 processors has gotten fewer and larger, is that --

16 A. That is correct.

17 Q. -- how you characterize the Arizona
18 market? Other than Sarah Farms, which began as a
19 producer-handler, who were your competitors for the
20 markets that you had served? You said Sarah Farms was
21 your primary competitor. But in 2003, who else was
22 competing with you on a regular basis for sales?

23 A. I think only Sarah Farms primarily.

24 Q. How about in 2000?

25 A. I'm not sure of the timing of -- of

1 Kroger acquiring Smith's. And Kroger had the Jackson
2 plant, which is at Glendale and 19th Avenue in Phoenix.
3 Smith's had entered the market. Smith's market out of
4 Salt Lake City had entered the Arizona market and built
5 a distribution center and milk processing plant.

6 So when Kroger acquired Smith's, they
7 shuttered their plant, which was really quite old by
8 comparison, and consolidated all of their milk
9 processing into the Smith's plant.

10 So I'm not sure in 2000 whether that had
11 occurred yet or not. It was around that time that it
12 occurred.

13 Q. And as you stated, Kroger became a
14 captive plant supplying only its own stores?

15 A. Correct.

16 Q. And the competitive advantage you
17 described that you stated a producer-handler had, that
18 Sarah Farms had in Arizona, was that it would acquire
19 its milk at the cost of production?

20 A. Correct.

21 Q. And you acquired yours at the Class I
22 price?

23 A. Plus whatever over-order premiums were in
24 effect. But certainly for -- for, you know, matters
25 relevant to this proceeding, I think the key point of

1 difference is the cost of producing milk versus the
2 costs required under the Federal Order system for Class
3 I.

4 Q. So it's the cost of production versus the
5 cost of Class I for regulated. Okay.

6 Are you familiar with the concept of
7 individual handler pools?

8 A. Not really.

9 Q. Okay. Under an individual handler pool,
10 a handler such as Shamrock Foods would pay each of its
11 supplying producers a plant blend price and there would
12 be no marketwide pooling of milk. And the alliance that
13 I represent has offered that as Proposal Number 26 in
14 this proceeding. Does your company have an official
15 position on that proposal?

16 A. We most certainly do not. And I have not
17 reviewed that proposal, nor do I have any basis to offer
18 an opinion on it.

19 Q. Okay. Thank you.

20 JUDGE CLIFTON: Who would next like to
21 cross-examine Mr. Krueger? Mr. Ricciardi.

22 CROSS-EXAMINATION

23 BY MR. RICCIARDI:

24 Q. Al Ricciardi for AIDA. Mr. Krueger, you
25 testified about your projection of farm costs for Sarah

1 Farms, I believe, being comparable to the costs of the
2 Shamrock Farms operation. What is the size of the
3 operation?

4 A. At Shamrock Farms?

5 Q. Yes, sir.

6 A. They're milking 10,000 cows.

7 Q. And is the -- the full amount that's
8 produced by Shamrock Farms utilized by Shamrock Foods?

9 A. Yes.

10 Q. And can you tell me what the current cost
11 of production is at Shamrock Farms?

12 A. I cannot.

13 Q. Do you know?

14 A. I do not.

15 Q. Do you know whether or not the cost of
16 production at Shamrock Farms is greater than or less
17 than the current blend price in Arizona?

18 A. I would -- I would speculate if I gave an
19 answer, so I will say that I do not know.

20 Q. Where does Shamrock Foods sell its milk?

21 A. Where, geographically, or where from a
22 customer-style type?

23 Q. Let's take geographically first.

24 A. We actually have sales in all 50 states.
25 And I was even told our milk products were found in

1 Aruba.

2 Q. I haven't gotten there to Aruba to be
3 able to check that out for you, but I have been in some
4 other states, and I did find your milk.

5 A. Good, I hope you bought it.

6 Q. Well, that's another issue which we'll
7 talk about afterwards, and has nothing to do with the
8 quality of your milk.

9 And one of the reasons that you find your
10 milk in all 50 states is because you've got a national
11 agreement with Subway to supply them with the milk
12 chugs.

13 A. No. Chugs is a trade dress name that's
14 owned by Dean Foods.

15 Q. You're correct.

16 A. Shamrock Farms has no chugs for sale, nor
17 any products that it describes or defines as chugs.

18 Q. I understand that. Tell me how you
19 describe the product that I'm trying to find the name
20 for?

21 A. Well, we have single serve milk beverage
22 products that are sold to a variety of customers
23 throughout the 50 states. Subway, as you mentioned, is
24 one of those customers, yes.

25 Q. And in Arizona you serve a number of both

1 local supermarkets and other supermarkets?

2 A. Yes.

3 Q. Okay. And one of the group of local
4 stores, we haven't heard their name, and I'm going to
5 have to spell it now, is Bashas', B-a-s-h-a apostrophe
6 s. I think it's apostrophe s.

7 A. It's actually s apostrophe.

8 Q. S apostrophe, I apologize. That's one of
9 the stores, the local supermarkets chains, that you
10 serve?

11 A. Correct.

12 Q. And you compete for at least some of that
13 business with Sarah Farms?

14 A. Yes.

15 Q. Now, you have, since April of '06,
16 actually lost some business to Sarah Farms, correct, or
17 some customers?

18 A. Yes, we have lost some business to them
19 since then.

20 Q. And you've testified that after April '06
21 that Sarah Farms had lost some business to Shamrock,
22 also?

23 A. I don't believe I testified to that.

24 Q. Okay. So that I'm clear then, since
25 April of '06, there have not been any customers that

1 have left Sarah Farms to go to Shamrock Food -- Shamrock
2 Foods? Excuse me.

3 A. I can't identify any. I'm -- I'm not
4 testifying that we've not taken any customer away from
5 Sarah Farms.

6 Q. But right now, sitting here in the
7 witness stand today, you can't identify --

8 A. I'm not -- I'm not thinking of any major
9 piece of business that we've been able to take. It's
10 not that we're not trying.

11 Q. That I understand. Sarah Farms is a
12 family operation, to your knowledge?

13 A. To my knowledge, yes.

14 Q. Yes. Owned and operated by the head of
15 the family, in particular Hein, H-e-i-n, Hettinga,
16 H-e-t-t-i-n-g-a, and his son, Gerben, G-e-r-b-e-n,
17 Hettinga. Same spelling, right?

18 A. Yes.

19 Q. A couple of other things. You testified
20 that you also -- and I didn't write it down exactly but
21 I'll be close, obtained a, quote, legislative solution,
22 close quote?

23 A. Yes.

24 Q. That was your testimony?

25 A. Yes.

1 Q. Do you know what the cost was of the
2 legislative solution that you obtained?

3 A. I --

4 Q. How much did you have to pay for it?

5 A. I haven't understood that legislation was
6 something that you bought.

7 Q. Okay. That's fine.

8 JUDGE CLIFTON: Who will be the next
9 cross-examiner of Mr. Krueger?

10 MR. RICCIARDI: Your Honor, thankfully
11 somebody is looking out for me.

12 JUDGE CLIFTON: Mr. Ricciardi.

13 MR. RICCIARDI: One point. Sarah Farms
14 is actually owned by Hein Hettinga and his wife,
15 Ellen Hettinga.

16 THE WITNESS: Oh.

17 MR. RICCIARDI: And to the extent I
18 misspoke, I apologize.

19 JUDGE CLIFTON: Is her name Helen or
20 Ellen?

21 MR. RICCIARDI: Ellen.

22 JUDGE CLIFTON: Ellen, E-l-l-e-n?

23 MR. RICCIARDI: Correct.

24 JUDGE CLIFTON: Thank you.

25 MR. RICCIARDI: You're welcome.

1 JUDGE CLIFTON: All right. Mr. Tosi, do
2 you have any questions for this witness?

3 MR. TOSI: Yes, I do, your Honor.

4 CROSS-EXAMINATION

5 BY MR. TOSI:

6 Q. Thank you for coming in, Mr. Krueger.
7 You really came a long way.

8 A. You're welcome.

9 Q. There's a proposal notice -- I believe
10 it's Number 24 -- that proposes that if a
11 producer-handler maintains control over his or sells his
12 milk through his own stores or delivered on home
13 delivery, that there would -- that there would be no
14 limit placed on a producer-handler engaging or doing
15 business in that way. Do you have -- do you or Shamrock
16 Farms have a position on that?

