

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

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

Public Hearing

Before: Administrative Law Judge  
 Jill S. Clifton

Date: May 18, 2009

Time: Commencing at 8:17a.m.

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

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

## 1 APPEARANCES:

2 On behalf of United States Department  
3 of Agriculture:4 Brian T. Hill, Esq.  
5 of  
6 United States Department of Agriculture  
7 Office of the General Counsel  
8 Marketing Division  
9 Room 2343 South Building  
10 Washington, D.C. 20250  
11 Phone: (202) 720-5707  
12

13 On behalf of AIDA:

14 Alfred William Ricciardi, Esq.  
15 of  
16 Aiken, Schenk, Hawkins & Ricciardi  
17 Suite 100  
18 4742 North 24th Street  
19 Phoenix, Arizona 85016  
20 Phone: (602) 248-820321 Ryan K. Miltner, Esq.  
22 of  
23 The Miltner Law Firm, LLC  
24 527 North Westminster Street  
25 P.O. Box 477  
Waynesfield, Ohio 45896  
Phone: (419) 568-2920

1 APPEARANCES CONT'D:  
2

3 On behalf of AIDA:

4 Nancy S. Bryson, Esq.  
5 of  
6 Holland & Hart  
7 Suite 900  
8 975 F Street N.W.  
9 Washington, DC 20004  
10 Phone: (202) 654-692111 On behalf of the Florida Milk Producers  
12 Federation and Dairy Farmers of America, Inc.13 Marvin Beshore, Esq.  
14 of  
15 Law Office of Martin Beshore  
16 130 State Street  
17 P.O. Box 946  
18 Harrisburg, Pennsylvania 17108  
19 Phone: (717) 236-0781

20 On behalf of Aurora Dairy Corporation:

21 Livia M. Kiser, Esq.  
22 of  
23 Latham & Watkins, LLP  
24 Sears Tower, Suite 5800  
25 233 South Wacker Drive  
Chicago, Illinois  
Phone: (312) 876-7700

## 1 APPEARANCES CONT'D:

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

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

16 On behalf of Mallories Dairy, et al.:

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

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

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

Also present:

Kate Fisher, USDA  
Jack Rower, USDA  
Clifford M. Carman, USDA  
Gino Tosi, USDA

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1                   JUDGE CLIFTON:  Let's go back on record.  
2                   We're back on record.  It's 8:17 on Monday,  
3                   May 18, 2009.  This is day 11 of the milk  
4                   rulemaking hearing.  I'd like the transcript to  
5                   be Volume XI and the pages to be numbered in  
6                   sequence to those of Friday.

7                   We started a bit later this morning  
8                   because there are a number of exhibits being  
9                   distributed, including some documents from our  
10                  first witness who will either be -- I'm going to  
11                  let you all help decide -- Mr. Taylor, the owner  
12                  of Snowville Creamery, S-n-o-w-v-i-l-l-e;  
13                  Mr. Carman, with regard to all the pending  
14                  items, all things statistical.

15                  So I -- and then we have a number of  
16                  people who would like to testify later in the  
17                  day, but are not available right this minute.  
18                  So I would like some guidance and I would like  
19                  to start with Mr. Ricciardi, if you have any  
20                  preference as to whether we begin with  
21                  Mr. Taylor or begin with Mr. Carman.

22                  MR. RICCIARDI:  Your Honor, I know that  
23                  Mr. Yale has some limited time today, and I know  
24                  that he's got documents he wants to put in, and  
25                  wants to examine Mr. Carman on that.  I also

1 note that Mr. Vetne is not here with us yet. I  
2 know he has questions. My thought would be that  
3 Mr. Yale goes ahead and deals with his documents  
4 and any questions he has with Mr. Carman. And  
5 then when he concludes, since Mr. Carman will  
6 remain with us, that we go ahead and start with  
7 Mr. Taylor from Snowville Creamery next.

8 Also, Judge, I have told you, and I  
9 mentioned to my brethren that Mr. Arkema,  
10 A-r-k-e-m-a, Paul Arkema, of Country Dairy  
11 intends to come in and to testify at some point  
12 later today.

13 JUDGE CLIFTON: All right. You will  
14 notice that Mr. Ben Carroll is not here right  
15 this minute; Mr. Woody Carroll informed me that  
16 he had some plane delay. But we expect he will  
17 be here by 9:00, and his testimony today will be  
18 brief, maybe ten minutes on direct, something of  
19 that nature. Mr. Yale.

20 MR. YALE: I'm going to be helpful and I  
21 can be flexible. My only requirement is that --  
22 I will be storming out of the room at 4:00. No,  
23 I will have to leave at about 4:00, reluctantly,  
24 I might add, because I'd like to complete. It's  
25 been so long, I hate to come so close and not be



1 here. Maybe we'll be done, but I doubt it.

2 I do have some questions of Mr. Carman.  
3 They're not that long. It's a situation where  
4 he started in -- early in the afternoon, and I  
5 had the first shot. I don't have to be here  
6 through all of this cross, so -- I mean,  
7 whatever it takes to get the witnesses up and  
8 moving quickly into -- you know, that's fine.

9 And then I will at some point make a  
10 statement of counsel in terms of our positions  
11 because we're going to withdraw one of our  
12 proposals.

13 JUDGE CLIFTON: You want to give us a  
14 hint?

15 MR. YALE: Well, I think -- I was going  
16 to get my notes to do it. If we're on the  
17 record if everybody is ready, I can tell you  
18 what our position is.

19 This is on behalf of Select Milk  
20 Producers and Continental Dairy Products. The  
21 Proposals 1 and 2, Select and Continental are in  
22 support of those to this caveat.

23 The support exists if, and only if,  
24 provisions are provided that those existing  
25 producer-handlers at 3 million pounds or less

1 are left untouched by these regulations. Now,  
2 that can happen in one of three ways.

3 One, it can be in the form of the 26  
4 Proposal, which is the proposal of National  
5 Milk. There are some difficulties with that  
6 that we do not accept, because it doesn't leave  
7 them as they are. It actually changes them. It  
8 removes the 150,000 pounds per month that they  
9 can purchase in some orders. It gets the  
10 Department involved in retail of the labeling,  
11 which we oppose, although we understand and  
12 really concur with some of the concerns they  
13 have that are behind that, but we don't -- first  
14 of all, we don't think that will be an answer;  
15 and because one of the provisions deals with  
16 Nature's Dairy.

17 Let the record reflect that the owners of  
18 Nature's Dairy also own a farm in Texas which is  
19 a member of Select Milk Producers. And under  
20 the provision as defined by National Milk, they  
21 would lose their exemption that they have held  
22 for many, many years. And we're opposed to  
23 that. So if it's just simply to take the  
24 existing PDs under their existing rules and  
25 grandfather them in as is, we support that.

1 MR. BESHORE: Your Honor.

2 JUDGE CLIFTON: It has gone on longer  
3 than I thought. I just thought you were going  
4 to tell me a number.

5 MR. YALE: I am. I was leading up to it.  
6 I can make it short. I'll tell you quick.

7 JUDGE CLIFTON: That's okay. I'll save  
8 it until you're testifying because you're going  
9 to testify.

10 MR. YALE: I'm just going to tell -- all  
11 right. We can make a statement. I mean, we  
12 could make an oral argument. I just was letting  
13 them know what our position was.

14 JUDGE CLIFTON: Let me hear from  
15 Mr. Beshore.

16 MR. YALE: All right.

17 MR. BESHORE: I thought I missed the  
18 premise, because I didn't understand what I was  
19 hearing. It sounded like a post-hearing brief.  
20 And --

21 JUDGE CLIFTON: I just thought he was  
22 going to tell me which number he was  
23 withdrawing. But it's more complicated than  
24 that, so I'll defer that to a later time.

25 MR. YALE: I'll get there. We're

1           withdrawing Proposal 20, which is a grandfather  
2           clause. I was just trying to lead up to it to  
3           give the context. We're all warming up from the  
4           week. I apologize.

5           It's basically the same as 17. We stand  
6           by our proposal, I think it's 21, which would be  
7           an alternative that meets the goals. And I just  
8           wanted you to know why we were at where we were  
9           at. I wasn't trying to testify. I was just  
10          trying to give a context so people knew where we  
11          stood.

12          JUDGE CLIFTON: I know. It just went on  
13          too long.

14          MR. YALE: Well, that was -- we were  
15          about to the end. So we're done.

16          JUDGE CLIFTON: Okay. Thank you. All  
17          right. It sounds to me like Mr. Vetne is here  
18          now. And it sounds to me like our best first  
19          witness would be Mr. Carman. Mr. Carman, are  
20          you available to proceed at this time?

21          THE WITNESS: Good morning.

22          JUDGE CLIFTON: Good morning, Mr. Carman.  
23          Mr. Carman, you remain sworn. You're still  
24          under oath, and I would like you again to state  
25          and spell your name.

1 THE WITNESS: Clifford, C-l-i-f-f-o-r-d.  
2 Carman, C-a-r-m-a-n.

3 JUDGE CLIFTON: And I'd like you to begin  
4 by explaining to us why we have exhibits in  
5 addition to those that you had identified when  
6 you were last on the witness stand.

7 THE WITNESS: This morning I've brought  
8 with me copies of corrected Exhibit 6, corrected  
9 Exhibit 7, and corrected Exhibit 12. We found  
10 computational errors in those three exhibits and  
11 are today correcting the tables. Copies are  
12 available on the back. Each of the titles say,  
13 Corrected, in them.

14 JUDGE CLIFTON: All right. Mr. Carman,  
15 you had previously put some documents on the  
16 back table in a different day. Were those  
17 these, or were those other documents?

18 THE WITNESS: These are corrected  
19 documents from the first day of the hearing, and  
20 on Monday, when we put in Exhibit 5 through 20.  
21 So these are corrections to that first day  
22 exhibits.

23 On Friday of that same first week, I was  
24 back on the stand and we put in a number of  
25 exhibits that dealt with requests that we had

1 had from parties participating in this hearing.

