

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

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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  
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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

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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 grandfathers 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

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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           that. We'll try to do that.

2                    You may have to remind me before we break  
3           for lunch or something like that. Okay. All  
4           right. Is there anything else for the good of  
5           the order before we call it a day? Nothing  
6           more? I'll see you at 8:00 in the morning. We  
7           go off record at 6:20.

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PROCEEDINGS ADJOURNED AT 6:20 p.m.

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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.

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S. Diane Farrell, RPR, RMR, CRR