17 A. I do not. I apologize that we haven't
18 reviewed all of these proposals and formulated positions
19 on them. Again, I -- hopefully I stated with some
20 clarity our feeling that, you know, from our standpoint
21 limitation of a producer-handler exemption categorically
22 is not something that we're pursuing.

23 I think that there continues to be, as --
24 as I mentioned and was describing earlier today, some
25 very good examples where we would be supportive of that

1 exemption continuing, but where -- and -- and -- and so
2 I think, you know, where I'm comfortable in having a
3 line drawn is based on volume. You know, whether that
4 line should be at 2 million pounds or 3 million pounds.

5 You know, certainly in our market, you
6 know, our opinion is that 3 million pounds is a
7 reasonable limit to separate entities from -- that were
8 previously described today -- to continue to operate
9 where -- where their requirement of the rest of the --
10 of the marketplace and of the pool for balancing is --
11 is not significant, where their depression of the
12 uniform blend that's shared by all producers is -- is
13 not particular -- particularly significant and where, by
14 definition, their ability to continue to grow to really
15 be a substantial factor in the market is -- is by
16 definition not -- nonexistent.

17 So, you know, I'm not uncomfortable with
18 having a volume limitation like the 3 million pounds
19 that -- that was implemented for Arizona.

20 You know, I don't know what the future
21 holds for home delivery, or you know, any other, you
22 know, kind of unique or differentiated kind of
23 go-to-market strategy.

24 If -- you know, it would seem that home
25 delivery might be an unlikely big boom growth

1 opportunity. But if that's where the marketplace ended
2 up, you know, I would hate that we would all be back
3 here because we created this -- this loophole for home
4 delivery.

5 And I can't claim to be smart enough to
6 figure out, you know, what almost opportunities might
7 exist for the -- for the milk industry. So I would
8 be -- I would be hesitant about carving out a particular
9 type of business.

10 But I am comfortable with -- with using
11 size as a bright line for whether an entity could be
12 exempt or should be exempt, or whether they ought to
13 contribute to the pool, because their failure to do so,
14 in fact, allows them to be predatory in -- in growing
15 their market share and at the expense of -- of every
16 other entity that's participating in that market.

17 Q. Okay. I think I understood what you
18 said. To the extent that if the Department would
19 decide, for example, to set an upper limit on the size
20 of a route distribution on a producer-handler, what
21 would be your thoughts with respect to the need to
22 increase the exemption from 150,000 pounds to
23 450,000 pounds for exempt plants?

24 A. I don't have any objection to that.

25 Q. Okay. Thank you. That's all I have.

1 Again thank you for you appearing.

2 A. Well, thank you.

3 JUDGE CLIFTON: Thank you, Mr. Tosi. Any
4 redirect, Mr. English?

5 REDIRECT EXAMINATION

6 BY MR. ENGLISH:

7 Q. Thank you, Mr. Ricciardi, because he
8 reminded me. It opened the door to this. The Bashas'
9 stores that you -- at least one time share or may still
10 share to some extent with Sarah Farms, was that
11 happening pre-April 2006 as well?

12 A. Well, it was.

13 Q. And did Bashas' have a private label that
14 both you and Sarah Farms sold under into that store?

15 A. Yes.

16 Q. In those stores?

17 A. Yes.

18 Q. Was that an identical label?

19 A. Yes.

20 Q. And was it your view that you were
21 balancing Sarah Farms in that store?

22 A. Yes.

23 Q. Because the label was the same, the
24 private label was the same?

25 A. Yes.

1 Q. And so do you have a view about that kind
2 of situation, not preventing somebody from using their
3 own label, but that kind of situation with respect to
4 producer-handlers?

5 A. Right. It was -- I recall that
6 particular situation when -- when there was discussion
7 this morning, and I think it was -- it was the -- I
8 think it was the young man from Missouri that was
9 talking about his family business. And there was a
10 question about -- about the labels and whether there
11 should be an opportunity for shared labels to be used.

12 And I think, you know, that, you know,
13 understanding that potentially shared labels open the
14 door for gaming the system and for putting entities that
15 are operating under the market order to balance entities
16 that are exempt from the market order. I think that
17 that needs to be looked at very carefully to make sure
18 that that opportunity does not exist.

19 And Mr. Wilcox also described where, in
20 both their experience as a regulated handler as well as
21 their experience as a producer-handler, the ease with
22 which balancing can occur, even without the direct
23 participation or involvement of the producer-handler
24 entity, simply by having them supply a label, which is
25 also supplied by one of the entities that are -- that

1 are under the order.

2 Q. So to the extent that National Milk and
3 -- or actually National Milk, I guess also AIDA has a
4 exempt plant. To the extent that kind of proposal is
5 out there, what is your opinion about that?

6 A. To the extent that it would limit or
7 forbid a shared label, I would agree with that.

8 Q. All right.

9 MR. ENGLISH: That's all I have, your
10 Honor, in which case I think the witness may be
11 excused.

12 JUDGE CLIFTON: Mr. Krueger, your
13 testimony was very valuable and I appreciate
14 your being here. Thank you. The next witness
15 is Gary Latta. I'm prepared to go right in. Do
16 we need to go off record for a moment,
17 Mr. English?

18 MR. ENGLISH: No, your Honor. I'm
19 passing out the testimony.

20 JUDGE CLIFTON: Oh, excellent. I would
21 mark this document with our next number. It
22 would be Exhibit 40.

23 (Exhibit 40 was marked for
24 identification.)

25 THE COURT: Now, Mr. English, will --

1 will people have already had the opportunity to
2 see this or did they just get it?

3 MR. ENGLISH: Okay. The only people who
4 just received it were the government tables,
5 your Honor, and the court reporter. I believe I
6 mentioned it before lunch or something, and you
7 even asked whether anybody else needed a copy
8 that I had passed out copies to most of the
9 interested persons that I knew in the room. I
10 may have missed one or two. I apologize. But
11 we did -- I believe that the people who are
12 participating, certainly actively in this
13 proceeding, all have had a copy since lunch.

14 JUDGE CLIFTON: All right. Is there
15 anyone that needs to sit near a copy who doesn't
16 have one to look on? No one responded. I think
17 we're good to go.

18 All right. Mr. Latta, am I pronouncing
19 your name correctly?

20 THE WITNESS: Yes.

21 JUDGE CLIFTON: Good. I would like you
22 to state and spell it. And then I'll swear you.

23
24 THE WITNESS: My name is Gary Latta,
25 L-a-t-t-a.