2 JUDGE CLIFTON: Okay. What --

3 THE WITNESS: I believe those were  
4 Exhibit 52 through 70. Yes.

5 JUDGE CLIFTON: Have you distributed any  
6 corrections to any documents, 52 through 70?

7 THE WITNESS: No, I have not.

8 JUDGE CLIFTON: Okay. Now, Mr. Carman,  
9 I'm looking at the three documents that I've  
10 been given for today and I noticed that only one  
11 of them has four rectangles that are shaded.  
12 It's entitled Annual Route Sales by Handler  
13 Type, hyphen, Eight Orders, asterisk, Corrected.  
14 I'm going to label that document Exhibit 6-A so  
15 that it will appear in the record in the same  
16 place as 6, and people will be able to notice it  
17 right away. So that we'll call Exhibit 6-A.

18 (Exhibit 6-A was marked for  
19 identification.)

20 MR. BESHORE: Which one is that, your  
21 Honor?

22 JUDGE CLIFTON: It's noticeable because  
23 of the little shaded rectangles. Did you get  
24 three documents today, Mr. Woody Carroll?

25 MR. WOODY CARROLL: Yes, I got a bunch of

1           them today.

2                   MR. VETNE:   Your Honor?

3                   JUDGE CLIFTON:  Yes, Mr. Vetne.

4                   MR. VETNE:   John Vetne representing  
5 Mallorie's and others.  If that's a one-page  
6 document that you're referring to --

7                   JUDGE CLIFTON:  It is.

8                   MR. VETNE:   -- it's not on the back  
9 table, and I haven't seen it.

10                  MR. ENGLISH:  It was handed out last  
11 week, and you've got one.

12                  MR. VETNE:   Oh, I got one from last week?  
13 I thought they were on the table.

14                  JUDGE CLIFTON:  Good.  Thank you.  All  
15 right.  Then I'm going to look at Exhibit 7.  7  
16 is entitled, Information on Producer-Handlers,  
17 Operating in Federal Milk Order Marketing Areas,  
18 Selected Time Periods, and I'm going to mark the  
19 one that has that same title but then says,  
20 Corrected, as Exhibit 7-A.

21                               (Exhibit 7-A was marked for  
22 identification.)

23                  And then I'm looking at Exhibit 12, which  
24 is entitled, Sales of Fluid Milk Products in  
25 Federal Milk Order Marketing Areas, by

1           Producer-Handler, by Order, 2000-2008. And then  
2           there's a footnote one, and I'm going to mark as  
3           Exhibit 12-A the document that has that same  
4           title with added to the title, hyphen,  
5           Corrected.

6                     (Exhibit 12-A was marked for  
7                     identification.)

8           JUDGE CLIFTON: Mr. Carman, are the  
9           computational errors that you referred to  
10          something that a student of the original  
11          documents would have discovered, or is it  
12          something other than just math?

13          THE WITNESS: Our individual Market  
14          Administrator offices looked at the data  
15          contained on Exhibit 12 and they saw some  
16          numbers that didn't seem to make sense to them,  
17          and so we started looking and found the  
18          computational errors, which carried over into  
19          Exhibit 7.

20          Exhibit 7-A -- pardon me, Exhibit 6-A is  
21          a change in the beginning point of the data. In  
22          order to be consistent, we changed from what was  
23          originally done in one of our regional offices  
24          to the database in Washington. It changes  
25          almost all the cells on 6-A, but the actual



1           underlying trends as displayed in the percentage  
2           of sales changes and the percent changes from  
3           year-to-year are almost identical.

4           JUDGE CLIFTON: Good. Is there anything  
5           else you want to say about these three exhibits  
6           we're discussing that have the A?

7           THE WITNESS: No, your Honor.

8           JUDGE CLIFTON: Is there any objection to  
9           the admission into evidence of Exhibit 6-A, 7-A  
10          and 12-A? There is none. Those are admitted  
11          into evidence.

12          All right. Mr. Carman, is there anything  
13          else you would like to say before  
14          cross-examination begins?

15          THE WITNESS: No, your Honor.

16          JUDGE CLIFTON: The witness is available  
17          for cross-examination. Who would like to begin  
18          cross-examining Mr. Carman? Mr. Yale, thank  
19          you.

20  
21                                   CLIFFORD CARMAN  
22          of lawful age, having been previously sworn, was  
23          examined and testified as follows:

24                                   CROSS-EXAMINATION

25          BY MR. YALE:

1 Q. Benjamin F. Yale, Continental Dairy  
2 Products and Select Milk. Good morning.

3 A. Good morning, Ben.

4 Q. I want to -- I was so busy keeping notes  
5 from what was just happening I didn't have a chance to  
6 pull out the exhibits I wanted to go over. It has to do  
7 with the retail sales where you had compared costs to --

8 A. Exhibit 53.

9 Q. That's exactly the one. By the way, I  
10 appreciate the work. I tried to do this myself and  
11 it's -- even with spreadsheets, it's consuming.

12 As I understand it, you've done -- first  
13 of all, you're making two comparisons, and that is a  
14 co-op class price to a retail price and the Federal  
15 Order Class I price to a retail price, is that correct?

16 A. Yes, that's what's in those tables.

17 Q. Now, the Class I co-op price, how did  
18 you -- how was that derived?

19 A. It's from the website or monthly  
20 publication in Dairy Market News. I'm not sure which  
21 week it occurs, but it's our -- the co-op announced  
22 over-order Class I price. There's no verification that  
23 that price was actually paid. It's just the announced  
24 price and there may well have been credits or additional  
25 charges that occurred in that series.

1           Q.       Now, in that series there also is listed  
2 the -- and for some of the marketing areas, a -- kind of  
3 a weighted average of over-order paid on Class I, is  
4 there not?

5           A.       In another set of data using some of that  
6 same beginning information, we look at -- or the Market  
7 Administrative offices look at the range of over-order  
8 payments that were paid on Class I milk and calculates  
9 some weighted averages.

10                    It's another set of tables that I did not  
11 bring with me, but they're available on our website.

12           Q.       Well, that was my next question. This  
13 information used is available on the website?

14           A.       The co-op announced over-order Class I  
15 price is available on the website.

16           Q.       First of all, it's in the -- whatever  
17 week of the month would be under Dairy Market News?

18           A.       It would appear in Dairy Market News once  
19 a month.

20           Q.       And then also there is a summary of the  
21 table and the data that is accumulated by Dairy Programs  
22 that is part of the website under the industry  
23 marketing?

24           A.       Yes, there's a series of historical  
25 tables that would show each month for a number of years,

1 and then the current year that would show year-to-date  
2 monthly numbers.

3 MR. YALE: Your Honor, we would request  
4 that official notice be given of the data in  
5 Dairy Market News that covers the co-op  
6 announced prices and over-order premiums and the  
7 tables that Mr. Carman just described that are  
8 available on the Dairy Programs' website. And  
9 it can be gotten to through the various menu  
10 options on the website.

11 THE WITNESS: Yes, it's under the Federal  
12 Milk Marketing Order statistics subset on that  
13 website.

14 MR. BESHORE: What period of time?

15 MR. YALE: I would say, like he has, 2007  
16 through today.

17 MR. BESHORE: Thank you.

18 JUDGE CLIFTON: Official notice is hereby  
19 taken, as requested.

20 BY MR. YALE:

21 Q. Now, this price is as at a 3.5 percent  
22 butterfat, right?

23 A. Yes, the co-op announced Class I price is  
24 at 3.5 as is the Class I Federal price.

25 Q. And the Class I price is the announced

1 price at Boston which would have been whatever the  
2 Class I mover is for that month plus 3.25, right?

3 A. Yes, that would be the first table of  
4 Exhibit 53. The following tables would be for different  
5 cities with appropriate differentials for the case of  
6 those cities in this packet, the changes in those  
7 differentials on May 1 of '08.

8 Q. Okay. Now, does this include the PEP  
9 fee, the 20 cents per gallon or per hundredweight that's  
10 charged to Class I handlers?

11 A. No, I have not included that in this.

12 Q. And that would be an obligation whether  
13 it's under the co-op Class I price or the Federal Order  
14 Class I price?

15 A. For plants selling more than 3 million  
16 pounds per month, yes, that would be correct.

17 Q. And that's the reason you didn't include  
18 for PDs under 3 million, whether regulated or not, they  
19 would not have that obligation?

20 A. That's correct.

21 Q. Okay. And then I guess, really, the  
22 third column is just the math of the first subtracted by  
23 the third -- or the -- the first -- second selected from  
24 the first column?

25 A. Yes.

1 Q. And then the next one is the retail price  
2 collected by MAs, and I think we already have testimony  
3 on how that is collected, that once a month the MAs go  
4 into specific stores and collect prices, right?

5 A. Yes, specific stores of specific outlets.

6 Q. Okay. And they're consistent  
7 month-to-month?

8 A. Yes.

9 Q. So the next price is a -- I take it you  
10 divided the co-op Class I price by -- you tell me what  
11 number.

12 A. 8.6 --

13 Q. Okay.

14 A. -- pound per -- per gallon of milk.

15 Q. And you do the same thing for the Federal  
16 Order Class I?

17 A. Yes.

18 Q. And the over-order then -- per gallon  
19 then was the difference between the Class I -- co-op  
20 Class I gallon price and the Federal Class I price,  
21 right?

22 A. Actually, what I did is I took the  
23 over-order and divided by the price per -- the weight  
24 per gallon.

25 Q. Okay. There may be a penny here or

1 there, but it should be the same?

2 A. Yes, should be.

3 Q. And the next two are just subtractions of  
4 the over-order price minus the retail price and Federal  
5 Order price per gallon minus the retail?

6 A. The retail price minus --

7 Q. The Federal price co-op --

8 A. Yes --

9 Q. And then the retail --

10 JUDGE CLIFTON: Mr. Yale, stop talking  
11 over him.

12 MR. YALE: I'm sorry.

13 JUDGE CLIFTON: I know you are trying to  
14 speed it along, but let him finish.

15 Q. So the retail price less comp is just a  
16 simple subtraction, right?

17 A. Yes.

18 Q. And the second one is a simple  
19 subtraction?

20 A. Yes.

21 Q. Your Honor, going back to the retail  
22 price collected, we can do this one of several ways --  
23 well, let me ask this. That information is on the  
24 website, is that correct?

