

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

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

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 VOLUME VII
 - - -

Public Hearing

Before: Administrative Law Judge
 Jill S. Clifton

Date: May 12, 2009

Time: Commencing at 8:05 a.m.

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

Before: S. Diane Farrell, RMR, CRR
 Notary Public - State of Ohio

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1 (Exhibit 75, 75-A and 76 were was marked
2 for identification.)

3 JUDGE CLIFTON: All right. Let's go on
4 record. We're back on record at 8:05. It's
5 Tuesday, May 12th, 2009. We are in Cincinnati,
6 Ohio. This is day seven of the milk rulemaking
7 hearing. I'd like this to be Volume VII of the
8 transcript and the pages to be numbered in
9 sequence to those of yesterday. Mr. English.

10 MR. ENGLISH: Yes, your Honor. Before we
11 begin with Dr. Schiek and Mr. Newell, I wanted
12 to make a comment more in the form of a concern
13 than an objection. It doesn't quite yet rise to
14 the level of an objection.

15 JUDGE CLIFTON: Right in the microphone,
16 please.

17 MR. ENGLISH: Your Honor, we seem to
18 have, whether it's an arm's race or a lawyers'
19 race, we seem to be at a point now where we
20 lawyers have indicated the intention to testify
21 as witnesses.

22 I am concerned for a couple of different
23 reasons. Obviously you have situations, for
24 example, Mr. Hughes, who both testified and
25 asked questions. He is not an attorney. We had

1 an attorney who also serves in other roles
2 testify for Darigold. I think the situation is
3 different when you have outside counsel
4 testifying. And I understand the various
5 reasons and rationales that have been provided.

6 But I do think that there are issues
7 which I hope all of us will consider, that when
8 an attorney gets on the witness stand, it may
9 very well be the case that a couple of different
10 things happen: Waiver of privilege.

11 And in addition, once you get on the
12 witness stand and take an oath, it's different
13 from lawyers who are quite accustomed,
14 referencing Rumpole and Bailey or something
15 taking contrary positions on different days as
16 attorneys.

17 But when you get on the witness stand and
18 raise your hand and take the oath, and then make
19 any statement that is in effect a legal
20 statement, I think it puts it in a different
21 context. I don't have a solution. I was
22 mulling this over at an unseemly hour in the
23 middle of the night. But -- so I mostly wanted
24 to respectfully suggest that there is some
25 discussion, perhaps off the record or otherwise,

1 of how this issue may be resolved.

2 I think there have been other instances.
3 I can think of one in particular where an
4 attorney testified, and while I'm sure that
5 attorney would disagree, I think a number of
6 people who were at that proceeding would think
7 that it didn't help the record.

8 I'm not trying to get into a debate about
9 that issue. I mostly want to express a concern
10 before we get there. I can easily see a
11 situation where attorneys under oath take
12 positions, end up being cross-examined by
13 positions they've taken.

14 And while, again, we may take different
15 positions in different proceedings, it's
16 different when you're under oath. There is an
17 express provision within the rules for making
18 oral arguments, if that's what necessary instead
19 of briefing. There are briefs that can be
20 filed.

21 Now, if attorneys are going to testify
22 about how a proposal works, that may -- and I
23 emphasize the word may -- be different. But it
24 also may not be different. And I just am very
25 concerned that we are heading down a road that,

1 for whatever reason, is not a very healthy one
2 either for this industry or for rulemaking.

3 JUDGE CLIFTON: Does anyone else want to
4 be heard on this issue at this point, or do you
5 want just to think? All right. Thank you for
6 raising the concern, Mr. English.

7 Good morning, gentlemen, in the witness
8 box.

9 MR. NEWELL: Good morning.

10 DR. SCHIEK: Okay.

11 JUDGE CLIFTON: I'd like you each to
12 state and spell your name, and I'll swear you in
13 at the same time. Please note you need to be
14 about two inches from this microphone.

15 MR. CARROLL: Your Honor?

16 JUDGE CLIFTON: Mr. Carroll.

17 MR. CARROLL: May I make a preliminary
18 objection to these witnesses?

19 JUDGE CLIFTON: You may. Let me find out
20 their names first and then your objection will
21 be more fitting.

22 DR. SCHIEK: My name is William Schiek.
23 That's W-i-l-l-i-a-m. Schiek is S-c-h-i-e-k.

24 MR. NEWELL: My name is Michael Newell.
25 M-i-c-h-a-e-l, N-e-w-e-l-l.

1 JUDGE CLIFTON: Mr. Carroll, now I'll
2 hear your objection before I swear them in.

3 MR. CARROLL: Thank you. I only want to
4 take a minute on this. But, you know, we've had
5 a long hearing. It doesn't look like it's
6 shortening. These witnesses are not involved in
7 the marketing areas that we're involved with.

8 The Secretary can't make findings about
9 some other area somewhere else and extrapolate
10 that into the -- our own marketing areas. This
11 may be interesting, it may be fun, but I don't
12 think it has anything to do with the hearing and
13 it's been a long hearing.

14 So I'd like to enter a formal objection
15 to the relevancy of this testimony. Thank you.

16 JUDGE CLIFTON: Why can it not be
17 instructive to the Secretary, Mr. Carroll?

18 MR. CARROLL: Because the Secretary can't
19 act without findings. And nothing in the state
20 of California will have -- should have anything
21 to do with the conditions in the Northeast
22 marketing area. We're 3,000 miles away.
23 There's absolutely nothing of any consequence
24 that I know of in this hearing, and certainly I
25 think some proof should be offered in advance as

1 to the relevancy. At any rate, I've made my
2 objection.

3 JUDGE CLIFTON: All right. Thank you.
4 Any other objections before I ask for any
5 responses to the objections? Mr. Ricciardi.

6 MR. RICCIARDI: I'll add one point to
7 what Mr. Carroll had said. What we have is a
8 state system in California that operates under
9 state law, under a different standard with base.
10 And as I read the statements last night -- I
11 should have called Mr. English because it was
12 really early in the morning for me. We could
13 have convened on the issue that he raised.

14 But what I found was, obviously, we have,
15 as I said, a different statute, a different
16 regulatory system. It's not part of the Federal
17 Order. And I understand the issue that was
18 raised, that one proposal noted that it was
19 similar in some ways to how California operates.
20 I think it was Proposal 17. That's referenced
21 in one of the statements. But the bottom line
22 is we are in a different area. The Federal
23 Order system operates in pooling totally
24 different than California does. And so to, I
25 guess, corroborate what Mr. Carroll has said,

1 the court has to decide whether or not this is
2 relevant information that the Secretary really
3 needs.

4 JUDGE CLIFTON: Thank you, Mr. Ricciardi.
5 Any objections before I hear any responses to
6 the objections? There are none other. Would
7 you like to respond, Mr. English?

8 MR. ENGLISH: Thank you, your Honor.
9 These witnesses are offered as fact witnesses
10 with respect to how a particular portion of the
11 California system has worked and their
12 reflections on a proposal -- especially
13 Dr. Schiek -- with respect to how it relates to
14 one particular proposal.

15 Now, unfortunately, with how the hearing
16 has unfolded, we haven't had testimony about
17 that proposal yet. That might be inevitable,
18 but this is when these witnesses are available.

19 I would also point out that we have in
20 recent times had a series of four or five -- I'm
21 losing track -- hearings in which issues of how
22 the California system interacts with the Federal
23 system has been a direct issue.

24 We've even had -- frankly, I think it was
25 the very first panel at a Federal Order hearing,

1 two officials from the California Department of
2 Food and Agriculture appear in Order 30, a
3 thousand 500 miles away, to testify about how
4 the California system worked.

5 These witnesses are resource witnesses.
6 They are not here to testify in favor or
7 against -- for or against any proposal, except
8 to the extent that their testimony may infer a
9 position. They are not here to take a position.
10 They are here to offer a factual, factual,
11 factual perspective. It is highly relevant and
12 it should be heard.

13 JUDGE CLIFTON: Mr. English, do you agree
14 that it's Proposal 17 that suggests something
15 similar to what California has?

16 MR. ENGLISH: I believe that is the
17 testimony of Dr. Schiek that he will be giving,
18 yes. And so there's a proposal in this hearing
19 record. And they are here to testify at the
20 request of National Milk and others with respect
21 to how a part of the California system works
22 that is like Proposal 17. The fact that it may
23 be statutory in California isn't relevant. What
24 matters is their perceived similarity to
25 Proposal 17.

1 JUDGE CLIFTON: Thank you. Counsel, I
2 appreciate your raising the cautions. And I
3 believe that this testimony may have some merit
4 for the Secretary to consider.

5 Gentlemen, I'll swear you in now. Would
6 each of you raise your right hand?

7 (The witnesses were sworn.)

8 JUDGE CLIFTON: Thank you. The record
9 should reflect that both witnesses took the
10 oath. Mr. English.

11 WILLIAM SCHIEK AND MICHAEL NEWELL
12 of lawful age, being duly sworn, was examined and
13 testified as follows:

14 DIRECT EXAMINATION

15 BY MR. ENGLISH:

16 MR. ENGLISH: Thank you. Gentlemen, you
17 are going to quickly find that you are going to
18 have to have the microphone very close. I don't
19 think the court reporter had difficulty picking
20 up the I dos there.

21 Your Honor, I propose to have them
22 testify as a panel. We've done that several
23 times. I think it is most efficient, given the
24 circumstances here.

25 Dr. Schiek, your testimony is labeled as

1 Exhibit 75, correct?

2 DR. SCHIEK: Yes, it is.

3 MR. ENGLISH: And 75-A is different, is
4 basically a color version in the chart of page 3
5 of 75, correct?

6 DR. SCHIEK: Yes, it is.

7 MR. ENGLISH: There's no other
8 difference, correct? You made the copy.

9 DR. SCHIEK: Correct.

10 MR. ENGLISH: And this testimony was
11 prepared by whom, sir?

12 DR. SCHIEK: By me.

13 JUDGE CLIFTON: I did want to ask
14 Dr. Schiek, what is your doctorate?

15 DR. SCHIEK: Doctor of philosophy in food
16 and resource economics.

17 JUDGE CLIFTON: Thank you.

18 MR. ENGLISH: Dr. Schiek, have you
19 testified at Federal Order hearings in the past?

20 DR. SCHIEK: I have at one.

21 MR. ENGLISH: And have you testified at
22 California Department of Food and Agriculture
23 proceedings in the past?

24 DR. SCHIEK: Yes, at many.

25 MR. ENGLISH: And have you been

1 recognized as an expert in these proceedings --

2 DR. SCHIEK: Yes, I have.

3 MR. ENGLISH: -- in food and agriculture
4 economics?

5 DR. SCHIEK: Yes, I have.

6 MR. ENGLISH: Your Honor, I believe and
7 we can -- the witness has, in his prepared
8 statement, some extensive discussion that he
9 will give. And perhaps I'll wait until
10 afterwards. But I will make a motion to
11 recognize him as an expert in the field of food
12 and agricultural economics.

13 JUDGE CLIFTON: Thank you. Mr. Vetne.

14 MR. VETNE: If that is the intention,
15 your Honor, I would object. I would ask for
16 voir dire.

17 We are dealing with the Federal Order
18 system and prior experts have testified --
19 economists have testified as experts and in
20 relation to the Federal Order sytem.

21 Mr. English early on indicated that these
22 two are fact witnesses. He said they're fact,
23 fact, fact witnesses, as I recall. Percipient
24 witnesses are okay and they can discuss what
25 happens in California. And that was -- that was

1 my understanding when these witnesses -- when we
2 received notice that these witnesses would come
3 and received advanced copies prior to this.

4 This is the first -- absolutely the first
5 hint that anybody on this panel would be called
6 as an expert witness. So I didn't even have
7 time to prepare the voir dire part because I
8 assumed, as represented, that this is a fact
9 witness -- or two fact witnesses.

10 JUDGE CLIFTON: Don't leave. Let me ask
11 you a question. We know that when facts are
12 being established, lay witnesses can testify to
13 certain facts, how fast was the car going, how
14 far was she from him and the like.

15 People who have training that qualifies
16 them to testify of facts that lay witnesses
17 cannot can give their opinions about things that
18 are different from distance and speed and the
19 like.

20 They're still facts. Handwriting experts
21 tell us more facts than lay witnesses tell us.
22 Both can testify about handwriting. So why
23 would an expert not still be a fact witness just
24 by virtue of having been qualified as a expert?

25 MR. VETNE: And on the contrary, why

1 bother to qualify him on an expert if he can
2 give opinion sort of in the same nature as a
3 fact witness.

4 The intention of this apparently is to
5 provide for the Department and for the record
6 more weight on esoteric opinion than I had
7 anticipated the witness would be called for.

8 As I said -- and the record's clear --
9 for the past week this witness has been touted
10 as a fact witness. Now, you know, sure, every
11 witness up there gives opinion whether
12 they're -- whether they have a Ph.D. or not.
13 Every witness that comes to this proceeding is
14 an expert. And an expert is -- actually, I
15 think, the best description is somebody that
16 knows more than the Average Joe about something.

17 All of us know more than the Average Joe
18 about milk and milk marketing. But the
19 intention of calling attention to this witness
20 as an expert is to -- is to ask the Department
21 and the record and the Secretary to give
22 somewhat more weight to this witness' opinion
23 testimony than would be given to particularly
24 small business handlers who have no economists
25 on staff. And that's essentially the function

1 that Mr. Schiek serves for his organization,
2 Mr. Cryan from -- Dr. Cryan for his
3 organization, Dr. Yonkers for his organization.

4 So the request is essentially for us
5 large organizations and associations
6 representing large organizations, give more
7 weight to our witness than we do to -- to the
8 individual small handlers and producers that
9 come up here. I don't think that's fair. And
10 it certainly wasn't anticipated.

11 JUDGE CLIFTON: Thank you, Mr. Vetne.
12 Mr. Beshore.

13 MR. BESHORE: Very briefly, I would note
14 that Dr. Schiek was employed in the Market
15 Administrator's office in Order 2 and has
16 testified in his capacity as an expert at
17 Federal Order hearings prior to this one.

18 I think your Honor's comments with the
19 type of the testimony we're going to hear from
20 Dr. Schiek were very much to the point, that
21 his expertise very much enables him to provide a
22 factual analysis and discussion of the
23 California system, which is proposed here in at
24 least one proposal. I think there was actually
25 another one that basically adopts the same --

1 you know, the same producer-handler system.

2 And the fact that he's an expert in
3 his -- in his field really is not subject to --
4 to controversy, should not be. And he should be
5 recognized as such for his testimony. I didn't
6 hear him presented for the last week or
7 whatever, as Mr. Vetne touted, as Mr. Vetne has
8 asserted, as a fact witness. I think when Dr.
9 Bill Schiek comes to testify at these hearings,
10 everyone knows that he's coming to speak with
11 his training, education and experience. And
12 that's how he's offered.

13 JUDGE CLIFTON: Thank you, Mr. Beshore.
14 I won't rule until he's offered as an expert. I
15 have previously accepted him as an expert.
16 Mr. English.

17 MR. ENGLISH: Your Honor, I think it's
18 appropriate to have him give his testimony first
19 and then I might ask a few more questions after
20 that. But I think that contrary to statements
21 of Mr. Vetne, I think his statement, which was
22 out at 8:00 a.m. yesterday morning, so that
23 means people have had more than 24 hours as
24 opposed to the required -- could have been out
25 this morning.

1 The fact of the matter is, one can look
2 at it and see where he is giving, what is --
3 what may be viewed as opinion testimony. And so
4 that's more notice than many people will be
5 getting with respect to other things.

6 Your Honor, at this time I would ask just
7 a few questions of Mr. Newell.

8 JUDGE CLIFTON: Now, position the
9 microphone between you and Mr. English since
10 you'll be looking at him when you talk to him.

11 MR. ENGLISH: Mr. Newell.

12 MR. NEWELL: Yes.

13 MR. ENGLISH: Good morning.

14 MR. NEWELL: Good morning.

15 MR. ENGLISH: You are presently employed
16 by who?

17 MR. NEWELL: HP Hood.

18 MR. ENGLISH: And you are appearing here
19 with their permission?

20 MR. NEWELL: Yes.

21 MR. ENGLISH: And their knowledge?

22 MR. NEWELL: Yes.

23 MR. ENGLISH: Are you testifying with
24 respect to facts having to do with HP Hood?

25 MR. NEWELL: No, I am not.

1 MR. ENGLISH: Okay. What are you
2 testifying about?

3 MR. NEWELL: I am testifying as to my
4 experience with Crystal Cream & Butter Company.

5 MR. ENGLISH: And are you testifying at
6 the request of the Dairy Institute of
7 California --

8 MR. NEWELL: Yes.

9 MR. ENGLISH: -- basically as a
10 representative of that organization?

11 MR. NEWELL: Yes, I am.

12 JUDGE CLIFTON: The name of that,
13 Mr. English? Say it again.

14 MR. ENGLISH: Dairy Institute of
15 California.

16 Dr. Schiek, would you please give your
17 prepared statement, Exhibit 75?

18 DR. SCHIEK: Good morning. My name is
19 William Schiek. For the past 12 years I have
20 been Economist to Dairy Institute of California,
21 a trade association representing fluid milk
22 processors and dairy product manufacturers with
23 plants in California. Dairy Institute provides
24 member companies with market and regulatory
25 information services and advises them on

1 regulatory and legislative issues impacting
2 their business operations. We also serve as our
3 members' primary advocate on dairy legislative
4 and regulatory matters. Prior to joining Dairy
5 Institute's staff, I was Assistant Professor of
6 Agricultural Economics at Perdue University in
7 West Lafayette, Indiana from 1991 to 1997. At
8 Perdue, I had responsibility for teaching
9 courses in agricultural marketing and food
10 business management. I conducted research on a
11 variety of food and agricultural marketing
12 topics, including dairy marketing topic. From
13 1982 to 1989, I was employed by the New York-New
14 Jersey Milk Market Administrator's Office,
15 Federal Order Number 2, as a cooperative
16 relations specialist and economist. I have a
17 bachelor of science degree from Cornell
18 University in Applied Economics and Business
19 Management and M.S. and Ph.D. degrees from the
20 University of Florida in Food and Resource
21 Economics.

22 I am testifying today at the request of
23 the National Milk Producers Federation for the
24 purpose of describing the producer-handler
25 exemption that exists under California's state

1 milk pooling plan and its impact on market
2 structure and competition within the state. It
3 is my belief that the Secretary will find the
4 California experience helpful in formulating
5 policy as it pertains to producer-handlers in
6 Federal Orders, especially since the California
7 producer-handler exemption is similar to one of
8 the proposals under consideration at this
9 hearing, Proposal Number 17. A testament to the
10 relevance of California's experience with
11 producer-handlers -- with producer-handlers was
12 provided at the March prehearing information
13 session by a representative of Mallorie's Dairy,
14 the proponent of Proposal Number 17. In
15 describing Mallorie's alternative proposal, its
16 representative characterized Proposal 17 as
17 being inspired by the producer-handler exemption
18 in California.

19 Proposal 17, in the words of its
20 proponents, would allow producer-handlers whose
21 plants would become regulated pool distributing
22 plants, to grandfather their existing farm milk
23 production up to 3 million pounds per month, by
24 exempting such production from obligations to
25 pay money into or receive money from the pool

1 settlement fund. Such pool-exempt milk would
2 essentially be treated as milk in an individual
3 handler pool. Milk production from the
4 handler's own farm in excess of the
5 grandfathered exempt volume, along with receipts
6 of milk from other producers, would be subject
7 to marketwide pool obligation and payments to
8 the fund just like milk received by other
9 handlers.

10 Some in the industry refer to the type of
11 exemption described in Proposal 17 as a soft cap
12 because a specified volume of the
13 producer-handler's milk production receipts
14 remains exempt from pooling even as the
15 operation's milk volume grows, either by
16 increased own-farm production or by receipts
17 from other sources, beyond the exempted volume.
18 This type of exemption stands in contrast to a
19 so-called hard cap like the ones operative for
20 producer-handlers in the Pacific Northwest and
21 Arizona orders, where once a threshold volume is
22 exceeded, the producer-handler is subject to
23 regulation on all its production/receipts. As
24 you will see from my description that follows,
25 the soft cap exemption contained in Proposal 17

1 is quite similar to the producer-handler
2 exemption in California, although there are some
3 differences.

4 In California, producer-handlers are
5 often referred to as producer distributors or
6 PDs. The terms are used interchangeably and
7 refer to the same type of operation under
8 California's pricing and pooling system. There
9 are two types of producer-handler exemptions in
10 California. The first type is known as a Type
11 66 or exempt producer-handler. These operations
12 do not have to pool their own-farm production,
13 provided they meet qualifying requirements.

14 First, milk production and sales both
15 must average less than 500 gallons per day.

16 Second, 95 percent of both production and
17 sales must be disposed to retail/wholesale
18 outlets other than handlers.

19 And, three, no more than 5 percent of
20 Class I sales can be from outside sources. Only
21 two Type 66 producer-handlers are currently
22 operating, and the average monthly combined
23 volume of both is 129,000 pounds. This group
24 will not be the focus of my testimony. And for
25 the remainder of my testimony, the term PD will

1 refer to the second type of producer-handler
2 described below.

3 The second type of producer-handler in
4 California is the Type 70 or option exempt
5 producer-handler. These handlers operate with a
6 soft cap and can deduct the volume of their
7 exempt milk production from their Class I pool
8 obligation. On their nonexempt milk production
9 and on any milk purchased from other producers,
10 the Type 70 PDs must account to the pool in the
11 same manner as fully regulated handlers. Thus,
12 the exemption is analogous to the one contained
13 in Proposal 17, except that the entire
14 production is applied to the plant -- the
15 plant's Class I usage. And I should say the
16 entire exemption is applied to the plant's
17 Class I usage.

18 Currently, there are five Type 70 PDs
19 operating in California. And for the
20 September 2007 through August 2008 period, the
21 five Type 70 PDs had a combined exemption of
22 around 21.2 million pounds per month and their
23 pooled Class I volume was an additional
24 100.1 million pounds per month. They also
25 utilized another 83.3 million pounds per month

1 that was pooled in other classes. The
2 accompanying graph (Figure 1) shows the Type 70
3 PDs' average daily exempt production, pooled
4 Class I milk volume, and other pooled milk
5 volume by year since 1995. What is striking
6 about this graph is that it shows a clear upward
7 trend in the total PD Class I milk volumes.

8 California's producer-handler exemption
9 was not born amid policy deliberations by
10 agriculture marketing specialists, but was the
11 result of the political compromise that was
12 needed to pass the enabling legislation for the
13 Gonsalves Milk Pooling Act in 1967. This
14 compromise, which established statewide milk
15 pooling in California also led to our unique
16 method of dividing producer revenues according
17 to each producer's quota, base and overbase milk
18 production. Under the pooling legislation and
19 regulations, each producer was assigned a
20 production base derived from their historical
21 milk output. Any production above the
22 producer's base was termed overbase. Each
23 producer was originally allocated quota volumes
24 equal to some percentage of their production
25 base in proportion to their historic milk

1 shipments to Class I uses. Quota milk received
2 a higher price than base and overbase milk and
3 was highly desired by producers under the new
4 pricing system. This system of prices was
5 adopted in lieu of uniform pool prices in order
6 to gain legislative support from producers in
7 Southern California who traditionally had a
8 large share of the Class I market.

9 It was anticipated that growth in Class I
10 sales over time would allow the issuance of new
11 quota that would be allocated first to those
12 producers with relatively low quota holdings in
13 proportion to their base. In this way, it was
14 expected that all producers would eventually be
15 equalized with respect to their quota holdings.
16 Over time, quota began to be traded among
17 dairymen, providing a second way for producers
18 (including PDs) to increase their quota
19 holdings.

20 Under the Act, PDs who did not meet the
21 criteria for exempt plants (Type 66) were given
22 the option to deduct the volume of their
23 original allocated quota for their Class I pool
24 obligation, or they could receive the quota
25 price from the milk for their quota production,

1 but would receive no exemption in calculating
2 their handler obligation to the pool. This
3 choice or option was a one-time offer for the
4 Type 70 PDs and no new PDs could use this
5 exemption after the pooling plan was enacted.

6 In 1978, following legislative changes,
7 amendments were made to the Pooling Plan (the
8 regulations governing milk pooling in
9 California), which allowed Type 70s PDs to
10 increase their exemption to equal their original
11 quota plus any additional quota purchased prior
12 to 1978. They also received an additional daily
13 exemption of 150 pounds of fat and 375 pounds of
14 solids not fat, provided that they had not
15 transferred production base and pool quota after
16 February 9th, 1977. These changes to the PD
17 exemption were part of larger legislative and
18 regulatory amendments that were instigated by
19 producers to equalize each producer's quota
20 holdings at 90 percent of their historic
21 production base. The broader changes were
22 important to producer leadership and they were
23 willing to accept the PD exemption increases as
24 the price for getting their desired changes in
25 the quota regulations enacted.

1 By the early 1990s, producers needed to
2 change the way in which prices for base,
3 overbase and quota milk were determined to
4 relieve tensions over pool revenue distributions
5 that were developing between quota holders and
6 non-quota holders. In 1993, producers crafted a
7 quota reform bill that they viewed as a must
8 pass regulation, essential for the continued
9 viability of the pooling program. Once again,
10 because producers needed to move the
11 legislation, they were willing to accept
12 legislative amendments offered by the PDs, who
13 threatened to derail the quota reform bill if it
14 did not contain their amendments. As a result
15 of the legislation, the PD exemption was
16 expanded to cover all original quota and all
17 quota subsequently purchased, plus the
18 additional daily exemptions of 150 pounds of fat
19 and 375 pounds of solids not fat that were
20 allowed as a result of the 1978 amendments. The
21 ability of PDs to continue purchasing new exempt
22 quota was eventually terminated by legislation,
23 effective March 1, 1995. The point that I
24 believe is important from this history is that
25 once the soft cap exemption was established in

1 California, it became an attractive target for
2 economy rent-seeking behavior on the part of the
3 PDs. By opportunistically holding must-pass
4 dairy legislation hostage to their amendments,
5 PDs were able to increase their exemption, and
6 the regulators charged with overseeing the
7 proper administration and functioning of the
8 state order had little to say in the matter.

9 On exempt milk, the milk cost advantage,
10 which is a regulated cost advantage, PDs receive
11 is calculated as the Class I price less the
12 quota price. If the PD did not have a plant, he
13 would receive the quota price for all the exempt
14 milk he shipped to a regulated handler.

15 Therefore, the PD's opportunity cost on exempt
16 milk is the quota price. Put another way, the
17 transfer price between the farm side of the
18 operation and the plant is assumed to be the
19 quota price. In reality, integrated firms will
20 establish transfer prices to maximize the
21 profits of the entire integrated operation, not
22 just each component operation. If greater
23 profits can be made in total by accepting a
24 lower price at the farm, the PD will do it. So
25 the actual cost advantage to the PD may well be

1 greater than I have calculated here.

2 Using California price data from the
3 California Department of Food and Agriculture, I
4 calculated the advantage for California milk
5 testing of 3.5 percent fat and 8.7 percent
6 solids not fat on a per hundredweight basis by
7 subtracting the quota price per hundredweight
8 from the Class I price. The PD regulated raw
9 product cost advantage on a per gallon basis was
10 calculated by dividing the advantage per
11 hundredweight by the number of whole milk
12 gallons in a hundredweight of milk. On a
13 month-to-month basis, the value of this cost
14 advantage varies greatly due to changes in the
15 relationship between the Class I price and the
16 pool quota price.

17 For the January 2000 through March 2009
18 period, regulated cost advantage on milk covered
19 by the exemption averaged 11.3 cents per gallon.
20 And for the most recent 12-month period, it
21 averaged 17.7 cents per gallon. Competition for
22 fluid milk sales is intense in California and
23 business often moves from one milk supplier to
24 another based on price differences of a few
25 hundredths of a cent per gallon. In this

1 competitive environment, having a raw products
2 cost advantage of more than a dime per gallon is
3 a tremendous advantage for the PDs and a
4 formidable challenge for the fully regulated
5 suppliers of milk. The accompanying graph
6 (Figure 2) shows the PD cost advantage by month
7 as well as the 12-month moving average of that
8 advantage. During the September 2007 through
9 August 2008 period, the exempt portion of the
10 PDs Class I sales accounted for about 17 1/2
11 percent of their total Class I sales.

12 In the marketplace, not all customers are
13 created equal with regard to the profits they
14 generate for the businesses that supply them.
15 Customers that sell high volumes and which are
16 served at a relatively low cost per unit are
17 usually the most profitable or desirable for a
18 Class I supplier. It is these accounts: Club
19 stores, mass merchandisers and large grocery
20 stores that California PD's have aggressively
21 and successfully pursued. When going after
22 these types of accounts, producer-handlers have
23 made full use of their exemption. As an
24 illustration, several years ago one of our
25 member companies acquired a large piece of

1 grocery-chain business that could not be
2 adequately served from its existing processing
3 facilities, so they put that business up for bid
4 using an online auction. Three processors that
5 were fairly well positioned to serve the account
6 bid on the business -- who were fairly well
7 positioned to serve the account bid on the
8 business. Two were fully regulated processors
9 and the third was a PD. After the auction, a
10 representative of the company that put the
11 business up for bid contacted me, noting that
12 the bid submitted by the PD was significantly
13 below the bid of the other competitors. Given
14 that California has a law prohibiting sales
15 below cost, the representative wanted to know if
16 the bid was legitimate. When I informed him of
17 the magnitude of the PD cost advantage, he was
18 surprised, but was no longer concerned that the
19 bid might be below cost. The account was
20 awarded to the PD, even though one of the
21 regulated processors was more favorably located
22 to serve the business. The PD's low price was
23 the determining factor.

24 One of the axiom's of competition in the
25 California market is that, all other things

1 being equal, to acquire business you need to bid
2 lower than your competitor, but to retain the
3 business, you only need to match your
4 competitor's bid. With regard to PDs, their
5 soft-cap exemption can be characterized as a
6 movable feast or the gift that keeps on giving.
7 The California PD can pick and choose when to
8 use its exemption. When it wishes to acquire
9 business it can use its exempt volume to bid
10 aggressively and undercut fully regulated
11 competitors whose raw product cost cannot be
12 lower than the Class I price. Later, the PD can
13 simply match the regulated competitor's price by
14 utilizing it's nonexempt volume to retain the
15 account. Its exempt volume is then free to be
16 used to aggressively bid the next account it
17 wishes to acquire.

18 As a result of the cost advantages from
19 their exemption, producer-handlers have grown
20 their share of Class I sales at the expense of
21 their fully regulated competitors over time.
22 Using data contained in CDFA's Hearing Exhibit
23 from its October 2008 Class I pricing hearing, I
24 was able to compare the Type 70 PD's share of
25 California-sourced Class I milk with the share

1 of non-PDs over the July 1995 to August 2008
2 period. As the accompanying graph illustrates,
3 that's Figure 3, the PDs' share has increased
4 and the fully-regulated processors' share has
5 declined. The trend is unambiguous. For
6 example, in July 1995 the PDs' share of the
7 market was 14.8 percent and the non-PD share was
8 85.2 percent. By August 2008, the PD's share
9 had grown to 23.4 percent and the non-PD share
10 was 76.6 percent.

11 The operation of the soft-cap
12 producer-handler exemption in California has
13 significantly advantaged producer handlers to a
14 great degree. In California, it cannot be
15 argued that this has worked to the advantage of
16 producers, and it has certainly worked to the
17 disadvantage of fully-regulated Class I
18 processors. It has created a dilemma for policy
19 makers in the state, who struggle to reconcile
20 the goal of providing equal prices to handlers
21 competing in a marketplace with the
22 legislatively mandated producer-handler
23 exemptions. It is my sincere hope that the
24 Secretary will find the California experience
25 useful in forming effective policy with regard

1 to producer-handlers in Federal Orders. Thank
2 you.

3 MR. ENGLISH: Mr. Newell, if you would
4 get the microphone in front of you. Please
5 provide your testimony when you are ready after
6 adjusting the microphone.

7 MR. NEWELL: Thank you. Good morning.
8 My name is Michael Newell and I am currently
9 employed by HP Hood LLC as their Director of
10 Business Development for the Western United
11 States. From 1987 until May of 2007, I worked
12 in a variety of positions at Crystal Cream &
13 Butter Company, my family's milk processing
14 business which was located in Sacramento,
15 California. Relevant to today's testimony are
16 the positions I held as a Sales and Marketing
17 Analyst from 1991 until 1997, Vice President of
18 Marketing from 1997 until 2003, and Company
19 President from February 2003 through October of
20 2007. In May of 2007 Crystal's dairy assets
21 were sold to HP Hood and on November 1st, 2007,
22 HP Hood sold the Crystal brand and the
23 conventional milk business to Foster Farms Dairy
24 in Modesto, California. At that time I
25 transitioned to my present position at HP Hood.

1 The purpose of my testimony is to give a
2 first-hand perspective on the soft cap
3 producer-distributor exemptions that Dr. Schiek
4 discussed in his testimony and their impact on
5 the competitive landscape in the Northern
6 California milk market.

7 Crystal Cream & Butter Company was
8 founded in Sacramento in 1901. The Hansen
9 family owned the business from 1921 until its
10 sale in 2007. Crystal based its business on
11 core principles of quality, service, integrity
12 and competitive pricing. Crystal built an
13 extremely strong brand name in the Sacramento
14 Valley by consistently advertising on radio,
15 television, and print media from the late 1950s
16 through the early 2000s. Another key to
17 Crystal's success was its high quality milk
18 supply was almost entirely purchased from
19 independent dairy farmers. Being located in the
20 capitol city, Crystal was also extremely active
21 in the California dairy associations and
22 participated regularly in the California
23 Department of Food and Agriculture milk pricing
24 and pooling hearings.

25 Between 1990 and 1996, Crystal's -- let

1 me correct that. Between 1990 and 2006,
2 Crystal's annual milk purchases ranged from
3 45 million to 60 million gallons. During this
4 period Crystal had between 400 and 500
5 employees. For most of its business life
6 Crystal was a full line manufacturer producing
7 fluid milk, cultured products, ice cream, butter
8 and nonfat dried milk. Until 1996, all of these
9 products were produced at Crystal's downtown
10 plant in Sacramento. In 1996 Crystal opened a
11 state-of-the-art bottling facility on Belvedere
12 Avenue in Sacramento which also incorporated
13 extended shelf life pasteurization capabilities.
14 Fluid milk accounted for approximately
15 65 percent of Crystal's 140 to 180 million of
16 annual sales.

17 Crystal served the full gamut of
18 customers - schools, restaurants, independent
19 distributors, convenience store, other
20 processors, and grocery stores. Grocery stores
21 were the largest segment of Crystal's business.
22 Crystal's primary distribution area ranged from
23 Modesto (75 miles to the south of Sacramento) to
24 Redding (150 miles to the north) and from the
25 San Francisco Bay Area (75 miles to the west)

1 and Lake Tahoe (100 miles to the east.)

2 In the early 1990s, the vast majority of
3 the fluid milk sold in Northern California was
4 provided by three captive dairy processors and
5 five significant, family-owned independent
6 processors. For the most part, the captive
7 processors sold milk to the stores owned by
8 their corporate parents. They, in general, did
9 not compete with the independent processors and
10 for that reason will not be the focus of this
11 overview.

12 The independent processors were located
13 in Petaluma; Emeryville, which is near Berkeley;
14 Modesto, Fresno, and Sacramento. I would
15 estimate that in 1990 the processors based in
16 Emeryville and Modesto were of comparable size
17 to Crystal and the processors in Fresno and
18 Petaluma were less than half that size.

19 In the early 1990s competition between
20 the five independents was probably best defined
21 as orderly. The independent processors were
22 dominant in their own hometowns and although
23 each competed to some degree, distribution
24 distance really seemed to be a limiting factor,
25 i.e., you competed with your neighbor and not

1 your neighbor's neighbor. At that time a
2 customers' price was dictated by a published
3 bracketed -- by published bracketed price lists
4 and service levels. Based on the competitor's
5 price lists that I recall seeing, the prices on
6 the published price lists of the independent
7 processors were fairly similar, so customers
8 tended to base their purchasing decision on
9 quality, service, support, and brand in addition
10 to price. Looking back I think that price lists
11 were similar because the independent processors'
12 costs were fairly comparable.

13 Around 1993, we began seeing an elevated
14 level of competition with the processors located
15 in Modesto and Fresno. At first this
16 competition manifested itself in seemingly
17 disconnected actions like more aggressive
18 pricing on a school bid, offering full service
19 to a customer in what level -- at what
20 previously had been a drop ship price, or the
21 creation of a new price bracket for a high
22 volume -- a new price bracket for high volume
23 accounts. Then we learned about an undisclosed
24 provision in the 1993 Quota Reform Bill that had
25 removed the cap from the PD exemption and that

1 this had allowed the independent processors in
2 Fresno and Modesto to significantly decrease
3 their milk cost by increasing their exempt quota
4 holdings. Prior to this time we had a vague
5 knowledge of their dairy operations and that a
6 small portion of their milk had been exempted
7 from the pool since its establishment in 1969.

8 The discovery of this significant
9 competitive advantage was of great concern. We
10 began tracking this advantage on a monthly basis
11 and it ranged between 20 cents a gallon and no
12 difference. As Dr. Schiek has testified, on the
13 average the advantage was 11 cents per gallon on
14 the portion of the milk they were able to exempt
15 from the pool. In our mind, this was an
16 incredible cost advantage that threw what had
17 previously been a level playing field out of
18 balance. As I'm sure has been noted at this
19 hearing, customers often base their purchasing
20 decisions on a fraction of a penny per gallon,
21 and when you have an advantage of a dime per
22 gallon to use at your discretion, it becomes an
23 enduring competitive advantage. We actively
24 pursued legislative changes to correct this
25 inequity via the Dairy Institute, but were

1 unsuccessful beyond ceasing further expansion
2 after March of 1995.

3 This advantage was a truly disruptive
4 development for the Northern California
5 competitive landscape. In about 1996 a large
6 box store chain from the Northwest initiated its
7 expansion into California by opening a store in
8 Redding, California. Crystal had a large
9 distribution plant in Redding that had
10 previously been bottling a plant. Additionally
11 Crystal served a large box store in Redding and
12 virtually every independent grocery store in the
13 area with the exception of Costco. Thus we felt
14 we were in a great position to serve this new
15 prospective customer. We gave the customer our
16 very best pricing and the new entrant promptly
17 selected the PD from Fresno as its supplier -
18 from a distance of over 300 miles to the south
19 due to superior pricing.

20 This was just the start of a trend that
21 developed over the next ten years. Crystal was
22 very successful at taking care of its existing
23 business, but anytime new business was available
24 it seemed to go to one of the two
25 producer-distributors. Despite having a new

1 bottling facility, we found it extremely
2 difficult to be price competitive for new
3 business opportunities in the conventional milk
4 market. The PD from Fresno put the PD advantage
5 to good use - building a first rate full service
6 route system that covered virtually all of
7 Northern California to serve the Target stores
8 and several major convenience store chains. The
9 PD in Modesto was selected as the supplier for
10 the Wal-Mart stores in Northern California. I
11 should note that Crystal had a working
12 relationship with this PD and did serve the
13 Wal-Mart stores in the Redding area on their
14 behalf. During this period margins compressed
15 and business growth was slowly declining for
16 Crystal as independent stores went out of
17 business and very few new customers were added.

18 The PD advantage impacted the other two
19 independent processors in different ways. The
20 large independent processor that was located in
21 Emeryville opened a new facility in 1999 and by
22 2000 had sold their business. I believe that
23 increased competition and the declining prices
24 and margins were a fact in that family's
25 decision to sell. The new owner has lost its

1 share of high volume business opportunities
2 including the online bid for a chain that
3 Dr. Schiek referenced in his testimony. We
4 actively participated in this process and could
5 not come close to the price that was settled on.
6 The independent processor in Petaluma took a
7 different direction. They positioned their
8 business to appeal to a natural, health-minded
9 customer base conveniently located in close
10 proximity to their plant, and have been able to
11 grow their business quite successfully by
12 marketing their conventional and organic
13 products to this growing niche consumer segment
14 on product benefits rather than price.

15 By mid-2006 the Hansen family had reached
16 the conclusion that it was time to sell the
17 business. Margins and prices were continuing to
18 fall and business was eroding. Certainly, many
19 factors beyond the PD issue played a part in
20 this decision like industry consolidation,
21 market-wide excess bottling capacity, increasing
22 business insurance costs, union labor issues,
23 and family considerations. We did not have the
24 cost advantage of the producer-distributors, the
25 resources of a national milk processor, nor were

1 we focused on a specific consumer niche like the
2 Petaluma milk processor. The attributes that
3 had made us successful for so many years -
4 quality, service, and brand were not valued as
5 much as a lower price. The business was not fun
6 anymore and it was time to move on, which the
7 family did in May of 2007. HP Hood has taken a
8 much different approach with the Sacramento
9 plant choosing to sell the Crystal brand name
10 and conventional milk business and focus instead
11 on the segment of Extended Shelf Life dairy
12 products.

13 In conclusion, reflecting upon the impact
14 of the PD exemption over the last 15 years,
15 leads me to several conclusions. First of all,
16 I have no ill feelings toward the Northern
17 California PDs. To the contrary, they are both
18 excellent operators and I admire their ability
19 to see an opportunity and exploit it to their
20 advantage. I find it highly ironic however,
21 that the California milk pooling system that was
22 put in place to stabilize the milk market for
23 the benefit of all milk producers created this
24 situation. The expansion of the PD exemption
25 essentially channeled money that had previously

1 been paid to the producers via the pool to the
2 producer-distributors which used it to improve
3 their cost competitiveness and grow their
4 business, limiting other producers' access to
5 the Class I market.