1 JUDGE CLIFTON: Yeah, it's got to be
2 right close to your mouth.

3 THE WITNESS: How's that?

4 JUDGE CLIFTON: Only if you lean into it.

5 MR. ENGLISH: I think that may be getting
6 in the way.

7 THE WITNESS: Better?

8 JUDGE CLIFTON: Oh, excellent. All
9 right. Starting again, please, with your name.

10 THE WITNESS: My name is Gary Latta,
11 L-a-t-t-a.

12 JUDGE CLIFTON: Thank you. Would you
13 raise your right hand, please?

14 GARY LATTA
15 of lawful age, being duly sworn, was examined and
16 testified as follows:

17 JUDGE CLIFTON: Thank you. Mr. English,
18 you may proceed.

19 DIRECT EXAMINATION

20 BY MR. ENGLISH:

21 Q. Mr. Latta, just a couple of questions
22 first. Some people in the room may know you, some may
23 not. How long have you been involved in the dairy
24 industry?

25 A. Approximately 25 years.

1 Q. And you're presently the director of
2 industry relations for the Northeast Dairy Foods
3 Association, correct?

4 A. Correct.

5 Q. And prior to that time, not to go too
6 far, but the last two employers within the dairy
7 industries, if you could?

8 A. Crowley Foods and H.P. Hood.

9 JUDGE CLIFTON: I'm sorry. I can't even
10 hear you and I'm right next to you.

11 A. Crowley Foods and H.P. Hood.

12 Q. And have you testified at Federal Order
13 proceedings in the past?

14 A. Yes.

15 Q. You've attended a number of proceedings?

16 A. Yes.

17 Q. Why don't you proceed with your
18 testimony, sir?

19 A. I am here today to make comments
20 regarding this public hearing to discuss proposed
21 amendments to the producer-handler and exempt plant
22 provisions in all Federal milk marketing orders on
23 behalf of the Northeast Dairy Foods Association,
24 Incorporated. The Northeast Dairy Foods Association
25 Incorporated is a full-service member trade association

1 representing dairy processors, manufacturers, and
2 distributors doing business in the eight Northeast
3 states and in some cases all of the Federal Orders. We
4 have been in existence since 1928 and are headquartered
5 in Syracuse, New York. We have 112-members that include
6 very small Mom and Pop businesses to large national
7 companies. I would like to provide you with the
8 following comments that have been approved by our board
9 of directors.

10 Our association supports the USDA Federal
11 Milk Market Order (FMMO) system. The Federal Milk
12 Market orders provide the dairy industry, from producer
13 to consumer, a program that helps to ensure a viable
14 milk supply at uniform prices for producers with
15 opportunities for processors, manufacturers, and
16 distributors to deliver finished dairy goods to retail
17 outlets. It also helps to provide consumers with a
18 stable variety and availability of quality dairy
19 products at market driven competitive prices.

20 Wherever there are proposed changes to
21 the FMMO system, our association is concerned they could
22 lead to competitive advantages or distance for both
23 dairy producers and for companies in our association.
24 The proposed changes to the producer-handler and exempt
25 plants provisions have opened a Pandora's box.

1 We do not support changes to the FFMO
2 program when they allow through either intended or
3 unintended regulation the ability of a company to have a
4 disproportionate advantage in either milk procurement
5 you relate or marketplace costs.

6 We support the growth of any new
7 individual or corporation that enters the dairy industry
8 processing, manufacturing or distributing business.
9 Competition is important for the viability of any
10 industry and is especially essential for the dairy
11 industry. The current provision that allows a
12 individual producer-handler to be exempt from the
13 pooling provision of Federal orders is out dated. It
14 has become outdated because of improved dairy
15 technologies and efficiencies that were not present when
16 the provision was originally created. It is our
17 association's position that all processors of milk,
18 cheese, ice cream or any other dairy products who sell
19 into a Federal Order should participate in the producer
20 payment pool. We do not believe there should be any raw
21 milk payment exemptions or advantages given to any
22 business that competes in the open marketplace. This
23 includes any milk producer who may own a processing or
24 manufacturing plants or those who do operate a plant
25 that do not own their own herds. Although, given the

1 tradition, history, and original intent and politics of
2 the current exemption sales regulation, we would agree
3 and concede some compromise could be warranted. We
4 would support the current limit of 150,000 pounds of
5 milk that is sold by any type of plant in any Federal
6 order area to be exempt from pooling. It is our opinion
7 the 150,000 pounds limit should not be exceeded and this
8 is especially true for the Northeast Order 1 for the
9 following reasons:

10 The Northeast Order by far has the
11 largest number of producer-handlers and exempt plants in
12 the nation. For March 2009 there were 13
13 producer-handlers in the Northeast Order and 39 exempt
14 plants. In all Federal Orders, there were 37
15 producer-handlers and 110 exempt plants. This means the
16 Northeast Order has 35 percent of the producer-handlers
17 and 33 percent of the entire exempt plants alone. If
18 you look at the attached map and location index of the
19 Northeast marketing area pool handler locations, dated
20 February 2009, you will notice I've highlighted the
21 widely dispersed locations of producer-handlers in pink
22 and the exempt plants in blue. These companies are
23 located all throughout the Northeast Order 1 and are
24 successfully competing in the marketplace with
25 traditional handlers. They have the opportunity to sell

1 to both large and small customers and in large and small
2 population centers unlike other orders where their
3 territory is much larger with much less population.

4 I would like to provide you with some
5 basic statistics that will support our position.

6 Producer sales volume in the eight orders
7 reported by USDA shows an increase from 2002 of
8 298.6 million pounds up to a 2008 figure of
9 475 million pounds. This is an increase of
10 176.4 million pounds.

11 JUDGE CLIFTON: Let me stop you. I just
12 want to make sure that we conform your exhibit
13 to what you just testified. So we do need to
14 insert the word "million" there, is that
15 correct?

16 THE WITNESS: Yes.

17 JUDGE CLIFTON: And we can do that on the
18 record copy that will go on the AMS Dairy
19 website. And I would ask that be done on page
20 2. And would you again read that sentence
21 starting with, producer-handler?

22 A. Producer-handler sales volume in the
23 eight orders reported by USDA shows an increase from
24 2002 of 298.6 million pounds up to a figure of
25 475 million pounds. This is an increase of

1 176.4 million pounds, nearly 60 percent in just six
2 years.

3 Exempt distributor's sales volume has
4 increased from 74.2 million pounds up to
5 89 million pounds over the same period. A increase of
6 14.8 million pounds and up nearly 20 percent.

7 During this same time of 2002 to 2008,
8 fully regulated pool distributors have seen sales go
9 from 37,466.8 million pounds down to 36,098.4 million
10 pounds. This is a decrease in sales volume of
11 1,368.4 million pounds or down nearly 3.7 percent.

12 Total in area sales were 41,015 for the
13 eight orders in 2002. These total in-area sales dropped
14 to 40,701.4 in 2008. This is a decrease of
15 313.6 million pounds or .76 percent. It is clear from
16 this USDA data that while regulated handlers are
17 seeing --

18 JUDGE CLIFTON: Let me stop you now. I
19 want to make sure I understand that one, that
20 particular line. All right. So the drop was
21 from 14,000 what, 41?

22 THE WITNESS: 14,015 million pounds.

23 JUDGE CLIFTON: All right.

24 THE WITNESS: If we look -- if we refer
25 to -- it's much clearer if we refer to --

1 JUDGE CLIFTON: I think you just solved
2 it for me. So it's 41,015 million pounds?

3 THE WITNESS: Yes. And it's in million
4 pounds.

5 JUDGE CLIFTON: All right. And I'd like
6 that to be inserted as well, million pounds for
7 the eight orders in 2002. This total in-area
8 sales dropped to 40,701.4 million pounds in
9 2008, is that correct?