25 A. Yeah, and in a similar location. It's

1 listed under prices under the Federal Order stats  
2 section, as is in the over-order, now that you remind  
3 me.

4 MR. YALE: Your Honor, I would ask -- I  
5 can ask for official notice. It happens in  
6 preparation for this hearing, I burned some  
7 trees and actually made copies of some of those  
8 documents, which I have made available. So I'm  
9 game, either way. We can take official notice,  
10 which might be the easiest way, or if people  
11 would like to have exhibits they can identify,  
12 that's available. And that would be for retail,  
13 for whole milk, retail reduced fat, organic  
14 whole milk, and organic reduced fat.

15 JUDGE CLIFTON: Now, my thought is that  
16 it's very helpful when we have hard copies of  
17 things we're taking official notice of.

18 Now, it's up to you whether you want them  
19 to show on the website with all those other  
20 exhibits that will be on the website.

21 MR. YALE: I would say, your Honor, let's  
22 do official notice. And if somebody wants to  
23 pick up one of these and use this to  
24 cross-examine a witness specifically, then  
25 they've got a copy and they can make it an



1 exhibit it at that time.

2 JUDGE CLIFTON: Excellent. Excellent.

3 MR. YALE: I thought it might go faster.

4 JUDGE CLIFTON: Is there more than that I  
5 need to take official notice of right now?

6 MR. YALE: No, just the official notice  
7 of the retail prices for whole milk, reduced  
8 fat, organic whole milk and reduced fat from  
9 2007 to present, if available. The organic is  
10 only available from the middle of 2008.

11 BY MR. YALE:

12 Q. So whatever is available, from the middle  
13 of -- is that right, it's just from 2008, Mr. Carman?

14 A. Yes.

15 MR. YALE: So I would ask for official  
16 notice, as published on the USDA Dairy Programs  
17 website.

18 JUDGE CLIFTON: Official notice is taken  
19 as you have requested, Mr. Yale.

20 BY MR. YALE:

21 Q. Now, I have one final question on this,  
22 Mr. Carman. Whole milk is traditionally at  
23 3.25 percent, right?

24 A. The Food and Drug standards of identity  
25 minimum is 3.25, so I would hope that it's just a little

1 better than 3.25.

2 Q. Would it disappoint you if the variance  
3 allows it to go below that in some plants, maximize  
4 that --

5 A. I understand that 2 percent is at 1.95 on  
6 average. And so 3.25 would probably be 3.2 is -- I'm  
7 not sure all of the variance that's allowed.

8 Q. But 3.25 is -- is the standard and that's  
9 fair. But the other butterfat was listed at 3.5, right?

10 A. Yes. The comparisons I've made here was  
11 at 3.25.

12 Q. And which, in fact, shows a slightly  
13 higher spread per gallon than what would be the case if  
14 you were to adjust to a 3.25?

15 A. Marginally higher, yes.

16 Q. Marginally higher. Now, so we get into  
17 the record if somebody wants to do the math, the formula  
18 to do -- to compute the Federal Order Class I price at  
19 3. -- first of all, that -- there is a skim price, skim  
20 mover that's announced, right?

21 A. Yes. The advanced skim and advanced  
22 butterfat prices are announced.

23 Q. So to do 3.25, one would take 3.25 times  
24 the advance butterfat price, plus its differential?

25 A. Yes.

1 Q. And then you would add that to .9675,  
2 times the skim price with its location differential and  
3 that -- those two would give you a 3.25 butterfat price  
4 at the Federal Order minimum, right?

5 A. Correct.

6 Q. And then you could divide by 8.6 and do  
7 the same math you've done, if you wanted to?

8 A. Yes.

9 Q. Okay.

10 A. 3.25 fat milk is going to weigh slightly  
11 less than 3.5 milk and so --

12 Q. Okay.

13 A. -- you may have to adjust slightly for  
14 the differences in weight, but --

15 Q. There is -- I think it's already an  
16 exhibit, the containers; you have this fluid containers  
17 that you put out every two years. And what's the  
18 exhibit number on that?

19 A. Exhibit 22.

20 Q. And it has conversion values in there as  
21 well, right?

22 A. Yes.

23 MR. YALE: All right. Your Honor, that's  
24 it. Oh, no, there is one other thing. Just I  
25 would like to do it while I'm here because it's

1 related.

2 I had asked him questions about some  
3 series on cost of production. ERS publishes and  
4 makes available on the website cost of  
5 production by various states. And if you'll  
6 hold on a second, I'll give you the list of  
7 states. I'll find the -- yes.

8 A. Pennsylvania.

9 BY MR. YALE:

10 Q. Okay. You have those? Okay.

11 A. New York, New Mexico, California, Iowa,  
12 Vermont, Ohio, Michigan, Missouri, Illinois, Wisconsin,  
13 Washington, Virginia, Georgia, Texas.

14 Q. Yes.

15 A. I believe those are the ones that the  
16 Economic Research Service are currently publishing on a  
17 monthly basis.

18 Q. And I have, again, made copies of 2007,  
19 2008, and what they had for 2009 off that website.  
20 Again, I ask to have -- take --

21 MR. YALE: Can you go out of the room,  
22 please? It's kind of difficult to --

23 JUDGE CLIFTON: I know he's checking on  
24 the location of a lawyer we need here.

25 MR. WOODY CARROLL: It was wrapping up.

1 So I was checking out where he was.

2 JUDGE CLIFTON: Okay, Mr. Yale.

3 MR. YALE: The Economic Research Service  
4 of the USDA has these available on their  
5 website. And you have -- you have to specify.  
6 They're not -- you know, you have to put in the  
7 state and then they'll give a spreadsheet that  
8 shows, depending on how long they've been  
9 keeping them in recent years, it's available.

10 And all we're asking for is official  
11 notice of 2007 through -- through whatever is  
12 current on the website. And again, I have  
13 copies if somebody wants to use it as an  
14 exhibit. Otherwise, we just want official  
15 notice.

16 JUDGE CLIFTON: When you made copies,  
17 Mr. Yale, did you make copies of every one of  
18 the states that Mr. Carman said?

19 MR. YALE: Yes, I did. Yes, I did. And  
20 I did it for the three years if it was available  
21 for three years. There's a few they have just  
22 begun; they only did it in 2008. But the ones  
23 that were available in 2006, '7, I did that.

24 JUDGE CLIFTON: Okay. Mr. English, did  
25 you have a comment on this?

1 MR. ENGLISH: Yes, your Honor. Good  
2 morning. Charles English. As between official  
3 notice and exhibit, I certainly prefer notice  
4 rather than exhibit.

5 But I do want to comment before you take  
6 official notice that ERS, of course, is a  
7 different agency within USDA than the agency who  
8 the witness has testified, AMS.

9 There have been prior proceedings, one I  
10 can think of in particular 19 years ago now, in  
11 which a witness from ERS was on the stand for a  
12 half, three-quarters of the day explaining the  
13 vagaries, if you would, of how the data is  
14 collected and what it is and what it isn't. And  
15 we don't have that witness.

16 And I just wanted to note that as a  
17 result, we don't really know what goes in all of  
18 this. I'm not going to object to official  
19 notice, except the caveat of this statement that  
20 the data hasn't been subject to any kind of  
21 cross-examination unlike the data about the  
22 retail data about how it's collected. At least  
23 we know what its limitations are, such as it's  
24 three stores, you know, things like that; such  
25 as the fact that the co-op prices are not the

1 actual prices, they're announced prices, so we  
2 can all take that into consideration.

3 We don't have the opportunity to take  
4 into consideration what limitations there may  
5 be.

6 MR. YALE: Or may not be.

7 MR. ENGLISH: I have my views about ERS  
8 data.

9 JUDGE CLIFTON: Thank you, Mr. English.  
10 Mr. Yale, any response to that?

11 MR. YALE: Yeah, the response is that --  
12 at the ERS website, there is an explanation of  
13 what they do and its limitations. And it would  
14 be -- whatever official notice would be subject  
15 to that. And that's also something if one  
16 refers to in a brief, the Department is going to  
17 take into the weight, you know, it is used.

18 The problem is we've had a lot of  
19 petitions at this hearing about transfer costs  
20 and costs of production, and there's no data in  
21 the record at all to speak to that. This is the  
22 best data we have. I kind of confer with Dr. --  
23 I can concur to a degree with Mr. English that  
24 maybe we'd like better data. But it's the -- it  
25 is the -- it is the only official data that is

1 out there. And it does give some indication, a  
2 relatively accurate one, of what it is.

3 And it's also information that was used  
4 by Dr. Knoblauch. Some of this information was  
5 used by Dr. Knoblauch in presentation as well.

6 JUDGE CLIFTON: When you say we have no  
7 data in the record, you mean the individual  
8 anecdotal examples --

9 MR. YALE: Right.

10 JUDGE CLIFTON: -- are not part of a  
11 systemwide study?

12 MR. YALE: You're absolutely right. I  
13 mischaracterized that; is that we do not have a  
14 systematic, monthly, over a period of time, data  
15 of specific regions of the country. We have  
16 anecdotes by some farmers, by some processors  
17 and others that the Department can use equally  
18 as well. It's just some additional information  
19 that we may want to use in our briefs to argue  
20 certain points and that's why the information is  
21 available and the Department can use it as the  
22 weight that they wish to use it.

23 JUDGE CLIFTON: Mr. English.

24 MR. ENGLISH: The only comment is  
25 Mr. Yale also used the phrase, transfer price,



1 with respect to this. And I think there's been  
2 quit a bit of dispute about transfer price, and  
3 I don't think this goes to transfer price except  
4 to the extent people have said what they think  
5 transfer price is. I don't think this data goes  
6 to that. That's what you said.

7 MR. YALE: I understand. Some people  
8 might use it as a basis. I'm just trying to get  
9 something in the record other than anecdote.  
10 This is a pretty important hearing. I think  
11 evidence of facts are pretty important.

12 So that's all I have. And I have no  
13 other questions of Mr. Carman -- and by the way,  
14 I do want to thank you on behalf of my clients  
15 and everybody else for the tremendous amount of  
16 work the Department did in taking some lawyer  
17 questions and converting them into numbers that  
18 we could read and understand and surprise us.  
19 So thank you very much.