6 I was asked to testify about my
7 perception of the impact on the California PD
8 situation -- of the California PD situation. My
9 understanding is the Federal Order system is
10 considering a petition that would create a hard
11 cap that would effectively limit the size of an
12 exempt producer-handler to a relatively low
13 volume level. I would encourage this. The goal
14 of government controlled dairy pricing systems
15 should provide for market stability for both
16 producers and processors and should not create
17 opportunities which stand to benefit one party
18 at the expense of other parties.

19 That concludes my testimony. Thank you
20 for the opportunity to share Crystal's
21 experience. I hope you find it helpful.

22 MR. ENGLISH: Your Honor, if I may?

23 Dr. Schiek --

24 DR. SCHIEK: Yes, Mr. English.

25 MR. ENGLISH: -- I'm not going to belabor

1 the point too much. You first moved to
2 California 12 years ago?

3 DR. SCHIEK: That's right.

4 MR. ENGLISH: And before that -- that
5 would have been 1997. Before that, you were
6 involved with Federal Milk Marketing Orders for
7 at least 15 years, from 1982 to 1997, in one way
8 or the other?

9 DR. SCHIEK: In -- yeah, in difference
10 capacities, yes.

11 MR. ENGLISH: You received your bachelor
12 of science degree from Cornell University in
13 applied economics and business management,
14 correct?

15 DR. SCHIEK: Yes.

16 MR. ENGLISH: Did that involve in any way
17 dairy policy issues?

18 DR. SCHIEK: Well, it involved courses in
19 dairy marketing. And as an undergraduate
20 research assistant, I -- in 1980, I worked on a
21 series of milk transportation and milk receiving
22 studies while I was at Cornell.

23 MR. ENGLISH: And were those receiving
24 studies within Federal Order systems?

25 DR. SCHIEK: Yes, they were.

1 MR. ENGLISH: And then you received your
2 master's and Ph.D. from the University of
3 Florida in food and resource economics. That
4 master's and Ph.D., did they involve dairy
5 policy in any way?

6 DR. SCHIEK: Yes, they did.

7 MR. ENGLISH: To what extent?

8 DR. SCHIEK: My master's thesis had to do
9 with the impact of milk concentration
10 technologies on milk supply arrangements in the
11 Southeast United States. Particularly we were
12 looking at reverse osmosis, concentration of
13 fluid milk and its potential for supplying
14 deficit markets in the Southeast. And that was
15 under Federal Order pricing rules.

16 My dissertation for my doctorate was
17 related to a variety of policy factors that were
18 potentially impacting the regional structure of
19 production in the U.S., including the Federal
20 Order areas. We were looking at the impact of
21 milk inventory management programs, which were
22 in vogue at the time; at least they were
23 proposed at the time; as well Federal Order
24 changes that were being talked about and
25 considered and the use of bovine somatotropin as

1 a potential changer of production structure in
2 various regions of the country.

3 MR. ENGLISH: You mean recombinant bovine
4 somatotropin. I'll spell it later. I'll do it
5 during a break, if that's okay.

6 There's a difference between recombinant
7 bovine somatotropin --

8 DR. SCHIEK: Yes, there is.

9 MR. ENGLISH: -- and bovine somatotropin,
10 correct?

11 THE WITNESS: Yes, there is.

12 MR. ENGLISH: I only want to reference a
13 couple terms that you've used. You used the
14 phrase, economic rent seeking. Now, before I
15 ask you what that means, is that a phrase used
16 by economists?

17 DR. SCHIEK: It is a phrase used by
18 economists. And in its simplist sort of common
19 use, economic rent seeking is basically using
20 either market power or legislation or regulation
21 to obtain higher levels of profits than would be
22 found in -- without those changes in a
23 competitive market.

24 MR. ENGLISH: You've also used the
25 phrase, transfer price. Is that also a term

1 used by economists?

2 DR. SCHIEK: Yes, it is.

3 MR. ENGLISH: What is the meaning of that
4 term, at least as you are using it in this
5 testimony?

6 DR. SCHIEK: Usually transfer pricing
7 refers to integrated firms or multi-national
8 firms, and refers to how inside the confines of
9 the boundary of the firm, the firm will
10 establish pricing to move economic units of
11 production and goods or services from one part
12 of the business to another.

13 MR. ENGLISH: And other than providing
14 this testimony, is the Dairy Institute of
15 California taking any position of any kind of
16 what the Department should do as a result of
17 this hearing?

18 DR. SCHIEK: No, we are not.

19 MR. ENGLISH: So you are not opining on
20 which proposal -- proposal or proposals should
21 be or should not be adopted, is that correct?

22 DR. SCHIEK: No, I'm not.

23 MR. ENGLISH: No, you're not doing that?

24 DR. SCHIEK: I'm not doing that.

25 MR. ENGLISH: Before you were fortunate

1 enough to arrive here for this proceeding, there
2 was, I think, some discussion, much of it off
3 the record last week, with respect to a 15-A, 15
4 hyphen A, proceeding a few years ago with
5 respect to the regulatory treatment of
6 California processors for their sales into Clark
7 County. Do you remember that proceeding?

8 DR. SCHIEK: I do.

9 MR. ENGLISH: Did you appear in that
10 proceeding as an economist for the Dairy
11 Institute of California?

12 DR. SCHIEK: Yes, I did.

13 MR. ENGLISH: And were you accepted as an
14 expert, as an agricultural economist, in that
15 proceeding?

16 DR. SCHIEK: Yes, I was.

17 MR. ENGLISH: Your Honor, I have no
18 further questions of this witness at this time.
19 I believe that his credentials as an expert are
20 well established. I reemphasize that he's
21 talking about the California system. He is not
22 opining -- and that's what I meant by a fact
23 witness -- he's not here to say the Department
24 should do X, the Department should do Y. He was
25 applying facts using his economic background.

1 Given both his history in the Federal
2 Order sytem, given his university experience,
3 given his experiences in California and the fact
4 that even while he was in California he
5 testified in a (15)(A) as an economist, I think
6 it is fair to recognize him as an expert.

7 As for the statement made 20, 25 minutes
8 ago that somehow people weren't on notice, the
9 testimony was out yesterday morning at 8:00
10 a.m., probably even before, and was available.

11 In fact, I handed it out physically to
12 each attorney. No statements were made prior to
13 that about what Dr. Schiek was or was not
14 saying. The statement was there.

15 The term rent seeking, the term transfer
16 price, the entire testimony was out there so it
17 cannot be a surprise. Those are terms of art
18 used by economists and that is one of the
19 reasons -- only one of the reasons, but one of
20 the reasons -- why this witness should be
21 recognized as an expert.

22 Ultimately he is not asking, telling or
23 otherwise opining on what the Secretary should
24 do. He is providing, as I said before, within
25 the context of his professional life, a factual

1 background of how a producer-distributor
2 exemption in California has worked. I move
3 admission of the exhibit and I move Dr. Schiek
4 as an expert in agricultural economics.

5 JUDGE CLIFTON: Don't leave yet.
6 Dr. Schiek, I'd like to look at your statement.
7 On page 2 in the last paragraph about the middle
8 of the paragraph you changed the word production
9 to exemption when you read it.

10 DR. SCHIEK: That's correct. That's
11 correct.

12 JUDGE CLIFTON: And is that a change you
13 would like made on the copy of your Exhibit --

14 MR. ENGLISH: 75.

15 JUDGE CLIFTON: -- 75, thank you. That
16 will be available on the website for all to see?

17 DR. SCHIEK: I would like that change
18 made. That is a correction. It means -- it has
19 a different meaning than production in that
20 case.

21 JUDGE CLIFTON: All right. I'm going to
22 ask that the AMS people mark that change for his
23 initials, and there was one other -- two others
24 that I wanted to ask if you want them changed on
25 your written statement.

1 Look at the bottom of page 4, the last
2 line. When you read that, you read it as, he
3 would receive the quota price. Is that a change
4 that's important enough that you want it to show
5 in the document that will be on the website?

6 DR. SCHIEK: Yes. The price was --
7 should have been in there.

8 JUDGE CLIFTON: All right. I'd like that
9 change also to be made available for your
10 initial.

11 And then on page 5 above the chart, the
12 paragraph above the chart in the middle of that
13 paragraph, there's a sentence that starts, the
14 PD, and you inserted the word, regulated, before
15 we got to raw product cost advantage.

16 DR. SCHIEK: Yes, I did. Because I feel
17 that clarifies what I'm talking about. So I do
18 think that's an important change as well.

19 JUDGE CLIFTON: All right. I'd ask that
20 that item also be changed. And then,
21 Dr. Schiek, before you leave here today,
22 Ms. Fisher will approach you for initials of
23 those changes.

24 DR. SCHIEK: Okay.

25 JUDGE CLIFTON: Are you aware of any

1 others -- I realize I didn't read it exactly as
2 written, but those are the only changes I noted
3 that might have some significance important
4 enough to deal with.

5 Mr. English, are you aware, or,
6 Dr. Schiek, are you aware of any others?

7 MR. ENGLISH: I am not, your Honor.
8 Thank you for catching those. I circled them
9 and then I neglected to mention them. Thank
10 you, your Honor.

11 DR. SCHIEK: I'm not aware of any others
12 either.

13 JUDGE CLIFTON: Thank you, Dr. Schiek.
14 And then, Mr. Newell, would you look on your
15 Exhibit 76? You pointed out the change in the
16 last paragraph on page 1. It's not a full
17 paragraph, but it has three lines. And you
18 changed the 1996 data to 2006.

19 MR. NEWELL: Yes. It should have been
20 2006.

21 JUDGE CLIFTON: Is that important enough
22 that you would like that to be changed --

23 MR. NEWELL: Yes.

24 JUDGE CLIFTON: -- and you'll initial it?

25 MR. NEWELL: Yes, I would.

1 JUDGE CLIFTON: That's the only one I
2 noted. Mr. English and Mr. Newell, are there
3 any other changes that you would like made?

4 MR. ENGLISH: Your Honor, I noticed only
5 that on page 2 in the bottom paragraph in the
6 i.e. section, the third or fourth line, instead
7 of saying, you competed with your neighbor but
8 not your neighbor's neighbor, he said and not
9 your neighbor's neighbor. I don't think there's
10 a material difference there, but if the witness
11 wishes -- he said the word and rather than but.
12 I will let him tell whether either matters.

13 MR. NEWELL: No, it doesn't matter.

14 MR. ENGLISH: I didn't think so, but I
15 did note it, your Honor.

16 JUDGE CLIFTON: All right. Any others,
17 Mr. English?

18 MR. ENGLISH: Just one thing -- with
19 Mr. Newell, I'm fine. I just want to clarify
20 one thing with Dr. Schiek. 75-A, it was passed
21 out -- it was made available today. It is
22 different from page 3 of 75 in what respect?

23 DR. SCHIEK: In that the graph is
24 displayed in color on 75-A as opposed to black
25 and white in the copies distributed.

1 MR. ENGLISH: And you thought that was
2 necessary because or was important because?

3 DR. SCHIEK: Because when the color graph
4 was rendered into black and white, the trend
5 that I referenced in the written testimony was
6 not seen as clearly as it was in color. And I
7 did not realize when copies were made that --
8 that they would diminish the visual clarity of
9 that relationship.

10 MR. ENGLISH: There's no other reason for
11 the difference, correct?

12 DR. SCHIEK: There is no other reason for
13 the difference.

14 MR. ENGLISH: All right. Your Honor, I
15 again offer Exhibit 75, 75-A and 76 for
16 admission. And I repeat that Dr. Schiek should
17 be recognized as an expert in agricultural
18 economics for the testimony he has given.

19 JUDGE CLIFTON: Thank you. Let me start
20 with the exhibits and determine whether there's
21 any objection to their being admitted beyond
22 that already stated by counsel.

23 Starting with Exhibit 75 and 75-A, is
24 there any objection to those being admitted into
25 evidence, other than the objections that were

1 made at the testimony in the first place? There
2 are none.

3 Exhibit 75 and 75-A are hereby admitted
4 into evidence.

5 Is there any objection to the admission
6 into evidence of Exhibit 76, other than those
7 already stated before the witnesses testified?
8 There is none. Exhibit 76 is hereby admitted
9 into evidence.

10 Any objection to Dr. Schiek being
11 recognized as an expert in agricultural
12 economics, other than those that have already
13 been stated? There is none, and Counsel, I
14 appreciate that. I do accept Dr. Schiek as an
15 expert in the field of agricultural economics.

16 Now, the witnesses are available for
17 cross-examination. Would anyone like to
18 cross-examine? Mr. Vetne.

19 MR. VETNE: John Vetne representing
20 Mallorie's Dairy and two other producer-handlers
21 whose production in Class I is less than
22 3 million pounds.

23 CROSS-EXAMINATION

24 BY MR. VETNE:

25 MR. VETNE: Starting with you,

1 Dr. Schiek. The definition of economic rents
2 that you -- let me see if I can paraphrase this
3 correctly. Pursuit of a competitive advantage
4 or economic gain from regulation, from
5 legislation were like artificial -- I say
6 artificial -- means that one could not gain in
7 the competitive marketplace, is that correct?

8 DR. SCHIEK: That -- yeah. That's the
9 definition I gave.

10 MR. VETNE: Okay. You have not been here
11 for more than a week of hearings, is that
12 correct?

13 DR. SCHIEK: That is correct.

14 MR. VETNE: And you have not heard
15 testimony of producer-handlers who invest in
16 their business who have testified they would not
17 be able to meet their debt load, their cash flow
18 needs if they become fully regulated and had to
19 contribute to the pool. You are not aware of
20 that testimony, is that correct?

21 DR. SCHIEK: I am not. I was not here.

22 MR. VETNE: Would not the term economic
23 rent seeking also apply to the proposals,
24 Proposals 1 and 2, for a cap with respect to the
25 proponents' efforts by regulation or rulemaking

1 to make it uneconomic for smaller processors to
2 continue in business?

3 DR. SCHIEK: Any agricultural policy --
4 let me put it in a broad context. The Federal
5 Order system in its entirety could be viewed as
6 economic rent seeking by producers in their
7 entirety. So with specific -- in regard to
8 specific changes, they could be characterized
9 that way.

10 MR. VETNE: Okay. And with respect to
11 handlers, and looking specifically here, you
12 were asked to come and offered as a witness by
13 Mr. English. He represents handlers, you
14 understand that, not producers?

15 DR. SCHIEK: I understand that.

16 MR. VETNE: Okay. And with respect to a
17 handler proposal, the results of which,
18 according to the testimony of an earlier
19 witness, would be to put them out of business.
20 That would be an effort at economic rent seeking
21 by those who hope to gain that business when
22 their regulatory targets go out of business,
23 correct?

24 DR. SCHIEK: Well, I should say I didn't
25 hear the testimony, but if I take on face value

1 what you have said, it could be categorized that
2 way.

3 MR. VETNE: And even if they don't go out
4 of business, increasing a competitor's costs
5 creates advantage for those who, by regulation
6 or legislation, seek to increase those costs?

7 DR. SCHIEK: If you assume the starting
8 point is a competitive market, yes. It could
9 also be characterized as redressing a former
10 regulatory imbalance that created -- but was
11 created by economic rent seeking on the part of
12 the advantaged party.

13 MR. VETNE: You're assuming a -- a
14 seeking took place at some point by the
15 advantaged party. Can we --

16 DR. SCHIEK: I am, you're right.

17 MR. VETNE: You are. Okay. With respect
18 to producer-handler status in the Federal Order
19 system, it's been relatively unchanged other than
20 into markets for maybe 70 years. So if there
21 are those who sought, they are long since passed
22 on.

23 DR. SCHIEK: Is that a question?

24 MR. VETNE: Is it? Yes, that's a
25 question.

1 DR. SCHIEK: As you described it to me,
2 that sounds correct.

3 MR. VETNE: Now, let me start with your
4 graph, with the colored version, so I can
5 understand it. Let me see what this represents.

6 This represents aggregate combined volume
7 of milk reported processed by the Type 70
8 producer-handlers, is that correct?

9 DR. SCHIEK: Yes.

10 MR. VETNE: That's all of their milk
11 receipts and utilization?

12 DR. SCHIEK: That's correct.

13 MR. VETNE: Okay. And there are five
14 such plants that continue to exist?

15 DR. SCHIEK: That's correct.

16 MR. VETNE: Okay. And they derive their
17 exemption for part of their milk back to 1967,
18 correct?

19 DR. SCHIEK: Yes. That was when the
20 legislation was enacted. The pooling plan
21 become effective in 1969.

22 MR. VETNE: Okay. There -- let's see.
23 On the color version, there is -- a portion of
24 the bar is red. That is the legislatively
25 exempt volume?

1 DR. SCHIEK: That's correct.

2 MR. VETNE: And that's a volume that's
3 exempt from accounting at the difference between
4 Class I and quota for those producer-handlers,
5 correct?

6 DR. SCHIEK: Correct.

7 MR. VETNE: And they only get to take
8 advantage of that exemption or enjoy the
9 difference -- let me put it this way. They only
10 get to enjoy a retention of the difference
11 between Class I and quota if they actually
12 produce a volume of Class I milk that equals or
13 exceeds that?

14 DR. SCHIEK: That's correct.

15 MR. VETNE: Okay. And then the blue
16 portion is the additional Class I that these
17 five Type 70 producer-handlers fluid milk
18 products make from either their own milk above
19 the exempt volume or milk purchased from other
20 producers?

21 DR. SCHIEK: That's correct.

22 MR. VETNE: And the gray portion is
23 Class II, Class III, Class IV A and IV B,
24 correct?

25 DR. SCHIEK: Correct.

1 MR. VETNE: And do you know whether in
2 this system any of this volume would include the
3 diversions to manufacturing plants or sales to
4 manufacturing plants?

5 DR. SCHIEK: This is pool volume, so it
6 would include diversions which would be
7 classified at the ultimate utilization. In
8 other words, how it was finally used wherever
9 they sent it.

10 MR. VETNE: Of the receiving plant?

11 DR. SCHIEK: That's right.

12 MR. VETNE: Okay. And do you know if
13 this represents all pooled receipts, these bars?

14 DR. SCHIEK: Pooled receipts by the Type
15 70s?

16 MR. VETNE: Yes.

17 DR. SCHIEK: Okay. The blue and the gray
18 bar are the pooled receipts of the Type 70s.

19 MR. VETNE: Do you know if these, the
20 blue and the gray and the red combined, reflect
21 all receipts by the Type 70 exempt
22 producer-handlers to the extent -- let me put it
23 this way -- to the extent that these
24 producer-handlers received milk from dairy farms
25 located out of California, is that volume

1 reflected here?

2 DR. SCHIEK: That volume would not be
3 reflected here.

4 MR. VETNE: Would it be reflected for
5 some of those years?

6 DR. SCHIEK: It is possible that that
7 volume would have been reflected for some of
8 those years. It is possible, yeah.

9 MR. VETNE: Is it not the case that from
10 about 1997 through about 2004 that out of state
11 milk was included in the pool?

12 DR. SCHIEK: It is the case, yes.

13 MR. VETNE: So do you know any reason why
14 it would not be reflected here for those years?

15 DR. SCHIEK: Other than the fact that I,
16 in my time at Dairy Institute and discussing
17 matters of the market with a lot of people in
18 the industry, including our membership, there
19 was never any indication that the Type 70s in
20 Northern California engaged in importing milk
21 from out of state.

22 MR. VETNE: Okay. There are two Type 70
23 PDs in Northern California and three in Southern
24 California?

25 DR. SCHIEK: That's correct.

1 MR. VETNE: No gray above the bar graph
2 for 1993 and '94. Could you explain that?

3 DR. SCHIEK: Yeah. This data was
4 provided by the milk pooling branch of the
5 California Department of Food and Agriculture as
6 part of a hearing exhibit in the matter of the
7 Class I, II and III milk pricing hearing that
8 was conducted on October 30th and 31st of 2008.
9 And the exhibit they put together, for whatever
10 reason -- I'm not quite sure why -- did not have
11 the -- other than the exempt quota level did not
12 have the pooled Class I and the pooled other
13 information available for those prior years.

14 MR. VETNE: Okay. Would it be correct to
15 say that for every year from 1996 when the
16 pooling plan was first put into effect through
17 1994, there was also some pooled Class I and
18 some pooled other milk from those Type 70
19 producer-handlers?

20 DR. SCHIEK: Could you restate the
21 question? I want to make sure I give an
22 accurate answer.

23 MR. VETNE: Yeah. The pool plan was put
24 into effect in 1969, okay? If you had all of
25 the data on receipts and utilization, would you

1 not expect to find some blue and some gray on
2 the bar graphs going back prior to 1994?

3 DR. SCHIEK: If you included out of state
4 milk, is that what you're --

5 MR. VETNE: No.

6 DR. SCHIEK: Okay. I'm confused.

7 MR. VETNE: In 1994, if you had the data,
8 you would expect to find, on the 1994 bar, some
9 blue and some gray?

10 DR. SCHIEK: Yes, that's correct.

11 MR. VETNE: And it would probably be
12 pretty close to what appears in the following
13 year, 1995. There's not much change from year
14 to year?

15 DR. SCHIEK: Yeah, that would be my
16 assumption.

17 MR. VETNE: And the same thing would be
18 true for prior years, there would be some blue
19 and some gray?

20 DR. SCHIEK: There would be some blue and
21 some gray, that's correct.

22 MR. VETNE: And you're not aware of any
23 dramatic increase in the blue and the gray for
24 years prior to 1995?

25 DR. SCHIEK: I am not aware of it, no.

1 MR. VETNE: With respect to the Type 70
2 exempt producer-handlers, there are five
3 remaining. How many were there originally in
4 1969 when the pooling plan went into effect?

5 DR. SCHIEK: I don't know the answer to
6 that.

7 MR. VETNE: Okay. Do you know the number
8 for any period of time prior to the current
9 year?

10 DR. SCHIEK: There have been five since I
11 have been at Dairy Institute. So from 1997
12 forward, there have been five. My understanding
13 is there were five in 1993 when the last
14 legislative increase in the exemption occurred.

15 MR. VETNE: Okay, all right. Do you
16 know -- do you know what the specific exempt
17 volume is for each of the five?

18 DR. SCHIEK: No, I do not.

19 MR. VETNE: Do you know the range of
20 exempt volume for the five?

21 DR. SCHIEK: No, I do not. I do know
22 that it is not equal among the five. Two are
23 significantly smaller than the other three. And
24 even among those three, there is a range in
25 terms of what percentage of their production is

1 covered. It -- what I had been told was that it
2 ranged -- and this was several years ago, so as
3 they expand production, the percentages go down,
4 you understand. But the range was between 10
5 and 30 on the larger PDs.

6 MR. VETNE: And as a percentage of what?

7 DR. SCHIEK: Of their total Class I
8 sales.

9 MR. VETNE: Okay. Then what does that
10 translate to in -- in pounds or gallons?

11 DR. SCHIEK: I don't know. I can tell
12 you that, on average, we're looking at 21 to
13 22 million pounds a month, roughly
14 4 million pounds per -- if you divided by 5,
15 it'd be 4 million pounds per. Since three of
16 them are larger it's reasonable to assume for
17 those three it's more than 4 million pounds a
18 month.

19 MR. VETNE: Okay. Who are the two
20 smaller ones?

21 DR. SCHIEK: The two smaller ones are
22 Scott Brothers Dairy and Hollandia Dairy.

23 MR. VETNE: And they are located?

24 A. Scott Brothers, I believe, is in -- I was
25 going to say Ontario, but it might be San Bernadino, in

1 San Bernadino County. And Hollandia is in San Diego.

2 MR. VETNE: Okay. So one of the what
3 you've described larger PDs with a larger
4 exemption is located in Southern California, and
5 the other two relatively larger ones are the two
6 Northern California ones that were described,
7 correct?

8 DR. SCHIEK: Correct.

9 JUDGE CLIFTON: Would you spell
10 Hollandia?

11 DR. SCHIEK: One moment, please. I
12 believe it's H-o-l-l-a-n-d-i-a.

13 JUDGE CLIFTON: Thank you.

14 MR. VETNE: On the bottom of page 2, the
15 last full paragraph in the middle, after the
16 word Proposal 17, you say, except that the
17 entire production is applied to the plants'
18 Class I usage. The characterization of the
19 entire production applied to the plant's Class I
20 usage. You are contrasting what exists in
21 California with Proposal 17, correct?

22 DR. SCHIEK: I need to make the
23 correction that that word production was changed
24 to exemption.

25 MR. VETNE: Okay.

1 DR. SCHIEK: Okay. With that correction,
2 except the entire exemption as applied to the
3 Class I usage, you were comparing Proposal 17 to
4 what currently exists in California for Type 70
5 PDs?

6 DR. SCHIEK: I was comparing my
7 understanding of Proposal 17, yes.

8 MR. VETNE: Okay. And to which of those
9 two regulatory schemes or proposed regulatory
10 schemes did you apply the characterization of
11 the entire exemption applied to Class I usage?

12 DR. SCHIEK: For the California system.

13 MR. VETNE: Okay. So you weren't
14 referencing back to Proposal 17?

15 DR. SCHIEK: That's correct.

16 MR. VETNE: You were referencing to
17 California?

18 DR. SCHIEK: That's right.

19 MR. VETNE: Okay. And you understand
20 that the Proposal 17 in contrast would apply it
21 to a plant blend?

22 DR. SCHIEK: That was my understanding
23 from reading it, yes.

24 MR. VETNE: What -- that would make a
25 difference, wouldn't it, in a plant's ability to

1 offer milk at a lower price?

2 DR. SCHIEK: Unless the plant was
3 100 percent Class I utilization, yes.

4 MR. VETNE: Okay. Further on, you
5 indicate that the five plants that have some
6 Type 70 exempt milk have a pooled Class I
7 volume, an additional 100.1 million pounds per
8 month. Do you know -- and then some additional
9 pooled in other classes. So five plants, 183,
10 '84 million pounds for all of them. Do you
11 know -- other than dividing 183 by five, do you
12 know something about the size range of those
13 plants?

14 DR. SCHIEK: I couldn't comment with
15 certainty on that.

16 MR. VETNE: Can you comment with
17 something less than certainty but informed
18 information?

19 DR. SCHIEK: Not at this time. I could
20 perhaps do that with a little time to think
21 about it.

22 MR. VETNE: Okay. Can you identify the
23 plants that are the largest among the five, say
24 the three largest?

25 DR. SCHIEK: Sure. The largest three are

1 Producers Dairy located in Fresno, California;
2 Foster Farms Dairy located in Modesto,
3 California; and Rockview Dairy located in
4 Downey, California.

5 And the order in which I gave them is not
6 necessarily the order of largest to smallest.
7 It's just those are the three that are larger
8 than the other two.

9 MR. VETNE: Are you able to -- based on
10 the information that you have gained for the
11 past 12 years in California, is that right, 12
12 years?

13 DR. SCHIEK: 12 years, yes.

14 MR. VETNE: Okay. Do you know whether
15 any of these plants are as small as
16 5 million pounds or 4 million pounds total
17 receipts per month?

18 DR. SCHIEK: Of the five?

19 MR. VETNE: Yes.

20 DR. SCHIEK: I do not.

21 MR. VETNE: Do you know?

22 DR. SCHIEK: Let me clarify that. I'm
23 sure four of the five are larger than that. I'm
24 not sure about the fifth.

25 MR. VETNE: Okay. As I understand -- as

1 I understand your testimony, things were going
2 on fairly okay with respect to Type 70 PDs until
3 the legislature on two occasions increased their
4 exempt volume, is that correct -- is that a
5 correct understanding?

6 DR. SCHIEK: I believe that was from
7 Mr. Newell's testimony.

8 MR. VETNE: Okay. Do you have any
9 different view?

10 DR. SCHIEK: No. I arrived in 1997 so I
11 don't have the specific knowledge of what it was
12 like in the market prior to that time.

13 MR. VETNE: Okay. And based on your
14 experience and understanding, you're not aware
15 of any particular difficulty prior to that time?

16 DR. SCHIEK: From familiarity with Dairy
17 Institute meetings -- we have boards meetings
18 like any trade association does, several times a
19 year -- the producer-handler issue was one that
20 could come up in discussion, and I probably
21 should note that until the 1993 exemptions,
22 producer-handlers were -- even the large
23 producer-handlers were members of our
24 organization.

25 The issue was talked about, discussed

1 among the non-PDs who probably had concerns --
2 some of whom had concerns about it, but
3 certainly the -- I think the best way to
4 characterize it is the level of concern became
5 much higher after the 1993 amendments.

6 MR. VETNE: Okay. Going to page 4, so we
7 can translate concepts you use in California to
8 concepts that we use in the Federal Order
9 system.

10 The second full paragraph, beginning with
11 the words, in 1987 producers received -- Type 70
12 producer-handlers received an additional daily
13 exemption of 150 pounds fat and 375 pound solid
14 nonfat. What does that translate to in terms of
15 pounds of milk or monthly pounds of milk?

16 DR. SCHIEK: Well, I haven't made the
17 calculation in terms of into converting it into
18 producer milk. Primarily that's because our
19 pricing in general works on components and has
20 for a long time in California. So the
21 hundredweight milk price, for example, is more
22 of a reference point than it is a matter of
23 economic measurement in the state.

24 But to -- you could ascertain that by
25 assuming 3.5 percent fat in standard milk, and

1 figuring out what -- what volume that would come
2 to, taking the 150 and doing the math, or
3 8.7 percent solid nonfat at that time.

4 MR. VETNE: Okay. Otherwise, is the 150
5 to 375 ratio intended to be similar to fats, to
6 nonfat solids in producer milk?

7 DR. SCHIEK: Looking at it, it appears
8 that it is.

9 MR. VETNE: Okay. You could do either
10 one. You could take 3.5 pounds of fat and
11 simply divide 150 by 3.5 pounds, and you'll get
12 the daily pounds of milk. And multiplied by the
13 number of days in the month, you get the monthly
14 volume that represents?

15 DR. SCHIEK: That sounds correct, yes.

16 MR. VETNE: So two things happened
17 legislatively in 1978 with respect to Type 70
18 PDs. One, they got an additional exempt volume
19 of 150 pounds fat, whatever milk that
20 represents, plus to the extent that they had
21 purchased quota --

22 DR. SCHIEK: Uh-huh.

23 MR. VETNE: -- and quota is sold on the
24 open market in California as an asset?

25 DR. SCHIEK: It is, yes.

1 MR. VETNE: And it's an asset that
2 provides -- basically you're purchasing an
3 income stream?

4 DR. SCHIEK: Correct.

5 MR. VETNE: Plus there -- the value of
6 the asset they purchased in the past increased,
7 because the income stream increased by adding
8 quota purchased to the exempt volume, is that
9 correct?

10 DR. SCHIEK: Again, could I ask you to
11 repeat the question?

12 MR. VETNE: To the extent, prior to 1978,
13 producer-handlers had purchased quota, that
14 additional purchased volume was added to their
15 exempt volume?

16 DR. SCHIEK: It was added to the original
17 allocated exempt volume, yes.

18 MR. VETNE: All right. So when they
19 purchased quota, they purchased an income
20 stream. And when the legislature acted in 1978,
21 it improved that income stream?

22 DR. SCHIEK: Correct.

23 MR. VETNE: And a similar thing happened
24 in 1993?

25 DR. SCHIEK: Correct.

1 MR. VETNE: And all of this, as I
2 understand your testimony -- well, first of all,
3 it happened before you got there, so you did
4 some research, correct?

5 DR. SCHIEK: Correct.

6 MR. VETNE: Okay. All of this happened
7 because of, as I understand it, the political
8 power of producer-handlers, correct?

9 DR. SCHIEK: Yes.

10 MR. VETNE: And in California,
11 producer-handler exemptions and classification
12 of milk and milk products, the relationship of
13 quota to overbase, a lot of things are
14 determined legislatively that, in the federal
15 system, are determined by the Secretary of
16 Agricultural in a hearing such as this?

17 DR. SCHIEK: That is correct.

18 MR. VETNE: Okay. And, in fact, one of
19 the reasons that producer-handlers in particular
20 have political power in California is that
21 during this time, and maybe even now, they were
22 represented by Representative Gonsalves, who was
23 the father of the original pooling act, correct?

24 DR. SCHIEK: You've done your homework,
25 too. Correct.

1 MR. VETNE: And he's a lobbyist now, or
2 he was during this time?

3 DR. SCHIEK: When he was alive, he was a
4 lobbyist, and his son continues.

5 MR. VETNE: Continues the business?

6 DR. SCHIEK: Uh-huh.

7 MR. VETNE: And it was the original
8 Gonsalves, the father of the Milk Pooling Act,
9 who -- who was the lobbyist that secured for his
10 clients the 1978 legislation when he was alive
11 and kicking?

12 DR. SCHIEK: He was the lobbyist then,
13 yes.

14 MR. VETNE: And your belief is that it
15 would have been better for your Dairy Institute
16 members if this kind of decision could be made
17 by the Agriculture Department, the Secretary of
18 Food and Agriculture who administered the
19 program, correct?

20 DR. SCHIEK: In general. I would say it
21 depends on the person, the Secretary's chair,
22 but as a -- as a rule and in general, the
23 Department has experts in dairy marketing on
24 staff. Typically, the legislature does not.
25 And I -- I bring this point up primarily because

1 even -- you are correct in -- in your statements
2 about the legislator being more involved in --
3 in dairy policymaking in California. But we've
4 seen, I believe, in the Federal Order sytem
5 cases where legislature has stepped in and
6 overruled the Secretary on various issues. The
7 one I'm thinking of is the Class I differentials
8 in 1999.

9 MR. VETNE: Do you -- are you aware in
10 the Federal Order sytem of whether
11 producer-handlers have any measure of political
12 power with the decision makers; that is, the
13 Department of Agriculture, comparable to the
14 political power that producer-handlers have with
15 the legislature in California?

16 DR. SCHIEK: Okay. Let me state back
17 your question. You're asking if the
18 producer-handlers in the Federal Orders have
19 power with the Department in the Federal Orders,
20 the U.S. Department of Agriculture, comparable
21 to the power that they have in the legislature
22 in California? And I guess my answer to that
23 is, I am not aware of any such.

24 MR. VETNE: Good. Thank you. That's my
25 question, and thank you for understanding my

1 questions and giving me a direct answer.

2 JUDGE CLIFTON: Mr. Vetne, this is about
3 the time of morning that's good to take a break.
4 Would you mind terribly if I interrupt your
5 cross?

6 MR. VETNE: Absolutely not.

7 JUDGE CLIFTON: All right. Thank you.
8 Let us take a 20-minute break. Please be back
9 and ready to go at five minutes after ten.

10 (A recess was taken from 9:47 to 10:06.)

11 JUDGE CLIFTON: Let's go back on record.
12 We're back on record at 10:06. Mr. Vetne, you
13 may proceed.

14 MR. VETNE: Okay. Dr. Schiek. Still
15 with you. One of the characteristics of the
16 California regulatory system to which you
17 referred is a law that regulates the ability of
18 milk handlers to sell below cost, is that
19 correct?

20 DR. SCHIEK: That's correct.

21 MR. VETNE: Excuse me. Let's go off
22 record just a minute.

23 (Off the record.)

24 JUDGE CLIFTON: Mr. Vetne.

25 MR. VETNE: Okay. We were discussing the

1 sell below costs. Is that law administered by
2 the same people that administer the pooling and
3 pricing plans?

4 DR. SCHIEK: It is administered by the
5 dairy marketing branch, which also determines
6 minimum pricing, in terms of -- oversees minimum
7 pricing by class. The pooling plan is
8 administered by the milk pooling branch, which
9 is a separate branch although they're both under
10 the configuration of marketing services.

11 MR. VETNE: Okay. So the division of
12 marketing services, overall, administers all of
13 these programs?

14 DR. SCHIEK: Yes, correct.

15 MR. VETNE: Okay. As I understand it,
16 your testimony, there's a relationship between
17 the -- the sale below or anti sale below cost
18 law and the ability of California Section 70
19 producer-handlers to bid on wholesale or retail
20 accounts, is that correct?

21 DR. SCHIEK: I'm not sure I would
22 characterize it that way. If I could explain --

23 MR. VETNE: You might anticipate my
24 question, so please do.

25 DR. SCHIEK: Okay. There is a part of

1 the food and agricultural code that prohibits
2 sales below cost. And to the extent that a
3 processor is competing for sales, they can sell
4 below cost if they are needing a legitimate
5 price that is in the below cost. So what is --
6 what becomes important is not only as a
7 processor your cost if you were a processor, but
8 the cost of your competitors as well. So if
9 your competitive has a lawful price that they're
10 offered based on their costs, then you are
11 allowed to beat it. That may not answer your
12 question.

13 MR. VETNE: Well, it sort of does. When
14 there's a bid, for example, for -- well, you
15 described a bid process. And school sales are
16 bid processes, correct?

17 DR. SCHIEK: Usually, yeah.

18 MR. VETNE: Once you put in a bid, you
19 don't get a chance to meet your competition, is
20 that correct?

21 DR. SCHIEK: Typically, yeah.

22 MR. VETNE: And am I correct that, in
23 interpreting your testimony, that
24 producer-handlers, when they make a bid in
25 relationship to the below cost rule, they are

1 allowed to assign their exempt volume to that
2 bid?

3 DR. SCHIEK: Yeah, because that exempt
4 volume is a portion of their costs.

5 MR. VETNE: So they're allowed to take a
6 portion of their milk supply that they received
7 presumably at a lower cost and relate that to
8 the below cost law, disregarding their entire
9 average milk cost, is that correct?

10 DR. SCHIEK: That's my understanding,
11 yes.

12 MR. VETNE: Okay. And there is no
13 comparable regulations administered by USDA
14 that's integrated with milk pricing or pooling,
15 is there?

16 DR. SCHIEK: I'm not aware of any. Back
17 on your previous question, I might point out
18 that if that exemption, which I estimated on --
19 the advantage on exempt milk, which I estimated
20 at 11.3 cents, I believe, over the ten-year
21 period I was looking at, 11.3 cents per gallon
22 given the volumes of unregulated -- excuse me,
23 the volumes of exempt Class I and the volumes of
24 pooled Class I milk of the producer-handlers in
25 aggregate. If you spread that exemption over

1 their entire Class I volume, it would still be
2 about 2 cents a gallon --

3 MR. VETNE: I was going to ask that
4 question. Okay. So let's see. The bar graph
5 at the bottom of page 5, your testimony at the
6 bottom of page 6, and your reference to cost
7 advantages, all of your written testimony, all
8 relate to the advantage on that isolated portion
9 that is exempt?

10 DR. SCHIEK: The numbers that I cite
11 there are -- are on the exempt portion, that's
12 correct.

13 MR. VETNE: Okay. Other than your
14 response to the comment a question or two ago,
15 you did not in your testimony estimate an
16 advantage on the entire milk receipts and
17 utilization of Section 70, exempt
18 producer-handlers?

19 DR. SCHIEK: Not in my testimony, no.

20 MR. VETNE: Okay. Let's go to the top of
21 page 7, the sentence beginning with, as a result
22 of the cost advantages producer-handlers have
23 grown. Are you familiar with the term,
24 incremental costs?

25 DR. SCHIEK: I'm familiar with the term.

1 And I've heard it used different -- differently
2 in different situations.

3 MR. VETNE: Okay. Well I'm going to get
4 to that.

5 DR. SCHIEK: Okay.

6 MR. VETNE: Okay. When a
7 producer-handler -- somebody in the aggregate in
8 Figure 1 that has receipts of milk that is fully
9 pooled takes on an additional account, increases
10 Class I sales, is not the incremental cost for
11 that additional sale the same as for regulated
12 handlers; that is, the Class I price minus
13 quota?

14 DR. SCHIEK: I better ask you to repeat
15 the question.

16 MR. VETNE: Okay. When a
17 producer-handler that has some exempt milk but
18 also has nonexempt milk that's fully pooled,
19 right, increases Class I sales, takes on a new
20 account, is not the incremental cost for that
21 additional volume of milk receipts Class I minus
22 quota?

23 DR. SCHIEK: The additional cost -- the
24 additional cost -- Class I as --

25 MR. VETNE: I'm talking about on

1 nonexempt milk.

2 DR. SCHIEK: On non-exempt milk.

3 MR. VETNE: We are getting to that
4 portion that is not exempt.

5 DR. SCHIEK: Okay. So what you are
6 asking is, the cost of that milk to the handler,
7 nonexempt milk on incremental business --

8 MR. VETNE: Uh-huh.

9 DR. SCHIEK: -- is a Class I minus quota?
10 Unless I'm misunderstanding your question, I
11 think it's Class I, period.

12 MR. VETNE: Oh, it's Class I, okay. So
13 there is no advantage on -- for additional
14 nonexempt volume. The Section 70
15 producer-handler pays the same Class I price as
16 everybody else and accounts to the pool just
17 like everybody else?

18 DR. SCHIEK: Given the parameters of your
19 question, that's correct.

20 MR. VETNE: Has there been, in
21 California, a consolidation of plants and --
22 fluid milk plants in plant capacity as there has
23 been in the rest of the country?

24 DR. SCHIEK: There has been some, yes.

25 MR. VETNE: Plants are --

1 DR. SCHIEK: There are fewer plants.

2 MR. VETNE: Fewer plants. And the plants
3 that survive are larger?

4 DR. SCHIEK: We've had some fairly large
5 and some small plants close, so I don't know if
6 I'm really prepared to characterize the
7 situation that -- probably the average size of
8 -- of the remaining plants is larger, yes.

9 MR. VETNE: Well, if you have fewer
10 plants and fairly consistent volume of Class I,
11 they would be larger, wouldn't they?

12 DR. SCHIEK: Yes.

13 MR. VETNE: And in California during --
14 now, I'm on page 7 looking at that graph -- in
15 California are there other over-order premiums
16 on Class I milk?