10 THE WITNESS: Correct.

11 JUDGE CLIFTON: All right. We'll note
12 that just so we don't confuse anybody.

13 A. And the next bullet says to refer to the
14 attached chart 1, which is back here that shows the
15 these actual figures that are in million pounds. Sorry
16 that the copy is a little dark. Just the way that the
17 copy came out, but I'll proceed.

18 JUDGE CLIFTON: Yes.

19 A. It is clear from this USDA data that
20 while regulated handlers are seeing their sales volume
21 decline, both producer-handlers and exempt distributors
22 are seeing their sales increase. Please see the
23 attached chart 1. Now, I would like to provide you with
24 some statistics from the Northeast order.

25 Producer-handlers sales have been

1 arriving dramatically in the Northeast order. Since the
2 year 2000, sales of producer-handlers have gone from
3 63.5 million pounds up to 1,731.1 million pounds. This
4 is an increase of 67.6 million pounds. This is more
5 than doubling in eight years. A 106 -- 106.5 percent
6 increase. See chart 2.

7 There is no doubt that sales by
8 producer-handlers in all Federal Orders has been
9 increasing. Although the number of producer-handlers
10 has been dropping the size and sheer sales volume
11 perceive producer-handler has grown dramatically. See
12 chart 36789. The sales of product for exempt plants in
13 the Northeast Order has risen from 2000 -- from -- from
14 30.7 million pounds to over 38 million pounds
15 representing 43.5 percent of the total exempt plant milk
16 sold in the U.S. in 2008. See chart 4.

17 Both producer-handlers and exempt plants
18 have an economic advantage in costs of raw milk
19 procurement. This advantage provides them with a
20 significant head start when competing in the
21 marketplace. Producer-handlers have other advantages
22 such as the ability to balance supplies more easily;
23 they can adjust pricing and promotion with their
24 accounts to increase or decrease sales more quickly.
25 This is oftentimes at the expense of pool participating

1 plants and their producers.

2 Additionally, the buy local, go green
3 sustainability movements and similar initiatives are all
4 encouraging consumers to look for locally produced and
5 processed neighborhood supplies of milk and dairy
6 products. These, in many cases, government-sponsored
7 programs allow local producer-handlers and exempt plant
8 companies the ability to have higher wholesale profit
9 margins because of increased local demand for their
10 products.

11 Another advantage that producer-handlers
12 and exempt plants can secure more quickly and easily
13 which allows for higher profit margins is the ability to
14 manage the high peaks and low valleys of the Federal
15 Order milk pricing system. As USDA Federal Order prices
16 fluctuate rapidly and dramatically, producer-handlers
17 and exempt plants can maintain a more modest price
18 structure with their customers. They can also adjust
19 their prices more easily because they are vertically
20 integrated as both the producer, processor and
21 distributor.

22 In its December 14th, 2005 recommended
23 decision for the Arizona and Pacific Northwest markets,
24 USDA stated that review of the intent of the
25 producer-handler provision and the marketing conditions

1 arising from this provision in these orders could
2 warrant finding that the original producer-handler
3 exemption is no longer valid or should be limited to
4 150,000 pounds per month Class I route disposition
5 limit. We encourage USDA to stand by this statement
6 when making their decision on the proposal at hand.

7 We strongly encourage USDA to carefully
8 consider the uniqueness of the Northeast Order in its
9 decision to change the producer-handler and exempt plant
10 sales limit requirements. Proximity to easy markets
11 encourages production and sales allowing any company
12 with any scintilla of economic advantage to capture and
13 increase market share at the expense of their
14 competition.

15 More importantly, we are concerned about
16 the viability of the Federal order system in the
17 Northeast should USDA decide to increase the hard cap
18 for sales beyond 150,000 pounds per month to the
19 original proposed limit of 450,000 pounds per month as
20 suggested by the International Dairy Foods Association,
21 IDFA, and the National Milk Producers Federation, NMPF.
22 Even more drastic would be the decision to allow a hard
23 cap of 3 million pounds per month proposed later by
24 National Milk Producers Federation. Should either of
25 these limits be approved there is the potential for

1 42 million more pounds of milk to be sold into the
2 marketplace. Assuming most of this was in Class I
3 sales, there is another factor to consider.

4 Dairy producers who are paid out of a
5 Federal Order pool share equally in the sales value of
6 Class I products. Producer-handlers and exempt plants
7 do not pay the Class I fluid value for the milk they use
8 into the pool. If producer-handlers and some exempt
9 plants are allowed to dramatically increase their sales
10 with new higher caps, this diminishes the pool money
11 allocated to producers being paid out of the pool. It
12 is our association's position and opinion this Class I
13 sales value erosion would be devastating to the
14 producers who fairly participate in the Federal Order
15 system. It would put pressure on the Federal Order
16 system to adequately achieve its original goals. It
17 would also significantly increase pressure on competing
18 processors and distributors who pay into the pool.

19 We would encourage USDA to allow
20 government managed and colleges who run direct farms and
21 a plant serving their own needs to be excluded from any
22 hard cap sales limit.

23 The difference between Class I and the
24 uniform price provides producer-handlers and exempt
25 plants a huge advantage when competing for wholesale

1 business. The differences as documented by National
2 Milk Producer Federation's table 1 chart in their
3 original proposal can be as much as 15 cents per gallon
4 depending on the order.

5 We encourage USDA to use caution in
6 deciding a recommendation for any changes to the
7 producer-handler provisions and exempt plants sales
8 limit status. We continue to urge USDA to move toward
9 any changes in recommendations that apply fairly to all
10 concerned. We discourage any decisions that lead to
11 disorderly marketing.

12 We also encourage USDA to allow to
13 consider the North Order 1 to set a different hard cap
14 on sales of milk by producer-handlers and other smaller
15 exempt plants times in an order. The Northeast Order
16 has significant differences in geographic size,
17 population, and in consideration that we have more
18 widely disposed producer-handlers and exempt plants that
19 can quickly influence the marketplace should a
20 significant proposed limit be changed.

21 Thank you very much for allowing me to
22 provide this testimony today.

23 JUDGE CLIFTON: Now, you need a minute, I
24 think, to look at the charts.

25 MR. ENGLISH: I'll -- I'm sorry?

1 JUDGE CLIFTON: Mr. English, do you want
2 to follow up with some questions?

3 MR. ENGLISH: I apologize, your Honor.

4 JUDGE CLIFTON: No problem. You were
5 very close. I just know that I need a minute to
6 look at the charts.

7 BY MR. ENGLISH:

8 Q. Why don't you very briefly describe each
9 of the charts one more time separately from your
10 testimony, Mr. Latta?

11 JUDGE CLIFTON: That would be very
12 helpful.

13 A. Yeah, the first chart would -- the first
14 chart would be -- you would call it a map. This map
15 comes from the Order 1 website, and we printed a copy of
16 the map. And along with the map is a location index
17 which are on the next three pages.

18 And the location index indicates the
19 different status of the different dots or the different
20 little plants that are on this map. And we highlighted
21 the -- the pink producer-handlers and the exempt
22 distributing plants are in blue. And if you go for
23 chart 1, chart 1 is a -- Annual Route Sales by Handler
24 Type by Eight Orders. And I refer to it in my
25 statement. Sorry that a couple of these blocks turned

1 out dark like.