20 JUDGE CLIFTON: Mr. Yale, before you  
21 leave, the data that you are asking me to take  
22 official notice of that ERS publishes on a  
23 monthly basis is cost of production data?

24 MR. YALE: It is, yes, cost of production  
25 data for dairy in selected states.

1 JUDGE CLIFTON: Thank you. Official  
2 notice is so taken.

3 MR. YALE: And here's the title they use  
4 is, Monthly Dairy Costs of Production Per  
5 Hundredweight of Milk Sold.

6 JUDGE CLIFTON: Thank you.

7 MR. YALE: Thank you, your Honor.

8 JUDGE CLIFTON: All right. Mr. Carroll  
9 has arrived. I'd like to take a five-minute  
10 stretch break while he coordinates with the  
11 other Mr. Carroll. And then we'll go back on  
12 record for further cross-examination of  
13 Mr. Carman, so please be ready to go at 8:58.

14 (A recess was taken from 8:53 to 9:02.)

15 JUDGE CLIFTON: All right. Let's go back  
16 on record. We're back on record at 9:02.  
17 Mr. Carman is back in the witness stand.

18 When we complete Mr. Carman's  
19 cross-examination, I recommend that we have as  
20 our next witness, Dr. Carolyn Orr, O-r-r, who is  
21 present.

22 All right. Who next will cross-examine  
23 Mr. Carman? Mr. Vetne, thank you. You may come  
24 forward.

25 CROSS-EXAMINATION

1 BY MR. VETNE:

2 Q. Good morning, Mr. Carman. John Vetne,  
3 representing Mallorie's, et al. I just have some  
4 questions. And I wasn't here Friday, ten days -- nine  
5 days ago when the data requests were marked, so I don't  
6 necessarily have the numbers. But I'm going through --  
7 I'm going through the response to request for data  
8 submitted by John Vetne. Do you have a copy of that?

9 A. Yes, I have it.

10 Q. All right.

11 A. I have that cover sheet marked as  
12 Exhibit 62.

13 Q. Oh, good. The -- item number 1, as to  
14 utilization by producer-handlers to which certain  
15 restrictions apply, to your -- to your knowledge, is the  
16 information for producer-handler Class II, III, and IV  
17 use reflected in Dairy Programs' response -- does that  
18 capture all Class II, III and IV use in the same way  
19 that Class II, III, and IV use of fully regulated  
20 handlers is captured?

21 A. My understanding that it is. However,  
22 subject to the fact that it may not have been audited to  
23 the extent that a fully regulated plant would have  
24 received an audit.

25 Q. So you're confident, at least in the

1 reports by producer-handlers that you receive, you have  
2 the total representations at least by producer-handlers  
3 about their Class II, III and IV use?

4 A. Yes.

5 Q. And plus you have some audit, but as I  
6 understand it, not as intense as with fully regulated  
7 handlers?

8 A. Yes.

9 Q. Okay. And with respect to item 4, which  
10 essentially asked for producer-handler volumes of other  
11 source milk, is this data similarly of a comparable  
12 nature as data regularly collected and occasionally  
13 reported for other source milk from fully regulated  
14 handlers?

15 A. Yes, to the limit -- understanding that  
16 for at least three orders, producer-handlers can receive  
17 no other source milk.

18 Q. Okay. Other source milk in the Federal  
19 Order System includes some dairy products, correct?

20 A. Correct.

21 Q. Would dairy product receipts by  
22 producer-handlers such as skim powder -- would that be  
23 collected and reported, included in that exhibit as --  
24 in the same manner as that type of receipt for fully  
25 regulated handlers?

1           A.       Again, depending upon the accuracy of the  
2 receipts and utilization report of the producer-handler.

3           Q.       Okay. Again, it is included in the  
4 reports by producer-handlers to Dairy Programs' offices  
5 but not necessarily audited with the same intensity as  
6 fully regulated handlers?

7           A.       Yes.

8           Q.       With respect to item number 6 which asks  
9 for information about producer-handler contributions to  
10 the producer-handler settlement fund for the -- and the  
11 question included direct and indirect. When a  
12 producer-handler buys supplemental milk from a pool  
13 source, and that includes a contribution, no data was  
14 provided. Data is all restricted. Can you explain why  
15 all the data should be restricted when some orders with  
16 multiple producer-handlers allow for some purchase of  
17 pooled milk?

18          A.       I don't have a direct response to that.

19          Q.       Item 7 asks for some information on  
20 packaged end use by producer-handlers and your response  
21 was, it's not included in any survey done by Dairy  
22 Programs?

23          A.       Correct.

24          Q.       Basically you have no idea -- well, you  
25 don't have any statistical idea?

1           A.       Yes.

2           Q.       And finally, the last item asked for some  
3 information on -- on issue correspondence, statistical  
4 correspondence concerning producer-handlers from  
5 February '06, which was the date of the Pacific  
6 Northwest final decision or final rule to the current  
7 time, other than that published on the website. And the  
8 response was that the request will not be satisfied.  
9 Publicly available correspondence is posted on the  
10 website.

11                   My question here is, did Dairy Programs  
12 look for any additional information or correspondence  
13 meeting the request?

14           A.       At the time we responded to your request,  
15 I was not aware. However, we have since received an  
16 FOIA request, and we are examining, as are the eight  
17 marketing administrative offices, examining the records  
18 concerning correspondence.

19           Q.       Okay. So I'm correct that you did not  
20 ask the marketing area offices to examine their records  
21 to see if any documents met the subject matter of  
22 request number 8?

23           A.       At that time we responded to you, that's  
24 correct.

25           Q.       Okay. And Dairy Programs, Washington,

1 did not look within its files for correspondence that  
2 would respond to the question either, is that correct?

3 A. I did not ask the deputy administrator or  
4 the chief economist's office or the market information  
5 branch for whether they had any correspondence that  
6 would fit this or not. I just looked at my involvement  
7 and whether I had anything.

8 Q. Okay. So when you use -- in response to  
9 this request, when you use the term, publicly available  
10 correspondence, you used it in a narrower sense than --  
11 than the Freedom of Information Act uses information  
12 that's available to the public on request?

13 A. I believe that would be a proper  
14 interpretation.

15 Q. Based on preliminary examination, are you  
16 aware of whether there are any additional documents that  
17 are available that are not posted on the website?

18 A. I have not had any correspondence with  
19 the deputy administrator or chief economist office or  
20 the market information branch concerning whether they  
21 have anything or not.

22 MR. VETNE: Thank you. That's all.

23 Thank you.

24 JUDGE CLIFTON: Thank you, Mr. Vetne.

25 Who next? Mr. English. Thank you.

## CROSS-EXAMINATION

1  
2 BY MR. ENGLISH:

3 Q. Good morning. Charles English. Good  
4 morning, Mr. Carman.

5 A. Good morning, Chip.

6 Q. I just have a couple of follow-up  
7 questions from questions from Mr. Vetne and then I just  
8 want to ask some questions about Exhibit 12 and Exhibit  
9 12-A.

10 Mr. Vetne asked you some questions with  
11 respect to the restricted data set on the purchases of  
12 milk. Do you remember that, those questions?

13 A. Yes.

14 Q. And you indicated that you don't have a  
15 direct answer, correct?

16 A. Correct.

17 Q. Now, since Friday, May 8th, other than  
18 last Monday, when you were not here, you've been at the  
19 proceeding every single day, correct?

20 A. Correct.

21 Q. Has anybody approached you as a  
22 procedural matter to ask that question before asking the  
23 question here today?

24 A. No.

25 Q. So no one has tried to say, gee, why is



1 that data restricted to give you a chance to look at it?

2 A. No one has asked me that question.

3 Q. Turning to Exhibits 12 and 12-A. And I  
4 tried to do the math and I succeeded mostly, I believe.  
5 First, as I see it, the changes between Exhibit 12 and  
6 12-A are entirely in the years 2005, 2006, 2007 and  
7 2008, is that correct?

8 A. Correct.

9 Q. I noted -- I tried to do some math, and  
10 it looked to me that for 2005, the difference -- the  
11 difference appears to be counted entirely by the  
12 Southwest Order, Order 126, is that correct?

13 A. That's correct.

14 Q. Okay. So no other data, whether  
15 restricted or unrestricted, was changed in 2005, and  
16 looking to do the math, the difference between order --  
17 Exhibit 12, Southwest of 89.2 and Southwest for 12-A of  
18 68.2 accounts for the difference between 744.5 and 723.5  
19 in the two exhibits, correct?

20 A. I believe that's correct. There may have  
21 been some minor changes on some restricted data.

22 Q. If there were minor changes, and my math  
23 is right, they just all washed out then, correct?

24 A. Correct.

25 Q. But if there were any changes, they were

1 minor?

2 A. Yes.

3 Q. Now, I'm going to leave aside 2006 for a  
4 moment because it didn't quite work the same way.

5 Let me turn to 2007. For 2007, I did the  
6 math, and it appears to me that the changes -- first of  
7 all, I just looked at the columns with numbers and the  
8 changes are in the Mideast and the Southwest Orders, is  
9 that correct?

10 A. Correct.

11 Q. And I did the math, and 100 percent of  
12 the difference between Exhibit 12 of 610.2, and 12-A of  
13 528.9 is accounted for in the difference of Mideast and  
14 Southwest, is that correct?

15 A. Again, there may have been minor changes  
16 in the restricted data sets.

17 Q. And if so, they washed out, correct?

18 A. That would -- you could --

19 Q. You could lead that conclusion?

20 A. You could lead -- be brought to that  
21 conclusion just looking at the gross numbers.

22 Q. And similarly, for 2008, it looks to me  
23 that the only number, set -- leaving aside restricted  
24 data, that changed is Mideast and Southwest, is that  
25 correct?

1 A. Correct.

2 Q. And again, math is math. It looks to me  
3 that the entire difference between Exhibit 12, 654.3 and  
4 Exhibit 12-A, 578.3, is accounted for leaving aside  
5 minor differences in restricted by Mideast and  
6 Southwest, correct?