17 DR. SCHIEK: Yes, there are.

18 MR. VETNE: Okay. And those have varied
19 over time, haven't they?

20 DR. SCHIEK: They have.

21 MR. VETNE: And they've become an
22 increasing part of the price that handlers have
23 to pay during the last decade?

24 DR. SCHIEK: An increasing part? They
25 varied over time. I'm not sure that the trend

1 is necessarily increasing. I don't know. But
2 at times they've been larger. At times, we had
3 a -- a marketing agency operative in southern
4 California for a number of years that got very
5 large at that point. That agency collapsed, and
6 then they got much smaller again.

7 MR. VETNE: The -- the chart, the line
8 graph on page 7 --

9 DR. SCHIEK: Uh-huh.

10 MR. VETNE: -- showing shares of Class I
11 market by types of plants, that reflects a
12 number of competitive factors, does it not,
13 including premiums charged, location of plants,
14 plants closing, plant efficiencies, in addition
15 to whatever the cost advantage Section 70 plants
16 have on a portion of their supply?

17 DR. SCHIEK: The graph is simply an
18 estimate of the share -- simply is the share and
19 it would be reflective of all the factors that
20 are at work in the marketplace.

21 MR. VETNE: Okay. So it is not your
22 intent by this graph to opine that the ratio of
23 sales by Section 70 plants and non -- and fully
24 regulated plants is exclusively due to the
25 Section 70 producer-handlers having a cost

1 advantage on some of their milk?

2 DR. SCHIEK: Exclusively, no. To the
3 largest degree and as the most important factor,
4 yes.

5 MR. VETNE: Okay. Have you quantified or
6 identified the other factors?

7 DR. SCHIEK: I have not quantified the
8 other factors.

9 MR. VETNE: Okay. Have you identified
10 the other factors?

11 DR. SCHIEK: No, not specifically.

12 MR. VETNE: Okay.

13 DR. SCHIEK: But I would point out other
14 factors are, in general, at work for all
15 processors.

16 MR. VETNE: Okay. With respect to fully
17 regulated California processors, what is the
18 average size of those plants?

19 DR. SCHIEK: I don't know.

20 MR. VETNE: What about the average size
21 of the members, fluid distributors in your
22 membership?

23 DR. SCHIEK: I don't have that figure
24 either.

25 MR. VETNE: Okay. Does your membership

1 collect data on plant costs --

2 DR. SCHIEK: No, we didn't.

3 MR. VETNE: -- on processing costs?

4 DR. SCHIEK: We don't collect any data
5 simply on our members' processing costs, no.

6 MR. VETNE: Do you receive information
7 from other sources on processing costs of fluid
8 milk plants in general, for example, for
9 purposes of below-cost regulation?

10 DR. SCHIEK: We do not. The state is the
11 one in charge with enforcing sales below costs.
12 And they would -- they would have costs. If
13 they're involved in a matter, they would be
14 given those costs by the processor, if there's a
15 complaint. So we don't specifically request
16 those costs from our members.

17 MR. VETNE: So it's not part of your
18 function of the Dairy Institute of California to
19 consult and advise with its members on issues of
20 below cost sales?

21 DR. SCHIEK: We will when they ask us
22 specifically to do it. We don't maintain a
23 database or we're not out there telling our
24 members that -- we're not monitoring our members
25 on that, I should say.

1 MR. VETNE: Okay. Based on the limited
2 involvement that your institute has with
3 processors costs, do you have a ballpark figure
4 on what it costs to take milk from the silo to
5 the package?

6 DR. SCHIEK: Again, I don't think I have
7 a number that I can give you at this time. The
8 Department of Agriculture in California, the
9 CDFA, does produce annually a limited analysis
10 of marketing margins. In other words, they
11 would look at the fluid milk price and retail
12 price and assign a share attributed to
13 production and retailing. So that data is
14 available. I have seen it. I just don't recall
15 it.

16 MR. VETNE: Okay. Would it be fair to
17 say, based on what we know of the
18 producer-handlers and their total volume, that
19 the type 70 producer-handlers are not
20 substantially smaller than most of the fully
21 regulated plants with which they compete?

22 DR. SCHIEK: I think that would be fair
23 to say for three of the five Type 70s, yes.

24 MR. VETNE: Okay. On the top of page 5
25 of your testimony, you -- I guess speculate is

1 the best word. In the last sentence, the
2 paragraph ending at top of the page. So actual
3 cost advantage may be greater.

4 You are referring there to the price
5 received at the producer-handler farm, is that
6 correct?

7 DR. SCHIEK: Yes, I'm referring to that
8 transfer price that I've described.

9 MR. VETNE: Okay. And that would occur,
10 cost advantage being greater, would occur if the
11 cost of farm milk production at the
12 producer-handler farm were lower than costs at
13 other farms?

14 DR. SCHIEK: I think it could -- I think
15 my point there is that it could occur regardless
16 of the cost at the farm.

17 MR. VETNE: It could occur at -- so
18 you're saying -- I don't -- I don't get it in
19 that case. Because a farm that operates
20 continually below cost is not going to exist
21 very long. Would you agree with that?

22 DR. SCHIEK: Not necessarily. In the
23 case of a Type 70 producer-handler you could
24 operate your cost at the farm significantly --
25 significantly -- a -- below cost at some level,

1 and as long as your profitability from the
2 processing side more than compensated you, you
3 could do it. There's an integrated business.
4 Total profit of the entire business is what
5 matters.

6 MR. VETNE: Yeah, it really doesn't
7 matter how the producer -- Type 70
8 producer-handler allocates within its units?

9 DR. SCHIEK: Yeah.

10 MR. VETNE: It's the bottom line from the
11 cow to the package totaled up that makes the
12 difference, correct?

13 DR. SCHIEK: The bottom in terms of
14 costs, you mean?

15 MR. VETNE: In terms of cost advantage.
16 That's the word you used.

17 DR. SCHIEK: Certainly the business is
18 not viable long run if they're selling milk
19 below that total cost. In terms of their
20 advantage relative to a fully regulated handler
21 at any point in time, it's -- they will price
22 internally in a manner that maximizes their
23 total profit. That's my point.

24 MR. VETNE: Do you know for a fact that
25 producer-handlers price within -- within their

1 organization to the farmer?

2 DR. SCHIEK: So you're asking me -- what
3 you are really asking me there from an economic
4 perspective is whether they're profit maximizers
5 or not. And I have no reason to believe they're
6 not.

7 MR. VETNE: You assume, as an economist,
8 that everybody is.

9 DR. SCHIEK: I would say from my
10 experience in California with three of the Type
11 70 PDs that they are profit maximizers.

12 MR. VETNE: My question was, don't you,
13 as an economist, assume that everybody operating
14 in a competitive market is a profit maximizer?

15 DR. SCHIEK: Yes.

16 MR. VETNE: You say earlier in that
17 paragraph the transfer price is assumed to be
18 the quota price. My question is, assumed by
19 whom?

20 DR. SCHIEK: Well, certainly assumed by
21 me.

22 MR. VETNE: I got that part.

23 DR. SCHIEK: So there's -- there's one.
24 Discussions with industry personnel, from the
25 producer trade associations from CDFA's staff,

1 from my membership and -- I guess that's pretty
2 much everybody except the PDs. That's how
3 everyone calculates it, and that's the
4 assumption everyone makes.

5 MR. VETNE: Everyone. I guess I can't
6 cross-examine you on that. The sentence ending
7 at the top of the page from the prior page.

8 DR. SCHIEK: The sentence ending the top
9 of the page?

10 MR. VETNE: Page 4 to 5. If the PD did
11 not have a plant --

12 DR. SCHIEK: Okay.

13 MR. VETNE: -- he would receive --

14 DR. SCHIEK: Okay.

15 MR. VETNE: -- the quota price for all
16 exempt milk he shipped to a regulated handler.

17 DR. SCHIEK: Uh-huh.

18 MR. VETNE: In that case the exempt milk
19 is no different from any other milk. It's just
20 quota milk?

21 DR. SCHIEK: It's quota milk, exactly.

22 MR. VETNE: It's, in effect, not exempt
23 milk anymore?

24 DR. SCHIEK: If that were the case, if
25 the exemption did not exist, it would not be

1 exempt milk, that's correct.

2 MR. VETNE: Okay. The label exempt milk
3 on that volume is not intended to suggest that
4 that milk is any different than any other quota
5 holder's milk going to a regulated handler?

6 DR. SCHIEK: In the situation described,
7 that's correct.

8 MR. VETNE: And it is not exempt from
9 pooling in that transaction?

10 DR. SCHIEK: In the situation described,
11 that's correct.

12 MR. VETNE: All right. Could you move
13 your microphone to the right, please?

14 MR. VETNE: Good morning, Mr. Newell.

15 MR. NEWELL: Good morning.

16 MR. VETNE: What was the date you changed
17 from 1996 to 2006? Was that at the bottom of
18 page 1?

19 MR. NEWELL: Yes.

20 MR. VETNE: Okay. Of the -- let's see,
21 during this time period through -- through 2006,
22 Crystal operated one plant?

23 MR. NEWELL: 1990 to 2006?

24 MR. VETNE: Yes.

25 MR. NEWELL: From -- in 1990, we operated

1 two plants. We had our plant on D Street and to
2 be perfectly clear, we had a small plant in
3 Redding, California.

4 MR. VETNE: Okay.

5 MR. NEWELL: A little plant.

6 MR. VETNE: A little fluid plant?

7 MR. NEWELL: A little fluid plant.

8 MR. VETNE: And that was in 1990?

9 MR. NEWELL: That was in 1990. When we
10 opened our new plant in Sacramento, our new
11 fluid plant in 1996, that small plant in Redding
12 ceased to produce milk, and we consolidated into
13 one plant.

14 MR. VETNE: Okay. The small plant in
15 Redding was what volume, so we get a reference
16 to your small plant characterization?

17 MR. NEWELL: So long ago I can't -- I
18 can't remember.

19 MR. VETNE: Okay. And the plant in
20 Sacramento, between those years processed how
21 much fluid milk?

22 MR. NEWELL: The --

23 MR. VETNE: Gallons, pounds, whatever.

24 MR. NEWELL: Yeah. I would say 50 to
25 60 million gallons a year.

1 MR. VETNE: Okay. And the rest of it was
2 in various soft products, Class II products?

3 MR. NEWELL: Yes.

4 MR. VETNE: Class III?

5 MR. NEWELL: Class II through IV.

6 MR. VETNE: Class II through IV A?

7 MR. NEWELL: IV A, yeah. No cheese. No
8 hard cheese.

9 MR. VETNE: No cheese. Okay. During
10 those same years would Crystal Creamery -- did
11 Crystal Creamery receive all of its milk from
12 dairy cooperatives or have some independent
13 producers?

14 MR. NEWELL: No, I think in my -- in my
15 testimony the vast majority of our milk came
16 from independent producers. And we balanced
17 ourselves. Essentially we would buy cream on
18 occasion if we -- if we did have a shortfall on
19 milk, we could go buy from a co-op, but not
20 usually.

21 MR. VETNE: Okay. Did that ratio of
22 co-op to independent milk change during those
23 years, again going through 2006?

24 MR. NEWELL: Yes, we did as we got out of
25 the milk drying business, and we -- our producer

1 based strength, so we did buy more co-op milk
2 than we have in the past towards the end.

3 MR. VETNE: Okay. And during the latter
4 part of that period through 2006, what was the
5 range of premiums paid for that milk?

6 MR. NEWELL: Approximately -- I think we
7 had -- I'm sorry, for the independent producers?

8 MR. VETNE: No, for the co-ops first.

9 MR. NEWELL: I don't know.

10 MR. VETNE: Okay. Then for the
11 independent producers 25 cents per hundredweight
12 for rbST free and then we paid a quality bonus
13 on top of that that probably topped out at about
14 45 cents.

15 MR. VETNE: Okay. That was a premium on
16 the blend, not on the class, correct?

17 MR. NEWELL: Yes.

18 MR. VETNE: And you talked about some --
19 some bidding and below costs also. Is it your
20 understanding that Type 70 producer-handlers
21 were able to bid the prices that were successful
22 on bid because they were able to isolate their
23 exempt volume to that sale?

24 MR. NEWELL: Psychologically they had an
25 advantage, and they seemed to use it.

1 MR. VETNE: Psychologically. Well, how
2 does that work?

3 MR. NEWELL: They -- it means they just
4 bid very aggressively when they want something.
5 Now, below cost, the -- the state does not -- I
6 would say very seldom do they get involved in
7 bid issues.

8 MR. VETNE: Okay. And this was a bid
9 from one of the two northern California Type 70
10 producer-handlers?

11 MR. NEWELL: We're talking about the
12 online bid?

13 MR. VETNE: Yes.

14 MR. NEWELL: Yes. The online bid was --
15 one -- yes, one of them was the winner of that
16 bid.

17 MR. VETNE: Okay. You used the term,
18 independent processors, several places in your
19 testimony.

20 MR. NEWELL: Yes.

21 MR. VETNE: Do you intend that to be
22 synonymous with Type 70 producer-handlers?

23 MR. NEWELL: No.

24 MR. VETNE: Okay. What --

25 MR. NEWELL: Type 70 producer-handlers I

1 refer to as PDs. So that's exclusive to those
2 two. Independent processors is meant to define
3 the five independent processors in northern
4 California.

5 MR. VETNE: Okay.

6 MR. NEWELL: PDs being a -- two-fifths of
7 the five.

8 MR. VETNE: A subgroup?

9 MR. NEWELL: A subgroup.

10 MR. VETNE: Okay. So the top of page
11 3 -- refer to your testimony please -- the first
12 full paragraph, you refer to legislative action
13 in 1993 moving the PD exemption cap. Well,
14 actually it changed the cap, correct?

15 MR. NEWELL: I think it removed it and
16 then the cap got put back on. But that's my
17 perception.

18 MR. VETNE: Okay. And this allowed
19 independent -- the independent processors in
20 Fresno and Modesto to significantly decrease
21 their milk costs, increasing their exempt quota
22 holdings. In that case your use of the words,
23 independent processors, simply characterized a
24 subgroup of independent processors located in
25 Fresno and Modesto who happened to be --

1 MR. NEWELL: The two PDs, yeah. I was --
2 I was transitioning them from independent
3 processors into PDs.

4 MR. VETNE: Got it.

5 MR. NEWELL: Prior to that time -- as a
6 sales part of our organization I think maybe
7 upper management had a different view. But
8 prior to that time we really didn't know the PD
9 issue exists. We didn't know there was an
10 advantage there.

11 MR. VETNE: All right. For Crystal
12 Creamery during this time through 2006 -- well,
13 the last few years before that that you were
14 there, do you have information on processing
15 costs, what it costs to move milk from the silo
16 to the package?

17 MR. NEWELL: I do not.

18 MR. VETNE: Do you know whether Crystal
19 had its own blowing -- bottle blowing operation?

20 MR. NEWELL: Yes, we had a blow mold. We
21 had five blow molds.

22 MR. VETNE: And did you make your own
23 caps?

24 MR. NEWELL: No.

25 MR. VETNE: Purchased caps?

1 MR. NEWELL: Purchased caps.

2 MR. VETNE: Make your own labels?

3 MR. NEWELL: Purchased labels.

4 MR. VETNE: Install your own labels?

5 MR. NEWELL: Installed our own labels.

6 MR. VETNE: Okay. You refer to a large
7 box store. What's a box store?

8 MR. NEWELL: A box store is a -- it's a
9 large grocery store that sells their goods
10 cheaply to bring volume through. So a -- an
11 example of a box store would be -- probably a
12 Wal-Mart Supercenter could be a box store. I
13 think Meijer in this area is -- is a box store.

14 MR. VETNE: M-e-i-e-r?

15 MR. NEWELL: I think it's M-e-i-j-e-r.

16 MR. VETNE: J-e-r. Yeah, that was
17 referenced yesterday by one of the witnesses.

18 MR. NEWELL: Yeah, that's a box store.
19 Price impact is another word for that.

20 MR. VETNE: And the word, box? What --
21 what significance does the word, box, have to do
22 in box store?

23 MR. NEWELL: I don't know.

24 MR. VETNE: Okay. I'm looking at page 4.
25 Referring to the independent processor in

1 Petaluma, that took a different direction?

2 MR. NEWELL: Yes.

3 MR. VETNE: Again, we're referring to the
4 Type 70 producer-handler?

5 MR. NEWELL: No.

6 MR. VETNE: No?

7 MR. NEWELL: No, no. They are one of the
8 three nonPDs.

9 MR. VETNE: NonPDs?

10 MR. NEWELL: Right.

11 MR. VETNE: Okay. As was the independent
12 processor in Emeryville?

13 MR. NEWELL: Yes.

14 MR. VETNE: That was one of the three --

15 MR. NEWELL: Non-PD.

16 MR. VETNE: -- non-PD independent
17 processors?

18 MR. NEWELL: Yes, family-owned
19 independent processors.

20 MR. VETNE: Got it. Do you have any
21 knowledge, information, from your experience,
22 which would indicate that the size of the Type
23 70 partially exempt PDs is any different than
24 the size of their fully regulated competitors?

25 MR. NEWELL: I -- I think I'll refer to

1 what -- or agree with what Dr. Schiek said, is
2 three of them are comparable size plants and two
3 of them, I think, are very small.

4 MR. VETNE: Quite small. Do you have a
5 volume reference when you use the term, quite
6 small?

7 MR. NEWELL: I do not.

8 MR. VETNE: Do you have --

9 MR. NEWELL: I don't -- I don't really
10 know much about southern California, so I
11 can't --

12 MR. VETNE: All right. Move the mic back
13 over to Dr. Schiek, please.

14 The number that you use as a transfer
15 price and competitive advantage Class I minus
16 quota, right --

17 DR. SCHIEK: Uh-huh.

18 MR. VETNE: -- that is the difference,
19 resulting difference from that subtraction, is a
20 dollar amount that has declined over -- well,
21 increased over a period of years, correct? As
22 production has increased in California, the
23 resulting subtraction produces a higher number?

24 DR. SCHIEK: Yeah, that would be the --
25 the effect of new production in the lower

1 classes.

2 MR. VETNE: And all new production goes
3 into lower classes?

4 DR. SCHIEK: I would say typically, yes.

5 MR. VETNE: I mean, there has been no
6 increase in --

7 DR. SCHIEK: In fluid volume there's been
8 no substantial -- there's no upward trend since
9 the late 1980s in fluid milk production in
10 California.

11 MR. VETNE: Now, by fluid milk
12 production, you mean Class I sales?

13 DR. SCHIEK: Class I sales.

14 MR. VETNE: And the way that this works
15 in California is all of the revenues in all
16 classes are put into the pool, is that true?

17 DR. SCHIEK: That's true.

18 MR. VETNE: Okay. And then from all
19 those revenues that are in the pool, you figure
20 up how much quota eligibility -- the dollar
21 value of quota eligibility is, correct?

22 DR. SCHIEK: The -- if I can be more
23 precise, the amount of quota is -- that's out
24 there is known obviously prior to the running of
25 the pool. The amount of quota shipped is -- is

1 known. And that -- once they know the pounds of
2 quota shipped, then the -- the amount that has
3 to be set aside to pay the quota premium is
4 known.

5 MR. VETNE: Right. So the quota value is
6 set aside from the total pool?

7 DR. SCHIEK: Uh-huh.

8 MR. VETNE: Every pound of milk or
9 actually every pound of solid not fat then gets
10 an equal share of that pool after the set aside,
11 and then for the quota holders that set aside is
12 thrown back and applied to their solids not fat,
13 am I correct?

14 DR. SCHIEK: That's right except for the
15 exempt quota volume of the producers.

16 MR. VETNE: Right. But that's not in the
17 pool in the first place.

18 DR. SCHIEK: Well, you said all Class I
19 revenues.

20 MR. VETNE: Okay. So would it be fair to
21 say that the problem you've described of
22 competitive advantage is one that has
23 exacerbated over time as the difference between
24 Class I minus quota has become larger and
25 larger?

1 DR. SCHIEK: Yeah. And in fact, it, as
2 you can view from the graph I provided, Figure
3 2, it changes significantly from month to month
4 as well, depending on the -- not just the volume
5 growth in lower classes but the relationship
6 between Class IV A and IV B as a consequence of
7 Class I being priced off the higher of.

8 We had a situation last year where the PD
9 advantages I calculated as -- was quite large,
10 and that was more a consequence of the fact that
11 IV A, a significant portion of our pool, was
12 quite low relative to Class IV B.

13 MR. VETNE: Again, that would illustrate
14 that the advantage over time during that month
15 is a product of increasing milk going into
16 cheese and butter powder.

17 MR. VETNE: Yes. And increasing
18 volatility in the dairy market.

19 MR. VETNE: And volatility. And there's
20 some months it's negative, and that's
21 illustrated by upside down prices --

22 DR. SCHIEK: Right.

23 MR. VETNE: -- when the Class I price is
24 somewhat less than the blend prices?

25 DR. SCHIEK: Yeah. And a consequence of

1 advanced pricing on Class I.

2 MR. VETNE: California has advanced
3 pricing on some uses and retroactive pricing on
4 others just like the federal system?

5 DR. SCHIEK: That's correct.

6 MR. VETNE: However, the timing of those
7 are not identical to the federal system?

8 DR. SCHIEK: No, they're not. Class I is
9 more similar than Class II and III, Class II and
10 III in California, which is equivalent to
11 Federal Order Class II.

12 MR. VETNE: And over time, the Class III
13 and IV prices that have produced this spread of
14 increasing concern, those Class III and IV
15 prices over time have generally been lower than
16 than Class III and IV prices?

17 DR. SCHIEK: Class IV A and IV B.

18 MR. VETNE: IV A and IV B in California
19 are equivalent products to Federal Class III --
20 well, let's see, IV B is Federal Class III, and
21 IV A is Federal Class IV, is that correct?

22 DR. SCHIEK: Uh-huh. That's correct.

23 MR. VETNE: Now, what did I ask?

24 DR. SCHIEK: If they were lower. If they
25 were lower --

1 MR. ENGLISH: Your Honor?

2 JUDGE CLIFTON: Mr. English.

3 MR. ENGLISH: Your Honor, Charles
4 English. I think Mr. Vetne just asked a very
5 pertinent question: Why did I ask that?

6 I've been wondering the same thing for
7 myself for the last 20 or 30 minutes. The
8 relevance of the questioning is so far afield at
9 this point. I mean, perhaps for a class in
10 agricultural trigonometrics about dairy regulation,
11 but, you know, your Honor, since yesterday
12 morning -- I live three blocks from the U.S.
13 capitol. I know a filibuster when I see it.
14 And the time has come for some pointed relevant
15 questions and enough of this filibuster. I
16 object. Mr. Vetne is absolutely correct: Why
17 did I ask that question? Who knows?

18 JUDGE CLIFTON: Mr. English, don't leave
19 yet. It appears to me -- and I do not
20 understand everything that I am listening to.
21 But it appears to me that Mr. Vetne did not want
22 this evidence in.

23 One of Mr. Vetne's clients has proposed
24 Proposal Number 17. If he were to leave the
25 testimony unchallenged, it would appear that

1 Proposal 17 is not such a good idea.

2 I think all of his cross-examination has
3 been to distinguish the situation in California
4 from the situation in the Federal market orders.
5 I think it's all been relevant. Now, tell me
6 where I'm wrong.

7 MR. ENGLISH: Well, it's certainly not
8 different. I would say a question of what is a
9 box store -- you know, at some point your
10 Honor -- we could be here for absolutely
11 forever. Of course, it's connected.

12 The same entities that have been
13 testified about are the entities that have been
14 testified about that are -- that are the --
15 those sales are going to in the Federal Orders,
16 maybe not by Mr. Vetne's clients but by others.

17 But if this hearing is going to come an
18 end and if people who are going to say, our
19 clients can't afford economic experts, are going
20 to drag it out for three weeks, just to drag it
21 out for three weeks, you know, there needs to be
22 something said.

23 The fact of the matter is that we
24 questioned organic dairy farmers for three hours
25 yesterday. Unheard of in these proceedings.

1 Frankly, I have stayed silent long
2 enough. Mr. Vetne opened the door by asking the
3 question of himself: Why did I ask that
4 question?

5 A perfect question, your Honor. I
6 object. Enough is enough. The filibuster must
7 end.

8 JUDGE CLIFTON: Mr. Beshore I'll hear you
9 in a moment. Mr. Stevens?

10 MR. STEVENS: Well, I guess all of us in
11 this room have been to one or more hearings.
12 We've had a lot of testimony that is, I might
13 say, peripheral to the issues of the proposals.

14 And I -- I, too, not with the eloquence
15 of my fellow counsel there, but I would -- I
16 would say there is a point when in
17 cross-examination you seek to enter evidence
18 through cross-examination of witnesses.
19 Everyone does it. But you also have your
20 witnesses to be for or against any proposal.

21 So I think we do reach a point at some
22 point when -- when in the cross-examination of
23 the witnesses we are reiterating or will
24 reiterate or try to through -- through testimony
25 what we seek to put in through direct witnesses.

1 And if that's the case, then we are -- then we
2 are plowing the same ground.

3 And so better put in by your witnesses
4 for or against proposals and certainly
5 cross-examine the witnesses for or against any
6 other proposals. But don't -- but I don't think
7 we should allow the endless or seemingly endless
8 continuation of that line of questioning. I
9 mean, ask the questions. Fine.

10 But what is a box store, the basics of
11 milk marketing, an assembler on the California
12 program. There are some comparisons, but we
13 don't need to go, I don't think, into the
14 minutiae of the California program to decide the
15 issues that are before the Secretary in these
16 proposals. Thank you, your Honor.

17 JUDGE CLIFTON: Thank you. Mr. Stevens.
18 Mr. Beshore.

19 MR. BESHORE: I will be very brief. I
20 join Mr. English's objection. I would just note
21 that before the break we had -- there was some
22 extended dialogue, questions by Mr. Vetne of
23 Mr. Schiek about California politics, who is the
24 legislative representative for the
25 producer-distributors in California.

1 I ask, your Honor, and anyone here what
2 possible pertinence California politics and the
3 political system has to do with the economic
4 operations of any of these proposals?

5 JUDGE CLIFTON: Let me tell you what I
6 got out of that, Mr. Beshore. Please don't
7 leave the podium yet.

8 What I got out of that is the dangers of
9 the increasing value of the exemption that
10 happened in California is not too likely to
11 happen under the Secretary of Agriculture.
12 That's what I got out of that.

13 MR. BESHORE: Well, you got more out of
14 it than I did because I don't know -- the
15 economics effects of organizations, fine. But
16 as to who put them in or how they were put in in
17 California, I still don't see how that has any
18 pertinence whatever.

19 JUDGE CLIFTON: Let me ask you,
20 Mr. Beshore, was there any relevance to
21 Dr. Shriek bringing it up in the first place?
22 That's what raised the issue.

23 MR. BESHORE: I didn't see him bring up
24 who the legislative representatives were. He
25 gave us some history of how it evolved, not who

1 promulgated this or why.

2 JUDGE CLIFTON: And how political it is
3 and how the producer-handlers mattered and how
4 the situation got worse with every legislative
5 act, that's what Dr. Schiek raised.

6 MR. BESHORE: The economic effects, how
7 the economic -- you know, what happened and what
8 the economics effects were. That's -- he's an
9 economist and that's what he testified, the
10 economic effects, how this would work if it were
11 promulgated by the Secretary of Agriculture. It
12 doesn't matter who promulgates it. How it would
13 work, that's what the issue is.

14 JUDGE CLIFTON: I'll hear from a few more
15 likewise, and then we'll get on with it.
16 Mr. Yale.

17 MR. YALE: Just briefly we believe the
18 line of questioning has been excellent. It's
19 been relevant. It's been right on point. I
20 think your Honor understood very well what that
21 question on the line of politics was.

22 I know Mr. Stevens mentioned minutiae
23 between California and -- and the Federal Orders
24 but it is in the minutiae that accumulates that
25 shows there is a vast chasm between the two.

1 And you can't do it big boulders. You got to do
2 it pebble by pebble, as painful as that is.

3 We didn't ask for the witness. And it's
4 in the record, and we cannot stand by and let it
5 be untested. And that's the way it's going to
6 have to be tested. It's not what we want to do.
7 We think the hearing is going too long anyhow.
8 We've got to defend our own positions.

9 JUDGE CLIFTON: Mr. Ricciardi.

10 MR. RICCIARDI: I concur with
11 Messrs. Yale and Vetne and add this.

12 In the middle of this room we have the
13 largest players in the dairy industry. They
14 have decided that they want to eliminate
15 producer-handlers. They have decided to put
16 this issue into play. They have decided to
17 bring people from every corner of this world,
18 including California and to bring fact witness
19 that transferred into expert witnesses. We have
20 the right to cross-examine them unfettered.

21 There has not been an extended effort to
22 do anything other than ask questions. And the
23 objection that I have at this point is to try to
24 characterize anything as a filibuster, as your
25 Honor indicated, is unfair and doesn't reflect

1 this record.

2 JUDGE CLIFTON: Thank you, Mr. Ricciardi.
3 Mr. English, I'll hear from you. Thank you,
4 your Honor. I did make the objection.
5 Unfettered was the word just used. No, your
6 Honor, there are standards. This proceeding is
7 still governed by administrative rules with some
8 guidance from the Federal Rules of Evidence; it
9 is not unfettered cross-examination. That's
10 precisely what we have right now.

11 I realize how your Honor is going to
12 rule. I still think the objection was timely
13 and well made, I especially think after
14 yesterday's three-hour cross-examination of
15 organic dairy farmers. We see a pattern.

16 I am certainly entitled to say what I
17 think I see. And when the very people who
18 complain about the cost of the proceeding are
19 the ones who are lengthening it, I think I'm
20 entitled to comment on that.

21 Your Honor, I'm prepared for people to
22 move on, but I don't think the answer is
23 unfettered cross-examination. There has to be
24 some basis. And I think much of this
25 cross-examination has exactly been unfettered.

1 JUDGE CLIFTON: I personally enjoyed very
2 much Dr. Schiek's testimony both on direct and
3 on cross. He's extremely knowledgeable. He
4 understands the differences between California
5 and the Federal Orders. He is very responsive
6 to questions whether they're asked on direct or
7 on cross. And you -- in response to Mr. Stevens
8 suggestion that everyone who needs to be heard
9 here should just have his own witness like
10 Dr. Schiek, my paraphrasing, there isn't another
11 one like Dr. Schiek. So even though this has
12 gone on long, and we have probably eight more
13 witnesses to hear today and these witnesses were
14 supposed to be heard yesterday and I am
15 concerned about how long this is taking, I am
16 not going to limit relevant questions.

17 And I do find that Mr. Vetne's questions
18 have been relevant to the proceeding. And as
19 far as how timely your objection was,
20 Mr. English, he's almost at the end. So I'm not
21 sure how timely it was.

22 I believe you made it as kind of a
23 prophylactic concern going forward. As I've
24 said, Dr. Schiek is very unique.

25 Mr. Vetne, you may proceed. Where you

1 were, you were talking about the increasing
2 concern.

3 MR. VETNE: Yes, I was your Honor. I
4 don't have a client in this room, so I don't
5 need to raise my voice, and I'm not playing to
6 the audience.

7 It was actually my last question and I'd
8 lost my train of thought. And my observation to
9 myself was the result of a 15-minute delay in
10 the hearing. We were talking about --

11 JUDGE CLIFTON: No, your question to
12 yourself was the digression to get straight what
13 Class IV is in California compared to what it is
14 in the federal order. That's when you had lost
15 your thought.

16 MR. VETNE: Yes.

17 JUDGE CLIFTON: But the reason you went
18 into that was you were talking about upside down
19 pricing and about the increasing concern over
20 what I'll call disorderly conditions.

21 MR. VETNE: Okay. Dr. Schiek.

22 DR. SCHIEK: Yes.

23 MR. VETNE: Thank you for your attention
24 and thank you for your precise answers to my
25 questions. The last question I had here and

1 which I was getting to was one of the -- one of
2 the factors that creates a spread of increasing
3 concern between Class I and quota is the -- is
4 that there is more Class III and IV utilization
5 in California and Class III and IV prices in
6 California in addition are lower than those in
7 the Federal Order have been over the past few
8 decades, correct?

9 DR. SCHIEK: Yes, that would be correct.
10 I would point out that for me the last time I
11 looked at the relationship between those prices,
12 particularly on IV B in relationship to Class
13 III, that they had grown closer together with
14 Federal Order pricing, comparable Federal Order
15 pricing than they have been in the past.

16 MR. VETNE: And that has been since
17 California removed the whey factor?

18 DR. SCHIEK: Yes, but even before then.
19 We had a much wider pricing gap in the '80s and
20 early '90s than we have had in the last -- in
21 the 12 years I've been in hearings.

22 MR. VETNE: Thank you. Thank you very
23 much both for your responses and courteous
24 answers.

25 JUDGE CLIFTON: Who next will

1 cross-examine these witnesses? Mr. Yale.

2 CROSS-EXAMINATION

3 BY MR. YALE:

4 Q. Good morning. Benjamin F. Yale on behalf
5 of Continental Dairy Products and Select Milk Producers.
6 Good morning.

7 MR. NEWELL: Good morning.

8 DR. SCHIEK: Good morning.

9 MR. YALE: I want to start with
10 Mr. Newell, who seems to have been an observer
11 most of the morning.

12 MR. NEWELL: Okay with me.

13 MR. YALE: Yeah, I'm sure it probably is.
14 I have just a couple of questions in terms of
15 market conditions.

16 I think one of your testimonies was the
17 fact that there was -- I think a box store
18 started purchasing money from one of the Type
19 70s PDs; in other words, took business away from
20 you there in the central part of -- in the
21 northern part of California, is that right?

22 MR. NEWELL: Didn't take business away
23 from us.

24 MR. YALE: They didn't take it. They got
25 it that you didn't get?

1 MR. NEWELL: Right.

2 MR. YALE: Are you aware of any recent
3 market conditions in that situation that's gone
4 vis-a-vis that PD 70 supplying that customer?

5 MR. NEWELL: Yes. That -- that customer
6 continued to expand into California. I'd say
7 that PD served them for probably five years and
8 then they -- maybe longer. Then Dean Foods, a
9 Berkeley Farms subsidiary, picked up the
10 business via a bit and then Foster Farms in
11 Modesto picked up the business from Dean Foods,
12 Foster being the PD. So they've kind of
13 round-tripped.

14 MR. YALE: And then what's happened in
15 recent months to that business?

16 MR. NEWELL: As far as I know, it's with
17 Foster Farms.

18 MR. YALE: You are not aware of a change
19 that's occurred as a result of a plant in
20 Nevada?

21 MR. NEWELL: Not on that business.

22 MR. YALE: Not on that business. But
23 it's on another box store, right?

24 MR. NEWELL: Well, I believe that there
25 is -- Sam's Club and Costco are purchasing milk

1 from that plant in Nevada to some degree.

2 MR. YALE: These are Costco and Sam's
3 stores in California?

4 MR. NEWELL: Yes.

5 MR. YALE: All right.

6 MR. NEWELL: But maybe not all Costcos in
7 northern California.

8 MR. YALE: But Berkeley Farms is not a
9 Type 70 PD?

10 MR. NEWELL: No, they're owned by Dean
11 Foods.

12 MR. YALE: Okay. Would you describe the
13 competition amongst Class I handlers in
14 California as being vigorous?

15 MR. NEWELL: Vigorous, yeah.

16 MR. YALE: Now, there is another factor
17 we've kind of suggested with Nevada and that is
18 that in addition to regulated handlers in
19 California in Type 70 PDs, because you are a
20 state order you also have a situation with
21 plants outside of California supplying milk into
22 the market, is that correct?

23 MR. NEWELL: I know that was the case,
24 yes.

25 MR. YALE: And it is the case in Nevada,

1 right?

2 MR. NEWELL: That is the case in Nevada,
3 yes.

4 MR. YALE: And that plant is unregulated?

5 MR. NEWELL: I believe that plant is
6 unregulated --

7 MR. YALE: Okay.

8 MR. NEWELL: -- by California.

9 MR. YALE: By California, right. Let me
10 ask Dr. Schiek some questions.

11 MR. YALE: Good morning.

12 DR. SCHIEK: Good morning, Ben. How are
13 you?

14 MR. YALE: I'm doing fine. It was an
15 interesting examination. I'm always learning
16 something about California. I learned some
17 things this morning, so it was --

18 DR. SCHIEK: Good.

19 MR. YALE: -- fruitful. And there's some
20 who say I don't know enough.

21 DR. SCHIEK: Can you ever know enough?

22 MR. YALE: Can you ever know enough? I
23 want to follow on that line of question. There
24 is a -- there is -- in California, you've talked
25 about the fully regulated plants and the Type 70

1 PDs, right?

2 DR. SCHIEK: Uh-huh. I have.

3 MR. YALE: And then we have another group
4 of suppliers of bottling milk into California
5 that have just been identified and this is
6 plants regulated by Nevada. Some would suggest
7 that's not a regulation, but regulated by
8 another state order, not California, that's now
9 supplying stores in California, right?

10 DR. SCHIEK: Correct.

11 MR. YALE: Right. And they have a
12 different price relationship vis-a-vis their
13 minimum pricing and the like as compared to
14 California plants, is that right?

15 DR. SCHIEK: They have a different --
16 please repeat the question.

17 MR. YALE: All right. That create a
18 different price relationship for their costs
19 than what you have in California, right? I mean
20 the regulated plants.

21 DR. SCHIEK: It could. It really depends
22 on how they procure milk.

23 MR. YALE: Right. And I think you
24 testified at a hearing, I think in September,
25 was it --

1 DR. SCHIEK: October.

2 MR. YALE: -- October, on Class I pricing
3 in California?

4 DR. SCHIEK: Yes, I did.

5 MR. YALE: And at that hearing, and I'm
6 sure you probably attended the whole thing and
7 paid attention to all of it, because that's your
8 job, right?

9 DR. SCHIEK: It is my job.

10 MR. YALE: Okay. And one of the
11 testimonies there was the fact that the handler
12 in Nevada is able to acquire milk at basically
13 the over base price in the valley of California,
14 transfer it to Nevada, process it, and ship it
15 back as bottled milk into California, not
16 subject to the California rules, is that right?

17 DR. SCHIEK: Yeah. They were procuring
18 milk in that manner for a period of time, yeah.
19 I'm not --

20 MR. YALE: You don't know whether they
21 still are or not?

22 DR. SCHIEK: What I had heard was when
23 the extreme advantages of doing it that way
24 diminished, they began sourcing the milk in
25 Nevada more, more in terms of large volumes from

1 Nevada.

2 MR. YALE: Right. Now, we also have
3 another situation in California that is unique
4 in the Federal Orders in that there are plants
5 in California, fully regulated plants in
6 California that purchase milk from out of state
7 and that milk is not subject to the minimum
8 price under the California order, is that
9 correct?

10 DR. SCHIEK: That's correct.

11 MR. YALE: All right. And what
12 percentage of milk now going into California
13 comes from that unregulated source? Do you
14 know?

15 DR. SCHIEK: Not off the top of my head,
16 I don't.

17 MR. YALE: Is it in excess of 10 percent?

18 DR. SCHIEK: It has at times been above
19 10 percent. I don't know if it is right now.

20 MR. YALE: Has it ever been above
21 20 percent?

22 DR. SCHIEK: In terms of the pool, no.

23 MR. YALE: In terms of the pool. You
24 mean in pooled Class I or total pool?

25 DR. SCHIEK: Total pool.

1 MR. YALE: What about Class I?

2 DR. SCHIEK: Class I it may have been
3 above 20 percent. Again, I don't recall the
4 numbers.

5 MR. YALE: Okay. And now as a result of
6 the MREA you have yet another type of regulation
7 on milk being supplied in the South or into
8 California and that is that a plant located in
9 Arizona shipping milk into California is subject
10 to the Federal Order prices, but not the
11 California price, is that right?

12 DR. SCHIEK: As a result of the MREA, the
13 regulation of that milk became part of the
14 federal order pool. Yes. That's right.

15 MR. YALE: Okay. So California has a
16 wide variety of different types of regulation or
17 nonregulation or whatever the one they describe
18 it, between all of the bottlers within the state
19 or -- or the supply of the milk within the
20 state. Let's stay with the supply of the milk.
21 There's a wide variety there, right?

22 DR. SCHIEK: Yeah, I would say right, as
23 would be true with most state orders.

24 MR. YALE: Yes. And that adds to the
25 complexity of the competition, right?

1 DR. SCHIEK: It certainly adds complexity
2 to figuring out costs of raw product, regulated
3 costs of raw products, yes.

4 MR. YALE: And it also puts even PDs at a
5 disadvantage within California because they have
6 to match sometimes even cheaper milk or at least
7 the appearances of cheaper milk from out of
8 state sources, right?

9 DR. SCHIEK: It could, particularly with
10 packaged milk coming in from out of state.

11 MR. YALE: And I was typing the note and
12 I forget to write down who it was that said it,
13 so if it's you, you can say, fine, I'll agree
14 with that, or this is what I meant. And if not,
15 we'll ask Mr. Newell. But something to the
16 effect that is this psychological impact of the
17 pricing, that there's just the appearance that
18 they have the ability to price creates in itself
19 a market condition.

20 I may have misstated that. Maybe it was
21 Mr. Newell. I think it was Mr. Newell.

22 Mr. Newell, will you take the mic,
23 please. Do you recall that comment?

24 MR. NEWELL: Yeah.

25 MR. YALE: Would you explain that

1 comment?

2 MR. NEWELL: It's very tough to compete
3 when you know the person you are competing with
4 has an advantage that you can't possibly have.