2 Q. Was this data put into the record?

3 A. I'm sure this was put into the record
4 before me so there must be a clear chart 2. Chart
5 number 2, Sales of Fluid Milk Products in the Federal
6 Milk Order Market Areas By Producer. This is a USDA
7 document that shows sales growth, sales change by order
8 for producer-handlers. Northeast Order.

9 Q. Why don't you pause for one second, just
10 one second. I believe, just to help the record here,
11 that chart 1 is also Exhibit 6.

12 JUDGE CLIFTON: Thank you, Mr. English.
13 You're exactly right. And everyone has been
14 given a copy of Exhibit 6.

15 MR. ENGLISH: And I believe that chart 2
16 is Exhibit 12.

17 JUDGE CLIFTON: I agree. Thank you.

18 MR. ENGLISH: And I believe that chart 3
19 is Exhibit 7.

20 JUDGE CLIFTON: Correct. Thank you.

21 MR. ENGLISH: And I believe chart 4 is
22 Exhibit 11.

23 JUDGE CLIFTON: Good. Yes.

24 MR. ENGLISH: And then I believe the last
25 table is also a part of the National Milk

1 Producers Federation testimony. It's table 1.
2 And he's compiled this for his purposes by
3 putting it all together.

4 BY MR. ENGLISH:

5 Q. Is that correct, Mr. Latta?

6 A. Correct.

7 JUDGE CLIFTON: Good. Do you have
8 additional questions of the witness?

9 MR. ENGLISH: I do not. The witness is
10 available for cross-examination.

11 JUDGE CLIFTON: Thank you, Mr. English.
12 Who would like to begin the cross-examination of
13 Mr. Latta? Mr. Vetne. Thank you.

14 MR. VETNE: John Vetne representing
15 Mallorie's, et al.

16 CROSS-EXAMINATION

17 BY MR. VETNE:

18 Q. Mr. Latta, on the last page, last
19 multi-sentence paragraph, that's page 4, you relate your
20 testimony to things unique in New England referring to
21 producer-handlers and exempt plants quickly influencing
22 the marketplace.

23 Can you provide us with any illustration
24 or anecdote of any event in the past that demonstrates
25 such quick influence.

1 A. There have been -- not right as it stands
2 now, but what we're concerned with is if the thresholds
3 were expanded, that these people are -- that the -- that
4 the dairy farms that are currently in our marketing
5 area, large farms -- Mr. Buelow alluded to one yesterday
6 just north of where I live in the Binghamton market --
7 that could easily put on or could easily build a plant
8 and get into the fluid milk business and influence the
9 Binghamton market where there is a pooled handler at
10 this time.

11 Q. Would you agree with me that at the
12 current time and for the last several decades that there
13 has been no size -- regulated size limit in the
14 Northeast for producer-handlers?

15 A. Correct.

16 Q. Okay. And is it your testimony that if a
17 size limit of 3 million pounds is put in, that that
18 would be worse?

19 A. We -- the -- our board is in favor of
20 putting a size limit on producer-handlers the same that
21 exists for exempt plants, 150,000 pounds.

22 Q. Just to go back, you -- you have -- you
23 have no experience with any disruption by
24 producer-handlers that currently exist and have existed
25 without size limits in the past, is that correct?

1 A. I don't have any evidence of that, no.

2 Q. Okay. Is your greater concern, then, the
3 increase of -- of exempt plants to 450,000 pounds?

4 A. It is of great concern, yes.

5 Q. But you would propose to exclude
6 university exempt plant and government operated exempt
7 plants?

8 A. For sales on campus.

9 Q. Oh, limited to where ---

10 A. Limited to, yeah, for their use. Cornell
11 is a good example.

12 Q. Okay. And government or the plants, for
13 example, limited to sales in jails and hospitals, like
14 that kind of thing?

15 A. Exactly.

16 Q. And for those plants, there would be no
17 limit on where they can receive their milk, correct?

18 A. Correct.

19 Q. Okay. And if -- if they had some extra
20 product and made it available outside of the campus or
21 the state institution, they would lose their exemption
22 for that month?

23 A. Yes.

24 Q. Okay. A couple of paragraphs up from
25 that, you say that the difference between class month --

1 Class I and uniform price provides producer-handlers and
2 exempt plants with a huge advantage when competing for
3 wholesale business.

4 Does your testimony assume that -- that
5 that is the -- an accurate measure or the measure of
6 milk procurement cost advantage between the two types of
7 plants.

8 A. Generally.

9 Q. Okay. So you assume that
10 producer-handlers, therefore, have no non-Class I use of
11 their own milk?

12 A. Would you repeat that?

13 Q. I'm trying to follow along here. Plants
14 -- plants that you've been involved in, Crowley and HP
15 Hood, have Class I and other uses in their distributing
16 plants, correct?

17 A. Correct.

18 Q. Even if -- even if all they do is
19 process, they have some shrinkage?

20 A. Yes.

21 Q. Okay. And the -- the regulated cost to
22 those plants is a plant blend that is something less
23 than Class I?

24 A. Yes.

25 Q. And you're not attributing a plant blend

1 to producer-handlers to look at their procurement costs.
2 Instead of subtracting blend price from the plant blend,
3 which defines regulated plant costs, you're subtracting
4 blend price from Class I, a different measure for
5 producer-handlers and exempt plants?

6 A. Yes.

7 Q. So you're not attributing to those plants
8 any of their own shrinkage or balancing or milk to
9 calves, calves, own-farm use or any of that stuff?

10 A. No. I mean, I'm aware that there's
11 miscellaneous costs and there's other cost factors
12 involved. But even after you factor those in, we feel
13 that the difference is substantial enough to create some
14 disruption in the marketplace.

15 Q. Okay. Would you agree with me that there
16 are other uses, that some producer-handlers have some
17 surplus milk on occasion?

18 A. Sure.

19 Q. Sure. And so if you are looking for --
20 to compare plant cost to plant cost, you have to look at
21 all uses of milk in the plant that you say has an
22 advantage and compare that plant blend to the uniform
23 price?

24 A. Yes.

25 Q. Okay. Now, I'm looking at the top of

1 page 2.

2 JUDGE CLIFTON: I'm sorry, did you get a
3 response from him on that?

4 MR. VETNE: He did say yes out loud.

5 JUDGE CLIFTON: Thank you. I didn't
6 catch it.

7 MR. VETNE: But thanks for paying
8 attention.

9 Q. The top of page 2, the paragraph that
10 begins there, we do not believe there should be any --
11 I'm sorry, I'm reading starting the one, two -- the
12 fifth line down, sentence beginning at the end of
13 line 5. We do not believe there should be raw milk
14 payment exemption or advantages given to any business
15 that competes in the marketplace. This includes any
16 milk producer who may own a processing or manufacturing
17 plant or those who do operate a plant that do not own
18 their own herds. The last phrase there, or those who do
19 operate -- that don't own their own herds, that would be
20 a reference to exempt plants in your testimony, correct?

21 A. Correct.

22 Q. Okay. And exempt plants could be plants
23 that have own herds, don't have own herds, or have some
24 mixture of supplies?

25 A. Yes.

1 Q. Okay. And, in fact, if they don't have
2 their own herds and a supplier in the marketplace gets
3 to supply that plant, that supplier in turn is able to
4 enjoy a Class I revenue that isn't shared with other
5 folks?

6 A. Perhaps.

7 Q. And -- perhaps?

8 A. Yes.

9 Q. And that supplier could be balancing off
10 the pool, too?

11 A. Could be. Perhaps.

12 Q. And you put manufacturing plant in there
13 also. Any producer that owns a manufacturing plant
14 should participate in the pool same as everybody else?