7 A. Correct.

8 Q. Let's talk about 2006 for a moment.  
9 2006, Southwest is different again, correct --

10 A. Correct.

11 Q. -- between the two exhibits. And in this  
12 case, Mideast is restricted data, correct?

13 A. Correct.

14 Q. Would it be fair to say that most --  
15 given the fact that for '07 and '08, the Southwest -- I  
16 mean, that's -- the Mideast had the change -- I'm not  
17 trying to get some restricted data. I think the fact  
18 that it's different doesn't matter because they're all  
19 restricted, but you can tell me. But it is a fair  
20 characterization that most of the difference is in the  
21 Mideast again?

22 A. Yes.

23 Q. If there are other differences in other  
24 restricted data, they're very modest?

25 A. Yes.

1 MR. ENGLISH: That's all the questions I  
2 have. Thank you, sir.

3 JUDGE CLIFTON: Thank you, Mr. English.  
4 Who next will cross-examine Mr. Carman?  
5 Mr. Beshore, thank you.

6 MR. BESHORE: Thank you, your Honor.

7 CROSS-EXAMINATION

8 BY MR. BESHORE:

9 Q. Marvin Beshore for National Milk  
10 Producers Federation and Dairy Farmers of America. Good  
11 morning, Mr. Carman. I just have a couple of question  
12 areas, two areas.

13 Going to first Exhibit 63, the response  
14 to -- the response to John Vetne, one of the  
15 responses --

16 A. Yeah, Exhibit 63, and it would also be  
17 the same as Exhibit 55 and 61.

18 Q. Okay. If you look at just, for example,  
19 63, page 8, which is the Central Order, and you said  
20 that's -- it's the same exhibit as --

21 A. 55 and 61.

22 Q. Okay. Looking at the exhibit for the  
23 Central Order, producer-handler utilization by class, my  
24 question is, the producer-handlers that went into the  
25 universe to create these aggregate figures -- and I

1       assume it was done consistently in each order, is that  
2       correct?

3               A.       I would assume that until proven  
4       otherwise.  However, I would point out that the Central  
5       Order has only got annual numbers.  And some of the  
6       other numbers have monthly numbers.

7               Q.       Well, what I'm specifically trying to  
8       determine, if you can -- if you can help me, is, you  
9       know, just get directly to the point.  There's been  
10       testimony from a producer-handler in -- that's located  
11       physically in the Central Order, but which has -- in  
12       effect two of them, which have indicated they have sales  
13       in other orders as well as the Central Order?

14              A.       Yes, there has been that testimony.

15              Q.       Okay.  Now, are those producer-handlers  
16       included in this aggregate data for Central Order  
17       producer-handler utilization because of their geographic  
18       location?

19              A.       Those two producer-handlers are  
20       responsible to report to the Central Order, which then  
21       passes sales data onto the other orders.

22              Q.       Okay.  But would their aggregate sales be  
23       included in this aggregate for Order 32 or only their  
24       in area Order 32 sales be included in that data?

25              A.       I believe it's their aggregate.

1           Q.       And the same thing would apply, then,  
2       assuming the data is consistent, if there's a  
3       producer-handler -- and we've had some testimony that a  
4       producer-handler in Order 33 that possibly has some  
5       sales over in Order 30. All its sales would be shown --  
6       if that's the case, all its sales would be -- since it  
7       reports to Order 33, all its sales would show in the  
8       Order 33 data?

9           A.       That's my understanding of the way that  
10       we asked them to report that.

11          Q.       Okay. Now, let's go then to Exhibit 59,  
12       and I don't know if this has -- has another -- another  
13       exhibit number or not. But this is an exhibit that was  
14       in response to data submitted by -- in response to the  
15       request for data submitted by AIDA.

16                    And I'm looking at 59 -- well, yeah, what  
17       I have had marked as page 4 of Exhibit 59, which is  
18       Estimated Impact of Depooled Milk Due to Price  
19       Relationships - Federal Order 32 - Central Marketing  
20       Area. Can you --

21          A.       For which area again?

22          Q.       Central Order 32. Okay?

23          A.       Okay.

24          Q.       Now, as I -- as I look at that exhibit  
25       and look in the column to the right marked, Difference,

1 I notice just going down, there are both positive and  
2 negative numbers?

3 A. Yes.

4 Q. And, for instance, if you go to May or  
5 June of 2008, am I correctly -- take May 1st. I'm  
6 correctly reading this data to indicate in May 2008  
7 there was a net positive difference of 32 cents on the  
8 PPD estimated impact of depooled milk?

9 A. Yes.

10 Q. Okay. And in June 2008 there was a net  
11 positive difference of 41 cents per hundredweight in the  
12 PPD because of net -- or estimated impact of depooled  
13 milk?

14 A. Yes.

15 Q. And so the other numbers, April of 2008,  
16 there was a net impact of negative 2 cents per  
17 hundredweight on the PPD there?

18 A. Yes. The one thing I'd point out, Marv,  
19 is that this is comparing a large negative to a smaller  
20 negative. So instead of being minus -- for example, for  
21 June of -- excuse me, May of '08, instead of being minus  
22 \$1.10, if the milk had pooled, the differential would  
23 have been minus 78 cents. So it's a smaller negative.  
24 It would have added -- if the milk had pooled, it would  
25 have improved the pool value to producers.

1 Q. Right. And the negative -- the PPD would  
2 still have been negative because of the class price  
3 relationships?

4 A. Yes.

5 Q. Okay. But the pool would have -- if the  
6 milk had not been depooled, the pool would have actually  
7 been less valuable, the greater negative PPD?

8 A. If it had not been pooled?

9 Q. Had not been depooled.

10 A. You got too many negatives going on.

11 Q. Okay. Well, we'll assume the signs are  
12 correct here. And I just wanted to make sure that I  
13 understood them to be both positive and negative in  
14 that -- in the difference column.

15 A. Yes.

16 MR. BESHORE: Thank you. That's all I  
17 have.

18 JUDGE CLIFTON: Thank you, Mr. Beshore.

19 Who next will cross-examine Mr. Carman?

20 Mr. Ricciardi. Thank you.

21 MR. RICCIARDI: Al Ricciardi, AIDA.

22 CROSS-EXAMINATION

23 BY MR. RICCIARDI:

24 Q. Good morning, Mr. Carman.

25 A. Good morning, Al.



1           Q.       I'm going to ask you questions about  
2 Exhibits 7, 7-A, and 12 and 12-A, so you can have those  
3 in front of you. But I want to ask a more general  
4 question first before we specifically deal with those  
5 exhibits.

6                    As I understand it, the reason for  
7 corrected Exhibit 6-A, 7-A, and 12-A is basically  
8 computational errors?

9           A.       Yes.

10          Q.       Okay. And who discovered those?

11          A.       Some of our marketing administrative  
12 offices.

13          Q.       Okay. Let's talk then specifically for a  
14 moment about Exhibit 7 and 7-A. I too have compared  
15 them, and tell me where I'm wrong on this one,  
16 Mr. Carman. Hopefully you'll say not, but I see changes  
17 that -- three changes on Exhibit 7-A from 7 in the  
18 column, sales by producer-handlers, which went from  
19 56,883 on Exhibit 7 to 51,227 on Exhibit 7-A, correct?

20          A.       Correct.

21          Q.       In percentage of sales by  
22 producer-handlers, which was reduced from 1.5 to 1.3  
23 from Exhibit 7 to 7-A, correct?

24          A.       Correct.

25          Q.       And in the average sales for

1 producer-handlers in the time period for December of  
2 2008, which went from 1,422,080 on Exhibit 7 to  
3 1,280,686 in 7-A, correct?

4 A. Correct.

5 Q. Have I captured all the changes on those  
6 documents?

7 A. Yes.

8 Q. And explain to me then the percentage of  
9 sales by producer-handler column on Exhibit 7-A, which  
10 is now 1.3 percent. What does that mean exactly?  
11 1.3 percent of what?

12 A. Producer-handler share of the Class I  
13 sales.

14 Q. In all Federal Milk Marketing Orders?

15 A. Yes.

16 Q. Then producer-handlers throughout the  
17 Federal Milk Marketing Order system have, according to  
18 the data on Exhibit 7-A, for the period through December  
19 of 2008, 1.3 percent of the sales, and the remaining  
20 sales would go to whom?

21 A. Regulated handlers, partially regulated  
22 handlers, and exempt plants.

23 Q. Okay. Did you break that out further,  
24 meaning the percentage by exempt plants, regulated  
25 handlers and partially regulated handlers?

1           A.       Exhibit 7 -- 6. Pardon me, Exhibit 6 and  
2 what is now 6-A for eight of the ten orders.

3           Q.       Okay. So we would be able to read those  
4 two together, 6-A and now 7-A, to be able to get those  
5 breakdowns, correct?

6           A.       Understanding that 7-A is all ten orders.  
7 6-A is just eight orders.

8           Q.       And the reason for the distinction?

9           A.       The publication of all ten orders as  
10 contained in 6-A, given the fact that the Pacific  
11 Northwest releases their data for their order, would  
12 result in the ability to get to the Arizona order, which  
13 is restricted data.

14          Q.       Okay. And it's restricted data because  
15 there are -- there is only one current producer-handler  
16 in that order?

17          A.       Limited numbers of producer-handlers and  
18 limited number of exempt plants.

19          Q.       Okay. Then let's -- let's flip to  
20 Exhibit 12 and 12-A. And, again, this is -- at the risk  
21 of actually having lawyers do numbers, I looked at 12-A  
22 and compared it to 12. And for 2008 the changes -- the  
23 overall change obviously is a reduction from 654.3 to  
24 578.3. And I found those reductions by looking in the  
25 Mideast and the Arizona-Las Vegas columns. Am I

1 correct?

2 A. The Mideast and the Southwest Orders.  
3 There may have been some other minor changes in the  
4 restricted.

5 Q. Well, as I look at Exhibit 12 and Exhibit  
6 12-A for the Southwest -- hang on a second. I  
7 apologize. You're correct, it is the Southwest and the  
8 Mideast.