5 MR. YALE: Or at least has an appearance
6 of. You don't know how they can use it, but
7 everybody assumes they have an advantage, and
8 therefore you have to compete against something
9 you don't know. Is that a fair statement?

10 MR. NEWELL: I think that's a fair
11 statement, yeah.

12 MR. YALE: And, really, what's going on
13 is there's a lack of transparency in that
14 situation, right?

15 MR. NEWELL: Yes. But, I mean, when you
16 are offering a proposal, that's the idea, there
17 is a -- that's competition.

18 MR. YALE: I understand that. But it's
19 that lack of transparency that creates the risk
20 and the uncertainty in those situations, is that
21 right?

22 MR. NEWELL: Yes.

23 MR. YALE: I want to go back to
24 Dr. Shriek. If you would look at your Figure 3
25 on page 7, and we talk, a California source

1 Class I market by type of operation.

2 DR. SCHIEK: Yes.

3 MR. YALE: We've just mentioned some
4 other types of operation, so let me clarify.
5 This does not represent the share of
6 California-sourced milk by class of operation of
7 all of the Class I milk sold in California, does
8 it?

9 DR. SCHIEK: It does not, no.

10 MR. YALE: All right. The milk from --
11 we mentioned from Nevada and Arizona would not
12 be included in that, right?

13 DR. SCHIEK: In this chart, the bulk
14 milk -- the bulk -- neither the bulk milk nor
15 the packaged milk from out of state would be
16 included in that graph.

17 MR. YALE: That's great. I got two
18 answers.

19 DR. SCHIEK: Simply because we don't have
20 the data broken out.

21 MR. YALE: So this only references milk
22 produced in California sold to a processor in
23 California and marketed in California by that
24 Class I processor, right?

25 DR. SCHIEK: It would -- yes, it would be

1 the pool milk in class I that is
2 California-sourced, which it's going to pool
3 milk that's California sourced and the exempt
4 quota.

5 MR. YALE: Okay. So if the milk
6 is produced on the farm outside of California,
7 it's not included, right?

8 DR. SCHIEK: That's correct.

9 MR. YALE: And if the milk is processed
10 out of state, whether it's from California or
11 not, it's not included?

12 DR. SCHIEK: If the milk is processed
13 from out of state, it's not included, that's
14 correct.

15 MR. YALE: And you have indicated that of
16 Class I in California as much as maybe
17 20 percent or so could come from bulk milk
18 shipped from out of state shipped into the Class
19 I handlers in California?

20 DR. SCHIEK: It could. It could.

21 MR. YALE: And that's not reflected in
22 this chart, right?

23 DR. SCHIEK: No it's not. Although
24 based -- again, based on my understanding and
25 discussions in the industry, one of the larger

1 importers of bulk milk for their own use is an
2 exempt -- Type 70 exempt PD in southern
3 California. If I included other bulk source
4 milk, it is my firm conviction that the angle of
5 those graphs would be even steeper. In other
6 words, the increase in the Type 70 PD share
7 would go up faster, would be greater, and the
8 fully regulated would be less.

9 MR. YALE: But you don't have to be a
10 Type 70 to take advantage of the out of state
11 bulk milk, right?

12 DR. SCHIEK: You don't have to be.

13 MR. YALE: Right. But it would be a
14 different graph in Figure 3 if we were able to
15 include the bulk milk purchased from out of
16 state?

17 DR. SCHIEK: It would be different in
18 terms of numerical values. I don't believe the
19 direction of the trend would reverse in any way.

20 MR. YALE: Now, and maybe the question
21 was asked. I had to step out of the room
22 quickly, and I apologize. I just want to make
23 sure. Of the Type 70 PDs, do you know what
24 percent of their supply of milk is own-farm
25 production?

1 DR. SCHIEK: Own-farm production, no.

2 MR. YALE: Okay.

3 DR. SCHIEK: They have own-farm
4 production that is in excess of their exemption.
5 The data sources I had only included the
6 exemption in aggregate, so I don't have the
7 own-farm production.

8 MR. YALE: Okay. Is there -- California
9 also, unlike the Federal Order, does audits and
10 checking costs of production at the farm level.
11 You are aware of that?

12 DR. SCHIEK: They do. They survey --
13 well, they do audits of a select number, yeah.

14 MR. YALE: Right. To provide some
15 relatively accurate data in terms of the costs
16 of producing, would you not agree, of milk in
17 California?

18 DR. SCHIEK: Yeah. It's certainly
19 accurate for those farms they survey.

20 MR. YALE: Have you compared -- let me
21 back up. For a Type 70 PD --

22 DR. SCHIEK: Uh-huh.

23 MR. YALE: -- the production -- or the --
24 if they didn't have the quota, they would only
25 get credit for the overbase price on their farm.

1 Am I mixing things? Because they're a
2 producer-handler.

3 DR. SCHIEK: What type -- which type of
4 milk are we talking about? If they didn't have
5 quota, they wouldn't have an exemption. So they
6 would receive the overbase price on their farm,
7 and they would be paying the Class I price on
8 milk purchased.

9 MR. YALE: Right. So under the Type 70
10 exemption, it's just that they have quota, they
11 just don't have to report that to the pool?

12 DR. SCHIEK: No, they deduct it from
13 their Class I usage.

14 MR. YALE: They deduct it from their
15 Class I usage, right.

16 DR. SCHIEK: Yeah. Which is different
17 than --

18 MR. YALE: Yes, it is. That was my next
19 question. You mentioned in your testimony over
20 on page -- that leads right into a segue to
21 that. Over on page 2, that -- at the bottom of
22 the first full paragraph, the last sentence, it
23 says, although there are some differences. Do
24 you see that?

25 DR. SCHIEK: Yeah.

1 MR. YALE: And that's differences between
2 Proposal 17 and 20 as compared to the California
3 system?

4 DR. SCHIEK: That's correct.

5 MR. YALE: And one of those proposals is
6 to do a down-allocation. You understand that?

7 DR. SCHIEK: I believe I do.

8 MR. YALE: Okay. Do you know what a
9 down-allocation is?

10 DR. SCHIEK: Okay. My understanding of a
11 down-allocation is that you would look at a
12 particular subset of milk received, used in a
13 plant, and indicate its use to lower Class I
14 utilization as opposed to the higher Class I
15 utilization. That would be a down-allocation,
16 as I understand it.

17 MR. YALE: So if you -- I think we're
18 right, and I just want to -- you say lower Class
19 I, but to the lower class?

20 DR. SCHIEK: Lower classes, yeah.

21 MR. YALE: Right. So that the own-farm
22 production would absorb all of the Classes II,
23 III and IV milk before it was ever able to
24 reduce the obligation to the Class I milk for
25 the purchase. Is that how you would understand

1 it?

2 DR. SCHIEK: That's how I would -- I'm
3 taking it on faith, as you've described it. Is
4 that --

5 MR. YALE: That's what was intended by
6 that.

7 DR. SCHIEK: Is that -- are you referring
8 to Proposal 17?

9 MR. YALE: It's in 17 and/or 20.

10 DR. SCHIEK: Okay.

11 MR. YALE: Which are very close.

12 DR. SCHIEK: Then perhaps I didn't
13 understand 17. My understanding of 17 was that
14 milk would simply not be reported, and as Dr. --
15 excuse me, as Mr. Vetne questioned, we were
16 talking about the relevant comparison, analogous
17 comparison, to what I was doing on advantages
18 being plant blend less market blend. And that's
19 how I understood Proposal 17 to work.

20 I wouldn't necessarily characterize that
21 as a down-allocation, but perhaps it would be in
22 the Federal Orders. I don't know.

23 MR. YALE: Are you -- what other
24 differences did you see between the proposals
25 that you think are relevant?

1 DR. SCHIEK: Well, I'm -- I'm not as
2 certain on the proposal itself how
3 producer-handlers would be handled if they grew.
4 I guess I'm assuming when they grow, if they're
5 under the 3 million cap, then their exemption
6 would increase up to that point, whereas in
7 California there is no ability to increase their
8 exemption other than through legislation.

9 MR. YALE: Do you understand that the cap
10 here is the higher or -- I'm sorry, the lower of
11 an average of production during a narrow window
12 of time or 3 million?

13 DR. SCHIEK: Okay. Then I -- then --
14 presumably then that cap is set.

15 MR. YALE: So the exemption would not
16 grow. It would be fixed.

17 DR. SCHIEK: Okay.

18 MR. YALE: So that's a difference, right?

19 DR. SCHIEK: Right, yes.

20 MR. YALE: And that would temper the
21 ability compared to the California exemption.
22 They may not have quite the juice under this
23 system to grow like you are suggesting that the
24 California system had?

25 DR. SCHIEK: They may not.

1 MR. YALE: Yeah.

2 DR. SCHIEK: I can't give you a definite
3 answer, but they may not.

4 MR. YALE: You haven't modeled it?

5 DR. SCHIEK: No.

6 MR. YALE: And the same thing with the
7 down-allocation, that could be kind of a downer,
8 so to speak, and slow some of that advantage as
9 well, right?

10 DR. SCHIEK: It -- excuse me. It could.
11 As I -- again, as I understand it, if the PD in
12 question had significant sales outside Class I.

13 MR. YALE: And although I know you
14 referenced it in terms of the politics of the
15 situation, which clearly there was, but in large
16 part, the -- the rationale for the Type 70 PD
17 was that the industry wanted to move to a
18 different method of regulating itself and here
19 are people who had a vested interest under a
20 particular model that at least needed some
21 acknowledgement in the new regulations to avoid
22 some economic waste on those models' parts,
23 right?

24 DR. SCHIEK: I'm not sure that I would
25 characterize it that way.

1 MR. YALE: How would you characterize it?

2 DR. SCHIEK: One of the reasons that I
3 believe that there was an option given was
4 because at the time this happened, Class I
5 utilization for the pool as a whole was
6 extremely high in the state, well above
7 70 percent, I believe, when I looked at the
8 data. And I think that at the time electing to
9 participate in the pool under the option that
10 they had, that I described, would have returned
11 not really much different than electing the
12 exemption.

13 So I'm not sure -- I really think the
14 option was -- was, you know, more of a political
15 dynamic than a means to redress some economic
16 losses.

17 MR. YALE: Yes. Okay.

18 DR. SCHIEK: Perhaps an opportunistic
19 decision.

20 MR. YALE: That's all I have. Thank you.

21 JUDGE CLIFTON: Thank you, Mr. Yale.

22 Mr. Ricciardi.

23 CROSS-EXAMINATION

24 BY MR. RICCIARDI:

25 MR. RICCIARDI: Good morning. I am Al

1 Ricciardi on behalf of AIDA, which is a group of
2 producer-handlers and also an exempt plant.
3 And, Mr. Schiek, you've got the microphone, so
4 let's start with you.

5 DR. SCHIEK: Okay.

6 MR. RICCIARDI: Thank you. The Dairy
7 Institute is a trade association that represents
8 dairy processors who have plants in California,
9 correct?

10 DR. SCHIEK: That's correct.

11 MR. RICCIARDI: And it assists those
12 plants who are members with regulatory and
13 legislative issues, among other things?

14 DR. SCHIEK: Among other things, yes.

15 MR. RICCIARDI: And one of the members of
16 the institute is Dean Foods?

17 DR. SCHIEK: That would be correct, yes.

18 MR. RICCIARDI: One of the other members
19 is HP Hood?

20 DR. SCHIEK: That is also correct.

21 MR. RICCIARDI: Now, Dairy Institute
22 employs a lobbyist in Washington, D.C., correct?
23

24 DR. SCHIEK: We have employed lobbyists,
25 yes.

1 MR. RICCIARDI: And the lobbyists that
2 Dairy Institute has employed is the same
3 lobbyist that is employed by Dean Foods?

4 DR. SCHIEK: You know, I don't really
5 know the answer to that question. I'm sorry.

6 MR. RICCIARDI: Okay. Fair enough.
7 Did -- in fact, we talked about political issues
8 in your testimony. Did, in fact, Dairy
9 Institute have a substantial amount of lobbying
10 costs that were spent in attempting to pass the
11 MREA?

12 DR. SCHIEK: I'm not sure what you mean
13 by substantial.

14 MR. RICCIARDI: \$400,000 or more.

15 DR. SCHIEK: I'm not sure the Dairy
16 Institute costs were that high to employ
17 lobbyists.

18 MR. RICCIARDI: Can you tell me how much
19 it was?

20 DR. SCHIEK: I don't know exactly here.

21 MR. RICCIARDI: Fair enough. Let's move
22 to a term in your testimony. I think Mr. Vetne
23 asked you some questions on it. I want to
24 follow up because I have some other questions
25 too. You used the phrase, economic rent

1 seeking. And you remember the cross-examination
2 questions asked by Mr. Vetne, correct?

3 DR. SCHIEK: Uh-huh, uh-huh.

4 MR. RICCIARDI: Now, isn't economic rent
5 seeking also known as monopoly privilege rent
6 seeking?

7 DR. SCHIEK: It can be if the -- if the
8 basis of the rent seeking is market power.

9 MR. RICCIARDI: Okay. And one
10 possibility of economic rent seeking is to
11 capture special monopoly privileges, correct?

12 DR. SCHIEK: Yes.

13 MR. RICCIARDI: And another factor in
14 economic rent seeking is that it seeks to impose
15 substantial losses on society as a whole,
16 correct?

17 DR. SCHIEK: Again, I -- it sounds like
18 you are reading a definition from an economic
19 textbook, and I -- you know, economists describe
20 it in different ways. I -- I -- the attempt to
21 impose an economic loss on society, that may be
22 an effect. I'm not sure it's the intent.

23 MR. RICCIARDI: Okay. Let's assume it's
24 an effect, and let's talk hypothetically as a
25 economist now. If you assume for purposes of my

1 question that a particular group of cooperatives
2 control 80 or 85 percent or more of the milk in
3 a particular Federal Order area and they seek
4 through the passage of a proposed regulation to
5 eliminate any independent producer-handlers who
6 don't, in fact, sell their milk through the
7 cooperatives, that, my hypothetical, would be an
8 example of economic rent seeking, correct?

9 DR. SCHIEK: I think it really depends on
10 the parameters of the market and the market
11 structure that you're talking about. I think in
12 a regulated system like we have in milk in
13 California, for example, that may not
14 necessarily be characterized as rent seeking if,
15 in fact, the economic system that's in place has
16 conferred market power already to -- to a
17 certain subset. It could be simply a redressing
18 or rebalancing of market power to restore a more
19 competitive situation. And I wouldn't
20 characterize that as rent seeking.

21 MR. RICCIARDI: If, in fact, the
22 cooperatives already have monopoly privileges by
23 being exempted from certain forms of antitrust
24 laws federally, then the additional effort to
25 eliminate any potential competition could be an

1 example of economic rent seeking under your
2 definition?

3 DR. SCHIEK: I think, again, in the
4 narrow confines of your hypothetical, yes.

5 MR. RICCIARDI: Okay. This is actually
6 the good thing about cross-examination from
7 others, because they eliminate a lot of the
8 questions that this particular person might ask.

9 So why don't we move the microphone to
10 Mr. Newell, because I want him to know that I
11 like him, too.

12 Mr. Newell, you say at the last part of
13 your statement, which is Exhibit 76, that I was
14 asked to testify about my perception, and then
15 it goes on. It's the next to the last full
16 paragraph. Who were you asked to come here and
17 testify?

18 MR. NEWELL: Bill asked me if I would
19 come and testify.

20 MR. RICCIARDI: Okay. And that would be
21 Mr. Schiek?

22 MR. NEWELL: Yes.

23 MR. RICCIARDI: Who is paying the
24 expenses for the time that you're spending here?

25 MR. NEWELL: Well, I believe my company

1 is, but if not, you're looking at him.

2 MR. RICCIARDI: You're unsure about that.
3 Hopefully you can send this transcript over and
4 they will. Let me ask you some questions, and
5 the basis for my questions is going to be found
6 on page 4 of your statement. So give yourself a
7 chance to take a look at that.

8 MR. NEWELL: Okay.

9 MR. RICCIARDI: You don't have to refer
10 to it, but that's where I'm taking the
11 information from. You state in the second
12 paragraph, and you're talking about a couple of
13 independent processors who have sort of gone in
14 different directions; one went out of business,
15 and the other continues to grow their business.

16 MR. NEWELL: Well, one sold their
17 business.

18 MR. RICCIARDI: Sold their business. I
19 apologize, sold their business.

20 Now, you weren't involved in the decision
21 by that company to sell?

22 MR. NEWELL: No.

23 MR. RICCIARDI: When you say things like,
24 I believe, that's -- you assume the reasons why
25 they sold, correct?

1 MR. NEWELL: Yes.

2 MR. VETNE: Okay. With regard to the
3 other business, which is the one that decided to
4 go into conventional and/or organic products,
5 that company has stayed in business and, in
6 fact, has grown even in competition with the
7 Type 70 producer-distributors, correct?

8 MR. NEWELL: That is -- that is true in
9 as far as they're really going after a different
10 customer base and consumer, and the location of
11 their plant matches with that type of consumer.

12 MR. RICCIARDI: Now, and you understand
13 that for that particular business they've
14 decided to go in that direction to serve a
15 particular market, correct?

16 MR. NEWELL: (Nodding head.)

17 MR. RICCIARDI: Yes?

18 MR. NEWELL: Yes.

19 MR. RICCIARDI: And with regard to that
20 quality market and the type of niche area
21 they're talking about, they can compete with
22 producer-distributors or others, but they are
23 focused on their own market, correct?

24 MR. NEWELL: Yeah, my point is, they
25 don't compete on price. They compete, you know,

1 on their product differentiation.

2 MR. RICCIARDI: Everybody, as you state
3 in the front part of your statement, competes,
4 among other things, on price, quality, service,
5 reputation, et cetera, correct?

6 MR. NEWELL: Yes, yes.

7 MR. RICCIARDI: That would include even
8 the producer-distributors, such as Producers
9 Dairy that you mentioned and also Foster Farms,
10 correct?

11 MR. NEWELL: Yes.

12 MR. RICCIARDI: You indicate in the next
13 to the last paragraph on paragraph 4 that the
14 decision by the Hansen family to sell had many
15 factors, and I want to talk about one of them.
16 It says, we did not have the cost advantage of
17 producer-distributors or the resources of a
18 national milk processor.

19 Well, first of all, that always brings up
20 the question. You put the word, we. Did you
21 actually own part of the business?

22 MR. NEWELL: Yeah, I think I said at the
23 beginning of the testimony I was one of the
24 family members.

25 MR. RICCIARDI: Okay. So you're actually

1 a family member and the decision to sell was
2 partly yours, obviously?

3 MR. NEWELL: Yes.

4 MR. RICCIARDI: Working with Hood, is
5 that part of the sales agreement, that you would
6 stay with them for a period of time?

7 MR. NEWELL: Yes. But no longer.

8 MR. RICCIARDI: Okay. All right. You're
9 no longer working with them?

10 MR. NEWELL: No. I'm working with Hood,
11 but the agreement is no longer in place.

12 MR. RICCIARDI: I got it. Are you
13 getting continued compensation as a result of
14 the sale right now?

15 MR. NEWELL: I'm an employee. Not as a
16 result of the sale.

17 MR. RICCIARDI: Okay. Fair enough. The
18 resources of a national milk processor, are you
19 talking about someone like Dean Foods?

20 MR. NEWELL: Yes.

21 MR. RICCIARDI: Okay. You guys didn't
22 have \$12 billion in sales before you decided to
23 sell?

24 MR. NEWELL: No.

25 MR. RICCIARDI: Okay.

1 MR. NEWELL: And we were in one market,
2 not multiple markets.

3 MR. RICCIARDI: Fair enough. Thanks.

4 MR. NEWELL: Okay.

5 JUDGE CLIFTON: Thank you, Mr. Ricciardi.
6 Who will next cross-examine the panel?
7 Mr. Rower.

8 CROSS-EXAMINATION

9 BY MR. ROWER:

10 MR. ROWER: My questions are for Mr.
11 Schiek. Would it be accurate to say that the
12 California producer-handler exemption is not
13 transferable? It can't be sold, is that
14 correct?

15 DR. SCHIEK: That is accurate, yes.

16 MR. ROWER: On page 2 of your statement,
17 sir, you describe the two types of California
18 producer-handlers. Are those descriptions --
19 are they complete official definitions of
20 producer-handlers in California -- for
21 California?

22 DR. SCHIEK: They are, I believe, the
23 salient points. The actual descriptions with a
24 lot more verbiage than I put in are available in
25 the milk pooling plan chapters -- or Article 6

1 and 6.5 and those are available on CDFA's
2 website. You can download the pooling plan and
3 the most complete description is there.

4 MR. ROWER: Okay. And CDFA is the
5 California Department of Food and Agriculture,
6 is that correct?

7 DR. SCHIEK: That is correct.

8 MR. ROWER: Mr. Tosi is next.

9 JUDGE CLIFTON: Mr. Tosi.

10 CROSS-EXAMINATION

11 BY MR. TOSI:

12 MR. TOSI: Thank you Dr. Schiek and
13 Mr. Newell for coming.

14 DR. SCHIEK: It is our pleasure. Mine
15 anyway. I don't know about Mike.

16 MR. NEWELL: Mine as well.

17 MR. TOSI: To the extent that any
18 cross-examination is in conflict with things
19 that you articulated in your written statements,
20 would it be proper for the Secretary to rely on
21 your written statements?

22 DR. SCHIEK: I'll answer first. I
23 believe -- I'm not aware that I was in
24 contradiction, but if that was perceived, I
25 believe my written statement to be accurate.

1 There's nothing that I heard in
2 cross-examination that would make it inaccurate.
3 So I think, yes, they could rely on it -- the
4 Secretary could rely on the written statement or
5 should rely on the written statement.

6 MR. TOSI: And Mr. Newell?

7 MR. NEWELL: I would say yes as well.

8 MR. TOSI: Thank you. That's all I have.
9 Again, thanks for coming. I know you both came
10 a long way.

11 MR. NEWELL: Thank you.

12 JUDGE CLIFTON: Thank you, Mr. Tosi.

13 Mr. Beshore.

14 CROSS-EXAMINATION

15 BY MR. BESHORE:

16 MR. BESHORE: Sorry. I just have one
17 question or area for Dr. Schiek that I'd like to
18 cover. And let me thank you first for coming.
19 As you indicated in your testimony, National
20 Milk did request your testimony. And we
21 appreciate that.

22 DR. SCHIEK: You're welcome.

23 MR. BESHORE: With respect to Figure 3 on
24 page 7 of your testimony --

25 DR. SCHIEK: Yes.

1 MR. BESHORE: -- there are a lot of
2 things that go on in the California marketplace
3 as Mr. Yale, for one, at least discussed. I
4 mean, there's milk that comes in, both packaged
5 form and bulk milk from out of state, correct?

6 DR. SCHIEK: That is correct.

7 MR. BESHORE: And other things. This
8 doesn't attempt to depict everything that goes
9 on there?

10 DR. SCHIEK: That's true.

11 MR. BESHORE: But what it does -- is this
12 what it depicts? It depicts two groups of
13 plants in California, both of which are subject
14 to all those other forces, competitive forces,
15 correct?

16 DR. SCHIEK: Correct.

17 MR. BESHORE: The only difference being
18 that one group of plants has the Type 70, the
19 subject of the Type 70 production-handler
20 regulation, correct?

21 DR. SCHIEK: Correct.

22 MR. BESHORE: And the other group of
23 plants does not have those prerogatives?

24 DR. SCHIEK: Correct.

25 MR. BESHORE: And over time both groups,

1 being subject to all other external forces in
2 the marketplace, these are the trend lines of
3 their aggregate sales?

4 DR. SCHIEK: Correct.

5 MR. BESHORE: Thank you.

6 JUDGE CLIFTON: Thank you, Mr. Beshore.
7 Any redirect?

8 MR. ENGLISH: Absolutely not, your Honor.

9 JUDGE CLIFTON: Thank you, Mr. English.
10 What I'd like to do now is thank the witnesses
11 and ask them to step down. And I would like for
12 those who are here and available to testify
13 today to come to the front of the room, and if
14 there is counsel who will assist them with their
15 question and answer, I'd like counsel to come
16 forward with them as well.

17 MR. ENGLISH: Can we take a five-minute
18 break?

19 JUDGE CLIFTON: Mr. English would really
20 like a five-minute break first. Let us do that.
21 Please be back and ready to go at 11:46.

22 (A recess was taken from 11:41 to 11:50.)

23 JUDGE CLIFTON: Let's go back on record.
24 We're back on record. It's 11:50. I think
25 I'd -- Mr. Carroll. I think what I'd like to do

1 is have you stand in front of the podium sort of
2 in order of how soon it is you would like to
3 testify; that is, if there's someone for whom it
4 is somewhat urgent that you go next for whatever
5 reason, because of cows to milk, because you
6 have a plane to catch, because you've had enough
7 for one day, please come to the podium. Do not
8 be shy to take the first spot.

9 MR. ENGLISH: Your Honor, it may be
10 simple. Mr. Erickson is here, he's been here
11 since yesterday. He needs to get out today. I
12 believe he has like an 8:00 p.m. flight, which
13 means adjusting for that. Ms. Dewey has been
14 here since yesterday. She also has about an
15 8:00 flight. They're flying different
16 directions. But so she needs to be about the
17 same time.

18 Mr. Beshore.

19 MR. BESHORE: Mr. Wernet, who is from
20 Bareman's Dairy in Michigan is here and has been
21 here since yesterday, also needs to leave later
22 today sometime.

23 MR. WERNET: When we can. We're driving.

24 MR. OBERWEIS: Your Honor, Jim Oberweis
25 from Oberweis Dairy Farm. I also have a flight

1 out tonight. It's the only day I am available
2 to be here. The flight is about 7:00 tonight.
3 And I will be brief in my comments.

4 DR. YONKERS: And, your Honor, Robert
5 Yonkers. If we get through those, then I would
6 like to go on.

7 JUDGE CLIFTON: And Mr. Carman hasn't
8 come up here but I have Mr. Carman available for
9 cross-examination, in my mind. We don't need --
10 we don't need to get him. All right.
11 Mr. Oberweis, would you go back to the
12 microphone? How do you spell your last name?

13 MR. OBERWEIS: O, b as in boy,
14 e-r-w-e-i-s.

15 JUDGE CLIFTON: One S?

16 MR. OBERWEIS: One S.

17 JUDGE CLIFTON: And you said you're Jim?
18 Is that your formal name?

19 MR. OBERWEIS: How about if I give you a
20 card?

21 JUDGE CLIFTON: Would you? And would you
22 give one also to the court reporters and one to
23 the USDA table, more than one if you have them.
24 All right. Mr -- is it Wernet?

25 MR. WERNET: Yes.

1 JUDGE CLIFTON: Spelled W-e-r-n-e-t, is
2 that correct?

3 MR. WERNET: Correct.

4 JUDGE CLIFTON: Would you please state
5 and spell your name?

6 MR. WERNET: Jim Wernet, W-e-r-n-e-t.
7 I'm with Bareman Dairy, B-a-r-e-m-a-n.

8 JUDGE CLIFTON: And would you distribute
9 cards in like fashion if you have them?

10 All right. Mr. Erickson, would you go to
11 the podium, please, and spell and state your
12 full name and if you have cards distribute them?

13 MR. ERICKSON: Warren Erickson.
14 W-a-r-r-e-n. Erickson, E-r-i-c-k-s-o-n. I
15 represent Anderson Erickson Dairy.

16 JUDGE CLIFTON: And Anderson Erickson is
17 two different words, but there's no hyphen?

18 MR. ERICKSON: Yes. Yes, your Honor.

19 JUDGE CLIFTON: Okay. And Ms. Dewey, if
20 you would go to the podium and identify yourself
21 please.

22 MS. DEWEY: Christine Dewey from
23 Harrisburg Dairies. Dewey is D-e-w-e-y.

24 JUDGE CLIFTON: And I presume that's
25 Pennsylvania?

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MS. DEWEY: It is.

JUDGE CLIFTON: Thank you. And,
Dr. Yonkers, I'd like you to do likewise. We
know you, those of us who have been here for a
while, but we have some new people in the room.
Would you say who you are?

MR. YONKERS: Sure. Robert Yonkers,
Y-o-n-k-e-r-s. I'm representing the
International Dairy Foods Association.

JUDGE CLIFTON: Now, I thought I had
about ten people to testify today. Who else do
I have besides Mr. Carman and those of you who
have stepped forward? This is good news. All
right. I'd like to take another witness before
we break for lunch. And I'd like that to be
Mr. Oberweis. So Mr. Oberweis.

MR. MILTNER: This is Ryan Miltner for
the record. Mr. Oberweis, I understand, will be
commenting on one of the AIDA proposals, and he
arrived from the airport within the hour and
we've not had a chance to talk. I would like to
have his examination after the lunch hour if we
could.

JUDGE CLIFTON: Okay.

1 MR. WERNET: That's why I did not step
2 forward first.

3 JUDGE CLIFTON: I just said who's got a
4 7:00 flight. The other people have 8:00
5 flights. We'll go with him.

6 MR. MILTNER: We appreciate that
7 consideration, Judge. Then let me go to
8 Mr. Wernet.

9 MR. ENGLISH: Your Honor.

10 JUDGE CLIFTON: Mr. English.

11 MR. ENGLISH: We would propose an order
12 if we could, your Honor, for various reasons.
13 Mr. Beshore and I, who are sponsoring those
14 three witnesses, Mr. Wernet, Mr. Erickson, and
15 Ms. Dewey, for various reasons, we would propose
16 Mr. Erickson go now. So if that's okay with
17 your Honor.

18 By the way, I also mentioned Ms. Dewey's
19 testimony has been in the back of the room for a
20 while. I passed out some to the government and
21 I have one here for your Honor and for the court
22 reporter.

23 MR. YALE: So the order will be what
24 then?

25 MR. ENGLISH: We propose Mr. Erickson now

1 and then if we break for lunch, either Chrissie
2 Dewey and then Bareman or Bareman and then
3 Chrissie Dewey. We'll figure it out at lunch.
4 And then Mr. Oberweis.

5 JUDGE CLIFTON: Now, does Mr. Erickson
6 have a statement?

7 MR. ENGLISH: No, it'll be a traditional
8 direct, your Honor.

9 JUDGE CLIFTON: All right. Thank you.

10 MR. ENGLISH: And I've handed your Honor
11 for later today, and they're also in the back of
12 the room, Ms. Dewey's testimony, both you and
13 the court reporter. And I believe I've handed
14 them out to the government as well.

15 JUDGE CLIFTON: Good. Thank you. You
16 may take the witness stand, if you will, and
17 would you, after you set your water down remove
18 that extra chair?

19 Would you please again state and spell
20 your name?

21 THE WITNESS: My name is Warren Erickson,
22 W-a-r-r-e-n, E-r-i-c-k-s-o-n.

23 JUDGE CLIFTON: Thank you. Would you
24 raise your right hand, please?

25 (The witness was sworn.)

1 JUDGE CLIFTON: Thank you. Mr. English,
2 you may proceed.

3 MR. ENGLISH: Thank you, your Honor.

4 WARREN ERICKSON

5 of lawful age, being duly sworn, was examined and
6 testified as follows:

7 DIRECT EXAMINATION

8 BY MR. ENGLISH:

9 Q. Mr. Erickson, would you please first tell
10 us just a little bit about the background of Anderson
11 Erickson Dairy?

12 A. Yes, sir. Anderson Erickson Dairy is a
13 family-owned dairy processor in DeMoines, Iowa. We
14 produce a full line of dairy products, including milk,
15 cottage cheese, yogurt, sour cream, and dips. Also have
16 some juices. We're a family business started by my
17 grandfather in 1930.

18 We have 525 full-time employees and we
19 distribute to portions of six states in and around Iowa.
20 We have typical monthly receipts of approximately
21 38,000 pounds of milk.

22 Q. Is Anderson Erickson Dairy affiliated
23 with any other dairy company in the United States?

24 A. No, sir. We're a privately-owned family
25 business.

1 Q. What is your background? First, what is
2 your position today?

3 A. My -- my position today is one of an
4 employee of Anderson Erickson Dairy and owner. I'm the
5 chief operating officer of Anderson Erickson.

6 Q. What is your background, educational
7 background?

8 A. I have a background in accounting. I
9 have a master's degree, master's of arts in accounting
10 from the University of Iowa. I'm a CPA. I've been
11 involved in the dairy business for approximately 12
12 years on a full-time basis and oversee all portions of
13 the company, but specifically the plant operations,
14 office, accounting, and milk procurement, among others.

15 Q. Now, you've been at the dairy for 12
16 years, but you're also a CPA. Did you work at an
17 accounting firm?

18 A. Yes, sir.

19 Q. Where did you work?

20 A. I worked for Arthur Andersen in Kansas
21 City for six years.

22 Q. Now, you've been here since yesterday,
23 just before noon, correct?

24 A. That is correct.

25 Q. Yes. We went to 9:00 last night, so you

1 had a full day? Yes?

2 A. Exactly, yes.

3 Q. So you understand that the issues being
4 discussed in this proceeding are with respect to the
5 regulatory treatment of producer-handlers, correct?

6 A. Yes, sir.

7 Q. Are you here to talk about any specific
8 proposal?

9 A. No. I'd like to share my views and facts
10 as I see them as to producer-handlers in our area.

11 Q. So are there producer-handlers in -- in
12 the Iowa and surrounding state marketing area?

13 A. There are several, yes.

14 Q. Can you describe the kinds of operations
15 there are?

16 A. Yeah, I would be glad to. Many of the
17 producer-handlers in our area are smaller farm-based
18 organizations. They specialize in niche markets, some
19 of them organic, some of them glass bottles. Some of
20 them do have distribution to stores, but some of them
21 don't. They have an exclusive distribution just on
22 their farm.

23 We have a wide variety. There are -- I
24 can think -- there's a handful, and most of them are of
25 that category. One in particular, Heartland Creamery,

1 started out that way. We have a -- they started in
2 glass bottles, and were just distributing their product
3 that way. And then they transitioned to a little
4 different strategy.

5 Q. What was their transition? What was the
6 strategy for the transition?

7 A. They transitioned from exclusively glass
8 bottles to starting to sell gallon jugs, low-cost gallon
9 jugs into the -- into the marketplace.

10 Q. Now, do you have a -- a large customer
11 that may have already previously been described in this
12 record in your marketing area that currently receives
13 milk from Heartland Creamery?

14 A. Yes, sir, we do. We have a very large
15 customer of ours and that customer in the -- they will
16 traditionally bid their milk business for private label
17 on a -- on an occasional basis, and they did put out for
18 bid their milk in 2007.

19 And we were successful in a -- just --
20 they bid in geography, so we were successful in a
21 portion of that bid and started serving this customer in
22 June of 2007. They're a little unique because they have
23 two different labels. And I'll refer them to as PL 1
24 and PL 2.

25 Q. You mean private label 1 and private

1 label 2?

2 A. That's my own secret code. But private
3 label 1 is branded with their store name and it is the
4 one that they promote the most. Private label 2, PL 2,
5 is branded with a different name, and they use it
6 exclusively as the low-cost dairy product on the shelf.
7 And they use it for matching purposes and other -- other
8 purposes. It doesn't have as much space as PL 1, PL 2
9 would not, but it is a portion of their private label
10 business which we were awarded in -- specifically in
11 the -- in one area of geography.

12 Q. Let me see if I can back up for a moment.

13 A. Yes.

14 Q. You -- this customer, does it have
15 branded product?

16 A. It does have branded product, yes.

17 Q. I'm not sure. I think we've gone seven
18 days, and I'm not sure how clear we've been about the
19 difference there. Could you describe what branded
20 product is in the dairy industry?

21 A. In my terms I can. I guess some might
22 disagree. But we, our business at Anderson Erickson, is
23 primarily branded business, whereas most of the product
24 that we sell carries the Anderson Erickson name.

25 Q. So that's a brand?

1 A. That is the brand, yes. And you will see
2 in different markets a variety of different brand names,
3 which are usually company names that are in the milk
4 processing business. And then you'll see store branded
5 product, which is usually the name of a store or a --
6 kind of a little bit more generic type of a label.

7 Q. And is that like a private label?

8 A. That would be a private label. That's
9 what I would refer to as a private label.

10 Q. So in terms of this customer you've been
11 discussing, did you have branded product in that store?

12 A. Absolutely, yes.

13 Q. And then there's the store private label?

14 A. There is a store private label, yes.

15 Q. And did you have that product in the
16 store?

17 A. Well, that is the product that they bid
18 periodically. We were awarded in June of 2007.

19 Q. But that's the name of the customer,
20 right?

21 A. Yes.

22 Q. And then there's a secondary private
23 label?

24 A. Yes.

25 Q. And that doesn't have a store name on it?

1 A. It does not.

2 Q. Does that have just sort of a name that
3 the store uses throughout its system for that private
4 label?

5 A. Yes.

6 Q. Okay. So for the purpose of convenience,
7 they're sort of private label 1?

8 A. Yes.

9 Q. Which is what you were bidding on, which
10 had the store name?

11 A. Yeah.

12 Q. And then there's private label 2, which
13 doesn't have the store name but has a common name
14 throughout the system of the store, is that correct?

15 A. Yes.

16 Q. Is that correct?

17 A. That is.

18 Q. And when the store sells the milk out the
19 door, does it have a pricing scheme for branded milk,
20 the store private label 1, and the other private label
21 2?

22 A. Yes.

23 Q. Okay. What is that pricing scheme that
24 you have -- first of all, have you seen that pricing
25 scheme for yourself?

1 A. I have seen the effects of that pricing
2 scheme.

3 Q. But do you -- for yourself, have you seen
4 in the stores what those prices are?

5 A. Yes.

6 Q. Okay. And how do those prices work for
7 the branded milk versus the private label 1 and the
8 private label 2?

9 A. I'll speak in the terms of difference
10 because milk prices do tend to change. And it's not the
11 same for every store because this particular store gives
12 their local managers leeway in pricing up to an extent.
13 But -- so, in other words, it is not set by corporate,
14 but the managers would.

15 But a typical configuration, very typical
16 would be a branded product would be the highest priced.
17 The private label, the store PL 1, the store-branded
18 product would be approximately 10 cents less per gallon.
19 And the PL 2 would be approximately 20 cents less per
20 gallon.

21 Q. So now when was it that this customer
22 solicited bids for private label 1?

23 A. They solicited bids in the spring of
24 2007.

25 Q. And how often does this customer go

1 through that process?

2 A. Every few years.

3 Q. And did you participate in that process?

4 A. Yes, sir.

5 Q. And you had mentioned earlier that you
6 sell milk in various states. Does that include down
7 into Missouri and Kansas City?

8 A. Yes, Kansas and Missouri are both states
9 that we distribute into.

10 Q. Where were you awarded the private label
11 business?

12 A. In the Kansas, Missouri, region of this
13 store chain.

14 Q. And do you know, since you bid,
15 successfully bid on the business, what the customer's
16 issues are for awarding that particular business?

17 A. You know, the customer has a very lengthy
18 vetting process, culminated in written responses to many
19 questions. But it is a very price sensitive process.

20 Q. And when you bid, what did you get
21 awarded by this customer?

22 A. We were awarded the private label, both
23 PL 1 and PL 2 in the Kansas City region.

24 Q. So you were awarded both the P1 and the
25 P2 -- private label 1 and private label 2, correct?

1 A. That is correct.

2 Q. Did you also have a branded product?

3 A. We previously had branded. And that
4 continued.

5 Q. What happened next with respect to this
6 customer and in terms of its milk supply that you are
7 aware of?

8 A. Well, an interesting thing happened.
9 We -- like I said previously, we started servicing this
10 customer in June of 2007 with both PL 1 and PL 2 labels
11 for their stores. Heartland Creamery became a very
12 aggressive part of that market.

13 And in the latter stages of 2007, but
14 increasingly in 2008 they were trying to place their
15 product in this particular store's shelves. And the way
16 that they did that was they -- they used their product
17 instead of PL 2. So they -- they -- they priced their
18 product such that it was more aggressive. It was a
19 better sales point than PL 2, and thereby replaced PL 2
20 over time in that -- in that area.

21 Q. So today do you still have the branded
22 product in the store?

23 A. We do. We have the branded product in
24 the store.

25 Q. Do you still have the store private label

1 1?

2 A. We still manufacture and distribute the
3 PL 1, service the store with that.

4 Q. And what has happened with PL 2 over
5 time?

6 A. PL 2, just to give you some concrete
7 numbers, during 2007, we had annualized sales of
8 185,000 gallons of PL 2 and that during 2008, we had
9 annualized sales of 40,000 gallons. And that product is
10 no longer produced.

11 Q. By Anderson Erickson?

12 A. Right. And it's been replaced by
13 Heartland Creamery's product that has taken all of that
14 volume away from us.

15 Q. Now, to be clear -- and I think some
16 other people have testified on this. But to be clear,
17 the label that is being used for PL 2, is that the same
18 label as you used when you had PL 2?

19 A. Actually, to be clear, we used -- the PL
20 2 that we used to their specification for the label.
21 Heartland Creameries came with their own brand.

22 Q. They actually came in with a brand?

23 A. Heartland Creameries and replaced PL 2.

24 Q. So a branded product replaced your PL 2,
25 is that correct?

1 A. That is correct.

2 Q. Is that somewhat unusual for a branded
3 product to replace the lowest cost pricing in a retail
4 store?

5 A. That would be quite unusual.

6 Q. And at this time do you have any sales to
7 this customer of the private label 2?

8 A. PL 2 sales have been eliminated. We no
9 longer sell that product.

10 Q. And do you know for a fact that that
11 product is on the shelves from Heartland?

12 A. I know for a fact that Heartland
13 Creameries supplies product to that store in lieu of
14 PL 2.

15 Q. Now, have there been any impacts on
16 either the branded sales or the PL 1 sales?

17 A. There have been some impacts on PL 1.
18 And I've tried to quantify that. Approximately a
19 decrease of approximately 200,000 gallons annually in
20 the PL 1 sales.