15 A. Yes.

16 Q. Did you read into this -- and maybe I'm
17 wrong about this. People use words sometimes to convey
18 something other than they intend.

19 You said there should be no compensations
20 or advantages to a certain group of people. Did you
21 mean to infer that it's okay to have exclusions or
22 disadvantages as a result of regulation?

23 A. It's not okay. We feel that everybody
24 should be on a level playing field. Why should there be
25 an advantage for a certain type of a business? A good

1 example would be if you want to open a pizza parlor, you
2 would have to compete with the Pizza Huts and the Little
3 Caesars. You wouldn't get a discount on our flour or
4 our cheese. We are saying in our statement that
5 150,000 pounds, we feel, is a good upper threshold
6 limit.

7 Q. All right. The -- you are here on behalf
8 of Northeast Dairy Foods Association. You were employed
9 by HP Hood and have been previously employed by Crowley?

10 A. I'm not employed by HP. I am employed by
11 Northeast Dairy Foods Association.

12 Q. You have been employed by Crowley?

13 A. In the past.

14 Q. Okay. Crowley and HP Hood operate fluid
15 milk processing plants?

16 A. Yes.

17 Q. What are the size volume capacities of
18 the plants that you have?

19 A. I don't have that with me. And it would
20 be proprietary.

21 Q. In a range, something that doesn't
22 reveal --

23 A. I wouldn't even want to take a guess.

24 Q. Would it be fair to say that you're not
25 aware of any that's small as 1 or 2 or 3 million pounds?

1 A. Wouldn't want to take a guess.

2 Q. You knew at one point but now it would be
3 a guess, is that correct?

4 A. I believe they're larger than that.

5 Q. Okay. Would you also agree that there
6 are costs due to economies of scale that are incurred by
7 very small entities that are not incurred by large ones?

8 A. Absolutely. It's true of any type of
9 business, yes.

10 Q. So at what point -- at what point, if you
11 have an opinion or know, does size come into play where
12 a small entity is actually able to have -- because of
13 such costs, to provide an advantage when competing in
14 the marketplace?

15 You've looked at the -- you looked at the
16 milk procurement side and costs include both procurement
17 and processing. At what point would the combination of
18 procurement and processing create an advantage in the
19 marketplace?

20 A. It's very difficult to put an exact
21 number on such a thing because there are so -- there are
22 so many variables. But, of course, as you know, farm --
23 farm restructuring is taking place and is taking place
24 in the Northeast. Farms are getting larger.

25 Their milk cost of production is getting

1 lower. And it's -- it's almost like if you -- if you
2 look at a bee sting, okay, a small bee sting stings a
3 little. But if that bee gets much bigger, it stings a
4 lot. Or if you have a lot of bees that sting you, from
5 a lot of different locations, lots of hurt.

6 But the point I'm trying to make is that
7 you have to draw a line in the sand, where sort of like
8 an operation gets an advantage on start-up costs,
9 perhaps 150,000 pounds, but then once they get started
10 they should play by the rules, the rules everyone else
11 has. Why should any entity get a break in their
12 break -- get a break in the raw milk price?

13 Q. You referred to restructuring of farms
14 and farms getting larger and larger?

15 A. Yes.

16 Q. And that is also true in the Northeast
17 for plants?

18 A. Yes.

19 Q. There has been an erosion in the
20 Northeast -- not the entire country, but in the
21 Northeast of smaller plants and a consolidation leaving
22 larger plants serving the market?

23 A. Uh-huh.

24 Q. Correct?

25 A. Correct.

1 Q. Okay. And in that competitive
2 environment, is there room or opportunity for smaller
3 size plants to even enter unless they enter at a very
4 large level?

5 A. No, I -- I think they have been entering.
6 If you look at charts -- the growth in the Northeast in
7 producer-handlers numbers and the growth in the
8 Northeast of exempt handlers that, you know, growth is
9 taking place.

10 Q. I -- I -- I agree that those numbers show
11 that there has been growth in producer-handler and
12 exempt pounds. My question was not related to plants
13 that are exempt. My question related to entry of plants
14 that are fully regulated, the opportunity at some size
15 other than the very large sizes of plants that have
16 survived the restructuring?

17 A. Why not? They have a unique product. If
18 they had an extremely high quality product, they're
19 specific to a local market or a niche or they have
20 something that nobody else has, certainly they can get
21 into business and play right along at the same playing
22 field that everyone else is at.

23 Q. Were you here earlier today? I think it
24 was Mr. Ricciardi was asking a question, if there's
25 money to be made --

1 A. Yes.

2 Q. -- in doing a certain business, would you
3 not expect that reasonable businessmen would have seen
4 that opportunity, taken advantage of it and you would
5 see it there already?

6 A. Yeah. I believe we do see that.

7 Q. And if you don't -- do you see it? Do
8 you see somebody entering the market as a regulated
9 plant at 3 million or 5 million up and down. You have
10 seen that?

11 A. No. But it's possible. We see
12 situations where a group of -- small groups of handlers
13 are having their milk bottled by a plant, that if that
14 plant decided to sell, selling that plant to this -- to
15 the group of dairy producers who claim to be making a
16 very high quality, very unique type of milk, that that
17 plant could be sold to these -- this small group of
18 dairy producers. And the producers could have their own
19 plant. I mean, it's possible. We see that happening in
20 the marketplace now.

21 Q. This is something -- this is something
22 you've actually observed or is this something that could
23 happen?

24 A. Something that I've observed. Something
25 we have observed. There's players in the market.

1 Q. That have purchased a --

2 A. No, they have not purchased yet. But
3 they're small and growing. They have unique products.
4 And we foresee someday that this group of producers
5 perhaps buying the plant that currently bottles their
6 milk.

7 Q. Got it. Thank you.

8 JUDGE CLIFTON: Thank you, Mr. Vetne.
9 Mr. Carroll, I recognize you. I'd like to take
10 a little stretch break as we'll be in
11 cross-examination for a little while, I believe.
12 I know it's getting a bit late. It's nearly
13 5:45. Please be back and ready to go at five
14 minutes to 6:00.

15 (A recess was taken from 5:45 to 5:56.)

16 JUDGE CLIFTON: Thank you. Let's go back
17 on record. We're back on record at 5:56.
18 Mr. Carroll, you may cross-examine.

19 CROSS-EXAMINATION

20 BY MR. CARROLL:

21 Q. Good morning, Mr. Latta.

22 JUDGE CLIFTON: No, no, no, no. Good
23 afternoon.

24 Q. Good afternoon, Mr. Latta.

25 A. It's 6:00.

1 Q. Good afternoon. I want to ask you if you
2 would work along with me with your -- your exhibit
3 report and maybe we can follow together and save some
4 time.

5 A. Okay.

6 Q. On your letterhead, on the left-hand
7 side, you have a secretary by the name of Steve
8 Schwartz. Can you tell me, is he an owner or involved
9 in a milk -- milk plant dealer?

10 A. Steve operates a plant -- at least he
11 used to operate a plant. He might be co-packing now,
12 but down around the New York City area.

13 Q. We had some testimony that there was a
14 Schwartz operation that did organic milk.

15 A. That's a different guy.

16 Q. It's a different person?

17 A. Yes.

18 Q. Okay. Thank you. Now, directing your
19 attention to the first paragraph of your comment, you
20 state that -- that you -- that you have large national
21 companies and mom and pop businesses, both. I'm
22 directing your attention to that.

23 A. Yes.

24 Q. And can you tell us the names of the
25 large national companies that are members of your

1 organization?