9 MR. RICCIARDI: Okay. I don't have any  
10 further questions. Thanks.

11 JUDGE CLIFTON: Thank you, Mr. Ricciardi.  
12 Who next will cross-examine Mr. Carman?  
13 Mr. Miltner, thank you.

14 CROSS-EXAMINATION

15 BY MR. MILTNER:

16 Q. Good morning, Mr. Carman.

17 A. Good morning.

18 Q. Can we turn back to Exhibit 59, page 4,  
19 please? That's the chart you were discussing with  
20 Mr. Beshore on the Central Order.

21 A. Yes, I have it.

22 Q. Okay. The first question is related to  
23 the column labeled, Difference. That column, as I see,  
24 is calculated by subtracting the column labeled,  
25 Actually Pool Value, from the column labeled, Adjusted

1 Pool Value, is that right?

2 A. Yes, given that the adjusted numbers may  
3 have been rounded to the nearest penny.

4 Q. Okay. We'll settle for that. And in  
5 every one of those instances, the difference reflects  
6 additional money in the pool if the volumes that were  
7 depooled were included? Is that -- am I reading that  
8 correctly?

9 A. No, not in every instance. For example,  
10 for the first -- no.

11 JUDGE CLIFTON: Excuse me. Let's go off  
12 record just a moment.

13 (Off the record.)

14 JUDGE CLIFTON: Thank you. Let's go back  
15 on record. All right. We're back on record.  
16 Mr. Miltner, proceed, please.

17 BY MR. MILTNER:

18 Q. Okay. I think Mr. Carman was answering.  
19 The question was, for every difference that reflects a  
20 positive addition to the producer settlement fund, is  
21 that right?

22 A. In a gross sense, yes. More milk would  
23 increase the total pool value. When you get over and  
24 start looking at the PPDs or the blend prices, whether  
25 they go up or down is a function of what milk pooled at

1 what class.

2 Q. Right. Now, let me ask specifically  
3 about a couple of months that Mr. Beshore had talked  
4 about, specifically the May 2008 and June 2008.

5 In those months under the Actual PPD and  
6 the Adjusted PPD, there was a negative PPD under both  
7 scenarios, correct?

8 A. Correct.

9 Q. But under the Adjusted PPD, it was a  
10 lower negative PPD?

11 A. How about a smaller magnitude?

12 Q. Thank you. The magnitude was smaller?

13 A. Yes.

14 Q. Still negative, but under the Adjusted  
15 PPD, the uniform price increased 32 cents for May and 41  
16 cents for June, is that -- am I reading all that  
17 correctly?

18 A. To the extent that uniform means the  
19 Class III price plus the PPD.

20 Q. That's how I'm using that term.

21 A. Yes.

22 Q. Okay. And the same would be true for  
23 December 2008. For instance, the uniform price defined  
24 as Class III plus the PPD would have increased by 35  
25 cents for that month, as it was adjusted?

1 A. Yes.

2 Q. Okay. Do you happen to have Exhibit 21  
3 with you, Mr. Carman?

4 A. Uh-huh. No, I don't -- that's your --

5 Q. That's our series of requests.

6 A. Yes. The Judge has shared her copy with  
7 me.

8 MR. MILTNER: Thank you, Judge.

9 BY MR. MILTNER:

10 Q. I apologize. I've got to grab my notes.  
11 I think maybe the easiest way to go through this will be  
12 to start with what's the third page of Exhibit 21, which  
13 is the letter for Dairy Programs dated April 16th. And  
14 I want to try to match up the request with either an  
15 exhibit that's in the record or determine that -- that  
16 the information wasn't available.

17 For the first three requests, asking for  
18 the impact of Proposals 1, 2 and then 1 and 2, that's  
19 contained in Exhibit 56, is that -- is that right? If  
20 you need to look at Exhibit 56, that's fine.

21 A. Yes, I believe it is contained in  
22 Exhibit 56.

23 Q. And for some marketing areas, the data  
24 was restricted?

25 A. Yes.

1 Q. And for Orders 6 and 7, there was no  
2 impact, is that right?

3 A. For a limited number of months in Order  
4 7, there was a producer-handler. There were none in  
5 Order 6.

6 Q. And the same with the exempt plants  
7 between 150 -- 150,000 pounds and 450,000 pounds?

8 A. Yes.

9 Q. If you would turn to the next page of  
10 Exhibit 21. For items 4, 5, 6, and 7 we asked for  
11 information on certain statistics for the same time  
12 period as what's in exhibit -- is that Exhibit 8, I  
13 believe; pardon me, Exhibit 7 -- as to what's numbered  
14 as request 5 and request 6, the Class I volumes handled  
15 by the average fluid handler for those time periods, and  
16 the total volumes handled by the average manufacturing  
17 non Class I volumes for that same time period. That  
18 data is not available from Dairy Programs, is that  
19 right?

20 A. Correct.

21 Q. And the average volume of milk marketed  
22 per producer for the same time period was not provided  
23 in a -- in a separate exhibit but some -- some of it can  
24 be calculated from other information in the record, is  
25 that right?



1           A.       Correct. We show a total number of  
2 producers in marketings for members and nonmembers under  
3 a request that, I believe, Mr. Vetne received data for.

4           Q.       Okay. And that data goes back to, I  
5 think, the year 2000 in most marketing areas?

6           A.       Yes. I believe from January 2000 to  
7 March of 2009, by month. Maybe it was December of 2008.

8           Q.       Okay. So the data is not directly  
9 available or not able to be calculated from what's in  
10 the record for October 1959, October 1964, October 1969,  
11 October 1974, October 1980, October 1987, and  
12 October 1992?

13          A.       For the data that's in the record, that's  
14 correct. There is available the measures of growth data  
15 table that's published annually in the Market News and  
16 is available on the Dairy Programs website that would  
17 contain some of that data, but not all of it.

18          Q.       Okay. So one could go through Dairy  
19 Market News, either the weekly reports or the annual  
20 information and find that data or something that's  
21 relatively close?

22          A.       For the average size producer, yes, you  
23 could get something. Probably the easiest would be get  
24 the average growth off of the measures of growth table.

25          Q.       Looking at what is request 7, that

1 information is provided on Exhibit 13, right?

2 A. Yes.

3 Q. For requests 8 through 12, we asked for  
4 the definition of disorderly marketing and  
5 characteristics of disorderly marketing conditions that  
6 the USDA would employ or utilize in determining whether  
7 it's appropriate to eliminate the producer-handler  
8 definition. And you declined to provide that  
9 information because it wasn't statistical data, is that  
10 right?

11 A. Yes, I declined.

12 Q. And when we asked in exhibit -- in  
13 request 9 for the specific economic factors and  
14 statistical measures USDA would utilize to determine  
15 whether producer-handlers are causing or contributing to  
16 disorderly marketing, and also asked for the threshold  
17 impact of producer-handler activity on the uniform  
18 price, that information was -- was not provided?

19 A. It's beyond the scope of the statistical  
20 data.

21 Q. And then because no response was provided  
22 to 8 and 9, there was no additional description provided  
23 in response to exhibit -- or request 10, is that right?

24 A. Yes.

25 Q. And the same response for requests 11

1 and 12?

2 A. Beyond the scope of providing the  
3 statistical data.

4 Q. May I ask who made the determination that  
5 only statistical data?

6 A. Excuse me?

7 Q. May I ask who made the determination that  
8 only statistical data requests would be responded to?

9 A. It wasn't me.

10 Q. Do you know who made that determination?

11 A. No, I don't.

12 Q. Do you know how that decision was  
13 reached?

14 A. I was not in that meeting.

15 Q. And then who -- how did you gain the  
16 knowledge to respond to my questions about requests 8  
17 through 12 if you were not privy to that information?

18 A. It's contained in an e-mail that was sent  
19 to you. Item 2, items 8 through 12 are beyond the  
20 statistical requests.

21 Q. So your information and your responses  
22 are based on what's already contained in Exhibit 21?

23 A. Yes.

24 Q. If you could turn to the next page of  
25 Exhibit 21. For request 13, that information was

1 responded to in what's been marked as Exhibit 59, is  
2 that right?

3 A. Yes.

4 Q. In response to request 14, you had --  
5 well, let me withdraw that question.

6 In response to questions in requests 15  
7 and 16, Dairy Programs didn't have sufficient  
8 information to respond to those requests, is that right?

9 A. Yes. And item 14 should have been  
10 answered the same way in our -- in the cover memo as  
11 contained in Exhibit 21.

12 Q. And in response to the request for  
13 information on mailbox prices, you stated that that  
14 information was not available by marketing area but was  
15 available by milk shed. Where can that information by  
16 milk shed be found?

17 A. It is on Dairy Programs' website, again,  
18 under prices of the Federal Milk Marketing Order  
19 statistics section.

20 Q. If we could turn to the letter dated  
21 April 22nd in Exhibit 21.

22 A. Yes, I have it.

23 Q. Okay. Request number 1 in this letter  
24 was responded to in Exhibit 70, is that -- is that  
25 right? That's the same as Mr. Vetne's request for

1 members and nonmembers in each marketing area.

2 A. It turns out that you -- you are the  
3 requester in that, and Mr. Vetne.

4 Q. I think maybe we both requested it.

5 A. Okay.

6 Q. In response to request number 2, Dairy  
7 Programs does not collect that information or break it  
8 down by category, and instead you referred us directly  
9 to the ERS data, is that right?

10 A. Yes.

11 Q. In response to request number 3, that's  
12 in Exhibit 68?

13 A. Yes.

14 Q. And in response to requests 4, 5 and 6,  
15 Dairy Programs -- you stated that Dairy Programs does  
16 not have such data, is that right?

17 A. Yes.

18 Q. Now, does Dairy Programs administer the  
19 milk promotion program for producers?

20 A. A section of Dairy Programs has oversight  
21 for the National Milk Market -- National Promotion and  
22 Research Program, as well as oversight for the fluid  
23 promotion programs.

24 Q. And as part of administering that  
25 program, do you contract with companies to track demand

1 and supply for -- of milk in general and specific  
2 submarkets for milk?

3 A. My knowledge of our oversight and what's  
4 happening there is very limited. What I'm involved in  
5 is reviewing sections of the annual report to Congress.  
6 I don't get involved in the contracting at all.