21 Q. And have you done -- made any estimate
22 about what the loss of the PL 2 completely and the loss
23 of the PL 1, the portion of the PL 1, represents for the
24 Central Milk Marketing Order?

25 A. My estimation is about -- it's in excess

1 of 3 and a quarter million pounds on an annual basis.

2 Q. It's not a huge number right now?

3 A. No, it's not -- not an astounding number,
4 but it's troubling. And the trend is troubling. And I
5 might add that that's a number I can most completely
6 quantify. They do service other customers. But there
7 hasn't been a relationship where they've just took out
8 a -- a brand -- or a brand -- or some kind of label like
9 the PL 2 where that was much more easy to quantify.

10 Q. Have there been any other effects in the
11 market of this new PL 2 product, say, with respect to
12 the price you're able to sell product elsewhere?

13 A. It has a depressing impact on -- on the
14 market.

15 Q. Depressing. Do you mean financial or
16 emotional or both?

17 A. Well, from my standpoint, I'm an
18 accountant, so it would be both. In terms of this --
19 this venue, it would depress the market price.

20 Q. Now, given -- given the competition at
21 the PL 2 level as opposed to a brand level, although
22 it's PL 2 level at the brand of that company, do you
23 have any conclusion about -- well, let me back up for a
24 moment.

25 Do you still have the Anderson Erickson

1 branded product in those stores?

2 A. Yes, sir.

3 Q. And other than some loss of volume of
4 PL 1 to PL 2, do you still have the PL 1 in those
5 stores?

6 A. Yes, sir.

7 Q. So can this be a quality issue?

8 A. No.

9 Q. Is this a service issue?

10 A. No.

11 Q. Do you have a conclusion as to what it
12 is?

13 A. Well, the nature of PL 2 is it's the most
14 price-sensitive product on the dairy shelf. So my
15 conclusion would be that price was the -- the driver on
16 that decision.

17 Q. Now, that's competition?

18 A. Yes.

19 Q. So what's wrong with that?

20 A. Competition in and of itself is fine.

21 And there's -- there's a lot of ways we can
22 differentiate and do differentiate ourselves: Service,
23 quality, different package options, things -- and
24 including price. But I have a problem with competition
25 when I'm not on an equal playing field with somebody

1 else from a regulatory standpoint.

2 Q. Somebody might say, well, you've got a
3 bigger plant, and I've got a smaller plant, so I'm on an
4 equal field with you there.

5 A. I wouldn't really -- I wouldn't define
6 that as a meaningful argument. If I have inefficiencies
7 in my plant, that is my problem. And if somebody else
8 can do it better or more efficiently, then I need to
9 respond to that. And we have -- in our 79 years of
10 business have been able to do that.

11 But when that -- when that unequal
12 playing field is as a result of regulatory things that I
13 can't necessarily overcome, then that's -- that's --
14 that's a different issue. That's very troubling.

15 Q. Do you have -- do you reach any
16 conclusion based upon this regulatory difference as to
17 its impact on producer-handlers in your market?

18 A. Well, it has -- I can quantify in excess
19 of 3 million pounds of milk that is not part of the
20 order that would have been had this product remained a
21 part of a regulated plan.

22 So I think that decreases the -- the
23 overall ability of the order to compensate the farmers
24 and things like that. I also would add that, you know,
25 it's troubling to be on an unequal playing field. And

1 if we can overcome efficiency differences, that's --
2 that's one thing. But if it's -- if it's just
3 differences in the Class I differential, that's
4 troubling.

5 Q. And you've been here now for a little
6 over a day and obviously the hearing notice has been
7 out. Do you reach any conclusion about what a solution
8 could be for this problem?

9 A. Well, I think that I'll leave that to the
10 hands of the experts. I think Bob Yonkers is going to
11 testify on and to -- as far as AIDA's opinion, and I'll
12 follow their lead, but I think some of those proposals
13 that I've heard are very intriguing.

14 Q. Do you have anything you wish to add at
15 this time?

16 A. No, sir.

17 MR. ENGLISH: The witness is available
18 for cross-examination.

19 JUDGE CLIFTON: Thank you, Mr. English.
20 Mr. Yale, you may cross-examine Mr. Erickson.

21 CROSS-EXAMINATION

22 BY MR. YALE:

23 Q. Good afternoon. Benjamin F. Yale for
24 Continental Dairy Products and Select Milk. How are you
25 doing this afternoon?

1 A. I'm doing just fine. Thank you.

2 Q. I just have a couple of questions on the
3 labeling issue. There's clearly a difference between
4 the PL 2, as you call it, and the Heartland label,
5 right?

6 A. They're -- yeah, the labels look
7 different, yes.

8 Q. So this isn't a situation where that
9 store was -- you were balancing their supply of PL 2
10 with a PD. You understand what I mean by balancing that
11 supply with a PD?

12 A. I'm familiar with that, yes.

13 Q. And that was not going on here, right?

14 A. No.

15 Q. So I guess the -- the question -- the
16 comment comes back that you don't have to have the
17 same level -- label to be able to participate in the
18 sales of some of these chain stores, is that correct?
19 You don't have to use their label to still be a part of
20 that marketing, right?

21 A. If your question is, is there multiple
22 labels in a store, that would be correct.

23 Q. So if you made a limitation that said you
24 couldn't -- you had to have a unique label, that in
25 itself wouldn't necessarily stop a PD or anybody else

1 from getting into a store, the sales. This would be
2 price, right?

3 A. A lot of that decision is based on price.

4 Q. Now, while we're talking about price, the
5 question I had was -- and I -- you may have said it and
6 I -- I misunderstand. And I apologize.

7 Originally you said you had branded
8 PL 1, PL 2 and it was like a dime difference between the
9 branded and PL 1 and a dime difference between the PL 1
10 and the PL 2. Was that correct, the way I understood
11 that?

12 A. That's a typical outcome, yes.

13 Q. Okay. Now, with this PD, did that
14 relationship change?

15 A. Somewhat, yes. We had a branded product,
16 and there was still approximately a 10 cent difference
17 between branded and PL 1. Between PL 1 and PL 2 it
18 could get up to 20 cents difference.

19 Q. Okay. Now, in your market, do you pay
20 premiums?

21 A. Yes.

22 Q. Okay. And what's the range in the
23 premium structure for Class I milk in that market?

24 A. In May approximately \$2.60.

25 Q. And that would be --

1 A. That's an over-order premium.

2 Q. Yeah. So that's 20 cents, 30 cents a
3 gallon?

4 A. Yeah.

5 Q. And that's more than the dime difference
6 between -- on the Heartland, right? I mean, one could
7 explain the Heartland difference as just the over-order
8 premium?

9 A. One could explain it as \$1.80 difference
10 in the Class I as well.

11 Q. As well, right?

12 A. Yeah.

13 Q. Now, I have to set this question up
14 because I don't know an easy way to lead into it. There
15 are -- going back to your bit where you had the branded
16 PL 1 and PL 2, an astute, knowledgeable milk marketer
17 could go into the dairy case and look at the plant
18 number that's stamped or sealed or somehow on each of
19 those containers, whatever they are, and determine that
20 they came from the same plant, is that right?

21 A. Plant codes are a required part of
22 your -- on our package, yes, sir.

23 Q. Right. All right. So if you were
24 supplying all three of them. Someone like me, because I
25 know that, could go in there and identify that they're

1 all three from the same plant, right?

2 A. That's correct.

3 Q. And it's also safe to say that it's
4 fundamentally the same milk between the three, it's just
5 different cartons, right?

6 A. That's accurate.

7 Q. Okay. Now, are you aware that there are
8 some stores and chains that have been criticized for
9 selling the same product from the same plant with
10 different labels at different prices?

11 A. I haven't been a part of that criticism.

12 Q. You haven't been a part of that. So you
13 don't know -- you don't think that that would have been
14 the part of the overall strategy of this store to make
15 this change?

16 A. I have knowledge that that wasn't.

17 Q. That's the answer then. That's really
18 what I wanted to know because that's a factor that's out
19 there.

20 MR. YALE: I don't have any other
21 questions. Thank you.

22 JUDGE CLIFTON: Thank you, Mr. Yale.

23 Mr. Ricciardi.

24 CROSS-EXAMINATION

25 BY MR. RICCIARDI:

1 Q. Good afternoon, Mr. Erickson. I
2 represent AIDA, a group of producer-handlers and exempt
3 plants. And I've got some questions based upon your
4 testimony. Your plant, as I understand -- I'm looking
5 at the Dairy 100 and congratulations on being number 66,
6 by the way -- is located in DeMoines, Iowa, correct?

7 A. That is correct.

8 Q. What's the distance between DeMoines and
9 Kansas City?

10 A. It's approximately 200 miles.

11 Q. Do you know the distance between Newark,
12 Missouri, and Kansas City?

13 A. Not intimately. Approximately a hundred
14 miles.

15 Q. Okay. So the Heartland plant is located
16 closer to Kansas City than your plant is, correct?

17 A. That's correct.

18 Q. What's your transportation costs to go
19 from your processing plant to Kansas City?

20 A. That's a -- could you -- could you be
21 more specific?

22 Q. Sure. I mean, it costs money to
23 transport milk to a customer, right?

24 A. That is correct.

25 Q. Okay. And who transports your milk?

1 A. Anderson Erickson transports the milk.

2 Q. Okay. And do you have a figure that you
3 break out per gallon for transportation from this --
4 your plant to this particular customer?

5 A. This particular customer is 22 different
6 stores in a pretty wide geographic area, so no, I
7 couldn't answer that specifically.

8 Q. Let me be more specific. You were
9 talking about one store or were you talking about the 22
10 locations in your testimony?

11 A. Yes, sir, the 22 locations.

12 Q. Okay. And where are those 22 locations?
13 Are they all in the Kansas City area?

14 A. They're in a region in and around Kansas
15 City and extending up to parts of Missouri and Kansas.

16 Q. And what's the farthest store location
17 from your processing plant?

18 A. The farthest?

19 Q. Yes, sir.

20 A. Potentially Topeka.

21 Q. How far is that?

22 A. 250 miles.

23 Q. Okay. Can you give me at least an idea,
24 ballpark range, as to what your cost of transportation
25 is to take the milk from your processing plant to these

1 locations of this particular customer in the Kansas City
2 region?

3 A. I can tell you it's a number greater than
4 zero, but I don't have that number in front of me. I'm
5 sorry.

6 Q. Well, it's more than zero. We'll take
7 that as a number. Isn't it true, though, that if, in
8 fact, Heartland is closer to those locations, their
9 plant is than yours, that their transportation costs
10 should be -- all things being equal, it should be less?

11 A. That's correct.

12 Q. So therefore, they would be able to
13 utilize at least the transportation distance in pricing
14 their milk to this particular customer, correct?

15 A. That is correct.

16 Q. And they -- since they process their own
17 milk and they source their own milk, they don't have to
18 pay a 25 cent over-order premium to a co-op, right?

19 A. That is an opportunity cost to them if
20 they were going to market their milk somewhere else. So
21 they wouldn't pay it to themselves necessarily.

22 Q. But they don't have to pay the money to
23 the co-op that you do?

24 A. That's correct.

25 Q. Now, getting to that point, your family

1 has invested in the processing plant that you have? You
2 don't have farms, right?

3 A. No farms.

4 Q. You made the decision at some point, your
5 family did, and let me check this out. Don't tell me.
6 But you've been in business for a while. At some point
7 your family made a decision that they were going to
8 invest in that portion of the business and not the dairy
9 farm portion of the business, correct?

10 A. Correct.

11 Q. And you also source your milk through a
12 cooperative, is that right?

13 A. Some of it.

14 Q. And where do you get the other portion of
15 it?

16 A. We source it directly from a few farms
17 and through co-ops.

18 Q. How much of your milk comes from
19 independent sources versus cooperative sources, sir?

20 A. 40 percent independent, 60 percent co-op
21 on average.

22 Q. And the -- I apologize. I'm sorry. I
23 thought you were done.

24 The 60 percent that comes from the co-op,
25 is there a particular co-op that you use?

1 A. No. We use three.

2 Q. What are the three co-ops that you use?

3 A. Dairy Farmers of America; AMPI, which is
4 American Milk Producers, Inc., I believe; and Swiss
5 Valley.

6 JUDGE CLIFTON: I lost the last part of
7 that.

8 THE WITNESS: Swiss Valley.

9 Q. Your plant is located in what Federal
10 Order, sir?

11 A. We're in order 32.

12 Q. So with regard to Federal Order 32, do
13 you know the percentage of the milk that is supplied in
14 that order into the pool from Dairy Farmers of America?

15 A. No, I'm sorry, I do not know that.

16 Q. Is it more than 50 percent, to your
17 knowledge?

18 A. Honestly, I don't know.

19 Q. Honestly is important. That's good.
20 Thanks.

21 One of the reasons that you use a
22 cooperative to source your milk is you don't want to
23 have to deal with the issue of the question of having an
24 adequate source. If you need milk, you simply go ahead
25 and contract for the milk, right?

1 A. Could you reask the question?

2 Q. Yeah. It's probably not a good one.
3 I'll see if I can do it this way. A producer-handler
4 such as Heartland, since you brought Heartland up, has
5 to supply its own milk source through its processing
6 plants and so it needs to ensure at the end of any
7 particular month, one, that it's got enough milk and,
8 two, that it doesn't have too much milk, right?

9 A. Yes.

10 Q. That is not your problem?

11 A. No, that is my problem, also.

12 Q. Okay. Do you have that issue in terms of
13 finding milk?

14 A. Absolutely. I have to balance milk.

15 Q. In what way?

16 A. I have two contracts with co-ops that
17 specify the loads taken per day. And they're the same
18 year round.

19 Q. Okay. And those particular co-ops will
20 supply you -- so you've got -- you've got a yearly
21 supply contract that requires a certain amount be picked
22 up every day?

23 A. Yes. Actually, technically, it's a
24 certain amount to be dropped off every day.

25 Q. Dropped off. You're right. Sorry. I

1 apologize. That is a factor in making the decision that
2 you made to pick those particular co-ops to contract
3 with, correct?

4 A. Availability of milk is a factor when I'm
5 sourcing milk, yes.

6 Q. All right. By the way, I didn't ask you
7 this. You are a member of AIDA?

8 A. That is correct.

9 Q. And as a member of AIDA, you are here to
10 support their proposal, correct?

11 A. I am here to give you facts that pertain
12 to my experience with the producer-handler.

13 Q. And you're here to support their proposal
14 also, or not?

15 A. I'm here to give facts as it pertains to
16 the producer-handler.

17 Q. Do you support their proposal or not?
18 Just -- if it's yes or no or you don't know, that's
19 fine.

20 A. I'm going to defer to Mr. Yonkers and
21 others as to the ultimate disposition of that matter.

22 Q. Okay. Have you looked at any other
23 proposals?

24 A. Have I read any of the proposals, yes.

25 Q. Okay. Have you read Proposals 23, 24 or

1 25? 25 would be, among other things, the individual
2 handler pool proposal.

3 A. I have no intimate knowledge of the
4 numbering of said proposals. I've read several, but
5 honestly, I can't tell you if I've read number 24 or 25
6 or 23.

7 Q. Good enough. The six states that you
8 actually market milk in would be Missouri, Kansas, and
9 what?

10 A. Iowa.

11 Q. Yes, sir.

12 A. Illinois, Minnesota, Nebraska.

13 Q. You said you don't have any problem with
14 competition. That's not a problem for you, right?

15 A. It's a fundamental part of this business.

16 Q. And you also don't have any problem that
17 milk is available at a low price to consumers in stores,
18 correct?

19 A. Milk consumption in the aggregate is a
20 good thing. So I do not have a problem with economical
21 availability of milk.

22 Q. Now, you have -- we've danced around this
23 large customer private label information. Is that
24 because you are not going to identify the name of the
25 customer?

1 A. I'd prefer not to.

2 Q. Okay. Good enough. Is it what we've
3 referred to as a warehouse store or a box store?

4 A. You could characterize it like that.

5 Q. If I characterize it like that, would I
6 be right?

7 A. Yes.

8 Q. And as I understand it, you have not seen
9 the purchase orders or the invoice -- invoices between
10 this particular customer and Heartland. You've seen the
11 shelf prices, correct?

12 A. Physically seen, yes, that is correct.

13 Q. Okay. Now, I don't understand. Have you
14 seen the purchase orders or the invoices between this
15 customer and Heartland?

16 A. No, I have not.

17 Q. Okay. You have seen the shelf prices?

18 A. Yes, sir.

19 Q. By going into the store?

20 A. That would be public knowledge, yes.

21 Q. Yes. I understand. Did you go into more
22 than one location of the 22 that you talked about or
23 just one?

24 A. All 22.

25 Q. Okay. And when did you do that?

1 A. Various dates between -- approximately a
2 week ago.

3 Q. Okay. Do you know, by the way, the
4 particular date that Heartland started supplying this
5 particular customer that you've been talking about?

6 A. There isn't a bright line. It was a
7 process that started in the end of 2007 but accelerated
8 through 2008.

9 Q. Okay. So the starting time was
10 sometime --

11 A. Late fall 2007.

12 Q. Calendar year 2007, correct?

13 A. Yes. That it was most aggressive in
14 2008.

15 Q. Okay. So you started to lose some of the
16 business, though, in calendar year '07, correct?

17 A. That's correct.

18 MR. YALE: Thank you, sir.

19 THE WITNESS: You're welcome.

20 JUDGE CLIFTON: Who will next
21 cross-examine Mr. Erickson? Mr. Beshore.

22 CROSS-EXAMINATION

23 BY MR. BESHORE:

24 Q. Good afternoon, Mr. Erickson.

25 A. Good afternoon.

1 Q. I just have one question. Did -- with
2 respect to the PL 1 sales that were -- that went to
3 Heartland, did the customer bid those sales?

4 A. PL 1 sales, we continue to service that
5 customer with PL 1.

6 Q. I'm sorry, PL 2. I misspoke.

7 A. PL 2 sales were -- were replaced by
8 Heartland. I'm not sure -- I guess I'll ask you to ask
9 your question again.

10 Q. Okay. Did the store bid -- you said that
11 you had obtained those sales sometime in 2007, I think,
12 through a bid process, is that correct?

13 A. That is correct.

14 Q. Okay. Now, when you lost the PL 2 sales
15 to Heartland, was there a -- you know, had the bids been
16 reopened, had the account been reopened, did you have
17 the opportunity to bid on those sales?

18 A. No, it was not a bidding situation. The
19 nature of PL 2 is it was the cheapest milk in the milk
20 case. That was replaced by Heartland Creamery and
21 thereby not -- there was -- there was no need for PL 2
22 anymore.

23 Q. Okay. Was -- so you didn't have the
24 opportunity to provide a lower price on your supply of
25 PL 2 versus whatever price Heartland was charging the

1 customer for its labeled milk? Do I understand that
2 correctly?

3 A. You would always have an opportunity to
4 go to a customer and lower your price.

5 Q. Okay. Do you know -- did you -- did you
6 talk to the customer about your loss of those sales?

7 A. We did, yes.

8 Q. Okay. What did you learn?

9 A. Well, we learned that their pricing
10 strategy, their -- Heartland Creamery's pricing strategy
11 was one that they were going to undercut the lowest cost
12 dairy product in the case.

13 Q. And that's what the -- the store told
14 you?

15 A. That's what the store managers told us,
16 that they were communicated by Heartland Farm -- or by
17 Heartland Creamery. They take our price, subtract some,
18 that would be their price.

19 Q. They would take your price, subtract
20 some, and that would be their price?

21 A. Yes.

22 MR. BESHORE: Thank you.

23 JUDGE CLIFTON: Thank you, Mr. Beshore.

24 Is there any other cross-examination of
25 Mr. Erickson? There is none. Mr. Tosi.

1 MR. TOSI: I have no questions for you,
2 Mr. Erickson, but we do appreciate your coming
3 and participating in the hearing. Thank you
4 very much, sir.

5 THE WITNESS: Thank you.

6 JUDGE CLIFTON: Mr. Ricciardi, did you
7 think of something else?

8 RECROSS-EXAMINATION

9 BY MR. RICCIARDI:

10 Q. I thought of one thing based upon the
11 last question from Mr. Beshore. As I understand the
12 information that you provided to Mr. Beshore, is that
13 someone who works for you heard something from someone
14 who worked for the customer, and you just reported it,
15 correct?

16 A. Triple hearsay, yes, correct.

17 MR. RICCIARDI: Thank you very much.

18 JUDGE CLIFTON: Any redirect,
19 Mr. English?

20 MR. ENGLISH: No, your Honor.

21 JUDGE CLIFTON: Thank you. Thank you so
22 much, Mr. Erickson. You may step down.

23 Would anybody object to our taking an
24 hour now for lunch? No objection. It's almost
25 12:45. Please be back at 1:45 ready to go.

1 (A recess was taken from 12:42 to 1:49.)

2 JUDGE CLIFTON: Please come to order.

3 (Exhibit 77 was marked for
4 identification.)

5 (Exhibit 78 was marked for
6 identification.)

7 JUDGE CLIFTON: We're back on record at
8 1:49. Mr. Beshore, shall I have the witness
9 identify himself?

10 MR. BESHORE: Yes, please, your Honor.

11 JUDGE CLIFTON: Would you please spell
12 your name again for us?

13 THE WITNESS: My name is Jim Wernet,
14 W-e-r-n-e-t. And I'm employed by Bareman's
15 Dairy in Holland, Michigan.

16 JUDGE CLIFTON: Thank you. Would you
17 raise your right hand, please?

18 (The witness was sworn.)

19 JUDGE CLIFTON: Thank you, Mr. Wernet.
20 Mr. Beshore, you may proceed.

21 MR. BESHORE: Thank you, your Honor.

22 JIM WERNET
23 of lawful age, being duly sworn, was examined and
24 testified as follows:

25 DIRECT EXAMINATION

1 BY MR. BESHORE:

2 Q. Mr. Wernet, before you proceed to present
3 your written testimony, which has been marked as
4 Exhibit 77, I have just a couple of preliminary
5 questions.

6 First of all, would you tell us just a
7 little bit about yourself, your personal background?

8 A. Well, I've been in the dairy business my
9 whole life. My father was a home delivery milkman.
10 That's how he started out. And I worked on his trucks
11 off and on during high school, and for different dairies
12 that he worked for in that period and spent a couple of
13 years at college.

14 And in 1971, I joined the Marine Corps
15 Reserve. When I came home from the reserves, the
16 opportunity arose that I could start my own distribution
17 business, of which I bought a truck and started a
18 business. Built that business over the next 16 years
19 into about 12 trucks and subsequently was sold to Stan
20 Bareman, who is my current employer, and I've been with
21 Bareman's ever since, which was 1987.

22 Q. Okay. What did you distribute in your
23 distribution --

24 A. We distributed milk and ice cream
25 products.

1 Q. And what geographic area were you in?

2 A. Generally, it was the area east of Grand
3 Rapids, Michigan, kind of a rural area, maybe about a
4 six-county area. And, in fact, that was the main reason
5 that we sold the business, is the customer base was
6 expanding and basically wanting to drag us into areas of
7 the state that were uneconomical for us to go to with
8 the coverage that we would have.

9 So by combining with Bareman Dairy
10 routes, we were able to get route efficiencies and
11 service the customers that we brought to the business as
12 they expanded in other areas of Michigan.

13 Q. Just one other question before going into
14 your prepared statement. Have you ever testified in a
15 Federal Milk Order hearing before?

16 A. No, I have not.

17 Q. What brought you here today?

18 A. Well, one of the suppliers that we buy
19 milk from is DFA, and my representative is Chuck
20 Courtade, who I've known for years. He used to be our
21 representative from an independent milk co-op of which
22 ended up being folded into DFA at some point in the
23 past. But for years I've complained about some of the
24 unfair competition from the producer-handler.

25 And when he was notified that there was

1 going to be a hearing, then he, in one of his normal
2 visits to call on us, told me that if I had something to
3 say, now was the time to say it. And so I agreed to
4 come and say what I know.

5 Q. And this statement that you are going to
6 present, did you prepare that?

7 A. I did. It is my statement. I did ask
8 Chuck some questions about what to expect, what a
9 Federal hearing is all about, is it in a courthouse.
10 You know, I knew nothing. He directed me to a telephone
11 number to Elvin -- and I don't even right now remember
12 Elvin's last name, I'm sorry. And he and I conversed on
13 the phone and through e-mail, he gave me a general idea
14 of what I could expect here and what the hearing would
15 require of me, as far as some idea of my background and
16 why I was qualified to speak on this issue.

17 So I did have some assistance in the
18 basic outline of what my statement is from Elvin, but
19 the words are mine.

20 Q. Okay. With that, would you proceed with
21 your statement, sir?

22 A. Yes. I am Jim Wernet and I'm the
23 sales -- general sales manager for Bareman Dairy,
24 located at 234 Charles Street in Holland, Michigan.
25 We're a fluid milk processing business with in excess of

1 \$100 million in annual sales. Like most of our dairy
2 farm suppliers, Bareman's Dairy is a family owned and
3 run business, now in its fourth generation. Our
4 distribution area includes Michigan, Northern Indiana
5 and the Greater Chicago area. We currently employ 287
6 employees and have operated in Holland, Michigan, since
7 1898.

8 My duties at Bareman's include oversight
9 of the 11 person sales team, determining pricing for all
10 products and customers, customers relations as well as
11 purchasing all dairy products not produced at our
12 plant -- or by our plant.

13 I am responsible for the bottom line
14 profitability on all items that we sell. I've been
15 employed at Bareman Dairy for the last 21 years. I have
16 held my current position at Bareman's since 1994. In
17 total, I have been employed in the dairy business in
18 Michigan since 1971.

19 Bareman's Dairy purchases raw milk from
20 Dairy Farmers of America, Incorporated, and Michigan
21 Milk Producers Association and is fully regulated by the
22 Federal Marketing Order 33. We are a completely
23 independent company and do not belong to any trade
24 organizations.

25 Bareman's Dairy competes in all channels

1 of trade, grocery, institutional, vending, C stores in
2 three of the top 40 markets. That would be Chicago,
3 Detroit and Grand Rapids. We compete against the
4 largest fluid milk processing company in the country,
5 Dean Foods, as well as several large regional dairy
6 companies, Prairie Farms, and Kemp's. Additionally, we
7 compete against a producer-handler, Country Dairy, that
8 has added cows steadily over the past decade.

9 I am here to testify in support of
10 Proposals 1 and 2 as offered by the National Milk
11 Producers Federation and the International Dairy Foods
12 Association and oppose any grandfathering. Bareman's
13 Dairy is supportive of Federal Orders and feel that the
14 orders are a benefit to our dairy and its 287 employees.
15 I am not a expert in the field of Federal Milk Marketing
16 regulations, but I do have a general understanding of
17 what is being discussed here.

18 I understand that a producer-handler does
19 not pool the revenues from his farm with the Federal
20 Order. I understand that most producer-handler milk
21 volume is Class I volume and that these volumes are sold
22 for the highest price; so when the returns from that
23 volume of milk is not part of the Federal Order pool,
24 the resulting blend price will be lower. But more
25 importantly for Bareman's Dairy, a producer-handler is

1 not accountable to the Federal Order for the minimum
2 Class I price -- and that is a big concern to us.

3 In the business lines I have discussed
4 above, we deal daily with many of the processors
5 mentioned here at the hearing. The one fact that I can
6 be assured of is that they -- they pay the Federal Order
7 minimum prices in the same way that I do. This is not
8 true when I compete with a producer-handler. In my
9 competitive area, I do face competition from
10 producer-handlers.

11 In our market, this is an actual daily
12 marketplace concern. We think the issue needs to be
13 reviewed and are appreciative of the hearing. Our view
14 is that the large producer-handlers can and do affect
15 the marketplace and exploit a price difference in ways
16 that are not intended. We urge the Secretary to change
17 the Order rules as suggested in Proposals 1 and 2.

18 I understand that the order system does
19 not guarantee a profit for Bareman's Dairy but it does
20 claim to provide the same minimum prices to processors
21 in the form of class prices. Once this balance gets
22 upset, the consequences may be hard to correct - we are
23 dealing with that situation now in portions of my
24 marketing area, and I am concerned that if the Secretary
25 does not act soon, we could have similar issues in other

1 areas.

2 Due to the continued growth of the
3 largest retailers such as Wal-Mart, Kroger, Target and
4 the like, with whom the largest dairy companies have an
5 advantage and the inside track due to their larger
6 distribution footprint, the smaller, independent grocer
7 and the C store operator has become more important to
8 our survival. This is the very customer targeted by our
9 large producer-handler competitor.

10 Our continued existence and the jobs that
11 we now provide and have provided to the Holland
12 community for over 100 years are as valuable as the jobs
13 that they provide. If their existence depends on a
14 regulatory wrinkle, as the producer-handlers would have
15 you believe, then that's a very fragile existence
16 indeed.

17 We object to the head start the producers
18 have in pricing at the expense of other farmers in
19 Michigan, but we also feel that they cause havoc in the
20 marketplace when in the normal cycle of production, they
21 have more milk than customers to purchase it. This
22 normally happens in the spring when per cow production
23 is up and per capita consumption is down. With no way
24 to balance sales with milk production, they turn to fire
25 sales both to establish customers and any others that

1 might be receptive.

2 When below cost priced milk flows out
3 into the market, we are left with two choices: Match
4 the costs to retain the sales and the customer and lose
5 money in the process, as we have no surplus milk at
6 lower costs; let them have the sale and hope the surplus
7 cycle works its way out and that they don't add more
8 cows.

9 Either way, the low retail prices spread
10 across the marketplace as one retailer after another
11 match up to prevent their customers -- their own
12 customers from switching stores. The reality is that
13 one below market quote affects much more milk than --
14 more than the milk quoted, and incumbent vendors match
15 up and the producer-handler rolls on to other prospects.
16 Therefore a producer-handler affects more milk than he
17 can produce and deliver. We have watched this cycle
18 repeat itself annually as our producer-handler
19 competitor has worked his way up from 80 cows to a
20 thousand. Will a thousand be enough, or another 500
21 more cows, which would keep them under the 3 million
22 pound limit -- level be added?

23 Will a new producer-handler begin this
24 cycle all over again?

25 A recent example -- a recent example of

1 competitive issues we face with producers, a C store
2 chain of 32 stores, 28 of which we service, four
3 serviced by our producer-handler competitor, was offered
4 all gallons of milk at \$1.90 if they would retail at
5 \$1.99. This same offer is being currently made to
6 others in our marketing area. These costs are not
7 possible to meet paying the current Federal Order --
8 Federal Order cost plus the over-order Class I premiums
9 with the volumes and cost of delivery that a typical C
10 store purchases.

11 We are told that many producer-handlers
12 have built their businesses on quality, not on the cost
13 advantage that they have. From our viewpoint, it's
14 simply not true in our market. Price has been the first
15 weapon used by producer-handlers in our marketplace.

16 I am asking that fairness be restored and
17 competition can live on.

18 If independent dairies like Bareman's are
19 forced out of the marketplace, there will be no one to
20 compete with the large dairies on school bids and dairy
21 government contracts as most producer-handlers do not
22 process half pints. In addition to many Michigan
23 schools, we also serve the Chicago public schools, the
24 third largest in the country. Competition is good and
25 something we do not fear, but to require participation

1 in the Federal Order by some companies but not others is
2 not our idea of fair competition and simply not
3 justifiable. How can one family business be favored
4 over another simply because they have livestock?

5 If this issue is not corrected, we may
6 have to press our suppliers to eliminate the Order
7 system as the only way to meet the lower price offered
8 to retailers from producer-handlers.

9 Thank you for the opportunity to express
10 my opinions. I'll be glad to try and answer any
11 questions you may have about my testimony.

12 BY MR. BESHORE:

13 Q. Okay. Mr. Wernet, first question I have
14 about your testimony is, you have used the phrase, C
15 store, several times. Can you tell us what you mean by
16 C store?

17 A. A C store is a convenience store, gas
18 station, that type of -- with a -- more than a gas
19 station but with a store added on.

20 Q. Okay. Now, you've referenced in your --
21 in your testimony --

22 Before I get to that, let me ask you, do
23 you have in front of you a document that's been marked
24 as Exhibit 78? And it consists of double-sided -- seven
25 double-sided pages, and I think 13 pages of copy. Do

1 you have that?

2 A. I do.

3 Q. Okay. Are you -- could you look through
4 it, please, and tell us if you are familiar with it?

5 A. Well, the first page is the home page of
6 Country Dairy.

7 Q. And who is --

8 A. That is -- Country Dairy would be the
9 producer-handler in New Era, Michigan, that markets in
10 our area.

11 Q. And that is the producer-handler that you
12 have referred to in your testimony you've just
13 delivered?

14 A. Correct.

15 Q. What are the rest of the pages after the
16 first page?

17 A. The rest of the pages are -- they list
18 the customer list, where you can buy the Country Dairy
19 milk on their website. And those are the locations.

20 Q. Okay. And that's all just printouts from
21 the website of Country Dairy?

22 A. That is correct.

23 Q. Okay. Now, the last two pages appear to
24 be a map with Xs. Can you tell us what that is?

25 A. That is a Michigan state highway map,

1 this map. And I reviewed the -- every town that is
2 represented by -- on those web pages and marked with an
3 X. So therefore like, say, Grand Rapids may have
4 multiple locations but only one X. Just an attempt to
5 show the range of their distribution.

6 Q. So the Xs on this map essentially show
7 the locations of the stores which are listed in the
8 previous web page printouts where Country -- Country
9 Dairy's products are distributed?

10 A. That is correct.

11 Q. Okay. Did you -- did you make the map?

12 A. I did.

13 Q. Okay. Now, you say -- you've testified
14 Country Dairy has what, about a thousand cows? Is that
15 your understanding?

16 A. They have a thousand cows, based on their
17 letter in support -- or in opposition to the -- the
18 proposals.

19 Q. And that's a letter -- a letter that was
20 addressed to officials in the United States Department
21 of Agriculture that was posted on the USDA website and
22 which you have reviewed?

23 A. I have.

24 Q. Okay. And now, is this -- the
25 distribution area, depicted on the map that you have

1 just described, would appear to be quite a broad --
2 quite a large geographic area. How far is it from north
3 to south, roughly, would you say?

4 A. North to south would be 200 -- a little
5 over 200 miles probably.

6 Q. Okay. How would a -- you know, a single
7 plant location, a thousand cow herd, have a distribution
8 system that extensive?

9 A. They do not. They do not have a truck.

10 Q. They do not have a truck?

11 A. No.

12 Q. Okay. You know that of your personal
13 observation?

14 A. Yes.

15 Q. Okay. So how are their products
16 distributed to this broad set of geographic locations?

17 A. They sell all their milk to a
18 distributor, who sells the milk for them and distributes
19 it alongside regulated milk from Dean Foods and Prairie
20 Farms.

21 Q. And you are familiar with that
22 distributor?

23 A. I am.

24 Q. Okay.

25 A. Cedar Crest --

1 Q. Is the name?

2 A. -- is the name of the distributor.

3 Q. Name of the distributor, okay.

4 A. And their address would be on the exhibit
5 here, because in reality this is not -- this list was
6 uploaded from Cedar Crest's computer. As an example, on
7 page -- well, let's see, if you were numbering -- it
8 would be on the -- it would be on the back of the second
9 page, but the fourth customer on the list is listed as
10 Employee - Price List, 5850 Balsam Drive, Hudsonville,
11 Michigan -- I guess there's no Michigan -- Hudsonville,
12 49426. This is Cedar Crest's customer list uploaded
13 into Country Dairy's website.

14 Q. Okay. So what does -- 5850 Balsam Drive,
15 Hudsonville, Michigan, what's that?

16 A. That would be Cedar Crest's location and
17 the location of these employees who can possibly buy
18 this milk using -- you know, I mean, they must have a
19 employee price or they wouldn't be listed in the
20 customer directory. And it didn't get edited out.

21 Q. So this came off of Country Dairy's web
22 page?

23 A. It did.

24 Q. But as far as employees go, Country Dairy
25 doesn't have any employees at 5850 Balsam Drive in

1 Hudsonville, Michigan?

2 A. No, they didn't.

3 MR. RICCIARDI: Objection, your honor.

4 JUDGE CLIFTON: Mr. Ricciardi, I'll hear
5 your objection.

6 MR. RICCIARDI: The foundation is shown,
7 that this witness does not know. He is
8 guessing. He is speculating about what is
9 actually included here. And therefore we need
10 for this record to be clear that we have
11 information and evidence that's based on
12 personal knowledge.

13 I can guess along with this witness as to
14 why the employee price list is included on this
15 document. I don't know, just like he doesn't
16 know. And therefore let's not have a record
17 replete with information that is not based on
18 personal knowledge or information he doesn't
19 have.

20 JUDGE CLIFTON: Thank you, Mr. Ricciardi.
21 Mr. Beshore, would you go into the foundation on
22 which he bases his opinion?

23 BY MR. ENGLISH:

24 Q. How do you know the Hudsonville location
25 is Cedar Crest's location?

1 A. I know that from memory.

2 Q. Okay. Have you been there?

3 A. I have.

4 Q. Do you do business with Cedar Crest?

5 A. My company sells Cedar Crest a little bit
6 of fruit drink.

7 Q. And you've done business with them in the
8 past?

9 A. I --

10 Q. Other kinds of business with them in the
11 past?

12 A. Yes.

13 Q. Okay.

14 A. They're in the ice cream business. They
15 sell some of the same kinds of ice cream that we do.
16 When they're short a product, say, they need a pallet of
17 Haagen-Dazs vanilla pints and we have it, we trade and
18 get it back. I mean, we're familiar with them.

19 Q. Okay. So if Cedar Crest has its
20 headquarters at 5850 Balsam Drive in Hudsonville, you
21 are assuming they have some employees at the
22 headquarters?

23 A. Yes.

24 Q. Now, let's talk a little bit --

25 JUDGE CLIFTON: Mr. Beshore, let's go

1 into what else he said about this. When you
2 click on that category on this website, the
3 category that says Employee - Price List, does
4 any drop down material appear or does any
5 additional information show?

6 THE WITNESS: No, your Honor. All the
7 information -- there's no more drop downs. The
8 drop down would be -- there really isn't. It's
9 just an aid for -- if you were looking for
10 Country Dairy milk, then you could look for your
11 town. That's why the -- I would assume the
12 purpose that Country Dairy placed this on their
13 website.

14 MR. BESHORE: So the website -- I
15 apologize.

16 JUDGE CLIFTON: Now, when you were
17 talking about the price list --

18 MR. BESHORE: I don't think I called it a
19 price list. Did you?

20 JUDGE CLIFTON: Well, that's what he --
21 he pointed us to.

22 THE WITNESS: Customer list. If I called
23 it a price list --

24 JUDGE CLIFTON: Oh, customer list?

25 THE WITNESS: Yes. Okay. Customer list.

1 When you talked about that and you talked about
2 how you could obtain additional information
3 about buying the product in your location and so
4 forth, were you just referring to this -- what
5 we see here is not something that can be
6 generated on the website that we do not see?

7 THE WITNESS: Correct. The only -- if --
8 when you are on the website, if -- I can't
9 exactly remember. But if you want to find out
10 where to buy it, then you click and it brings up
11 these following pages. And then it lists these
12 customers.

13 JUDGE CLIFTON: All right. And explain
14 how you -- how you understand that Country Dairy
15 uses the customer that's shown on this list as
16 an employee price list to distribute its
17 product.

18 THE WITNESS: I don't. I think -- what I
19 was saying there is the -- the very fact that it
20 says employee price list on the list and it --
21 that it shows that it's a Cedar Crest generated
22 list of customers, it is not a Country Dairy
23 generated list of customers.

24 JUDGE CLIFTON: Now, what you're telling
25 me is, if I -- I go, for example, to the first

1 entry here, which is in Sparta. And it's
2 called -- how do you say that? AGO?

3 THE WITNESS: It's American Gas & Oil,
4 Number 1.

5 THE COURT: Okay. How do you know that
6 to be not Country Dairy's customer but rather
7 the customer of its distributor?

8 THE WITNESS: I know that to purchase
9 Country Dairy milk from -- Country Dairy milk at
10 all -- other than from their retail outlet, you
11 must buy it from Cedar Crest. And I know this
12 because the general manager told me so, of
13 Country Dairy.

14 JUDGE CLIFTON: Okay. If you'd describe
15 when and where you had that conversation and who
16 that person is.

17 THE WITNESS: The person is Paul Aaredma
18 (sic) He is the son-in-law. And how I came to
19 have that conversation was, three years ago I
20 was close to making a deal with Whole Foods in
21 the Chicago area. It's a chain of stores.

22 They were looking for a less than organic
23 product that they could sell at a lower retail.
24 We were real close to having the deal done, and
25 at the last minute they needed rbST free milk,

1 of which we did not have a supply at that time.
2 So rather than just do away with the prospect, I
3 called Country Dairy for reasons -- might just
4 well as keep the business in Michigan and also
5 that would be a thousand gallons a day that I
6 didn't have to deal with on the market.

7 So I arranged to meet. I called Paul
8 Aaredma, asked him if he would be interested in
9 the business. He said he would, but we would
10 have to work through Cedar Crest Dairy, that he
11 had to sell all his milk to Cedar Crest.

12 So we did. It was a three-way meeting.

13 There was -- it ended up they did get the
14 deal. And the deal for Bareman Dairy, in turn,
15 for the lead, was a commission of 4 1/2 cents a
16 gallon for two years, of which they paid --
17 Cedar Crest paid, not Country Dairy paid -- from
18 the period of July '06 to August '07.