2 A. Why don't you name some and I'll say yes
3 or no.

4 Q. How about HP Hood?

5 A. HP Hood, yes.

6 Q. Dean Foods?

7 A. Yes.

8 Q. Garelick Farms?

9 A. Yes.

10 Q. And Dairy -- Dairylea. Would you have
11 Dairylea or not?

12 A. No.

13 Q. Okay. All right. Now, then, moving
14 down to the last paragraph of your first page, you
15 state, we support the growth of any new individual or
16 corporation that enters the dairy industry processing,
17 manufacturing or distributing business. Competition is
18 important for the vitality of any industry and is
19 especially essential to the dairy industry. Could you
20 tell us why you hold that opinion?

21 A. Because competition in any new business
22 is good. It's good for the business itself. It's good
23 for the people that buy the product.

24 Q. And it's better to be in a competitive
25 business than not, is what you're saying?

1 A. Yes.

2 Q. Now, directing your attention to the next
3 page. Toward of the middle of the page, you gave some
4 basic statistics and I want to ask you about those. And
5 in the first paragraph you come down to an increase from
6 -- in producer-handlers, I assume exempt milk also, from
7 2002, a change of 176 point -- million pound increase.
8 I'm directing your attention to that section.

9 Do you know what percentage of the
10 Class I sales that increase would have represented?

11 A. No, I do not.

12 Q. And then directing your attention from
13 the 176.4 million pounds down to the one, two -- the
14 third paragraph from the first paragraph, which would be
15 the fourth subparagraph there, that commences, total
16 area sales were 41,015.020 for the eight orders in 2002.
17 Directing your attention to that paragraph, you
18 conclude, quote, this is a decrease of
19 313.6 million pounds.

20 And now I want to direct your attention
21 back to the first figure of 176.4 million pounds, which
22 was the increase in producer-handlers, and ask you, if
23 you compare that to the decrease in Class I sales of
24 313.6, if there isn't still a drop in Class I sales that
25 has nothing to do with the increase of

1 producer-handlers?

2 A. Yes, that's true.

3 Q. And of that approximately 1.37.2 (sic), I
4 subtract 313.6, minus 176.4. But I can tell you,
5 whenever a lawyer picks up a pencil and starts doing
6 figures, it's bad news for everybody. So I get 137.2.
7 Would you agree with that?

8 A. Yes.

9 Q. Now, directing your attention to the next
10 page of your -- which I believe is page 3 of your
11 exhibit, there's two paragraphs and the third starts out
12 "Additionally, the buy local"?

13 A. Yes.

14 Q. I want to read that. Additionally, the
15 buy local, go green, sustainability movements and
16 similar initiatives are all encouraging consumers to
17 look for locally produced and processed neighborhood
18 supplies of milk and dairy products.

19 Directing yourself -- your attention to
20 that, is that not a factor that operates in the favor of
21 producer-handlers? In other words, they're more likely
22 or -- they're more locally situated?

23 A. Yes, it does.

24 Q. And then you continue on. You say these
25 in many cases government -- these -- in many cases

1 government sponsored programs allow local
2 producer-handlers and exempt plant companies the ability
3 to have higher wholesale profit margins because of
4 increased local determine demand for their products.
5 Could you explain what you mean by that sentence?

6 A. Well, in New York state we have a state
7 sponsored buy New York program that helps promote local
8 product. And the -- there's other programs in other
9 states that are similar to the buy New York program.

10 Q. And what governmental entities have
11 conducted those programs that you know about?

12 A. Well, New York state for one.

13 Q. All right. Is that pursuant to the
14 policy of the State of New York --

15 A. Yes.

16 Q. -- for that purpose?

17 A. Yeah.

18 Q. Could that have had an impact on
19 producer-handlers? In other words, that they would be
20 in a position to benefit from that?

21 A. I would think so. That's one of our
22 points, is that there is a buy local, buy green
23 movement. And that why should an entity that caters to
24 that particular market get an advantage by having a
25 different raw milk price?

1 Q. I understand. Now, I -- you're a dealer
2 organization so you may not have paid attention to this.
3 But do you have any opinion as to the effect on the
4 blend producers -- the blend monies paid to producers
5 for the figures that you've set forth in what we've just
6 talked about? What effect that sum of Class I sales
7 would have had upon producers?

8 A. Well, Class I sales in the Northeast have
9 been declining like they have everywhere. And what we
10 are concerned with is entities within the Order --
11 within the region losing sales due to the growth or the
12 expansion or the swelling of certain entities who have a
13 lower raw product cost.

14 Q. Right. Now, you're familiar with Byrne
15 Dairy in Syracuse?

16 A. Yes, I am.

17 Q. And that's a local -- I take it they're a
18 member of your organization?

19 A. Yes.

20 Q. I'm smiling because they don't belong to
21 everything. And that's local supplied -- you will agree
22 their milk is local supplied, isn't it?

23 A. Yes.

24 Q. So they, too, would benefit from this
25 governmental program, I take it?

1 A. Yes. If they participated in it, yes.

2 Q. Directing your attention to chart 3 of
3 your charts and directing your attention to the column
4 that says number of producer-handlers. I'm not sure you
5 were in the market to speak in 1959. I was, but I'm
6 sure you weren't. But we had, my recollection is, about
7 127 producer-handlers in New York. This figure is for
8 the United States, is that correct?

9 A. Yes. In Federal milk order areas.

10 Q. Right. So directing your attention to
11 that number 348 under 1959, number of producer-handlers
12 column, which would be column number one, two, three,
13 four columns in, moving from left to right, number of
14 producer-handlers, 348.

15 And then going down your -- on your table
16 to December 2008, do you see the number 40?

17 A. Yes.

18 Q. Which is almost a 90 percent decline in
19 the number of producer-handlers --

20 A. Yes.

21 Q. -- is that correct?

22 A. I see that. Correct.

23 Q. Okay. And then you have a column, which
24 would be one, two, three, four, five, six, called
25 percentage of sales by producer-handlers. And on

1 that -- does that not start on October of 1959 also?

2 A. Yes, it does.

3 Q. And does it show that the percentage of
4 sales of producer-handlers in October of '59 was
5 1.2 percent?

6 A. Yes.

7 Q. And then October -- or rather December of
8 2008 it was 1.5 percent?

9 A. Correct.

10 Q. Within a very small margin the same
11 percentage of sales?

12 A. Correct. But if you --

13 Q. But made by far fewer people?

14 MR. ENGLISH: I believe you cut off his
15 answer.

16 Q. Go ahead. I'm sorry.

17 A. If you look at the next column over, you
18 will see that between 1959 and 2008, the average sales
19 per producer-handler has grown dramatically, has it not?

20 Q. Yes. And I'm not -- I'm not even
21 questioning that because it's an obvious fact.

22 A. Our point is, is that in any given area,
23 a large producer-handler can disrupt the marketplace.

24 Q. Competitively, you mean?

25 A. Correct.

1 Q. Right. But in looking at your column
2 captioned, percentage of sales by producer-handlers, the
3 change from 1959 to 2008 is three-tenths of 1 percent?

4 A. Yes. That's to be expected because
5 there's much fewer of them, but the ones that remain are
6 much larger.

7 Q. I understand. That's all. Thank you
8 very much.

9 JUDGE CLIFTON: Thank you, Mr. Carroll.
10 Is there other cross-examination for Mr. Latta?
11 Mr. Tosi? None? Any redirect?