7 Q. Our request number 6 requested data on  
8 the effective economic value to consumers of the  
9 competition as reflected in retail prices for fluid  
10 milk. Did anybody in Dairy Programs check with the  
11 national promotion program to see if any of the research  
12 that's done through that program was responsive to that  
13 request?

14 A. I'm not aware of anyone checking on that  
15 issue.

16 Q. Moving on to request number 7, we  
17 requested information on the administrative assessments  
18 on producer-handlers at various levels in each order,  
19 and each -- each order did it a little bit differently  
20 but for the most part that was provided in Exhibit 60,  
21 is that right?

22 A. Yes. That would be -- in the case of  
23 producer-handlers, they would have to pay an admin fee,  
24 but they -- their marketing service fees would be exempt  
25 for own-farm milk. In the case of the Southeast and

1       Appalachian Order, they would be responsible for  
2       supplemental funding for -- or collection of money for  
3       supplemental milk to the marketing areas.

4               Q.       And moving on to request number 8, we  
5       requested the number of distributing plants and supply  
6       plants for the system and for each marketing area for  
7       certain years and broken down into categories. And some  
8       of that information has been provided in Exhibits 14  
9       through 20, is that -- is that right?

10              A.       Yes.

11              Q.       Okay. And, of course, I see now a  
12       typographical error in that request here, 1005. Of  
13       course it should be 2005.

14              A.       That's the way I read it, although we  
15       didn't make any attempt to collect 1005 data.

16              Q.       I appreciate that you didn't make that  
17       effort. For other years before 2005, for 1950, 1960,  
18       1970, 1980, 1990 and 2000, is the information that we  
19       requested available through any of the Dairy Market News  
20       data or annual statistics or other information available  
21       through Dairy Programs?

22              A.       Some of the data on the number of  
23       handlers would be available, and the measures of growth  
24       for December of selected years. I would point out  
25       handlers may or may not be different than the number of

1 distributing plants and the number of supply plants.

2 Q. And that information would not have  
3 information -- would not -- the information available  
4 would not provide a breakdown by size, is that correct?

5 A. That's correct.

6 Q. Okay.

7 A. I would point out that there is a  
8 five-year retention policy for records. So to go back  
9 more than five years, in a number of cases the data  
10 would no longer be available.

11 Q. And that's just a policy of Dairy  
12 Programs for all MA offices and the Washington office?

13 A. Yes.

14 Q. If you could turn to the letter dated  
15 April 24th. Request number 1 in that letter, I believe,  
16 is responded to in Exhibit 61, is that right? If you  
17 could check it and make sure I'm right on that point.

18 A. Yes. I would also point out it's the  
19 same as Exhibit 55 and 63.

20 Q. And we had requested for each year since  
21 1999 each of the -- the different offices, each of the  
22 different marketing areas provided different years based  
23 on, I assume -- is that based on what data they had  
24 available to them?

25 A. Yes. That's that five-year retention



1 period. Some of that is showing up there.

2 Q. The Northeast Order, I understand, only  
3 goes to 2008. Did they not have data before 2008?

4 A. Some of it was related to the pool  
5 calculations. We were only doing 15 months, so they  
6 only put those 15 months of data in.

7 Q. Okay. Moving on to the second and last  
8 request, we requested that the exhibits at this hearing  
9 include those -- anything that was posted to the USDA  
10 website for this hearing. To your knowledge, has every  
11 piece of statistical information that's been published  
12 to the website been now admitted as an exhibit in the  
13 hearing?

14 A. I believe so.

15 MR. MILTNER: Your Honor, to the extent  
16 it hasn't, we would request official notice of  
17 any document that hasn't been actually admitted  
18 as an exhibit.

19 JUDGE CLIFTON: Now, any document what?  
20 Referenced by your questions just now?

21 MR. MILTNER: I'm sorry. Any document  
22 that Dairy Programs has posted to its Web page  
23 for this hearing under requests for statistical  
24 information. Mr. Carman believes that they've  
25 all been admitted as exhibits. But to the

1 extent that they haven't, we would ask that  
2 official notice be taken.

3 JUDGE CLIFTON: Any response?

4 Mr. English.

5 MR. ENGLISH: I know we've all been here  
6 a long time, but I would hope that all parties  
7 could do their own -- look at that and instead  
8 of asking for a universe to be admitted that has  
9 not been identified, tell us what they are.

10 I'm afraid that this is now leaving  
11 ourselves coming and going from where we were at  
12 the beginning of the hearing about providing  
13 copies of documents to be officially noticed,  
14 things that may or may not be in the website.

15 I confess, I haven't looked every day to  
16 see what's up there. I can't remember now  
17 whether we've objected to some things that have  
18 been turned down.

19 I think if there are specific documents  
20 that Mr. Miltner knows have not been admitted  
21 that he wants to take judicial notice of, you  
22 know, we need to have him tell us what they are.  
23 Otherwise, I think the rule that you set down at  
24 the beginning of the proceeding to say we should  
25 have copies has been defeated.

1 JUDGE CLIFTON: Mr. Beshore.

2 MR. BESHORE: I join Mr. English's  
3 comments. I can't take notice -- shouldn't take  
4 notice of what we do not know.

5 MR. MILTNER: I think that -- that  
6 mischaracterizes the request. We -- the website  
7 has been referenced throughout this hearing.  
8 We're not asking to take notice of, you know, a  
9 universe of data that no one is aware of.

10 To the extent that we can look at the  
11 website and see if anything is out there, we can  
12 do so. But we're talking about USDA compiled  
13 statistical data directly relevant to this  
14 hearing posted for the specific purpose of this  
15 hearing. And there should be no issue as to  
16 whether it's noticeable. I mean, it's  
17 government-prepared data. There's no basis for  
18 excluding it from official notice. But -- I  
19 notice Mr. Vetne is coming.

20 JUDGE CLIFTON: What I like is the  
21 refining that we've done on the documents that  
22 we have paid some attention to. We lose all  
23 that if we go backwards and don't keep them in  
24 the context of how they've been evaluated here.  
25 Mr. Vetne.

1 MR. VETNE: I have a suggestion.  
2 Official notice of data, things that have been  
3 published, things that have been posted is not  
4 limited temporally to this hearing.

5 If there are things that are posted on  
6 the website, which we have overlooked, parties  
7 may identify that in their brief and request  
8 official notice. After the transcript's been  
9 certified, the Department frequently takes  
10 official notice of things that happen between  
11 the date of the hearing and the date of  
12 decision. And I think that practice can be used  
13 here if we've overlooked something.

14 JUDGE CLIFTON: I think so, too. For  
15 example, if we have data through March of 2009  
16 and something important happens before you  
17 submit your -- let's say not the first round of  
18 briefs. The first round of briefs is so there  
19 can be a recommendation to the Secretary; the  
20 second round of briefs, so you can comment on  
21 the recommendation. Who knows what might happen  
22 in the interim? And I think you could always  
23 ask the Secretary to take official notice of  
24 something.

25 MR. MILTNER: And then -- I appreciate

1           those comments, your Honor. And we will also  
2           look at the website to see if we have  
3           identified -- we can identify anything that  
4           hasn't been admitted to the record.

5                    JUDGE CLIFTON: Thank you. Mr. Beshore.

6                    MR. BESHORE: I just one to make one  
7           other quick point. I think there's a big  
8           difference between routine statistical  
9           publications for which the industry knows what  
10          they are, they've been going on for years,  
11          versus custom prepared materials by request,  
12          which is why Mr. Carman is here to testify. And  
13          I think there's a big difference in those. One  
14          can be noticed routinely, nobody has any  
15          problem. The other requires the witness's, you  
16          know, explanation.

17                   JUDGE CLIFTON: I agree with you. That's  
18          helpful. Mr. Miltner.

19                   MR. MILTNER: I have no other questions  
20          of Mr. Carman.

21                   JUDGE CLIFTON: All right. Thank you,  
22          Mr. Miltner. Any other cross-examination?  
23          Mr. Vetne.

24                   MR. VETNE: Your Honor, I took some notes  
25          during other cross-examination and have some

1 questions.

2 RECROSS-EXAMINATION

3 BY MR. VETNE:

4 Q. Mr. Carman, look at what's been marked as  
5 corrected Exhibit 6-A. Under the column, Partially  
6 Regulated, that would be a number requesting millions of  
7 pounds for the -- for the year, correct?

8 A. Yeah. For 2008, it's  
9 482.9 million pounds. And in the original exhibit it's  
10 437.6 million pounds in 6-A.

11 Q. In 6-A, I have 437.6.

12 A. 437.6.

13 Q. That's the corrected amount?

14 A. That's the corrected table.

15 Q. Okay. I just want to make sure I  
16 understand what's included in there.

17 There are a couple of plants, at least --  
18 actually, more than a couple of plants -- but at least  
19 two plants in Nevada that by -- by the wisdom of  
20 Congress are excluded from any milk order.

21 To the extent that those plants have  
22 distribution, say, in the Southwest Order -- I think  
23 we've heard some testimony that one of them did during  
24 one of these years. Is that included under the  
25 partially regulated volume?

1           A.       Nevada is not in any marketing area  
2 anymore. When the Western Order was terminated April 1  
3 of 2004, there were handlers that were fully regulated  
4 by the Western Order that became either fully regulated  
5 or partially regulated. Not all handlers that were in  
6 the Western Order fill those two categories. Some of  
7 them remained completely unregulated under the Federal  
8 Order System.

9           Q.       My question related to Nevada in  
10 particular. And the question is, since Congress  
11 exempted Nevada from the Federal Order System, are those  
12 pounds coming from the Nevada plants included in those  
13 eight orders included under the partially regulated  
14 pounds?

15          A.       Let me try again, John. Handlers are  
16 regulated either fully or partially depending on where  
17 their route sales occur, not based on their location.

18          Q.       I understand.

19          A.       So a handler in Nevada that has sales  
20 into Arizona would be either fully or partially  
21 regulated depending on how -- what extent those sales  
22 are of their total.

23          Q.       Okay. I'm still not sure I have the  
24 answer to my question.

25                    I'll give you a more concrete

1 hypothetical. Let's assume that a handler in Nevada  
2 packages milk in pints and those pints are distributed  
3 to schools in and around El Paso. Would that volume be  
4 included in any of the columns here for Class I sales?