19 So I have that from his own words.

20 JUDGE CLIFTON: Now I understand. Could
21 you spell Aaredma for me, if you know?

22 THE WITNESS: I'm pretty sure it's
23 A-a-r-e-d-m-a.

24 JUDGE CLIFTON: Thank you. Mr. Beshore,
25 back to you.

1 MR. BESHORE: Thank you, your Honor.

2 BY MR. BESHORE:

3 Q. Let's talk just a little bit, Mr. Wernet.
4 I'd like to ask you just a little bit about the current
5 pricing that you've testified about and that you've
6 observed in your marketplace with respect to Country
7 Dairy competition.

8 At page 4 of your testimony, Exhibit 77,
9 you've indicated that an offer has been made to a
10 customer of Bareman Dairies, 28 convenience stores that
11 you service, an offer has been made at \$1.90, and I
12 assume is that per gallon?

13 A. Correct, it is.

14 Q. Okay. And is that an offer that's been
15 made by Country Dairy?

16 A. Yes. It was an offer that was made to
17 the four stores that they service, with the condition of
18 selling it at that retail and with the offer that it
19 could be extended to the other 28 stores if they so
20 desired.

21 Q. How are you aware of that offer?

22 A. The buyer of the C store company conveyed
23 it to my salesman.

24 Q. And what has transpired with respect to
25 that account?

1 A. Well, this happened a week and a half or
2 so ago. The original conversation between my salesman
3 and the buyer, I instructed the salesman to put them on
4 with some special pricing, not \$1.90. And I don't know
5 exactly the pricing. It was around 2.10. And he did.

6 And then when I was on my way down here
7 yesterday morning, I got another call from my salesman.
8 The buyer was on the phone wanting to know if we were
9 unable to meet the offer.

10 Q. The offer being the --

11 A. The previous \$1.90 offer. She needed to
12 know.

13 Q. Okay.

14 A. I instructed the salesman that was too
15 low, we could not do it. I did give him a lower number,
16 lower than our previous number, and asked him to convey
17 that number. And I do not know if we held the business
18 or not.

19 Q. Now, your testimony says this same offer
20 is currently being made to others in your marketing
21 area.

22 A. Yes, it has been.

23 Q. And how are you aware of that and what
24 can you tell us about that?

25 A. We have both; some of our customers that

1 have told us that and then asked us if we could meet it
2 or we've just had our customers ask how their
3 competition across the street can be a \$1.99 all of a
4 sudden. It's also based on the knowledge that this has
5 happened almost annually for years.

6 Q. Okay. I want to ask you some more about
7 that. What -- what do you mean by annually? Is that a
8 particular time of the year?

9 A. In the spring when there's too much milk.

10 Q. Such as May?

11 A. Yes.

12 Q. And has that been, in your experience and
13 your observation, Country Dairy's marketing practices?

14 A. They have utilized that marketing
15 practice. I don't know if it's a marketing practice as
16 much as a survival practice. They have the milk. It's
17 got to go someplace. I doubt they want to sell it at
18 that price.

19 Q. But that's what happens?

20 A. It's got to go someplace.

21 Q. Have you -- are you aware that Country
22 Dairy has touted itself, including to the Secretary of
23 Agriculture, to officials in USDA, as a company that
24 operates on a premium product or survives on -- or
25 markets a premium product as opposed to a price -- a

1 low-priced product?

2 A. I did read all of the letters that were
3 posted on the USDA website as of a week or ten days ago,
4 and I did see the Country Dairy letter. And yes, I saw
5 that. And I got a chuckle.

6 Q. Okay. Why did you chuckle?

7 A. Because it's simply not true.

8 Q. Are there other producer-handlers in
9 Michigan with which you're concerned?

10 A. There are at least four other
11 producer-handlers in Michigan that are smaller,
12 farm-based, have their own particular thing that they're
13 doing and we're not concerned with those unless they
14 have the potential to grow to 3 million pounds a month.
15 Then four of those, four more of those would be
16 devastating. But at the level they are or the way they
17 market today, no.

18 MR. BESHORE: Thank you. I don't have
19 any further questions. Is there anything else
20 you'd like to add, Mr. Wernet, before
21 cross-examination?

22 THE WITNESS: No, I don't believe so.

23 MR. BESHORE: Okay.

24 JUDGE CLIFTON: Mr. Beshore, stay there
25 for a moment. The witness indicated, that after

1 he had talked with Chuck Courtade, and I'd like
2 to have that spelling.

3 MR. BESHORE: C-o-r-t-a-i-d, I believe.
4 No? I'm wrong.

5 AUDIENCE MEMBER: C-o-u-r-t-a-d-e.

6 MR. BESHORE: C-o-u-r-t-a-d-e.

7 JUDGE CLIFTON: Good. Thank you. And
8 the witness said he was referred with a phone
9 number to, sounded like Alvin. Might be Elvin.

10 MR. BESHORE: Elvin.

11 JUDGE CLIFTON: Would you spell that for
12 us?

13 MR. BESHORE: E-l-v-i-n.

14 JUDGE CLIFTON: And because you know who
15 that person is, would you identify him by his
16 whole name?

17 MR. BESHORE: Elvin Hollon, H-o-l-l-o-n.
18 And he's on the -- on our witness list, your
19 Honor.

20 JUDGE CLIFTON: Thank you. All right.
21 Good. Thank you. And who would like to begin
22 the cross-examination of Mr. Wernet? Mr. Yale.

23 CROSS-EXAMINATION

24 BY MR. YALE:

25 Q. Good afternoon, Benjamin F. Yale,

1 Continental Dairy Products, Select Milk Producers. Good
2 afternoon.

3 A. Good afternoon.

4 Q. And I had to slip out, and I apologize,
5 maybe I missed it. But how big is Country Dairy? Do
6 you know approximately how big they are?

7 A. I can only guesstimate by a thousand cows
8 that that would put them in the 2 million pound a month
9 range.

10 Q. And all -- to your knowledge, is
11 everything they do under their own label or do they
12 private label?

13 A. The only private label that I'm aware of
14 is the label -- the Whole Foods business that I was
15 instrumental in arranging for them.

16 Q. The -- you mentioned something about a
17 \$1.90 price or a \$1.99. Is that for skim milk or whole
18 milk or reduced or --

19 A. All.

20 Q. It was for all of them?

21 A. (Nodding head.)

22 Q. And what is -- for -- that would be,
23 what, for May prices or June prices? Do you know what
24 the --

25 A. It's for May.

1 Q. It's for May. And what's the Class I
2 Federal Order price for that area of Michigan?

3 A. We pay 15.70 for the month of May,
4 including all service charges.

5 Q. And what -- what do the service charges
6 run, approximately?

7 A. More than \$2. I mean, that's the
8 over-order premium. And I don't pay that much. The
9 bottom line is what I'm concerned -- you know, our
10 accountant, our CPA, takes care of that part of it.
11 And, you know, to the best of my recollection, it -- the
12 total of all the service charges, the over-order
13 premiums, everything that we pay above Federal Order
14 is more than \$2 and less than 2.50. But any given
15 month, I --

16 Q. It could vary?

17 A. Yes. And I don't keep that close a track
18 of it.

19 Q. Does the cost -- I mean, would you expect
20 it to cost more than 70 cents to process a gallon of
21 milk in that market?

22 A. No, I wouldn't. But to -- the actual
23 cost -- when you are talking about C store business, the
24 cost of distribution exceeds the cost of processing.

25 Q. So what would be a distribution in

1 roughly -- I mean, in that range? Can you give me a
2 range of distribution and processing?

3 A. The problem with distribution is you need
4 to know how much you are distributing. And the stopping
5 of the truck is a relatively static number. And if you
6 deliver 100 cases, you can get it down pretty good. The
7 average C store is very lucky to get up to 20 cases. So
8 you would need -- at 50 cents a gallon, with 20 cases of
9 milk, that would give you \$40 distribution income.
10 You'd be hard pressed to turn a route of 15, 16 C stores
11 in a legal day. And that's what you would need to bring
12 back to pay for the man and the truck, is at least that
13 \$600 or so.

14 Q. What's a -- a full-sized semi, how many
15 cases does that hold, roughly?

16 A. A delivery semi?

17 Q. Yeah.

18 A. Okay. We utilize all different sizes.
19 We have a lot of 28-foot, single axle tractor-trailer
20 combinations and you could legally scale up to 5 -- 550
21 cases on a rig like that. We have 45-foot
22 tandem-tandem, tractor-trailer combinations that you
23 could scale 1,100 cases on. And then we have straight
24 trucks that -- single axle straight trucks that you
25 might only have 300 cases on.

1 When it comes to the C store business,
2 the issue is time more than -- a route times out way
3 before it cubes out, or weights out.

4 MR. YALE: Very interesting. Thank you
5 very much.

6 THE WITNESS: Thank you.

7 JUDGE CLIFTON: Who next? Mr. Vetne.

8 CROSS-EXAMINATION

9 BY MR. VETNE:

10 Q. Mr. Wernet, I'm John Vetne. I represent
11 two producer-handlers in the Pacific Northwest and one
12 in New Mexico. I live in New Hampshire, and I grew up
13 in Michigan.

14 Am I correct that you have estimated the
15 size of the producer-handler as -- at approximately
16 2 million pounds per month?

17 A. That's correct. That's figuring 75,
18 80 pounds of milk a day per cow and using their number
19 of a thousand.

20 Q. And what is -- what is Bareman's volume
21 per month?

22 A. Currently 19 million pounds.

23 Q. Is that Class I?

24 A. We are very heavily skewed toward
25 Class I, well over 90 percent.

1 Q. 90 percent of 19 or 19 is 90 percent of
2 your total receipts?

3 A. 90 percent of the 19 would be Class I.

4 Q. Let's see. Grand Rapids is -- is not too
5 far from Holland. However, Detroit is clear across the
6 state, correct?

7 A. It is.

8 Q. In the Detroit market, do you have large
9 grocery chain or box store accounts or are those mostly
10 what you call C stores?

11 Q. We have a -- I don't know if it's a large
12 chain. No, we don't have any large national chains
13 other than Walgreen's, which, of course, is not a
14 grocery store. But we have independent grocers. We
15 have a grocer that has six very nice-sized stores and a
16 grocer that has three nice-sized stores in the Detroit
17 market.

18 Q. Okay. The area in which you compete with
19 Country, the producer-handler in New Era, is that
20 coextensive with your distribution area or is it
21 smaller?

22 A. Our distribution area covers the entire
23 lower peninsula of Michigan as well as the areas in
24 Northern Indiana and Greater Chicago. So we're -- our
25 distribution area is larger than the Cedar Crest/New Era

1 distribution area which defines where Country Dairy
2 is -- milk is available.

3 Q. Cedar Crest meaning what?

4 A. They are the distributor that distributes
5 all of the Country Dairy milk.

6 Q. Okay. And how far do they go, say, south
7 from New Era?

8 A. They go very close to the state line on
9 the western side, which would be down in the --

10 Q. Buffalo, St. Joe area?

11 A. Yes, Three Rivers, that area. They go
12 north to Traverse City. And they only go east to
13 about -- there's a highway in Michigan that kind of
14 dissects the middle. That would be 27 -- or 127 when
15 you get down farther. And they don't really go much
16 east of that.

17 But they have picked up a subdistributor
18 in Detroit that is a distributor of -- the distributor
19 that puts some of that milk out. But those locations --
20 they're small locations, and they wouldn't be listed on
21 the Country Dairy website because they're not listed in
22 the -- the Cedar Crest web -- customer list.

23 Q. Okay. When you refer to the C store
24 chain of 32 stores, 28 of which you service, do you
25 still service those 28?

1 A. As of yesterday morning, we did.

2 Q. Okay. And four were serviced by your
3 producer-handler competitive. Were those four of the 32
4 store chains that were closer to New Era, Michigan?

5 A. Actually, they're closer to Hudsonville,
6 Michigan --

7 Q. Okay.

8 A. -- the home of Cedar Crest.

9 Q. Okay. Home of the distributor. And how
10 far out in the state does this -- strike that.

11 When you say C store, you refer
12 generically to convenience stores?

13 A. Correct.

14 Q. You are not referring to a convenience
15 store brand that's called C Store?

16 A. No.

17 Q. And this chain of 32 stores, does it have
18 stores outside of the regular distribution area of the
19 distributor of the producer-handler?

20 A. No.

21 Q. They're all within that -- all in western
22 Michigan?

23 A. Yes. Very much concentrated around the
24 Grand Rapids area.

25 Q. Okay. And when you conclude that -- that

1 costs are not possible to meet, the bottom of page 4,
2 you are referring to actually a -- an offer of a milk
3 price of a \$1.90 is not possible to meet?

4 A. That's correct.

5 Q. Okay. And that's not possible to meet
6 because you have a combination of costs to get the
7 product into the package in order to market it?

8 A. Yeah. Actually, if you take the 15.60
9 that is the Class I complete price to a regulated
10 handler in Michigan in May and divide it by the 11 point
11 whatever gallons, you are going to end up with very
12 close to a \$1.40 just raw milk costs before you touched
13 it.

14 And we already established if you really
15 ran the route efficiently, you could do the distribution
16 for 50 cents. So now you got \$1.90, and you haven't put
17 a bottle around it or processed it.

18 Q. Okay. What are your costs of getting the
19 milk from the silo into the bottle?

20 A. That's not something that -- that I'm
21 actually involved in in deciding. I don't know if I --
22 I guess I got a number. I don't know if I -- if it
23 makes a difference and --

24 Q. Please. If you have a number in mind --
25 I guess it would be a number at which you could start

1 competing someplace above 1.90. But --

2 A. All right. I'll give you a number. We
3 believe our internal number is 33 cents a gallon.

4 Q. Okay. That's into your cooler, before
5 it's distributed?

6 A. Well; actually, we figure that -- we
7 average our hauling costs into our cost of production,
8 with the theory being that you can't get more milk --
9 for milk in one location than another. When, like,
10 you're selling to a chain of 32 stores, they're not
11 going to pay you more because this store is closer to
12 the plant and this store is farther.

13 So our loaded costs, when we get to a
14 final cost before we put distribution on it, includes
15 the cost of getting it to our distribution branches.

16 Q. All right.

17 A. And then the truck cost begins after
18 that.

19 Q. And when you used the term, cost of
20 production, an answer or two ago, you were referring to
21 the cost of processing from the silo to the store, is
22 that right?

23 A. No. Cost of production would not include
24 delivery.

25 Q. Okay. Not include delivery. The 33

1 cents or so that you gave me would not include delivery?

2 A. Correct.

3 Q. Okay. But you still are referring to
4 processing costs?

5 A. Correct.

6 Q. Would it be accurate to say that many of
7 the -- the convenience stores, mom and pop stores and
8 stores of that nature, are stores that are no longer
9 serviced by the largest dairy companies in the state
10 such as Dean Foods?

11 A. No, that wouldn't be true. We --

12 Q. Compete with --

13 A. -- compete with Dean Foods all the time.
14 In fact, we lost one of our least volume C store chains
15 to Dean Foods last fall, and it was -- probably not a
16 five case average there. So they'll go after anything.
17 They compete in all arenas.

18 Q. So they compete in all your arenas, but
19 you are not able to compete in all of theirs, is that
20 correct?

21 A. Where we have a disadvantage against Dean
22 Food, is that as the big boys, the Wal-Marts, the
23 Meijer, the business like that, if you were successful
24 in getting it, if you ever lost it, you'd be gone. And
25 you would -- it is so much volume that you would -- you

1 would lose 50 percent of your business overnight because
2 someone made a decision somewhere. That's a position we
3 haven't put ourselves into.

4 And then also another handicap is quite
5 often the footprint of how they bid stores, like a group
6 of stores, if it doesn't fit your distribution
7 footprint. Like if they include Toledo, Ohio, as part
8 of the Detroit Metro area and you don't go to Toledo,
9 Ohio, now you may not bid on that unless you are willing
10 to go to Toledo, Ohio. You know, they could cut it any
11 way they want, yet -- or a big regional or a Dean, of
12 course, they just chop it up between plants.

13 Q. All right.

14 A. And that's the same problem that Country
15 Dairy would have in bidding on that kind of thing. You
16 can't get a piece of it you can chew.

17 Q. Got it. When you say -- on your last
18 page, you say, most producers do not process half pints.
19 Is that based on personal observation?

20 A. Personal observation. Country Dairy does
21 not.

22 Q. Country Dairy does not. Country Dairy is
23 one. We have quite a few producer-handlers represented
24 here.

25 A. Okay. In the state of Michigan, no

1 producer-handler produces half pints. And in my
2 marketing area, no producer-handler. So in my
3 experience. And I have no experience outside of that
4 area.

5 Q. Okay. You indicated that there were four
6 others. Let me ask you this. Do you know whether those
7 others are, in fact, producer-handlers as opposed to
8 exempt plants?

9 A. I don't know. I -- well, one I know is a
10 producer-handler for a fact. That would be MOO-ville
11 Creamery in Nashville, Michigan.

12 Q. MOO-ville Creamery -- let me represent to
13 you that MOO-ville Creamery shows up in data supplied by
14 USDA as a producer-handler during some months of 2008,
15 and in other months shows up as an exempt plant. And it
16 doesn't show up anyplace in 2009.

17 A. And the others, I don't know about.
18 There's -- they're small. They haven't caused me a
19 reason to find out about it.

20 Q. All right. Going back to this offer of a
21 \$1.90 a gallon, first of all, this was -- this was
22 actual gallons. It wasn't a gallon equivalent or
23 different size packages, correct?

24 A. Gallons.

25 Q. Actual gallons. And what month was that?

1 A. May.

2 Q. All of this was May?

3 A. (Nodding head.)

4 Q. Okay.

5 JUDGE CLIFTON: You nodded your head.

6 Yes?

7 THE WITNESS: May 2009, yes.

8 Q. All right. Got it. And last couple of
9 questions. When you used the term, when below cost
10 priced milk flows out into the market, what is below
11 cost priced milk?

12 A. Well, I guess I'd start with a \$1.90.
13 But what I was getting to there is the fact that, you
14 know, if you blunt the attack, the attack goes somewhere
15 else. It just rolls on until -- I mean, until they find
16 a place for the milk to go. Because the milk must go.

17 Q. What do you mean by below cost? What is
18 your cost reference and how is it below that cost
19 reference?

20 A. Below the cost for the milk plus the cost
21 of the production, plus the cost to the bottle, label
22 and cap, and plus the cost to delivery. If you don't
23 get that much money, you lost money, and you're below
24 cost.

25 Q. Okay. So you were referring to your

1 below cost priced milk flowing into the market or
2 somebody else's below cost priced milk flowing into the
3 market?

4 A. Sir, when you're looking at a figure such
5 as a \$1.90, it's everybody's below cost. Even the
6 supposed -- the -- the allowance or the gap that's been
7 tossed around here for the past couple of days, the 6
8 cents to 15 cents or whatever, none of that is going to
9 help. That -- that is not going to fix \$1.90 milk. And
10 if you take my \$1.40 and make it a buck and a quarter,
11 if you've still got 50 cents to get it to the store, and
12 you've still got 12 or 13 cents minimum for bottle, cap,
13 and label, you're still not going to run it through a
14 plant. And you're going to be below cost, whether it's
15 my cost or the producer-handlers' cost.

16 Q. All right. Does Bareman's sometimes sell
17 below its calculation of costs in order to gain a
18 customer?

19 A. Not to gain a customer, to keep a
20 customer.

21 Q. To keep a customer. You don't do it to
22 get your shoe in the door?

23 A. No.

24 Q. Okay. Do you believe that other people
25 do that?

1 A. Yes, I believe they do.

2 MR. VETNE: Okay. That's all I have.

3 JUDGE CLIFTON: Mr. Vetne, it's not
4 really clear to me whether the other people do
5 it to get a shoe in the door or to keep a
6 customer.

7 MR. VETNE: Good point, your Honor. She
8 listens better than I do because she's not
9 asking the questions.

10 BY MR. VETNE:

11 Q. When I said, do you believe other people
12 do that, I intended: Do you believe other people sell
13 milk below cost to get a foot in the door?

14 A. I would believe so.

15 MR. VETNE: Okay. Thank you.

16 JUDGE CLIFTON: Thank you, Mr. Vetne.
17 Who next will cross-examine this witness?
18 Mr. Ricciardi.

19 CROSS-EXAMINATION

20 BY MR. RICCIARDI:

21 Q. Good afternoon, sir. Al Ricciardi on
22 behalf of AIDA, producer-handlers, and an exempt plant.
23 And I appreciate you taking the time. And I have some
24 questions. And, unfortunately, some of them are going
25 to have to do with math, so bear with me.

1 JUDGE CLIFTON: Should we get the witness
2 a pad and pen?

3 MR. RICCIARDI: Well, I don't know if we
4 need to do that, Judge. He was pretty good in
5 his head. But if he feels like he needs one,
6 that's fine.

7 THE WITNESS: Thank you.

8 JUDGE CLIFTON: I have learned that
9 that's the least I can do.

10 MR. RICCIARDI: I understand.

11 BY MR. RICCIARDI:

12 Q. And let's get our parameters correct. As
13 I understood your testimony thus far, including
14 cross-examination, you were talking about -- about --
15 for Bareman Dairy, a \$1.40 in raw milk costs, 33 cents
16 in processing costs and an estimate of 50 cents for
17 distribution?

18 A. That would be correct. That would be on
19 a -- a distribution on a 20 case volume stop.

20 Q. Okay. Now, I have added up -- be very,
21 very afraid on this because I've added it up. See if
22 you get it right. That comes to 2.23?

23 A. That would be correct. We don't have a
24 bottle yet.

25 Q. Okay. And how much would be the cost for

1 the bottle?

2 A. 13 cents. The bottle, cap and label.

3 Q. Okay. Now we're at 2.36?

4 A. Correct.

5 Q. And if we back off any perceived
6 producer-handler advantage, and let's use the largest
7 number, 15 cents, where does that get us?

8 A. 2.21.

9 Q. So your testimony is -- and we'll explore
10 the -- the basis for it in a moment -- that regardless
11 of any alleged advantage at \$1.90, if we use these as
12 your costs, that sale would be well below the cost even
13 to a producer-handler?

14 A. It would seem so.

15 Q. Okay. Let's leave that point there, and
16 I want to come to a couple of other things. Exhibit
17 78's been marked. That is a document that you prepared
18 by simply going to the Country Dairy website, copying
19 the front page, then copying other portions of it where
20 their products could be found. And then you went and
21 added the last two pages, which are a map. And then
22 what you did is, you reviewed the locations that were
23 found on the website and put Xs on them?

24 A. That would be correct.

25 Q. Okay. You indicate in your statement,

1 which is Exhibit 77, page 5, first full paragraph --
2 actually, second paragraph on the page, last sentence,
3 your words, price has been the first weapon used by
4 producer-handlers in our marketplace.

5 First clarification, then question.
6 Producer-handlers, you have testified only about Country
7 Dairy. So do you mean Country Dairy when you say
8 producer-handlers there?

9 A. That's been my experience.

10 Q. Okay. So that should actually be
11 changed. It should be one producer-handler, and that's
12 Country Dairy?

13 A. I would agree with that.

14 Q. Okay. And as I think, Mr. Vetne pointed
15 out, Exhibit 13 shows us that the only producer-handler
16 listed, at least in that Order that you're in, in 33, is
17 Country Dairy in New Era for 2009?

18 A. That's what Mr. Vetne said.

19 Q. Okay. And that's what the USDA document
20 says?

21 A. If you say so. I haven't looked at it.

22 Q. Well, I can get that for you, but I can
23 represent to you I've read it correctly.

24 A. I don't know why you'd tell me different.

25 Q. Thank you very much. Take a look at the

1 first page of Exhibit 78. Now, if you were creating a
2 website, and you have this document here in front of
3 you, and you were going to want to represent to people
4 that you were competing on price, is this the first page
5 of the website that you would actually put up?

6 A. The -- the -- that's immaterial. Because
7 the -- they don't compete -- you compete to get the
8 customer on price.

9 Q. Okay. I understand your statement.
10 Let's actually go through the document. It says -- it,
11 first of all, has a lovely picture of a cow, a bucolic
12 looking cow. And it says, come visit our family farm,
13 exclamation point.

14 A. They've got a very nice farm.

15 Q. And they do have a picture of the farm.
16 And it says, Welcome to Country Dairy. Under that, we
17 are a producer-handler, which means we own and control
18 the process - from our herd of registered Holsteins to
19 our modern processing plant, to the gallon of milk on
20 your store shelf.

21 A. Which is not true.

22 Q. Okay. Well, I understand that's what
23 you're saying. I'm just reading their website with you,
24 and we'll go through and finish this.

25 By doing this, we provide you the

1 freshest and best tasting milk, exclamation point.

2 If we read that, at least the
3 representation that's on the website, what they're going
4 for, is the fact that they control their own process,
5 that they have a fresh -- fresh product and that it is
6 essentially better tasting. That's how they are
7 advertising themselves as a producer-handler, correct?

8 A. That's what it says.

9 Q. Okay. Fair enough.

10 A. But it's also not true, at least part of
11 it's not true.

12 Q. Okay. And that's your position. I
13 understand. But you also brought this document with
14 you, and that's what this document says, right?

15 A. Yes.

16 Q. Okay. As I understand it -- a couple of
17 other things and then I'll move on and let you do the
18 same. Did I understand you telling Mr. Yale that you
19 pay over-order premiums in the range of 22 to 25 cents a
20 gallon? Is that right?

21 A. Sounds about right.

22 Q. Okay. And that's from DFA and also
23 Michigan Milk Producers?

24 A. That's correct.

25 Q. Those are the two sources of your milk?

1 A. That is correct.

2 Q. With regard to the commission that you
3 received for this Whole Foods business when you dealt
4 with Country Dairy back in '06, '07, the reason you got
5 a commission as opposed to the business is because you
6 didn't have rbST free milk?

7 A. Correct.

8 Q. Because you had to get it from the co-op?

9 A. And we would have had to segregate it as
10 we processed it, and it would have been something we had
11 talked about but we were not there yet.

12 Q. Whereas, Country Dairy, because it's a
13 producer-handler, has the ability to go ahead and
14 process its own milk and ensure that it's rbST free,
15 which is one of the reasons why whole milk -- why Whole
16 Foods got it, right?

17 A. That would be one of the reasons, yes.

18 Q. Because they were looking for that type
19 of product that you didn't have access to, right?

20 A. That's correct.

21 Q. Now, lastly, this \$1.90 issue that you've
22 referenced, it's sort of this old phrase that they used
23 to have, and I think I may be right, for those Cub fans,
24 is, Tinker to Everest to Chance. This is -- the
25 information came like this. It's supposedly someone

1 from Country Dairy to a buyer to a sales rep to you,
2 correct? That's the source of your information?

3 A. The buyer to my salesperson.

4 Q. To you?

5 A. Correct.

6 MR. VETNE: Thank you very much.

7 JUDGE CLIFTON: Thank you, Mr. Ricciardi.

8 Mr. Carroll.

9 CROSS-EXAMINATION

10 BY MR. CARROLL:

11 Q. Good afternoon, sir.

12 A. Good afternoon.

13 Q. You come from a city well known in my
14 area, so -- and in a business well known. I represent
15 the New England Producer-Handlers Association in Order
16 1, and -- some Order 1 handlers and another one in --
17 in -- not a producer-handler, presently in Order 5. I
18 have no connection or any experience with your markets,
19 so I'm not going to bother you much with it. I just
20 want to ask you a few simple questions, though.

21 From what I've listened to from your
22 testimony, you're in vigorous competition?

23 A. Correct.

24 Q. Not just with producer-handlers but with
25 some of the biggest people in America, really --

1 A. Correct.

2 Q. -- some of the bigger ones? And also
3 with regional handlers?

4 A. Correct.

5 Q. And through your efforts and skill, you
6 are still surviving and still in business?

7 A. So far, so good.

8 Q. Right. And is that competition -- has
9 that competition been -- in terms of price -- been a
10 benefit to the stores or to the consumers of the milk in
11 your distributing area?

12 A. Competition always benefits everybody.

13 Q. All right. And I want to ask you if you
14 know the terms of the arrangements between Country and
15 Cedar Crest. Do you know what their deal is?

16 A. No. The only thing that I know firsthand
17 is that I tried to buy the milk to sell to Whole Foods
18 and I was told by the owner, general manager, that I had
19 to buy it through Cedar Crest, that that was their
20 agreement.

21 Q. Okay.

22 A. And then we pulled Cedar Crest in, and
23 then that's how it all panned out.

24 Q. Do you know the terms of sale to -- from
25 Country to Cedar Crest? Do you know the pricing of

1 those sales?

2 A. I do not.

3 Q. Do you know the pricing or cost,
4 rather -- perhaps that's not right. Do you know the
5 costs of production and processing of Country?

6 A. I do not.

7 MR. CARROLL: Okay. Thank you very much,
8 sir.

9 JUDGE CLIFTON: Thank you, Mr. Carroll.
10 Mr. English.

11 CROSS-EXAMINATION

12 BY MR. ENGLISH:

13 Q. Good afternoon. Charles English.

14 A. Good afternoon.

15 Q. Just a couple of questions. You
16 testified about price. Have you actually gone to the
17 store to see what it's being sold at?

18 A. I have not.

19 MR. ENGLISH: I have no further
20 questions.

21 JUDGE CLIFTON: Is there any other
22 cross-examination of this witness? Yes, I see
23 you, Mr. Miltner.

24 CROSS-EXAMINATION

25 BY MR. MILTNER:

1 Q. Ryan Miltner on behalf of AIDA. Good
2 afternoon, sir.

3 A. Good afternoon.

4 Q. A distributing plant, after it runs all
5 the different types of milk through its plant, it
6 doesn't use milk at 3 1/2 percent butterfat, does it?

7 A. Our average blended product would
8 probably be plus or minus 2 percent, depending on what
9 time of year it was. Because the more school milk, the
10 lower it would be.

11 Q. And just because of the mix of whole
12 milk, 2 percent, 1 percent, skim milk, that's what --
13 that's what creates plant average, correct?

14 A. Correct.

15 Q. Okay. In your experience in Michigan,
16 not necessarily in your plant, what's the -- what's the
17 ratio of sales of those different fat levels?

18 A. Again, it depends on the package. When
19 we're talking about half pints, it's going to be
20 80 percent 1 percent, because that's what the schools
21 call for.

22 But when we're talking about gallons,
23 when you put -- given a choice -- and again, it depends
24 if you price it -- the difference or not. There's two
25 ways of pricing gallon milk. You can go all over the

1 country and see different -- sometimes there's -- like
2 one is 2.99 whole milk, 2.79, 2.59, 2.49 for fat free,
3 sometimes all gallons 2.79 or whatever.

4 Obviously, if you give the consumer all
5 gallons at the same price, they're going to buy up.
6 They know that it's a better value to -- to -- to buy
7 the 2 percent or whole. And the price buyers will --
8 there -- will buy more of that product.

9 So that all depends. But in --
10 companywide, we would be close to 50 percent 2 percent.
11 And then the other 50 percent would be about split,
12 20 percent whole -- Michigan's a strange market because
13 we have half percent. 5 percent would be 1 percent,
14 which would be the next one in most markets, but not
15 Michigan.

16 Then we would go to fat free and half
17 percent, and fat free would pick up the lion's share of
18 that. But fat free -- or half percent would be more
19 than 1 percent. But, you know, if -- you're trying to
20 get to an average butterfat of a gallon. Is that where
21 you're headed?

22 Q. Yeah.

23 A. Okay. I usually figure a little over
24 2 percent. If I cost out my 2 percent in a one price
25 situation, then that's going to be close to what the

1 public will buy. And that will also vary depending on
2 neighborhood and ethnic concentration. Hispanics will
3 skew way heavily to whole milk, and so will -- lower
4 income levels for some reason, whether it's inner city
5 or rural, buy whole milk.

6 Q. And in the retail context you described
7 some different models. I want to make sure my notes on
8 that were correct. You said you will see some retailers
9 differ their price on butterfat and others will not?

10 A. Correct. Because there's an actual
11 difference depending on how much -- the price of solids,
12 nonfat and fat. I mean, the difference between whole
13 milk and skim milk could be as much as 40 cents a gallon
14 or as little as 20 cents a gallon. And then, of course,
15 the other grades will fall in between there. And some
16 retailers will reflect that difference, so they -- skim
17 milk actually sells for a lower price than homo and some
18 will not.

19 Most of the time on regular price lists
20 I've seen from any milk vendor, they differentiate those
21 prices also. It's not all gallons. The only time you
22 see that is on a special that you want -- that you are
23 going to promote gallons two for five or \$1.99 or
24 something like that. Then you might get a one price all
25 gallons, mix or match.

1 Q. And as an Ohioan, it's nice to hear
2 somebody from Michigan admit you guys are a little
3 strange. Thank you.

4 But in Ohio, for example, in my part of
5 the state, which is a little bit north of here, we've
6 had Kroger put half gallons on sale for a buck a piece
7 in the past month. Do you have that same experience in
8 Michigan?

9 A. Kroger has run -- not half gallons.
10 They've run some gallons. There are no Krogers in
11 western Michigan. But in the Detroit area, Kroger has
12 run \$1.99 gallons since the price break on milk in
13 February.

14 Q. And Kroger in Michigan, I assume, is
15 supplied by its own captive plant, just like it is in
16 Ohio?

17 A. Right. They have a plant in the Detroit
18 area.

19 Q. Okay. Let's assume that -- do you guys
20 do bottled water in your gallons?

21 A. We do.

22 Q. Is the cost of your water negligible?

23 A. It is.

24 Q. Okay. Could you supply a gallon of water
25 to one of those convenience stores for, say, a dollar?

1 A. Yes.

2 Q. How about for \$1.20?

3 A. We couldn't get that much.

4 MR. MILTNER: Okay. Thank you.

5 JUDGE CLIFTON: Is there any other
6 cross-examination of Mr. Wernet? Mr. Tosi.

7 CROSS-EXAMINATION

8 BY MR. TOSI:

9 Q. Good afternoon, sir.

10 A. Good afternoon.

11 Q. A few questions. Has Bareman Dairy lost
12 accounts to producer-handlers?

13 A. Some of the accounts on that list are old
14 accounts of Bareman Dairy.

15 Q. And when those accounts were lost, what
16 were the conditions of losing the account? Was it based
17 on price?

18 A. Most of the time.

19 Q. Has Bareman Dairy ever regained an
20 account that was being supplied by a producer-handler?

21 A. Yes.

22 Q. And when a regulated handler like Bareman
23 wins an account back, what's the primary reason for
24 getting the account back?

25 A. It -- it can vary. A driver will get you

1 an account back alone on his service level at times, or
2 a bad driver from the other guy. That can swing the
3 business.

4 I mean, especially in the smaller stores,
5 they need the product in the right quantities. The
6 whole process that -- that -- we do what you would call
7 pack and peddle or driver peddle. So the driver
8 actually walks into the store, surveys the dairy case,
9 rotates the product, pulls out any old, determines from
10 his gut feeling what that store is going to do in the
11 next three or four days, whether Memorial Day is a big
12 deal for this store or a downer and takes that all into
13 consideration and fills them up accordingly.

14 And no matter if the customer -- the
15 store runs out of milk, then it doesn't matter what they
16 are buying it for if they're making their customer
17 happy. So we would get customers back on driver
18 service. We will also get some customers back on
19 acceptance, acceptance issues on the new dairy that --
20 and that doesn't necessarily mean that their product is
21 bad, just means the customers didn't accept it.

22 People are creatures of habit. They've
23 had maybe our milk for years and years and then there's
24 something else there, they're not -- in all cases, it
25 doesn't work.

1 And by the same token, we've replaced
2 Dean Foods in Chicago on occasion and had the same thing
3 happen to us. So there's various reasons. Sometimes
4 it's the promises that were made don't end up being
5 kept. It's hard to get them back. A lot of customers
6 on that list were our customers. Their growth over the
7 years has come at our expense.

8 As I said in my statement, the written
9 statement, the -- the call always is, is when you have
10 these price situations, do you meet it and hold the
11 account and then face them somewhere else, because you
12 will, or do you let them have it and hope that's enough.
13 It's like, you know, giving Czechoslovakia to Hitler.
14 Strike that, take that back. Appeasing, you never know
15 if it's enough.

16 Q. And you would -- you would attribute
17 price competition, at least with respect to Country
18 Dairy, that the biggest issue that you have with them
19 is -- has to do with being price competitive with them
20 and you see them as having this advantage?

21 A. There are other issues.

22 Q. But not having a pool obligation, where
23 you do?

24 A. I don't know that. I think that, as far
25 as -- because that can't really be quantified from time

1 to time. But you think that. And then I believe this
2 disposal of surplus milk is a problem.

3 And the other reason that Country Dairy
4 has taken business over the years is the rbST issue.
5 And that -- that was -- it's been an issue that was not
6 resolved because there is no rbST in any Class I
7 anywhere in our marketing area. But that was an issue.
8 Consumers didn't how know to deal with that.

9 And they would get -- they very
10 prominently displayed on their cartons and bottles. So,
11 yeah, they got some business that way.

12 MR. TOSI: That's all I have for you.

13 And, again, I want to thank you for coming in --
14 coming all the way down here to Cincinnati and
15 participating in this hearing.

16 MR. WERNET: Thank you.

17 MR. TOSI: Thank you.

18 JUDGE CLIFTON: Mr. Wernet, when you
19 said, their growth has come at our expense, who
20 is the they?

21 THE WITNESS: The Country Dairy or the
22 producer-handler. Their -- from the 80 cows to
23 the thousand cows, that milk had to go
24 somewhere.

25 JUDGE CLIFTON: And did you tell me how

1 long ago they were at 80 cows?

2 THE WITNESS: They're -- that's what they
3 started with in 1983.

4 JUDGE CLIFTON: Any other
5 cross-examination? Redirect? Mr. Beshore.

6 REDIRECT EXAMINATION

7 BY MR. BESHORE:

8 Q. Thank you. Just a couple of points,
9 Mr. Wernet. I think you, in response to one of
10 Mr. Tosi's questions -- I just want to make clear that
11 Bareman's is rbST free now, is that correct?

12 A. Correct.

13 Q. Okay. You were not at the time of the
14 Whole Foods transaction?

15 A. Correct. It was not available through
16 any of our two co-ops at that time.

17 Q. Okay. But -- and all of the -- basically
18 all of the dairies in Michigan are now, is that correct,
19 as far as you know?

20 A. Michigan, Indiana, Illinois, Wisconsin,
21 everywhere we market is bST free.

22 Q. Okay. Have you ever heard the term
23 balancing used --

24 A. Yes.

25 Q. -- in dairy terms? In your view, is

1 reducing price on milk products in the spring when milk
2 is long in essence a form of balancing?

3 A. Desperate balancing. But it simply has
4 to go someplace.

5 Q. And that's what you've seen over the
6 years with -- with Country Dairy?

7 A. Yes. I believe they balance using the
8 regulated milk that Cedar Crest purchases from Dean
9 Foods. Most of the time it works; most of the time.

10 But when there's extreme, when there's
11 too much, then they can't do it anymore.

12 Q. When you say, they balance using the
13 regulated milk Cedar Crest buys from Dean Foods, what do
14 you mean by that?

15 A. One of the problems that a typical
16 producer-handler would have is what happens when sales
17 are too strong. What do you tell your customers when
18 you don't have any milk? The simple answer is, you'll
19 order some in from Dean.

20 And even if it costs you a little more,
21 that's still good business. You're going there anyway,
22 so it's an incremental, anyhow delivery. So if you have
23 to put 20 gallons of Dean's in there that you pay X less
24 or more for, then so be it.

25 So I think that fact alone, the -- the

1 marriage of the producer-handler with an independent
2 distributor that is buying milk from two regulated
3 dairies that are in the pool is in itself some sort of a
4 twisted outcome of -- of these rules. I just can't
5 believe that that was ever intended.

6 Q. So, in other words, the distributor meets
7 its customers' needs with pool or nonpool milk depending
8 on availability?

9 A. Correct. The places that the milk is
10 sold as a -- like the Meijers stores are listed in --
11 in -- on the website. And we've talked about the Meijer
12 stores. I've heard their name two or three times. I
13 saw one on the hill when we were coming in. They're big
14 stores.

15 Q. Listed in Exhibit 78?

16 A. Yes, big stores, lots of dairy case. You
17 know, Country Dairy is in there as a specialty item.
18 You know, obviously at that store you can't substitute
19 the -- a Dean product. That's not what's expected. But
20 at another store that -- that is, say, a convenience
21 store that has got milk on sale, the consumer there
22 doesn't care. They're buying it there because it's on
23 sale.

24 And so if you run out of the Country
25 Dairy, balance with the -- the Dean or the Prairie

1 Farms. No one cares. But it's just a very twisted way
2 of using this producer-handler rule.

3 Q. And that's the way it works today in
4 Michigan?

5 A. It does.

6 Q. One final question. The -- you
7 testified -- it was in your direct statement that milk
8 was being offered by Cedar Crest, Country Dairy milk for
9 a \$1.90 on the condition that the store sell it out of
10 store at a \$1.99. Is that the way it worked?

11 A. That's the way it works in the spring.

12 Q. Okay. Is that the way it's working now
13 in Michigan?

14 A. No, we don't do that.

15 Q. No, no, not you. But the country -- the
16 Cedar Crest was offering the Country Dairy milk to the
17 convenience stores at a \$1.90 a gallon on the condition
18 that they sell it for a \$1.99 out of the store?

19 A. Correct. That's the way it was reported
20 to my salesmen from the buyer. And it didn't surprise
21 either my salesmen or myself because we've heard it
22 before. And it makes sense because you've got to move
23 the milk. I mean, the -- to sell it cheap and have a
24 high retail on it doesn't take care of the problem.

25 Q. And have you seen it happen that way

1 before?