12 MR. ENGLISH: No, your Honor.

13 JUDGE CLIFTON: Thank you, Mr. English.
14 Thank you so much, Mr. Latta.

15 THE WITNESS: Thank you.

16 JUDGE CLIFTON: You may step down. Thank
17 you. I want to ask if John Hornstra has
18 arrived. Is John Hornstra here? He is not.
19 That concludes the witnesses that we had
20 scheduled for today.

21 I'd like now to talk about tomorrow and
22 Monday. I want to read to you what I believe I
23 think we'll do those days and have you help me
24 add to it. Of course, if we have people drop
25 in, we'll try to work them in.

1 Tomorrow looks full. Mr. Ben Carroll has
2 three clients that will all be here to testify.
3 I have mentioned two of them before. The third
4 one is David Bauer, B-a-u-e-r. So the three are
5 David Bauer, Willard Stearns and John Rooney.
6 In addition, John Hornstra, if he's here
7 tomorrow, and in addition Gene Carrejo of Dean
8 Foods.

9 AUDIENCE MEMBER: Very good.

10 JUDGE CLIFTON: Thank you very much. I'm
11 going to work on that tonight. And Clifford
12 Carman to produce the balance of the U.S.A.
13 statistics.

14 And I'd like some sort of indication of
15 what we can expect so that people can begin to
16 formulate what they want to ask me to do
17 tomorrow.

18 Now, as we left it, the plan is just as
19 Mr. Stevens had articulated it, that what
20 Mr. Carman makes available will be available to
21 all on the AMS Dairy website. The hard copy
22 will be provided to the one who requested it.
23 There won't be other hard copies mass produced
24 for the group until we determine that there's
25 some need for that.

1 If there's some need for that, I will
2 address the group as a whole in order to
3 determine how we should proceed. If it's
4 extremely voluminous and therefore would be
5 expensive to copy, there are a couple of ways we
6 can go.

7 One is, make copies of only parts of it.
8 Another is, make fewer copies. We wouldn't need
9 50, I would think. So be thinking about this.
10 I'm not going to decide it tonight. I just want
11 you all to be aware it's a decision that still
12 needs to be made.

13 MR. WOODY CARROLL: Yeah.

14 JUDGE CLIFTON: Do you want to come to
15 the microphone?

16 MR. WOODY CARROLL: If we have a
17 voluminous exhibit that's going to be difficult
18 to copy on paper, if we could scan it in and get
19 it burned to some CDs, it's very quick, cheap
20 and efficient. And I think they can do all that
21 down at Kinko's.

22 JUDGE CLIFTON: Oh, goodness. We're
23 getting shaking of heads no.

24 MR. WOODY CARROLL: No? Okay.

25 JUDGE CLIFTON: So keep that in mind.

1 That's a good suggestion. And if you have time
2 tonight, see if you know of a place nearby here
3 where that could be done. It's a possibility.
4 Okay. So that's what I know about Friday.

5 Now, let me tell you what I know about
6 Monday and then I'll ask for you all to give me
7 input. What I know about Monday is that
8 Mr. Brosch will be back and it will be the only
9 day we'll have him back.

10 I am hoping to complete Dr. Roger Cryan's
11 cross-examination and redirect and to have the
12 entire testimony of Dr. Robert Yonkers.

13 If everyone has had the USDA statistics
14 over the weekend, that should facilitate that
15 examination of those experts.

16 The only other group that I'm aware of
17 for Monday is people who have to do with organic
18 dairy farming in the Northeast. I have the name
19 of Kathie Arnold, K-a-t-h-i-e, Arnold and Tony,
20 T-o-n-y, Schilter, S-c-h-i-l-t-e-r, and one or
21 more other organic dairy farmers that would
22 appear with them and may testify as a panel.
23 All right. Now, I'd like additional input.
24 Mr. English.

25 MR. ENGLISH: First, as to Friday, if I

1 may, your Honor? And I've spoken with
2 Mr. Carroll and he has tentatively agreed. If
3 we could put Mr. Carrejo on first tomorrow.
4 Turns out tomorrow, it's his daughter's
5 graduation. Getting to El Paso is not the
6 easiest flight. I'm not sure anybody else has
7 tried to get there sometime recently. It's
8 difficult to get to El Paso, so if we could get
9 him on first, we would be very grateful.

10 JUDGE CLIFTON: All right. Now, you've
11 usually gone last these many days. I think you
12 deserve a first.

13 MR. ENGLISH: I also thank Mr. Carroll
14 for his courtesy. On Monday, I thought earlier
15 in this week I indicated that Mr. William Schiek
16 S-c-h-i-e-k, from the Dairy Institute of
17 California would be here.

18 JUDGE CLIFTON: You probably did and I
19 was only collating my Monday through Friday. So
20 I bet I have in my notes somewhere.

21 MR. ENGLISH: And I know that he will be
22 coming in with me Sunday, so that he could
23 conceivably -- I don't -- I'm not sure when
24 other people are going to get here Monday, but
25 since we're going to start at 8:00 he could

1 conceivably be available. Also Mike Newell,
2 N-e-w-a-l-l (sic). He's with the HP Hood
3 Company.

4 JUDGE CLIFTON: It's H, B as in boy?

5 MR. ENGLISH: HP, as in Paul.

6 JUDGE CLIFTON: P.

7 MR. ENGLISH: H, period, P period, Hood,
8 I believe is --

9 I do not represent him but I am -- have
10 been asked to notify you that he expects to be
11 here Sunday, would like to try to get on Monday,
12 if possible. We'll figure it out. Those are
13 the things I would like to add.

14 JUDGE CLIFTON: All right. I remember
15 Mr. Schiek. He's testified before me in a
16 hearing. I don't remember who he's with.

17 MR. ENGLISH: The Dairy Institute of
18 California.

19 JUDGE CLIFTON: That's right. Okay.

20 (Off the record.)

21 JUDGE CLIFTON: Small note with respect
22 to the scheduling on Monday. Certainly we hope
23 Dr. Cryan will be able to get his
24 cross-examination on Monday. But he will not be
25 here to start the hearing at 8:00 a.m. He will

1 be arriving before 9:00 a.m., hopefully all
2 things work out. But he will not be available
3 to start. So we'll have to have another witness
4 to begin the day.

5 JUDGE CLIFTON: Good. That's helpful.
6 That will work out well. Good. Who else knows
7 about anybody else coming? Mr. Miltner.

8 MR. MILTNER: Your Honor, I don't have
9 anyone for Monday but we're beginning to see the
10 end of the case for Proposals 1, 2 and 26. And
11 so perhaps, if not right now, perhaps first
12 thing tomorrow, we could look at looking at
13 Tuesday, Wednesday, Thursday. Some of the
14 people for us have some scheduling limitation.
15 We have a good deal of flexibility, but as with
16 Mr. English's witnesses and Mr. Beshore's, there
17 are a few we would like to try to lock in as
18 soon as we can and give everybody else as much
19 advance notice as we can on the scheduling.

20 JUDGE CLIFTON: Excellent. Now, I say
21 excellent. The only problem with Friday as to
22 doing this is everybody is going to be in a
23 hurry to get out of here. So we may not want to
24 leave that to the last thing on Friday and it's
25 going to be a busy day. So we'll try to get to

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

I, S. Diane Farrell, RPR, RMR, CRR, the undersigned, a court reporter for the State of Ohio, do hereby certify that at the time and place stated herein, I recorded in stenotypy and thereafter had transcribed into typewriting under my supervision the foregoing pages, and that the foregoing is a true, complete and accurate report of my said stenotype notes.

S. Diane Farrell, RPR, RMR, CRR