2 A. I have.

3 MR. BESHORE: Thank you. I would move
4 Exhibit 77, 78, your Honor.

5 JUDGE CLIFTON: Thank you, Mr. Beshore.
6 Is there any objection to the admission into
7 evidence of Exhibit 77? There is none. Exhibit
8 77 is hereby admitted.

9 Is there any objection to the admission
10 into evidence of Exhibit 78? There is none.
11 Exhibit 78 is hereby admitted.

12 Mr. Wernet, you are an extremely clear,
13 dynamic witness, and I appreciate your testimony
14 here.

15 MR. WERNET: Thank you, your Honor.

16 JUDGE CLIFTON: You're welcome. You may
17 step down. And let us take a ten-minute break.
18 Please be back and ready to go at 3:28.

19 MR. ENGLISH: At which time we can have
20 Chrissie Dewey, your Honor.

21 JUDGE CLIFTON: That would be good.

22 (A recess was taken from 3:18 to 3:43.)

23 JUDGE CLIFTON: All right. We're back on
24 record at 3:43. I've indicated that you may
25 mark Ms. Dewey's statement as Exhibit 79.

1 (Exhibit 79 was marked for
2 identification.)

3 JUDGE CLIFTON: And I'd like you now to
4 state your name and spell it for us, please.

5 THE WITNESS: Officially, my name is
6 Christine Dewey. C-h-r-i-s-t-i-n-e, D-e-w-e-y.

7 JUDGE CLIFTON: Thank you. And when you
8 are known as Chrissie, how is that spelled?

9 THE WITNESS: C-h-r-i-s-s-i-e.

10 JUDGE CLIFTON: Thank you. Would you
11 raise your right hand, please?

12 (The witness was sworn.)

13 JUDGE CLIFTON: Thank you. Mr. English
14 you may proceed.

15 CHRISTINE DEWEY

16 of lawful age, being duly sworn, was examined and
17 testified as follows:

18 DIRECT EXAMINATION

19 BY MR. ENGLISH:

20 Q. Good afternoon, Ms. Dewey.

21 A. Good afternoon, Mr. English.

22 Q. Before you begin, have you ever testified
23 in a Federal Order hearing before?

24 A. No.

25 Q. Before -- I'm sorry, what time -- when

1 did you arrive at this proceeding?

2 A. Yesterday afternoon around 3:00 I entered
3 the hearing.

4 Q. And so you saw six hours yesterday and
5 today's proceedings, correct?

6 A. Yes, I did.

7 Q. Have you ever before today and yesterday
8 even attended a Federal Order proceeding before?

9 A. No, I have not.

10 Q. I'll resist asking whether you'll ever
11 come back.

12 A. If I have to.

13 Q. Have you ever testified at a proceeding
14 before the Pennsylvania Milk Marketing Board?

15 A. Yes, I have on one occasion.

16 Q. With that prelude, then, would you please
17 provide your testimony?

18 A. My name is Chrissie Dewey. I am
19 testifying today on behalf of my family's business,
20 Harrisburg Dairies, and on behalf of our trade
21 association, the Pennsylvania Association of Milk
22 Dealers, in support of their proposal to eliminate the
23 producer-handler exemption and increase the exempt plant
24 provision from 150,000 pounds per month to
25 450,000 pounds per month.

1 Harrisburg Dairies was founded by my
2 great grandfather, Ben Wolfe, in 1931. We started as a
3 small operation with all home delivery customers and
4 have grown and changed a great deal since our start. We
5 currently produce milk or purchase milk from 40
6 independent farmers in central Pennsylvania and deliver
7 milk to institutional, commercial, and retail customers
8 in 13 states. We process fluid milk, iced tea and fruit
9 juices as well as distribute other dairy byproducts.
10 Approximately 70 percent of our current milk sales are
11 to customers located outside of Pennsylvania. I
12 currently serve as the marketing manager at Harrisburg
13 Dairies.

14 The hallmarks of our business are our
15 independence, respect for our employees and dairy
16 farmers, and the quality of our milk.

17 Harrisburg Dairy is a fully
18 regulated fluid milk distributor located in the Federal
19 Milk Marketing Order 1. That means that every month we
20 have to endure the worry and uncertainties that many
21 fully regulated handlers must endure while waiting to
22 receive the bill for their pool payment. For us the
23 pool payment determines whether we make money, break
24 even, or worse.

25 All fluid milk processors operate on thin

1 margins, but when you are small like Harrisburg Dairies,
2 which is approximately 4 to 6 million pounds a month,
3 that pool payment really makes a difference. Due to the
4 way our financials are calculated each month, all other
5 costs and expenses are calculated before we receive the
6 pool payment invoice. So each month our bottom line is
7 calculated, and we simply wait for that invoice to
8 determine how much profit, if any, we have left over
9 after the pool payment is made. From month to month our
10 pool payment fluctuates, and if we have a month when it
11 is much higher than the average, it often completely
12 eliminates any profit we may have made. If we don't
13 have to make the pool payment each month, like some of
14 our competitors, we could use those funds for
15 advertising and public relations to help us be more
16 competitive in the marketplace. We could also offer
17 lower pricing on out of state accounts to make us more
18 competitive -- price competitive.

19 Harrisburg Dairies is not here to
20 complain about its pool payment. We recognize that it
21 is a part of doing business in such a highly regulated
22 industry, but we are extremely concerned that the
23 producer-handler exemption provides privileges to
24 producer-handlers that place companies like us at a
25 competitive disadvantage. Presently, we are not

1 experiencing direct competition from producer-handlers,
2 but we are extremely concerned that there is a trend
3 developing. We are aware of the producer-handlers out
4 west -- meaning western Pennsylvania -- that are serving
5 the kind of retail chains that we compete for, and we
6 would not survive in our current form if that trend
7 moves east. I have calculated that producer-handler
8 status for a company that is comparable in size to
9 Harrisburg Dairies would give them a minimum regulated
10 raw milk cost advantage of an average \$100,000 per month
11 or slightly more than 17 cents per gallon on the
12 purchase of 5 million pounds. This calculation is
13 derived from what Harrisburg Dairy would save if it
14 didn't have to contribute to the pool.

15 This would be devastating for us since
16 raw milk is such a significant portion of our costs. I
17 have calculated that raw milk is between approximately
18 61 and 66 percent of our costs. In my experience,
19 accounts are won and lost based on 1/100 of a cent per
20 gallon. It is true that Harrisburg Dairies prides
21 itself on quality and in fact we have won a number of
22 recent bids based on taste tests, but if we were 1/100
23 of a cent higher than our competitors, we would never
24 get to that tasting competition. In several instances
25 you must be among the lowest three bidders to be given

1 the opportunity to even bring your product to be
2 sampled. If we were going head-to-head with a
3 competitor that has a raw milk cost of over 17 cents
4 lower than ours, we can in no way be as price
5 competitive as they can.

6 I'm not even confident that we can
7 survive by converting to a producer-handler status. We
8 have been approached recently to become a
9 producer-handler and declined. We declined for a number
10 of reasons, including on principle alone. We couldn't
11 see doing that to our dairy farmers, many of whom have
12 shipped to us for three or four generations and count on
13 us for their livelihood. For us, this would mean
14 putting 40 farm families out of work. Even if we would
15 consider making the move to converting to a
16 producer-handler, in our particular situation, it is
17 very difficult to believe that it would be a viable
18 option for us at all. The urban location of our plant
19 leaves us nowhere to place a farm or herd of milking
20 cows nearby. Thus I do not even see that producers like
21 ourselves, if faced with competition from
22 producer-handlers, can reasonably expect to adopt the
23 producer-handler status as their salvation. We do not
24 believe that some companies should have regulatory
25 privileges that others cannot. In a business that

1 operates on such thin margins and incredible price
2 pressures to begin with, it is hard to imagine that we
3 could withstand direct competition from a handler that
4 is allowed this regulatory privilege.

5 Thank you for the opportunity to testify
6 here today.

7 Q. Ms. Dewey, in that last paragraph, at one
8 time you said, thus I do not even see that producers, I
9 believe is what you said, like ourselves. Did you mean
10 to say processors?

11 A. Processors, I'm sorry.

12 Q. And I believe you inserted a word that
13 might have been missing in the last sentence?

14 A. Right. That would be a typo that was
15 there.

16 Q. Is this your statement, ma'am?

17 A. It is.

18 Q. You wrote this?

19 A. I did.

20 Q. There were some questions of a previous
21 witness with respect to the issue of rbST-free milk.

22 A. Yes.

23 Q. What is Harrisburg Dairy's position or
24 what has their marketplace position been with respect to
25 rbST-free milk?

1 A. Our entire milk supply is rbSt free and
2 always has been. Ever since the beginning of the use,
3 we've -- our farmers have not been allowed to use that.
4 We only source milk from independent farmers that do not
5 use it.

6 Q. And do you supply, for instance, as we
7 heard, maybe supplied elsewhere, a major retailer with
8 rbST free milk?

9 A. We do. Actually, part of the reason that
10 we go to 13 states is we service Whole Foods in 13
11 states on the East Coast.

12 Q. Okay. Do you wish to add anything at
13 this time?

14 A. Not at this time.

15 MR. ENGLISH: The witness is available
16 for cross-examination. And I move the admission
17 of Exhibit 79.

18 JUDGE CLIFTON: Thank you, Mr. English.
19 Let's start with the exhibit. Is there any
20 objection to the admission into evidence of
21 Exhibit 79? There is none. Exhibit 79 is
22 hereby admitted.

23 Who will begin cross-examination of
24 Ms. Dewey? Mr. Vetne. Thank you.

25 CROSS-EXAMINATION

1 BY MR. VETNE:

2 Q. Ms. Dewey, my name is John Vetne. I'm
3 from New Hampshire. I represent two producer-handlers
4 in the Pacific Northwest and one in New Mexico. I
5 wouldn't want you to come all this way and watch us for
6 two days without having asked you a question.

7 MR. ENGLISH: She wouldn't mind.

8 A. That would be just fine.

9 Q. You mentioned -- let's start with Whole
10 Foods you serve in 13 states. If you were to take the
11 Whole Foods account out of the equation --

12 A. Correct.

13 Q. -- what portion of your milk sales would
14 be outside of Pennsylvania?

15 A. As a percentage?

16 Q. Yeah. Take those out.

17 A. It would still be nearly 50 percent of
18 our sales.

19 Q. Okay. And Harrisburg is located near the
20 Maryland border?

21 A. It's about an hour from the Maryland
22 border, yes.

23 Q. And is that the direction of most of your
24 sales, towards Maryland and --

25 A. Surprisingly, we do a good bit of sales

1 in Maryland, Virginia. We also go to Delaware, New
2 Jersey, and New York. So we head out in all directions.

3 Q. Okay. The very last line of the first
4 page of your testimony --

5 A. Yes.

6 Q. -- you're concerned that the
7 producer-handler exemption provides -- that place
8 companies like you at a competitive disadvantage?

9 A. Correct.

10 Q. The next sentence, you say you're not
11 currently experiencing direct competition. Would it be
12 more correct to say, would place companies like yours at
13 a competitive disadvantage, since you are not
14 experiencing it now?

15 A. Correct. It would be -- it would be more
16 accurate as -- as things stand today. But what I would
17 like to say about that is although we don't directly
18 compete head-to-head for a lot of the business, there
19 are a few producer-handlers, one, in particular, in our
20 general vicinity that we don't necessarily compete for
21 the same customers, but at this point is still
22 an outlet -- another outlet to purchase milk.

23 We all know that the market is made up of
24 one pie and, you know, you can only divide it so many
25 ways. So I didn't -- I wanted to be fair and not say

1 that that's direct competition for us at this point, but
2 I still would like to acknowledge that it is a
3 competitor.

4 Q. All right. You buy milk just from
5 independent producers?

6 A. We do.

7 Q. You have no Class II processing?

8 A. We do not.

9 Q. Okay.

10 A. We do -- as far as Class I utilization,
11 we are usually between 90 and 96 percent. That varies.
12 We obviously balance our own milk supply. When we have
13 a surplus, we sell to a cheese plant, is how we balance
14 our milk surplus, because we don't purchase co-op milk.
15 We do our own balancing, so that's how the things change
16 for us every month.

17 Q. If you had to supplement your food milk
18 needs, where would you go to acquire that?

19 A. If we start to gain more business and we
20 need to pick up more fluid milk, we would pick up more
21 independent farmers in our area. We generally have a
22 waiting list, and so we go into the waiting list.

23 Q. Okay. Have you ever had to acquire some
24 supplemental bulk milk and gone out on the market to get
25 it?

1 A. Not any time recently. We've been
2 fortunate.

3 Q. All right. Okay. All right. You
4 calculated a producer-handler advantage for a
5 hypothetical plant of comparable size, am I correct?

6 A. Correct. And that calculation was simply
7 based on our average pool payment per month and then
8 based on a plant of our size.

9 Q. Okay. Are there any producer-handlers on
10 the East Coast that are even close to your size, to your
11 knowledge?

12 A. Not producer-handlers, no.

13 Q. Okay. Are there any producer-handlers on
14 the East Coast that are threatening to become close to
15 your size, to your knowledge?

16 A. To my knowledge, I'm not intimately aware
17 of their plans for growth, so I don't feel I can answer
18 that.

19 Q. Okay. Do you know what the size of the
20 producer-handler out west -- and I was surprised you
21 then said western Pennsylvania rather than Colorado --
22 what the size of that producer-handler in western
23 Pennsylvania is?

24 A. I don't know of their size volumewise.
25 But what I am aware of are the types of accounts that

1 they are acquiring or serving at this point. They are
2 accounts that we would certainly like to have an
3 opportunity to serve ourselves, so --

4 Q. Okay. That producer-handler is limited
5 in its geography of distribution, to your knowledge?

6 A. To my knowledge, at this point, yes.

7 Q. And it doesn't come as far east as your
8 primary market, correct?

9 A. Not currently.

10 Q. All right. Do you know of any plans for
11 that producer-handler to come to your primary market in
12 eastern Pennsylvania?

13 A. I'm not aware of their plans.

14 Q. Do you know what the processing costs are
15 for that producer-handler compared to yours?

16 A. I'm not aware of their processing costs.

17 Q. What are your processing costs for about
18 5 million pounds per month?

19 A. On a total?

20 Q. Yeah, on the average per gallon per
21 hundredweight.

22 A. It depends. As far as processing outside
23 of what we purchase our milk for?

24 Q. No. I'm talking about when you -- from
25 the time you receive the milk from your independent

1 farmers, put it in your silo, to the time a milk jug is
2 filled and put in your cooler, how much does that cost?

3 A. I don't feel that I could give you an
4 accurate number that I'd be willing to put on record at
5 this point.

6 Q. What kind of containers do you use for
7 your milk?

8 A. Plastic containers for everything but
9 half pints are still in paper.

10 Q. Okay. Do you blow your own plastic?

11 A. We do not.

12 Q. You purchase them from where?

13 A. From a plastic supplier.

14 Q. Located how close to your plant?

15 A. They come in about three hours from where
16 we are.

17 Q. Okay. What about paper?

18 A. They come from a paper supplier that's
19 closer than that but still about an hour and 15 minutes
20 from our plant.

21 Q. I don't know much about paper. They
22 don't come pre-opened, do they?

23 A. No, they come folded down flat on a
24 pallet.

25 Q. They come folded, that you put it in a

1 machine, you open them --

2 A. Correct.

3 Q. -- seal them -- fill them, seal them
4 again?

5 A. Yes.

6 Q. Okay. And that's for half pints only?

7 A. Yes.

8 Q. Okay. Your reason for being here today,
9 as I understand it, is prophylactic. It is to prevent
10 something from happening in the future rather than --
11 you perceive is bad, rather than something bad happening
12 now?

13 A. It's a concern about a trend that would
14 have a great impact on us, yes.

15 Q. Okay. You are -- you are also here on
16 behalf of the Pennsylvania Association of Milk Dealers?

17 A. That's correct.

18 Q. You didn't mention that other than in
19 your heading much. What is -- first of all, in that
20 association, who are the members?

21 A. We have several members, dairy -- both
22 located in and outside of Pennsylvania that sell into
23 the state of Pennsylvania. So they would be considered
24 members. We have members of all sizes from much smaller
25 than us to obviously much, much larger than us. So it's

1 a varying group of members, I would say.

2 Q. And the members would include some
3 processing plants from central Pennsylvania that are not
4 federally regulated that have their independent handler
5 pools?

6 A. As far as they're not fully regulated
7 plants?

8 Q. Yes.

9 A. Yes.

10 Q. But the state of Pennsylvania regulates
11 price for those plants, correct?

12 A. It regulates, yes. In the state of
13 Pennsylvania, for sales in the state of Pennsylvania,
14 yes.

15 Q. Right. It regulates raw milk prices and
16 retail prices? It has two levels of regulation,
17 regulates -- Pennsylvania regulates a Class I price for
18 milk that is not federally regulated, am I correct?

19 A. Yes.

20 Q. Okay. And for plants that are subject to
21 that regulation, instead of Federal regulation, the
22 plants pay a plant blend, whatever the regulated value
23 of all their milk use, that they pay to their individual
24 farmers, is that correct?

25 A. They're responsible for paying their

1 farmers, yes. They are not responsible to the Federal
2 Order.

3 Q. And they're not responsible to a state
4 pool?

5 A. No.

6 Q. So they're just responsible to pay the
7 minimum value of milk in all uses to their patrons or
8 co-ops, whoever supplies them, correct?

9 A. Yes.

10 Q. Okay. And that kind of processor --
11 there are that kind of processors within the membership
12 of the Pennsylvania Association of Milk Dealers?

13 A. Yes, there are.

14 Q. And operating within Pennsylvania, you
15 have minimum markup or minimum retail prices, don't you?

16 A. We do, yes.

17 Q. Okay. Is it -- does the state regulation
18 of -- of transactions from a processing plant regulate
19 the transaction from the plant to the store as well as
20 the store markup, both, or neither?

21 A. It does not regulate the store markup.
22 It regulates our pricing to a retail customer.

23 Q. Okay. So the state of Pennsylvania on
24 in-state sales tries to make sure that in-state dairy
25 farmers have a market for milk to viable distributing

1 plants. Is that the general idea?

2 A. That -- you'd have to ask them their
3 intention for it. But of my understanding, that's close
4 to being accurate, yes.

5 Q. Okay. They don't want you and Dean Foods
6 cutting each other's throat. We know who is going to
7 win that one.

8 A. Thank you.

9 MR. VETNE: Okay. Thank you very much.

10 JUDGE CLIFTON: Thank you, Mr. Vetne.

11 Who next will cross-examine Ms. Dewey? Thank
12 you, Mr. Miltner.

13 CROSS-EXAMINATION

14 BY MR. MILTNER:

15 Q. Ryan Miltner on behalf of AIDA. Good
16 afternoon.

17 A. Good afternoon.

18 Q. I want to ask about your -- your
19 statement about balancing --

20 A. Yes.

21 Q. -- your milk supplies.

22 A. Correct.

23 Q. You buy your milk from independent dairy
24 farms?

25 A. We do.

1 Q. Okay. And what you don't use in your own
2 packaged products, you said you sell to a cheese plant,
3 right?

4 A. Correct.

5 Q. Okay. How is that reported to the
6 Federal Market Administrator?

7 A. I'm not sure.

8 Q. Okay. Are you responsible for preparing
9 the Market Administrator's report?

10 A. I'm not.

11 Q. You're not. Are you familiar with those
12 reports?

13 A. Partially.

14 Q. Okay. The volumes of milk that you
15 transfer to a cheese plant that's reported on that form,
16 do you know how that's reported --

17 A. I do not.

18 Q. Okay. When you sell that milk to a
19 cheese plant --

20 A. Correct.

21 Q. -- what price do you receive for it?

22 A. Much lower than we pay for it. I can
23 tell you that much.

24 Q. Okay. What do you pay for it?

25 A. The way that we pay our farmers -- I'm

1 sure in Pennsylvania -- this is a little different for
2 everyone. But we pay the -- we pay a Pennsylvania
3 over-order premium. And then in addition to that, in
4 our case we pay a volume, a quality, and an rbST-free
5 premium in addition to the Pennsylvania over-order.

6 Q. Okay. Can you describe for me what the
7 Pennsylvania over-order is?

8 A. It's an over-order premium over the
9 Class I price that's determined by the state -- mandated
10 by the state that everyone is required to pay.

11 Q. Okay. So all of your producers receive
12 the class -- the Class I price plus the over-order
13 premium, plus the other bonuses that you have discussed?

14 A. Ours in particular, yes.

15 Q. Okay. So their price is not based on the
16 Federal Order blend price, it's based off the Federal
17 Order Class I price?

18 A. I'm not -- I'm actually not sure.

19 Q. Okay. So you're not sure of what -- what
20 the agreement with your suppliers is on the base?

21 A. No, I only have -- I have only been
22 intimately involved with the pricing of our -- you know,
23 the bonus or premiums on top of the base pricing.

24 Q. Okay. And you're not familiar with how
25 that plant-to-plant transfer is reported to the Market

1 Administrator?

2 A. I am not. But I can tell you that
3 doesn't happen -- when we sell to the cheese plant, that
4 might happen three to four times a year. It's not a
5 regular occurrence for us. We normally are very close
6 to balancing our -- using everything that we buy. If we
7 have any excess, we do -- you know, we also make our own
8 half and half. We make -- are now going to start making
9 our own fresh heavy cream and light cream products. So
10 we do have a use for most of what we buy, so it is not
11 very often that we sell to a cheese plant, mostly
12 because it's not cost effective for us to do so. We try
13 to avoid doing that.

14 Q. And for a producer-handler that would
15 handle their milk supplies in the same way --

16 A. Correct.

17 Q. -- would you say that they also are
18 responsible for balancing their supplies if they operate
19 in a similar manner to you?

20 A. I can really only comment on what we're
21 responsible for. And I can tell you in our situation
22 we've made a conscious decision to balance our supply
23 that way. You know, other businesses make a decision to
24 use -- you know, buy from a co-op and deal with their
25 surplus in other ways. But for us, that's what we are

1 responsible for.

2 Q. Okay. And in your opinion, the way you
3 handle it, you bear the responsibility for those -- for
4 those balancing actions?

5 A. Our company bears, yes.

6 Q. It's not you as an individual but your
7 company?

8 A. Not me personally, right.

9 Q. Can you explain for me how you calculated
10 the -- as you call it, a milk cost advantage for the
11 producer-handler?

12 A. Right. And I think that I've gone
13 through this, but what I did was simply used \$100,000,
14 which is an average. And that's actually a conservative
15 average for what our pool payment is. We face -- in a
16 one year time our pool payment can vary by \$120,000 per
17 month. And \$100,000 per month is actually a
18 conservative average for the average. But I thought for
19 the case of argument it's always better to be more
20 conservative with your numbers. So I chose \$100,000 per
21 month.

22 And I used the purchase of
23 5 million pounds, because in our situation, that is very
24 near to what we purchase every month. So I would try to
25 equate what our pool payment is to what our purchases

1 are every month. And I also used a calculation of 8.6
2 is what -- is the number that I used for gallons to
3 pounds conversion. And that leaves you with just over
4 17 cents per gallon, is what that calculation works out
5 to be.

6 So what I'm saying, I'm not saying that
7 this is what it is for everyone. I'm saying for us, if
8 we did not have to pay into the pool, this would be the
9 difference in our situation on average.

10 Q. You are saying on average, the cost --
11 your cost, what you pay --

12 A. Into the pool.

13 Q. -- to get -- no, let me finish, because I
14 want to make sure you're answering the full question.

15 The 17 cents represents costs incurred by
16 you that you believe a producer-handler does not incur?

17 A. Incorrect.

18 Q. Okay.

19 A. What I've said here is that the 17 cents
20 per gallon is the difference between if we did not have
21 to pay into a pool -- in our current situation, the way
22 that we handle things now, if we did not have to pay
23 into a pool versus how we currently pay into the pool.
24 That's the only comparison that I'm making here.

25 Q. Okay. So this is just -- this is your

1 pool payment on a per gallon basis on average?

2 A. Correct.

3 Q. Conservatively estimated, as you
4 described?

5 A. Correct.

6 Q. Now, you -- and in the sentence, though,
7 you used the phrase, raw milk cost advantage?

8 A. Correct.

9 Q. And that seems a little different to me.
10 Can you explain?

11 A. In our eyes -- and I think I mentioned
12 this, down the road. You know, again, we're not
13 complaining about the pool payment that we make. We
14 understand that we operate in a regulated environment,
15 and we expect that as part of our business, and we make
16 adjustments for that. However, we also feel strongly
17 that either everyone should have to pay or everyone
18 shouldn't.

19 So what I'm making the comparison is for
20 those that don't have to pay the pool payment versus
21 those of us that do, this is the difference in our case.
22 That's the only comparison that I'm making here.

23 Q. For May, what is the per hundredweight
24 cost for you to acquire milk from your independent
25 suppliers?

1 A. That, I'm not sure of.

2 Q. Okay. If we assume that under your
3 contracts with your farmers, you pay them --

4 A. We don't operate under a contract with
5 any of our farmers.

6 Q. Not a written contract or --

7 A. No.

8 Q. Okay. It's just an agreement?

9 A. Yeah. We ask that they give us 30 days.
10 Either way, they give us 30 days' notice or we give them
11 the courtesy of 30 days' notice. It's very rarely that
12 we need to drop a farm, but if we do. But they do not
13 have to sign a contract with us then.

14 Q. Let's not call it a contract. Let's
15 assume under the arrangements with your farmers for May
16 you're going to pay them \$15 per hundredweight.

17 A. In Pennsylvania, you do realize that
18 that's not determined by us. The state determines --
19 the Federal and the state, and we just determine the
20 quality premiums that we pay on top of that.

21 Q. Let's assume that that is the
22 calculation, okay?

23 A. Okay.

24 Q. And that a producer-handler in the
25 western part of the state, it costs them, let's say, \$17

1 to produce their milk.

2 A. Okay.

3 Q. Do you still believe that there's a cost
4 advantage to the producer-handler in that example?

5 A. I would think that should that
6 producer-handler choose to just be a producer, they
7 would be entitled to the same price that everyone else
8 in the state is entitled for their milk. So I don't
9 feel that you are necessarily asking me to compare
10 apples to apples.

11 Q. Okay. My question was, at the plant
12 side, do you believe that there's a cost advantage still
13 in that example?

14 A. To our particular situation? It's all
15 very hypothetical, so I guess maybe if you could
16 rephrase it in a way that --

17 Q. Well, I tried to by asking what you paid
18 because I wanted to use your costs to make a comparison,
19 okay?

20 A. Okay.

21 Q. But you don't have that. So I gave a
22 hypothetical. When I say hypothetically, your payment
23 to your producers was \$15.

24 A. Correct.

25 Q. And that there was a \$17 cost of

1 production.

2 A. Correct.

3 Q. Okay? For a producer-handler. And my
4 question was, do you still believe there's a cost
5 advantage there?

6 A. In the situation that you are presenting
7 in those words, I know that you are trying to get me say
8 no, there is not a cost advantage. But I don't think
9 that necessarily -- that's not the issue or -- that's
10 really not the position, I guess, I'm trying to -- to
11 explain here.

12 All's that I'm trying to say is in our
13 particular case, in our situation, for us that's not the
14 concern. The concern is that should there -- there are
15 other advantages to being a producer-handler that you
16 can -- I look at being a producer-handler just like
17 vertical integration. We all have taken classes, I'm
18 sure, that talk to us about vertical integration. So
19 there are cost benefits to that.

20 So we have to pay -- you know, we haul
21 the milk from all of the different farmers in and that's
22 the cost of business that we have of acquiring our raw
23 milk. That doesn't go into the cost that we pay the
24 farmers and things like that.

25 So every business has different operating

1 costs. And that's part of running a business and trying
2 to be competitive. However, when you are looking at the
3 way that the pool system is set up at this point, and
4 you have two companies that are competing for the same
5 business, and one of them has to make, in our case, an
6 average of \$100,000 pool payment every month and another
7 one doesn't, to me, that is a competitive disadvantage.

8 MR. MILTNER: I hope I don't get out of
9 line, Judge, when I try to characterize that
10 last answer.

11 BY MR. MILTNER:

12 Q. What I hear you saying, then, is that
13 it's not -- not a question of a cost advantage to the
14 producer-handler, but that there is a cash expenditure
15 that you have that they don't have, is that right?

16 A. That is not right.

17 Q. Okay.

18 A. It's an expense that we have that they do
19 not have, yes.

20 Q. Okay. Thank you. Maybe that's a fairer
21 way to describe it. Are you willing -- I hope this
22 hasn't been asked and answered. Who was it that
23 approached you about becoming a producer-handler?

24 A. Mr. Fink. Oh, a producer-handler. I'm
25 sorry. I thought about being a witness.

1 Q. No, that's okay.

2 A. As far as about being a producer-handler,
3 there is a farm located south of us that has about 2,000
4 head on the farm and they do not do any processing of
5 their own. They have attempted to in the past and were
6 not successful at doing so. So they are strictly just a
7 producer at this point.

8 In the past and as recently as a couple
9 of months ago, have approached us about becoming --
10 taking producer-handler status and processing, you know,
11 as far as us purchasing their herd and us doing the
12 processing for them -- for ourselves at that point if we
13 purchase the herd.

14 Q. And you said you declined because of what
15 you believe to be your obligation to your dairy farmers?

16 A. As one of the reasons, yes.

17 Q. Okay. But then you say we don't believe
18 some companies should have regulatory privileges that
19 others cannot. And I can't reconcile those statements,
20 because you do have the privilege to become a
21 producer-handler, don't you?

22 A. Well, everyone does, sure.

23 Q. Okay.

24 A. If you can feasibly make that work for
25 your business, but I don't think that's the answer.

1 JUDGE CLIFTON: Let's go off record.

2 (Off the record.)

3 JUDGE CLIFTON: All right. Let's go back
4 on record. We're back on record at 4:18. We
5 had a little noise interruption. Do you
6 remember where you were, Mr. Miltner?

7 MR. MILTNER: I don't. Could I ask the
8 court reporter to read back the last question
9 and answer?

10 JUDGE CLIFTON: You may.

11 (The record was read.)

12 BY MR. MILTNER:

13 Q. Do you want to add anything to that
14 answer?

15 A. Not at this time.

16 Q. Okay. As you describe it, your operation
17 is a family business founded by your great grandfather?

18 A. Correct.

19 Q. Did he have any cows when he started the
20 business?

21 A. No.

22 Q. Okay. And presumably he -- he made --
23 the family made that decision over the years that you
24 were going to focus exclusively on processor?

25 A. Correct.

1 Q. And obviously have at least considered
2 whether being a producer-handler worked for you?

3 A. Correct.

4 Q. Are there any producer-handlers that are
5 members of the Pennsylvania Association of Milk Dealers?

6 A. I'm not sure.

7 Q. Do you know if Kreider Farms is a member?

8 A. I do not know if they're a member. I
9 know of their existence. I do not know if they're a
10 member.

11 Q. Do you know if, when PAMD decided to
12 support Proposals 1 and 2, whether they surveyed their
13 members or not?

14 A. I'm not aware of that.

15 Q. Do you know how they decided to -- to
16 support the proposals, how they arrived at that decision
17 at all?

18 A. I'm not aware of what their
19 decision-making process was.

20 Q. How did you become aware of their
21 position?

22 A. Through Mr. Fink.

23 Q. Okay.

24 MR. MILTNER: I don't think I have
25 anything further, Judge.

1 JUDGE CLIFTON: Thank you, Mr. Miltner.
2 Who next will cross-examine Ms. Dewey?
3 Mr. Tosi?

4 MR. TOSI: I have no questions for her,
5 but I wanted to thank you for coming here and
6 giving your testimony.

7 MS. DEWEY: Thank you for having me.

8 MR. TOSI: Appreciate it. Thank you.

9 JUDGE CLIFTON: Any redirect,
10 Mr. English?

11 MR. ENGLISH: No, your Honor.

12 JUDGE CLIFTON: Ms. Dewey, thank you very
13 much and thank you for your statement.

14 JUDGE CLIFTON: Mr. Miltner, would you
15 approach the podium, please? You can call as
16 the next witness, Jim Oberweis, Clifford Carman
17 or Elvin Hollon, if he's available to testify
18 today. He's not. Okay. Not Elvin, but
19 Dr. Yonkers testimony, the cross-examination of
20 Mr. Carman or of Jim Oberweis, you may chose.

21 MR. MILTNER: Because of Mr. Oberweis'
22 travel schedule, we'd like to have him next, and
23 a five-minutes recess before we bring him to the
24 stand.

25 JUDGE CLIFTON: Okay. I think five

1 usually means ten and the people who have come
2 back at five have been corralled early. So I'm
3 going to interpret that as ten. Come back at
4 4:43. Don't make it longer. 4:43. Before we
5 go off record, Mr. Yale.

6 MR. YALE: Yes. I had some additions to
7 my witness list that I had failed to realize --
8 or not failed to realize, failed to add, and
9 that is Mr. Vetne has three producer-handlers
10 that he wishes to have testify tomorrow, a
11 Mr. Gilbert, a Mr. Mallorie, and a Mr. Sapp.

12 JUDGE CLIFTON: That last one is S-a-p-p?

13 MR. YALE: Yes.

14 JUDGE CLIFTON: Thank you.

15 MR. YALE: And just kind of a rough
16 guessing, based on experience in this, I'm
17 saying somewhere between 30 and 40 hours of
18 hearing time.

19 JUDGE CLIFTON: That's frightening.

20 MR. YALE: Yes.

21 JUDGE CLIFTON: You know when a lawyer
22 says, just five minutes, your Honor --

23 MR. YALE: I understand that. I said --
24 this isn't me asking any questions, because I'm
25 not really including myself in the time, so who

1 knows. That's kind of where it's at, so -- I
2 just want to share that with you.

3 JUDGE CLIFTON: Thank you. I appreciate
4 that. Okay. I'm going to give you ten minutes
5 from now. Please be back and ready to go at
6 4:35.

7 (A recess was taken from 4:25 to 4:40.)

8 JUDGE CLIFTON: We're back on record at
9 4:40. Mr. Oberweis, would you again state and
10 spell your name for me?

11 THE WITNESS: Yes. It's Jim Oberweis, O,
12 b as in boy, e-r-w-e-i, s in super.

13 JUDGE CLIFTON: And I'd like your card.
14 I like the embossed cows.

15 THE WITNESS: Thank you very much.

16 JUDGE CLIFTON: Would you raise your
17 right hand? I'll swear you in.

18 (The witness sworn.)

19 JUDGE CLIFTON: Thank you. Mr. Miltner,
20 you may proceed.

21 MR. MILTNER: Thank you. We don't have a
22 written statement for Mr. Oberweis. We're just
23 going to facilitate a question and answer here.

24

25 JIM OBERWEIS

1 of lawful age, being duly sworn, was examined and
2 testified as follows:

3 DIRECT EXAMINATION

4 BY MR. MILTNER:

5 Q. Mr. Oberweis, this is Ryan Miltner on
6 behalf of AIDA. First of all, you are not a member of
7 AIDA, your business is not a member of our alliance?

8 A. That's correct. In fact, I had never
9 even heard of it until about two days ago.

10 Q. Okay. And what brings you to the hearing
11 today?

12 A. I have some very strong-felt feelings
13 about the industry and about the direction that our
14 country is taking. And I greatly appreciate the
15 opportunity to be able to present some of those ideas
16 today.

17 Q. And a lot of us in the room know a little
18 bit about you and your business. But if you could fill
19 in all of us a little bit, first of all, on your
20 business, and then anything about your involvement in
21 the business.

22 A. Sure. Our company was incorporated in
23 1927. My grandfather was a farmer who had a little
24 extra milk that he sold to some of our neighbors and in
25 1927 bought a processing plant. My father ran that

1 business after my grandfather. And I grew up in the
2 business, but -- had an older brother who entered the
3 business, and I decided at a young age, you know what,
4 this is a pretty tough business and there has to be
5 something better to do.

6 So I ended up going to a financial
7 services business, started a money management company
8 and a family of six mutual funds, which my son, Jim,
9 runs today. My brother, unfortunately, had a stroke and
10 wasn't able to continue in the business, and I bought
11 the business at that time.

12 It was a pretty small business at that
13 time, about 5 million in sales. Today we are at about
14 65 million in sales. We produce milk in glass bottles,
15 deliver it to homes in the Midwest, in the Chicago area,
16 in St. Louis and Detroit, in Indianapolis, Milwaukee,
17 and most recently in the Virginia Beach area of
18 Virginia.

19 And we have our own ice cream stores. We
20 have 48 of those, some of which are franchised,
21 41-company owned. And we do a little bit of what we
22 call wholesale business or sales to or through grocery
23 chains.

24 I'm currently chairman of the board and
25 my younger son, Joe, is now president of the company,

1 fourth generation in the business.

2 Q. And did I hear you correctly, when you
3 started the business, you did have cows as well as the
4 facility?

5 A. That's correct. We had cows. We were a
6 producer until the -- sometime in the 1970s my father
7 sold the cows and sold the farm.

8 Q. At that time, do you know if you were
9 actually a producer-handler under any of the Federal
10 Orders?

11 A. We were not. We bought some additional
12 milk from some of the other farms in the area at that
13 time.

14 JUDGE CLIFTON: Might I inquire,
15 Mr. Miltner? When you said you took over the
16 company, you had about 5 million in sales and
17 are now at about 65 million in sales?

18 THE WITNESS: Correct.

19 JUDGE CLIFTON: Is that dollars or
20 pounds?

21 THE WITNESS: Dollars.

22 JUDGE CLIFTON: Dollars. Thanks.

23 BY MR. MILTNER:

24 Q. And we've been dealing in pounds.

25 A. I'm sorry.

1 Q. You've probably heard -- you were here
2 for a few of the witnesses today so --

3 MR. MILTNER: I appreciate your
4 clarifying the record on that point, your Honor.
5 BY MR. MILTNER:

6 Q. Now, you have been here at the hearing
7 for most of today, is that correct?

8 A. Correct.

9 Q. Okay. And so aside from your awareness
10 of the hearing, your presence here, do you feel like you
11 have a good understanding about what the issues are
12 here, we're dealing with here about producer-handlers?

13 A. I certainly feel like I have an overall
14 understanding of some of the issues, how they apply to
15 our business. Again, I want to emphasize my background
16 is primarily in financial services. I think I
17 understand how our economy works. I understand how
18 markets work. I understand what free markets are, and
19 I'm still learning about the dairy business. It doesn't
20 generally fall in that category.

21 Q. Are you familiar with the individual
22 handler pool proposal that's been offered by AIDA in
23 this hearing?

24 A. I believe I am somewhat familiar with it.

25 Q. And did you -- one of the reasons you're

1 here was to offer your thoughts on that proposal, is
2 that right?

3 A. Yes. I believe it's a terrific idea. I
4 believe that it would be very beneficial to companies
5 like ours and would offer an opportunity for other
6 companies who chose to address the market in that
7 fashion to have an equal opportunity to do so, if they
8 wish to do so.

9 Q. Tell me a little bit about the farmers
10 that supply your plant.

11 A. We have approximately 30 family farms in
12 northern Illinois and southern Wisconsin. We buy all
13 the milk that they produce and that can be very
14 challenging at times because we don't necessarily
15 control how many cows they have. They can increase
16 their production if they chose to do so, and we're not
17 contractually obligated but have a general understanding
18 we will produce everything that they do, as long as it
19 meets our quality standards. And we have some high
20 quality standards, and we pay them a nice premium for a
21 higher quality raw milk.

22 Q. And you understand that under the
23 individual handler pool proposal, you will pay all of
24 your supplying producers based on your own plant
25 utilization and blend?

1 A. Correct.

2 Q. And do you feel that would be beneficial
3 for the farmers that are supplying you?

4 A. I think they would be ecstatic. I think
5 it would be very beneficial for -- for our producers. I
6 think it would be good for our company. I think it
7 would be good for consumers. I think it would help to
8 ensure that not only our consumers and our customers,
9 but customers across the country would have an
10 opportunity to secure the finest fresh milk that could
11 be produced.

12 Q. I want to turn to just a couple of
13 questions about producer-handlers in your market.
14 You've described the areas where your products are
15 available. But you're currently regulated in the Upper
16 Midwest Order, is that correct?

17 A. That is correct, yes, it is.

18 Q. Do you compete directly with any
19 producer-handlers either in the Upper Midwest Order or
20 other areas that you do business?

21 A. As I mentioned, we recently began home
22 delivery in the Virginia Beach area of Virginia. A
23 dairy by the name of Yoder Dairy went out of business
24 and we purchased their customer list and trucks and
25 hired some of their employees and began to provide home

1 delivery in that area. It's fairly recently, within the
2 last 30 to 60 days.

3 We are competing in that area with a
4 producer-handler. I believe the name is South Mountain
5 Creamery. That was the only producer-handler that I was
6 aware of before today that we competed with directly.
7 But one of the witnesses earlier today testified that
8 they were competing with a producer-handler in Detroit.
9 We're competing in Detroit, so I guess therefore we're
10 competing with them in Detroit.

11 Q. Now, you understand that as a
12 producer-handler, those operations don't have to
13 participate in the producer settlement fund as you do?

14 A. Correct.

15 Q. In your experience, has that fact, in
16 your opinion, put you at a competitive disadvantage to
17 those producer-handlers?

18 A. Well, look, each and every one of us has
19 competitive advantages and disadvantages. You can be
20 closer to your producers; you can be farther from your
21 producers and closer to your market; farther from your
22 market; you can have better, smarter management. We all
23 have different advantages in our individual businesses.

24 What I object to more than anything else
25 is government-imposed advantages such as the fact that

1 we have to compete, in my opinion, unfairly with unfair
2 competition from cooperatives where they have advantages
3 such as the ability to forward contract, which we are
4 not allowed to do for Class I milk. That, to me, is
5 unfair competition.

6 Competing with a producer-handler, bring
7 them on. I mean, that's perfectly acceptable, perfectly
8 fine. If I thought it was a huge advantage to operate
9 in that -- in that way, I certainly would give more
10 serious consideration to doing it myself.

11 And if we have individual handler pools,
12 you know, I think that gives us the best of both worlds.

13 Q. Are you a member of the International
14 Dairy Foods Association?

15 A. I sure am. I believe our company has
16 been a member for -- certainly as long as I can
17 remember. I'm sure it's been 20, 30 years or more.

18 Q. And as a member, do you support their
19 proposals to eliminate the producer-handler exemption?

20 A. I think IDFA does many very good things
21 for our industry. I have been very pleased with what
22 I've perceived as a movement within IDFA towards more
23 free markets, towards doing the right things in this
24 industry. And I've seen that significant change, that
25 significant movement, in my opinion, over the last five

1 or six or seven or eight years.

2 In my opinion, their position on this
3 issue is dead wrong. It's a step backwards from a
4 movement towards free markets, and it clearly is in
5 opposition to many IDFA's members' positions, such as
6 our position.

7 When I first became aware of this issue
8 and the potential hearings regarding this, I called Bob
9 Yonkers to try to get a better understanding of the
10 issue, because I wasn't sure I was really understanding
11 what was going on.

12 And Bob was very friendly, very helpful
13 on filling me in. The more I heard, the more upset I
14 became, the more disappointed I was about the position
15 that Bob was being directed to take by IDFA, which in my
16 opinion is -- may not be what Bob really believes in his
17 heart, but it is a position that he has been directed to
18 take.

19 He suggested if I wasn't happy with that,
20 I ought to call Connie Tipton, which is the head of
21 IDFA, which I immediately did with my next phone call
22 when I hung up.

23 Not reaching Connie, I left a message for
24 her regarding this issue and my beliefs and opinions on
25 this issue in pretty clear, strong terms.

1 Unfortunately, I never heard back from -- from Connie,
2 so I wasn't sure she got the message, but Bob assured me
3 this morning that she had definitely gotten the message.

4 Q. I want to return just for a second to the
5 payments you make to your supplying producers. And you
6 said you pay them premiums, and I assume pay them on
7 what both sides believe to be fair terms.

8 But how are your producers doing right
9 now in today's economic climate?

10 A. Well, certainly our producers would like
11 to see higher prices for milk. I think all producers
12 always like to see higher prices for milk. When the
13 price is over \$20, then they would likely be complaining
14 about the high cost for corn or other inputs.

15 Today, obviously the complaint is about
16 the low price for milk, and I'm sure that none of them
17 are doing very well with -- with the current level of
18 milk.

19 One thing that I think would lead to more
20 stable market prices, which I think would be good for
21 consumers, it would be good for producers, and it would
22 be good for processors, would be to allow companies like
23 us to forward contract so we could achieve --

24 MR. BESHORE: Your Honor.

25 JUDGE CLIFTON: Excuse me. Let me hear

1 the objection.

2 MR. BESHORE: Well, we're about to
3 hear -- we're about to hear a position statement
4 on --

5 JUDGE CLIFTON: Pull it closer or move
6 over more.

7 MR. BESHORE: We're about to hear a
8 position statement on an issue that is not
9 before the Secretary in this hearing in any way,
10 shape or form. It's not even under this Act, I
11 don't think. It's different legislation. It's
12 not relevant, and I don't think we need to take
13 time with that.

14 JUDGE CLIFTON: Thank you, Mr. Beshore.
15 I'll allow the witness to finish his sentence
16 and then we'll see what the next question is.

17 I'd ask that the court reporter read back
18 the question and the answer, as far as we got
19 one.

20 (The record was read.)

21 A. Okay. I'll make it very short. Yes, I
22 feel forward contracting would allow for stable prices,
23 would be good for our industry.

24 As an alternative to that, if we cannot
25 get forward contracting, which at the present we can't,

1 then I think individual handler pools would provide a
2 very positive benefit that would accomplish some of the
3 same goals.

4 Q. I was not trying to get into forward
5 contracting. I want to develop that answer a little
6 bit. Farms have a risk that the prices set by USDA and
7 the prices that are agreed to with their -- with their
8 buyers won't cover their costs of production at all
9 times, is that right?

10 A. You bet.

11 Q. And based on your conversation --

12 A. Probably in those times right now.

13 Q. We are in those times, is that what you
14 said?

15 A. Yes.

16 Q. Okay. But as a -- as a regulated
17 handler, you don't assume any of the risk of farm
18 losses, do you?

19 A. That's correct, we do not. But we have
20 some great family farmers, some great producers, and we
21 certainly feel very badly for them when they can't make
22 a profit. We think they'd have a better opportunity,
23 and they think they'd have a better opportunity to
24 achieve a reasonable profit level if we had an
25 individual handler pool.

1 Q. Let me ask you if -- if your operation
2 became a producer-handler and you produced milk from
3 your own cows and your own farm and supplied it to your
4 own plant, would you not also in that process be
5 assuming the risk of farm losses?

6 A. We certainly would, and that's certainly
7 been a hesitation and a concern about considering that
8 as an alternative.

9 Q. Okay. Thank you. Mr. Oberweis, is there
10 anything else that you wanted to add to your thoughts
11 here today?

12 A. Not that I can think of off the top of my
13 head, no.

14 MR. MILTNER: I don't have any other
15 questions, your Honor.

16 JUDGE CLIFTON: Thank you, Mr. Miltner.
17 Mr. Oberweis is available for cross-examination.
18 Who would begin?

19 Mr. Carroll. Thank you.

20 CROSS-EXAMINATION

21 BY MR. CARROLL:

22 Q. Good afternoon, Mr. Oberweis.

23 A. Good afternoon.

24 Q. As you probably know, this is a great
25 moment for me. And I'm not sure you remember, but

1 perhaps you do, that I represented your dairy --

2 A. I do indeed.

3 Q. -- years ago. And I represented them
4 against a federation of cooperatives that had raised its
5 handling charges to the point where your father
6 objected.

7 A. Very strongly, yes.

8 Q. Yeah. And I want to ask just so the
9 public -- people here know. It's true, isn't it, that
10 you have been the Republican candidate for the United
11 States Senate from the State of Illinois?

12 A. That's correct. Unfortunately, the time
13 that I ran in 2004 there was a candidate who got more
14 votes by the name of Barack Obama.

15 Q. And then were you a candidate for the
16 United States Congress at any time?

17 A. I was the Republican nominee last year.

18 Q. And you all came originally from a dairy
19 farm of your grandfather's and great grandfather's in
20 Illinois?

21 A. Actually, I've never lived on the farm,
22 per say, but our family farm --

23 Q. Family was there. I think you lived in
24 Aurora in those days?

25 A. Correct. My grandfather lived on the

1 farm.

2 Q. Now, I take it from what you've said you
3 have no fear of competing with producer-handlers?

4 A. I always have a fear of competing with
5 everybody, particularly the much larger companies who
6 have the competitive advantage that we can never achieve
7 of very large production.

8 As we talked earlier, several of the
9 witnesses have already testified that -- that there are
10 obviously economies of scale and we've recognized that,
11 as a little guy, we can never compete effectively
12 with -- with those big guys. But those are the guys
13 that I worry about the most.

14 But you know what? In any industry,
15 you've got big guys, you've got little guys, you've got
16 all kinds of different competition, and we just do the
17 best we can.

18 Q. Right.

19 A. Incidentally, I would mention growing up
20 in this industry, my father used to talk about the fact
21 that there were 54 home delivery dairies in the Chicago
22 milk marketing area when I was a kid growing up. Today,
23 I can tell you there is one left. We're it. We're the
24 last guys.

25 Q. You're the last ones?

1 A. Last ones.

2 Q. And I'm not sure you recollect this, but
3 at the time that he was in his battle with the
4 cooperatives on handling charges of his milk, that he
5 was in home delivery at that time to a considerable
6 degree?

7 A. Virtually entirely. Had one ice cream
8 store to go on and that was it, yes.

9 Q. Now, directing your attention to
10 something you may have -- I would like to expand on, and
11 that is, you're more concerned about cooperatives. Can
12 you tell me what you mean by that?

13 MR. BESHORE: Your Honor --

14 JUDGE FELSON: The objection is
15 sustained. He mentioned that he's more
16 concerned about the big guys and you may have
17 inferred that he meant cooperatives, but --

18 MR. CARROLL: I heard that, but if I
19 didn't, I'll ask the question.

20 BY MR. CARROLL:

21 Q. Do you have any concern about
22 cooperatives in terms of problems in the marketing area?

23 A. Yes, because they have an unfair
24 competitive advantage, as we've been talking about
25 earlier.

1 MR. BESHORE: Your Honor --

2 JUDGE CLIFTON: Mr. Beshore, get closer.

3 MR. BESHORE: -- I object to the
4 relevance.

5 JUDGE CLIFTON: Get closer. Thank you.

6 MR. BESHORE: I object to the relevance
7 of a general discourse about cooperatives in the
8 marketing area, which is what the question was
9 about. If you have a general -- if you have a
10 concern about cooperatives in the marketing
11 area, it's not relevant, and actually the
12 hearing -- I mean, cooperatives are not the
13 subject of -- of the hearing.

14 JUDGE CLIFTON: Thank you.

15 MR. CARROLL: I think the hearing
16 involves marketing conditions. We've certainly
17 had lots of testimony about marketing conditions
18 and all sorts of complaints about this and that
19 part of the marketing, and certainly
20 cooperatives are engaged in marketing. It seems
21 to me we ought to be able to develop that
22 theory.

23 MR. BESHORE: I'd like to -- I'd like to
24 have a proffer from Mr. Carroll, or the witness,
25 for that matter, with respect to one proposal in

1 this hearing where the word cooperative has --
2 enters in.

3 MR. CARROLL: I thought cooperatives --

4 THE WITNESS: I would be very
5 cooperative.

6 JUDGE CLIFTON: Go ahead, Mr. Carroll.

7 MR. CARROLL: I thought that these were
8 proposals by cooperatives that were claiming
9 some type of a terrible imbalance in the
10 relationships that were so severe that they had
11 to bring the entire United States to one hearing
12 and take almost three weeks for problems that
13 they presented. And we're certainly entitled to
14 look at the other side of the coin as well.

15 JUDGE CLIFTON: Mr. Beshore, I appreciate
16 the reason for your objection. I'm going to
17 allow the witness limited comment about his
18 concern about the marketplace, whatever the
19 concern is. We won't get too far afield because
20 he has a 7:00-something plane to catch, and it's
21 after 5:00.

22 So I do think that a mention of
23 cooperatives is appropriate in a discussion of
24 the current marketplace. But we won't let the
25 tail wag the dog. So that answer stands. I

1 heard his answer. He does have a concern about
2 cooperatives. You may very briefly inquire into
3 what that concern is.

4 BY MR. CARROLL:

5 Q. Can you tell us what that concern is?

6 A. Yes.

7 THE WITNESS: And, your Honor, I -- my
8 concern is unfair competitive advantage mandated
9 by government. And very clear examples, the
10 fact that cooperatives can compete with us
11 directly and they can forward contract for their
12 milk supply, which we are not allowed to do.
13 That would be my biggest, number one concern.

14 MR. CARROLL: That's all. Thank you,
15 sir.

16 JUDGE CLIFTON: Thank you, Mr. Carroll.
17 Who next will cross-examine Mr. Oberweis?

18 THE WITNESS: I guess we're done.

19 JUDGE CLIFTON: No, no, no, no.
20 Sometimes they're just still thinking.
21 Mr. Beshore.

22 MR. BESHORE: Thank you, your Honor.

23 CROSS-EXAMINATION

24 BY MR. BESHORE:

25 Q. Mr. Oberweis, Marvin Beshore. I

1 represent the National Milk Producers Federation and
2 Dairy Farmers of America. I have just two questions, I
3 think -- or three.

4 The 30 dairy farms that supply your
5 dairy, what's the monthly volume of milk that they
6 produce?

7 A. To be honest with you, I don't have those
8 figures off the top of my head. The average herd is
9 probably about 110 to 120 cows. You can probably
10 calculate it from that faster than I can.

11 Q. Okay. Yeah, I can't make that
12 calculation in my head. But do you know the -- the --
13 do you know the monthly volume at your plant? Do you
14 know about what that would be?

15 A. If you give me a second, I can probably
16 calculate it here for you in just a second. Ballpark,
17 we produce about 12,000 gallons per day, probably
18 operate the plant maybe about 22 days a month. So it
19 would be -- I think that's in the area of
20 250,000 gallons a month. Does that answer your
21 question?

22 Q. Okay. 250,000 gallons a month. We have
23 8 pounds -- 8.6 pounds per gallon. 4 to
24 5 million pounds a month, does that sound about --

25 A. That's -- yeah, 3 to 5 million.

1 Q. 3 to 5. Okay. Let's assume 5 million.
2 Now, let's assume you're paying your farmers \$20 a
3 hundredweight, which is -- are you paying them that much
4 now?

5 A. No.

6 JUDGE CLIFTON: Mr. Beshore, you are not
7 quite loud enough. I'm sorry.

8 MR. BESHORE: Okay.

9 JUDGE CLIFTON: Say it again, please.

10 BY MR. BESHORE:

11 Q. Okay. My question was, let's assume
12 you're paying your farmers \$20 a hundredweight, which is
13 above the current price, correct?

14 A. Yes.

15 Q. Okay. \$20 a hundredweight on
16 5 million pounds a month would be a raw milk cost of
17 \$1 million a month. Does that sound right?

18 A. I don't know.

19 Q. Assume with me it would -- that that
20 would be correct.

21 A. Okay.

22 Q. Okay? Now, your company has sales of
23 \$65 million per month?

24 A. No, per year.

25 Q. 12 plus million dollars a month?

1 A. No.

2 Q. I'm sorry. 5?

3 A. Yes.

4 Q. 5, okay. So you're taking a million
5 dollars of milk and you have \$5 million worth of sales?

6 A. Well, those sales include ice cream.
7 They include eggs, they include bacon and cheese and
8 chips, all kinds of other products. Those are total
9 company sales, not milk sales.

10 Q. Okay. Well, ice cream would be produced
11 out of the same milk --

12 A. Correct.

13 Q. -- milk from the farm, is that correct?

14 A. Correct.

15 Q. So your dairy sales are actually a
16 minority of the company's business then, less than --
17 less than half probably?

18 A. Dairy sales meaning milk and ice cream?

19 Q. Yeah.

20 A. No, it would be more than half.

21 Q. Okay. So the million translates into
22 more than 2.5 million in sales for your company?

23 A. Yes.

24 Q. Okay. If you had your druthers,
25 Mr. Oberweis, would -- would there be -- there would be

1 no Federal Milk Order regulations at all, isn't that
2 correct?

3 A. Would that make me unhappy if that
4 happened? I don't think I would be unhappy. I think
5 that if we had the opportunity to compete on a level
6 playing field, generally free markets are good for the
7 consumer and good for the country.

8 Q. And that's what you would advocate?

9 A. Well, I think it's been pretty clear that
10 what we're advocating here is an individual handler
11 pool, because I think that will directly provide an
12 opportunity for our producers to receive a good price
13 and for the assurance of a good supply of the best,
14 fresh milk possible.

15 MR. BESHORE: Thank you.

16 JUDGE CLIFTON: Thank you, Mr. Beshore.

17 Other cross-examination of Mr. Oberweis?

18 Mr. Tosi.

19 CROSS-EXAMINATION

20 BY MR. TOSI:

21 Q. Good afternoon, sir. Excuse me, I went
22 the wrong way on the switch there.

23 Do you support the objectives of the
24 Federal Milk Marketing Order program?

25 A. I will be honest with you and say I'm not

1 sure what those objectives are. I believe it's to
2 assure a -- a supply of milk, fresh milk to consumers,
3 and to do so at the most reasonable price for consumers.
4 If those are the objectives, of course.

5 Q. Okay. And to the extent that the Federal
6 Orders, in terms of leveling the playing field, make
7 sure that you and your competition that are similarly
8 located have the same minimum price, is that helping
9 keep the field level?

10 A. If you are -- are you asking me, do I
11 think the government should be involved in assuring that
12 I pay the same price that somebody else pays? Is that
13 your question?

14 Q. The same minimum price, that you know
15 what your competitors are paying at a minimum.

16 A. I do not think that should be the
17 objective of the government.

18 Q. Okay. Then what about producers? Should
19 producers receive the same minimum price for their milk?

20 A. I don't think that it's necessarily
21 destructive to have producers receiving the same minimum
22 price, as long as it's set at a reasonable level.

23 However, for almost every other product
24 in this country, the free market tends to set that
25 price, and the free market generally works better than

1 the ability of any individual to determine what that
2 should be.

3 Q. Would you agree, then, that even under
4 individual handler pooling that that would be the use of
5 a -- of the Federal Milk Marketing Order program, that
6 you're still asking the program to provide you
7 something?

8 A. I'm not sure I understand the question.
9 Would you explain a little further?

10 Q. Well, I'm taking away from your -- from
11 some of the things that you said, and you've said a lot
12 of different things about a lot of different things.
13 And I'm trying to reconcile what your position is on the
14 program itself and its objectives. And I understand, I
15 think, that you have issues with some of the things that
16 the program does. And I'm taking away from it that
17 somehow the government is intruding on something or that
18 we're not keeping the field level.

19 A. Right. I think individual handler pools
20 would remove some of the objective parts that -- that
21 create some inequalities in the competitive field. I
22 think that would be a big step in the right direction
23 towards free markets, yes.

24 Q. Okay. For those producers who are
25 fortunate enough to be located close to you, if we had

1 an individual handler pool and to the extent that we
2 have handlers that are not fortunate enough to be
3 located close to you, and they're delivering to a cheese
4 plant closer to their location --

5 A. You're saying, handlers. Do you mean
6 handlers or do you mean producers?

7 Q. I meant to say producers located near a
8 handler. There are going to be producers that are
9 advantageously located that are close to you. There are
10 going to be another set of producers that aren't that
11 may have to deliver to a cheese plant. And if we did
12 individual handler pooling, those folks are going to
13 have a price that's very significantly different than
14 those producers that are sending milk to you.

15 A. According to my favorite economist, that
16 would -- individual handler pools would probably
17 encourage the best quality milk to move to those plants
18 even if it meant moving the milk a little bit further,
19 which would assure the best quality milk ending up as
20 fresh milk. And I think that would probably be good for
21 the country.

22 Q. Are you aware that just about all milk
23 produced is Grade A and is eligible to be used in fluid
24 uses?

25 A. Yes. Are you aware that some of that

1 Grade A milk is better than others?

2 Q. Yes, sir, I am. But, please, I'm asking
3 the questions of you.

4 A. Okay.

5 Q. Okay. How would we achieve the
6 requirements of the law under an individual handler pool
7 when we have markets that have multiple handlers
8 converting raw milk into multiple dairy products? How
9 are we able then to return a price to producers that's
10 uniform and have a price to handlers, similarly situated
11 handlers, that's uniform?

12 A. Well, first of all, I'm not sure I have
13 all the answers to all the issues. I think that to the
14 degree that you have individual handler pools, that
15 could create an opportunity for certain producers to
16 receive higher payments than other producers.

17 It could also create a situation where
18 consumers would have access to higher quality milk and
19 consumers would have access to that milk at a lower cost
20 than is currently -- in the current system.

21 Q. Please describe, then, what is it about
22 the system now that is preventing consumers from having
23 this high quality milk because of the way the system is
24 now? You're making a lot of charges about something --

25 A. Sure. And the fact is that once --

1 JUDGE CLIFTON: Wait.

2 Q. And you're not backing it up with a real
3 example.

4 A. Okay. Let me please do that.

5 Q. Okay.

6 A. When you have a system that establishes
7 the uniform price to all producers across the entire
8 region, the entire market, you do not assure in any way
9 that the best milk is going to end up as fresh milk. If
10 you have an opportunity where there is a different
11 pricing system for that milk, the highest price going
12 for the highest quality milk, you will end up with the
13 milk moving to the -- its highest and best use, which,
14 in my opinion, happens to be fresh milk.

15 Q. And the distance of that producer having
16 access to a Class I handler would have less meaning over
17 quality?

18 A. It's certainly a factor, as many things
19 are factors.

20 Q. Okay. But that's -- you're basically
21 saying that, though? Would that be accurate?

22 A. I'm saying -- please state again what
23 you're --

24 Q. Well, you're -- what I'm hearing from you
25 is that there's something about the system right now,

1 because we don't have individual handler pooling, that's
2 somehow affecting the public's ability or handler's
3 ability to attract the highest quality milk to offer for
4 drinking purposes for Class I uses?

5 A. Yes.

6 Q. And I'm not seeing the connection in your
7 answers to --

8 A. Let me try it again.

9 Q. What is it about the system that's
10 limiting that?

11 A. Let me try it again. When the government
12 sets one fixed price that everybody is going to pay for
13 the same milk regardless of the quality of that milk,
14 which is essentially what we have today -- that's an
15 exaggeration; that's an oversimplification, because
16 obviously you pay more for higher butterfat and protein
17 and so on, but not particularly for the quality of that
18 milk -- then you end up with a random distribution of
19 where that milk goes.

20 If, in fact, you have a market that is
21 paying for the quality of that milk, you will have a
22 greater tendency for the best quality milk to reach its
23 highest and best use, which, as I said, in my opinion,
24 is fresh milk. And that's historically what we had in
25 this country and most other countries in the world.

1 Q. Are you saying, then, that you're paying
2 the same price for milk as a cheese plant?

3 A. We are paying essentially the same price
4 for milk. Of course, there's a different price for
5 Class I than for Class III, as we all recognize. But
6 the price to the producer ends up being the same. There
7 is no incentive for that producer if he -- to produce --
8 there's no incentive for him to make the extra effort to
9 produce the best milk.

10 If there were a graduated payment system
11 where the best milk got a higher price, there would be
12 incentive for individual producers to produce a higher
13 quality product, which, again, benefits consumers.

14 Q. So then -- are you suggesting, then, that
15 the statute that we operate under, the Agricultural
16 Marketing Agreement Act, that would have to be changed
17 in some way to address the quality issue?

18 A. I'm not an expert on that. What I am
19 saying, again, is I believe that establishment of
20 individual handler pools would allow an incentive, would
21 allow a reward for those producers that make the extra
22 effort to produce the best quality milk, low bacteria
23 counts, low somatic cell, things of that nature. And I
24 think that would be good for our country, good for
25 consumers, good for producers.

1 Q. Are you aware that there are other
2 premium structures above what Federal Order minimum
3 prices are that provide reward for things such as
4 quality?

5 A. Yes.

6 Q. And would you then conclude that that's
7 already part of the system?

8 A. I believe that a -- an individual handler
9 pool would tend to allow that to a much greater degree.

10 Q. Okay.

11 A. We could reward our producers, paying
12 them a significantly higher price directly, for
13 producing the high quality of milk that they produce.

14 Q. But to the extent that that's done now
15 through premiums above Federal Order minimums, there's
16 no government intrusion there?

17 A. The opportunity for us to pay a larger
18 premium would be there under individual handler pool
19 than exists today.

20 MR. TOSI: Thank you, sir. I appreciate
21 you coming.

22 THE WITNESS: Thank you.

23 JUDGE CLIFTON: Thank you, Mr. Oberweis.
24 Any redirect, Mr. Miltner?

25 MR. MILTNER: No, your Honor.

1 JUDGE CLIFTON: Mr. Oberweis, is there
2 anything else you want to add to your testimony?

3 THE WITNESS: No, your Honor.

4 JUDGE CLIFTON: Thank you so much for
5 being here.

6 THE WITNESS: Thank you.

7 JUDGE CLIFTON: You may step down, and
8 we'll take just a five-minute stretch break
9 before we call the next witness. Please be
10 ready to go at 5:28.

11 (A recess was taken from 5:28 to 5:34.)

12 JUDGE CLIFTON: All right. Let's go back
13 on record. We're back on record at 5:34.
14 Dr. Yonkers, would you begin by stating and
15 spelling your name?

16 THE WITNESS: My name is Robert Yonkers,
17 R-o-b-e-r-t, Y-o-n-k-e-r-s.

18 JUDGE CLIFTON: And all right. And what
19 is your title?

20 THE WITNESS: I'm a vice president and
21 chief economist with the International Dairy
22 Foods Association in Washington, D.C.

23 JUDGE CLIFTON: All right. And what
24 educational designation do you carry with your
25 name?

1 THE WITNESS: I have a Ph.D. in
2 agricultural economics and put the term Dr. in
3 front of it.

4 JUDGE CLIFTON: Thank you. Would you
5 raise your right hand, please?

6 (The witness was sworn.)

7 (Exhibit 80 was marked for
8 identification.)

9 JUDGE CLIFTON: Thank you. I have, while
10 we were off record, indicated that I have marked
11 Dr. Yonkers' statement as Exhibit 80.

12 Dr. Yonkers, you may proceed.

13 ROBERT YONKERS

14 of lawful age, being duly sworn, was examined and
15 testified as follows:

16 DIRECT EXAMINATION

17 BY MR. BESHORE:

18 A. Thank you, your Honor. This testimony is
19 submitted on behalf of the International Dairy Foods
20 Association or IDFA, a trade association representing
21 manufacturers, marketers, distributors and suppliers of
22 fluid milk and related products, ice cream and frozen
23 dairy deserts and cheese. IDFA represents the nation's
24 dairy manufacturing and marketing industries and their
25 suppliers, with a membership of 300 companies,

1 representing an industry.

2 JUDGE CLIFTON: Let me ask you how many
3 companies?

4 THE WITNESS: The membership of 530
5 companies.

6 JUDGE CLIFTON: Thank you.

7 A. Representing an industry whose retail
8 value of production exceeds \$100 billion annually. IDFA
9 is composed of three constituent organizations: The
10 Milk Industry Foundation, or MIF; the National Cheese
11 Institute, NCI; and the International Ice Cream
12 Association, IICA. IDFA's 220 dairy processing members
13 run more than 600 plant operations and range from large
14 multinational organizations to single-plant companies.
15 Together they represent more than 80 percent of the
16 fluid milk, cultured dairy products, cheeses and frozen
17 dairy deserts produced and marketed in the United
18 States.

19 As buyers and processors of milk, the
20 members of the IDFA and its constituent organizations
21 have a critical interest in these hearings. Most of the
22 milk bought and handled by IDFA members is purchased
23 under the Federal Milk Marking Orders promulgated
24 pursuant to the Agricultural Marketing Agreement Act of
25 1937, (the AMAA).

1 I am Dr. Robert Yonkers, vice president
2 and chief economist at the International Dairy Foods
3 Association, where I have worked since June of 1998. I
4 hold a Ph.D. in agricultural economics from Texas A&M
5 University in 1989, a master's degree in dairy science
6 from Texas A&M in 1981, and a bachelor's degree in dairy
7 products from Kansas State University in 1979.

8 Prior to taking my current position at
9 IDFA, I was a tenured faculty member in the Department
10 of Agricultural Economics and Rural Sociology at the
11 Pennsylvania State University, where I was employed for
12 nine years. At Penn State, I conducted research on the
13 impacts of changing marketing conditions, alternative
14 public policies and emerging technologies on the dairy
15 industry. In addition, I had statewide responsibilities
16 to develop and deliver extension materials and programs
17 on topics related to dairy marketing and policy. I have
18 written and spoken extensively on economic issues
19 related to the dairy industry, and I have prepared and
20 delivered expert witness testimony to state legislatures
21 and to Congress.

22 IDFA submitted a petition simultaneously
23 with National Milk Producers Federation to USDA on
24 January 30th, 2009 representing -- requesting that a
25 hearing be held to consider our proposals to modify

1 Federal Order regulations in all marketing areas with
2 respect to producer-handlers and exempt handlers. These
3 proposals are Proposals 1 and 2 in the Notice of Hearing
4 for this proceeding. IDFA urges USDA to adopt Proposals
5 1 and 2 as they and only they best address the issues
6 cited in the IDFA and National Milk Producers Federation
7 petitions. Since my testimony today follows that of
8 Dr. Roger Cryan of NMPF in support of Proposals 1 and 2,
9 I do not plan to restate all the facts in his testimony,
10 but rather will supplement his testimony from the
11 perspective of IDFA.

12 Federal Orders establish the minimum
13 price that dairy handlers must pay dairy farmers and
14 their cooperatives. The minimum price established for
15 Class I or fluid milk is intended by design to be the
16 highest of these regulated prices. On the other hand,
17 the regulated minimum price actually received by dairy
18 farmers and cooperatives from handlers is the uniform or
19 blend price, which represents Federal Order's
20 utilization of each class of milk and the minimum price
21 for each class. Because the regulated minimum price for
22 classes other than Class I are intended by design to be
23 lower than the Class I price, the uniform price is
24 nearly always lower than the Class I price. Proposal 1
25 submitted by IDFA and NMPF would eliminate the existing

1 producer-handler exemption from pricing and pooling
2 provision in all 10 Federal Milk Marketing areas.
3 Producer-handlers currently are entirely exempted from
4 this obligation to pay minimum class prices in eight of
5 the ten Federal Orders milk marketing areas, and are
6 exempted in the other two marketing areas if their Class
7 I use remains below 3 million pounds per month. This
8 means that, with respect to Class I milk, a
9 producer-handler can, in effect, pay their own farm milk
10 the uniform price rather than the class price. As
11 testified to in detail by Dr. Cryan, this provides a
12 producer-handler a very substantial advantage in the
13 cost of farm milk as compared to the cost incurred by
14 regulated plants processing and marketing Class I fluid
15 milk products, solely as a result of this regulatory
16 exemption.

17 Having some but not all fluid milk plants
18 subject to the Class I minimum price clearly creates
19 disorderly marketing conditions. Handlers not subject
20 to such regulations can use their artificial cost
21 advantage to offer customers lower priced processed
22 milk, or to offer increased customer services, or to
23 invest additional funds in their plant operations; or
24 they can engage in a combination of these business
25 strategies. All of these opportunities stem from the

1 increased profits artificially created by their
2 regulatory exemption.

3 By the same token, exempting
4 producer-handlers creates disorderly marketing by
5 excluding from the order pool the funds representing the
6 difference between the Class I and uniform price with
7 respect to the producer-handler's sales volumes. This
8 denies other dairy farmers and their cooperatives a
9 uniform price, because the producer-handler can derive
10 and keep a price in excess of the uniform price by
11 selling its fluid milk products to customers based on a
12 farm milk price above the uniform price, but still below
13 the Class I minimum price.

14 Whatever historical justification may
15 have once existed for the producer-handler exemption, it
16 clearly no longer applies in light of the significant
17 structural changes which have occurred at all levels of
18 the dairy product marketing chain. This is true nowhere
19 as much as the farm level.

20 At the farm level, not only has the
21 average farm size increased, whether measured in terms
22 of number of milk cows or total farm milk marketings,
23 but the share of total U.S. farm milk production from
24 the largest farm size categories has grown
25 substantially. USDA reports that in 2008 the 730 dairy

1 farms in the U.S. with 2,000 or more milk cows accounted
2 for 30.5 percent of all U.S. milk production that year.
3 This is significantly up from 1998, the first year USDA
4 began reporting the 2,000 or more milk cows category,
5 when 235 such farms accounted for only 8.4 percent of
6 milk production that year. Combined with the 2,620
7 dairy farms with between 500 and 1,999 milk cows, farms
8 with more than 500 milk cows accounted for 58.5 percent
9 of U.S. farm milk production last year.

10 To put this in perspective, the top five
11 states ranked by milk production per cow had an average
12 of more than 23,000 pounds produced per cow. This means
13 that a farm in these states with 500 milk cows produced
14 on average 11.5 million pounds of milk per year, nearly
15 1 million pounds per month. A 2,000 cow herd with a
16 23,000 pound per cow average would produce
17 46 million pounds per year, or nearly 4 million pounds
18 per month. Clearly, very large farms, with levels of
19 total milk production never contemplated during the
20 decades when the producer-handlers were exempt from
21 pricing and pooling regulations of Federal Orders, are a
22 fact of life in the marketplace today. The pernicious
23 impact of broad exemptions for producer-handlers has
24 simply grown too large to ignore any longer.

25 IDFA and NMPF also propose a concomitant

1 increase in the exemption for all smaller handlers,
2 (Proposal 2), from 150,000 pounds of fluid milk a month
3 to 450,000 pounds a month. This will preserve the
4 exemption from regulation for those plants too small to
5 cause material market disruption, including those small
6 plants previously exempted as producer-handlers.

7 As Dr. Cryan noted in his testimony, the
8 current 150,000 pounds per month threshold was adopted
9 in all Federal Milk Marketing Orders beginning
10 January 1, 2000 as part of what is known as Federal
11 Order reform.

12 JUDGE CLIFTON: Let me stop you,
13 Dr. Yonkers. Where -- in the middle line of
14 that sentence, where it says Federal milk
15 marketing areas, you actually read orders. And
16 does that make any difference at all?

17 THE WITNESS: I often use those terms
18 interchangeably. I prefer it to be reflected,
19 the areas, as I've written it. Thank you, your
20 Honor.

21 JUDGE CLIFTON: Thank you.

22 A. In the final decision to implement that
23 provision, USDA noted that this was the highest volume
24 threshold then in existence in Federal Order marketing
25 areas prior to 2000, and Dr. Cryan noted that this limit

1 first was adopted in the West Texas-New Mexico marketing
2 area in 1991.

3 Since the 1990 data that was available at
4 the time this hearing was adopted in the West Texas-New
5 Mexico marketing area, the average volume of fluid milk
6 products produced by U.S. fluid milk bottling plants
7 operated by commercial processors has roughly doubled,
8 from 93.9 million pounds annually in 1990 to
9 189.8 million pounds in 2007 (the most recent data
10 available). While this might suggest the current
11 threshold should also be doubled, IDFA and NMPF support
12 tripling it; after all, the data clearly show that the
13 average fluid milk bottling plant volumes continue to
14 increase over time, and Proposal 2 allows for future
15 growth while keeping the limit in line with the industry
16 structure at the time the threshold was first adopted in
17 the early 1990s.

18 Proposal 2 also requires that an exempt
19 plant sell its fluid milk products using unique labels,
20 lest this exemption be abused through the establishment
21 of numerous small plants effectively linked together so
22 as to market their milk jointly and to garner the
23 advantages of a large plant without being subjected to
24 minimum price regulations. This is not intended to
25 prevent an exempt plant from marketing packaged fluid

1 milk under more than one label; for example, an exempt
2 plant could have its own label as well as another for a
3 local home delivery distributor solely supplied by that
4 exempt plant and even have a third label for a local
5 grocery store solely supplied by that exempt plant.
6 This provision of Proposal 2 is intended to prevent a
7 large distributor, retailer, or other entity from
8 coordinating the production of fluid milk products from
9 a number of smaller exempt plants under the same label.
10 As an example only, an exempt plant under this proposal
11 should not be able to distribute a fluid milk product
12 under the name IDFA Milk Company if any other handler
13 also distributes a fluid milk product using that same
14 label name.

15 While a number of other proposals were
16 submitted by other parties and included in the hearing
17 notice, IDFA urges USDA to reject those and only adopt
18 Proposals 1 and 2. The proposals which seek to continue
19 the producer-handler exemption from pricing and pooling
20 provisions with some volume limit could in effect
21 continue the problem of disorderly marketing created by
22 this exemption. In particular, Proposals 23 and 24
23 could create new incentives for existing regulated
24 handlers to invest in dairy farms and/or retail stores
25 for the sole purpose of gaining a new exemption from

1 pricing and pooling regulation on at least a portion of
2 their Class I sales.

3 Proposal 25, rather than being innovative
4 instead proposes going back many years when such a
5 provision existed in Federal Orders. There were many
6 hearings over many years in which this type of provision
7 was found to contribute to disorderly marketing and IDFA
8 urges USDA to reject its adoption today.

9 And then, your Honor, on the last page
10 here, because I did cite from a reference that had not
11 been referred to earlier in this hearing, I have
12 included a page I printed from a website at the USDA's
13 economic research service.

14 The website is given at the bottom of the
15 page. It comes from a publication called, Livestock,
16 Dairy and Cultured Outlook. And it shows as long a time
17 series as they have put -- made available on the
18 website, what the number of fluid milk bottling plants
19 operated by a commercial processor are, 1950 to 2007,
20 and their estimate of the average volume per plant
21 processed in million pounds. And I refer to that in my
22 testimony. And that concludes my prepared statement.

23 JUDGE CLIFTON: Thank you, Dr. Yonkers.

24 Now, Mr. Beshore, do you have additional direct
25 examination of this witness?

1 MR. BESHORE: I do not have any questions
2 for Dr. Yonkers at this time.

3 JUDGE CLIFTON: All right. It's ten
4 minutes to 6:00 and I want to get consensus how
5 counsel wish to proceed. We can begin
6 cross-examination now, we can begin
7 cross-examination at 8:00 a.m., or we can begin
8 cross-examination when those witnesses who can
9 testify only tomorrow have been completed. Many
10 of those, I understand, are producers.

11 So Dr. Yonkers has indicated great
12 flexibility except that he has to leave -- is it
13 leave this hearing room at noon on Friday?

14 THE WITNESS: Yes, your Honor. I have a
15 flight that leaves a little after 2:00.

16 JUDGE CLIFTON: All right. So I'd like a
17 suggestion, a comment, idea. Mr. Yale.

18 MR. YALE: I think everybody else is so
19 tired they can't say anything, but --

20 JUDGE CLIFTON: You, on the other hand --

21 MR. YALE: I'm so tired I don't know
22 whether I'm awake or not. You know, let me just
23 give you kind of the pros and cons. You know,
24 in one respect, I think we can do bits and
25 pieces of cross-examination of Dr. Yonkers, and

1 somebody can start tonight and we can do some
2 later tomorrow and the like. And we've done
3 that in the past with other witnesses.

4 On the other hand, it does create a very
5 messy record when they're all spread out like
6 that. So if we're going to try to do it all at
7 once, I think it's a mistake to start with him
8 now.

9 I think if we got some of these other
10 witnesses, who have got to get out of here, I
11 think we're better off getting them out and
12 starting with him. That's my opinion. But on
13 the other hand, I'm game for anything because
14 you are so compassionate at this point.
15 Whatever you want to do.

16 But I -- that, to me, is the real issue,
17 is whether we want to fragment or do we want to
18 have it contiguous. And my preference is
19 contiguous, but I'm not going to make a big beef
20 if we need to break it up.

21 JUDGE CLIFTON: Thank you, Mr. Yale.
22 That's helpful. Does anyone else want to chime
23 in before I announce our course?

24 MR. VETNE: I agree with Ben.

25 THE COURT: Mr. Vetne seconds Mr. Yale.

1 Mr. Beshore.

2 MR. BESHORE: Maybe we'll get him done.

3 JUDGE CLIFTON: Get him done tonight? Do
4 you think it's possible?

5 MR. RICCIARDI: Now I will chime in.

6 JUDGE CLIFTON: Please, Mr. Ricciardi.

7 MR. RICCIARDI: That's the one thing I
8 totally agree with. I don't think we should
9 start the cross-examination of Dr. Yonkers. I
10 think that we should make a decision for the
11 good of the order, which is to get people some
12 sleep, or if they have to actually meet with
13 witnesses for tomorrow, let them do that.

14 The real question, your Honor, is do we
15 start with Dr. Yonkers or start with the other
16 witnesses. That's the determination we have to
17 make.

18 JUDGE CLIFTON: Okay. All right. Thank
19 you all. We'll start with the other witnesses.
20 We'll start with people who have come to testify
21 who have to leave tomorrow, and we'll try to
22 favor dairy farmers. And what I need to know is
23 whether to go with Mr. Miltner's witnesses or
24 Mr. Vetne's witnesses first at 8:00.

25 MR. VETNE: Mr. Miltner's.

1 JUDGE CLIFTON: Mr. Vetne.

2 MR. VETNE: Some of my people will be
3 staggering in tomorrow morning. I think it's
4 better toward mid morning.

5 JUDGE CLIFTON: I would like Mr. Vetne to
6 be heard. Start again.

7 MR. VETNE: Sure. My people are coming
8 in at staggered times between tonight and
9 tomorrow morning. I would like, if possible, to
10 do them consecutively. And it could be starting
11 mid morning or first thing in the afternoon.

12 If Mr. Miltner is ready with his first
13 thing, that would be my preference. If he's
14 not, I will struggle downstairs in the morning
15 or get a -- get a coffee cake and show up 30
16 minutes late. We'll make it.

17 JUDGE CLIFTON: Mr. Miltner.

18 MR. MILTNER: Our witnesses are also
19 coming in mostly after 5:00 today. We would be
20 able to put somebody on in -- to start the day
21 and then go from there.

22 JUDGE CLIFTON: Excellent. Good. And
23 then I'm going to rely on Miltner and Vetne to
24 keep me supplied with a witness. And we'll get
25 them done, and then I'll recall Dr. Yonkers.

1 Good. Thank you. Is there anything else before
2 we call it a night?

3 MR. ENGLISH: Thank the court reporters.

4 JUDGE CLIFTON: Thank the court
5 reporters. Yes, I do. That concludes our
6 record at 5:55. We'll see you at 8:00 in the
7 morning.

8 - - -

9 PROCEEDINGS ADJOURNED AT 5:55 p.m.

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C E R T I F I C A T E

I, S. Diane Farrell, RMR, CRR, the undersigned, a court reporter for the State of Ohio, do hereby certify that at the time and place stated herein, I recorded in stenotypy and thereafter had transcribed into typewriting under my supervision the foregoing pages, and that the foregoing is a true, complete and accurate report of my said stenotype notes.

S. Diane Farrell, RMR, CRR