5 A. Yes.

6 Q. Okay. And what column would those sales  
7 be included under?

8 A. If the handler was partially regulated,  
9 it would be under the partially regulated column. If  
10 the handler was fully regulated, it would be under the  
11 fully regulated column.

12 Q. Okay. So all distribution in the eight  
13 marketing areas from any source of Class I packaged  
14 products is included in Exhibit 6-A?

15 A. Yes.

16 Q. Okay. Mr. Miltner asked you some  
17 questions about -- about promotion program. Are you not  
18 aware that the milk promotion program -- first of all,  
19 it's also called MilkPEP, is that correct?

20 A. Yes.

21 Q. Are you not aware that the MilkPEP  
22 program has for many years contracted with ACNielsen to  
23 provide scanned -- fairly comprehensive scanned retail  
24 price information?

25 A. I'm aware of that. I believe it's



1 restricted to those who are contracted. For example, I  
2 do not have access to that data.

3 Q. Dairy Programs, however, as a supervising  
4 agency has access to that data, correct?

5 A. I'm employed by Dairy Programs. I don't  
6 have access.

7 Q. I know. You're in a different unit of --  
8 that would be accessible to the MilkPEP administrators?

9 A. I can't answer specifics on that  
10 contract. I do not know what -- how far that data is  
11 available into Dairy Programs.

12 Q. Okay. MilkPEP is run by -- by whom? Who  
13 is the administering party?

14 A. Who's the administering party? I do not  
15 know. I know we have oversight for their budgets and  
16 promotion activities. We approve or disapprove a  
17 specific promotion program if it's acceptable.

18 Q. Okay. Is not IDFA or one of its units  
19 involved in the administration of MilkPEP?

20 A. The fluid promotion program is  
21 administered by whoever it's administered. I don't  
22 know.

23 Q. You don't know. Okay. And it has a  
24 board, a nominated board, consisting of fluid  
25 processors, correct?

1 A. Correct.

2 Q. Okay. And excluded are plants of less  
3 than 3 million pounds, correct?

4 A. Plants of less than 3 million pounds do  
5 not pay the 20 cent promotion fee.

6 Q. Okay. Do you know whether the retail  
7 price information assembled and reported by  
8 ACNielsen through Milk PEP is available to the fluid  
9 processors that are members of the board?

10 A. I do not know.

11 Q. Okay. In response to requests for  
12 information about retail prices, is it correct to say  
13 that nobody in Dairy Programs sought to secure the  
14 retail price data produced for MilkPEP?

15 A. I did not.

16 Q. Is it correct to say that, as far as you  
17 know, nobody in Dairy Programs asked for that  
18 information?

19 A. I knew I wasn't -- it was not available  
20 to me, and I didn't ask.

21 Q. All right. And you're the only one who  
22 asked? Were you the conduit for all these requests?

23 A. I ended up being the pivotal point.

24 Q. Okay. So it's correct that you didn't  
25 ask and you're not aware of anyone else asking, is that

1 a fair statement?

2 A. That's a fair statement.

3 Q. And the Market Administrators  
4 additionally survey some retail prices, and that's  
5 reported and published?

6 A. Yeah. It's -- we collect from three --  
7 or two outlets depending on the type of milk that we're  
8 collecting for. It's more useful for trend analysis  
9 than specific retail levels of prices.

10 Q. Okay. Are you aware of whether anybody  
11 has observed that the retail price information gathered  
12 by the Marketing Administrators is at variance with that  
13 gathered by ACNielsen for MilkPEP?

14 A. Or with BLS, Bureau of Labor Statistics.

15 Q. Yes, that's another source.

16 A. Yes.

17 Q. Are you aware that anybody has commented  
18 or observed that the Marketing Administrator data is at  
19 variance, first of all, with MilkPEP data?

20 A. I have not compared them because I don't  
21 have access to the Nielsen data.

22 Q. My question was not whether you compared  
23 them, but whether anybody has observed and commented to  
24 Dairy Programs, to your knowledge, that the data is  
25 inconsistent?

1           A.       I have -- I do not have that knowledge.

2           Q.       Okay. Mr. Beshore asked you some  
3 questions about producer-handler milk usage for the --  
4 for the Central Order and for the Pacific Northwest. I  
5 think that's Exhibit 63, was it?

6           A.       61, 55, and 63. They're all the same, I  
7 believe.

8           Q.       Okay. Can you pull out the sheet that  
9 shows producer-handler utilization for the Pacific  
10 Northwest market, it's a one-page document, and for the  
11 Central Order, also a one-page document?

12                   MR. BESHORE: What exhibit number?

13                   MR. VETNE: I'm not sure. I wasn't here  
14 when these were marked.

15                   JUDGE CLIFTON: Which one do you want to  
16 go with, Mr. Carman?

17                   THE WITNESS: I have Exhibit 61 in front  
18 of me, and -- the Central Order and the -- and  
19 the producer-handler, the exempt plant for the  
20 Pacific Northwest and Arizona in front of me as  
21 part of Exhibit 61.

22                   MR. VETNE: Thank you.

23                   JUDGE CLIFTON: I may have written down  
24 the wrong numbers. But what you've told us  
25 before is that 61, 63 and 65 are the same, is

1           that correct?

2                   THE WITNESS: 61, 55 and 63.

3                   JUDGE CLIFTON: Thank you. Because I  
4           wrote 55 this time and then doubted it. 55.  
5           Thank you.

6 BY MR. VETNE:

7           Q.       Okay. Now, with respect to the Pacific  
8           Northwest market under the column Class I utilization by  
9           pounds, for 2008 there's a bit over 267 million pounds.  
10          Do you see that number?

11           A.       For 2008? 267,555,000.

12           Q.       Exactly.

13           A.       Yes.

14           Q.       Okay. Are you aware that this number of  
15          pounds of Class I use is the same number published by  
16          the Pacific Northwest Marketing Administrator in the  
17          February 2009 monthly report?

18           A.       I have not compared those two numbers,  
19          but I would assume that they are the same.

20                   MR. VETNE: Okay. Your Honor, do you  
21          happen to have Exhibit 82, Mr. Flanagan's  
22          testimony, accessible?

23                   JUDGE CLIFTON: Yes.

24 BY MR. VETNE:

25           Q.       Mr. Carman, I've handed you a copy of

1 Exhibit 82. The next to the last page is annual data on  
2 producer-handlers near the bottom of the page.

3 A. Yes. This looks to be a table that would  
4 be published by the market administrative office for the  
5 Arizona and Pacific Northwest orders.

6 Q. And Mr. Flanagan, when he testified,  
7 indicated that he had spoken with, I think Mr. Mycranz  
8 of the Pacific Northwest Order, and that the -- the  
9 volume information there is all of the Class I market  
10 volume for any producer-handler that has distribution,  
11 any distribution, within the Pacific Northwest. It is  
12 not the Class I volume of the five producer-handlers in  
13 that market?

14 A. I would believe that it's any  
15 producer-handler that had route sales.

16 Q. Okay. Based on that information, would  
17 you agree with me that there is considerable poundage  
18 duplication in the total volumes reported in Exhibit 61  
19 for the Central Order and the poundage reported in  
20 Exhibit 61 for the Pacific Northwest order?

21 A. There's seems to be.

22 MR. VETNE: Okay. That's it. Thank you  
23 very much. Can I give this back to the Judge?

24 THE WITNESS: Yes, please.

25 JUDGE CLIFTON: Thank you, Mr. Vetne.

1           Who else has questions for Mr. Carman?

2           Mr. English.

3                           REXCROSS-EXAMINATION

4   BY MR. ENGLISH:

5           Q.       Mr. Carman, do you have any estimate for  
6   how much time has been spent by the Department since the  
7   beginning of this hearing preparing data for response  
8   data requests?

9           A.       No, I do not have a direct estimate.  
10   It's been substantial. There have been two to three  
11   people in each market administrative office that have  
12   been involved in filling my requests and then a couple  
13   of people in headquarters that have been involved in  
14   assembling and comparing the data and seeing if we can  
15   eliminate duplication or -- or correct for what seems to  
16   be a different assumption from one office to another.

17          Q.       So two or three people in each of ten  
18   marketing areas?

19          A.       It would be eight.

20          Q.       Eight because --

21          A.       Eight offices because the Florida Order  
22   is administered in Atlanta, along with the Southwest --  
23   Southeast Order. And the Pacific Northwest and Arizona  
24   Order are administered in the Seattle office.

25          Q.       And then how many people in Dairy

1 Programs?

2 A. The Federal Order stats people -- I don't  
3 know, for Mr. Wetterau, whether he did all of the work  
4 himself or whether he assigned some of his staff to do  
5 that. I was involved along with other members of the  
6 order formulation staff also.

7 Q. And I have just a couple of questions. I  
8 don't want to get mired in things.

9 JUDGE CLIFTON: May I get the spelling of  
10 the gentleman you referred to, Mr. -- Mr. Rower?

11 MR. ROWER: W-e-t-t-a-r-a-u, I believe.  
12 E-r-a-u, excuse me.

13 JUDGE CLIFTON: W-e-t-t-e-r-a-u?

14 MR. ROWER: Yes.

15 JUDGE CLIFTON: Does that sound right to  
16 you, Mr. Carman?

17 THE WITNESS: Yes, that does sound right.

18 JUDGE CLIFTON: Thank you. Mr. English.

19 MR. ENGLISH: Thank you, your Honor.

20 BY MR. ENGLISH:

21 Q. I think you sort of had an answer. I'm  
22 not sure it didn't cover over a period of questions. To  
23 your knowledge, is ACNielsen very protective of the data  
24 they produce?

25 A. Yes.



1 Q. That ACNielsen, when it contracts with  
2 someone, inserts very strong confidentiality provisions,  
3 correct?

4 A. Correct.

5 Q. Now --

6 A. I've been on the fringe in two different  
7 organizations of USDA on that data and have never been  
8 able to look at it. When I worked in Dairy Programs of  
9 the Economic Research Service, there was Nielsen data  
10 available to the retail section of the ERS, but I  
11 couldn't see it.

12 And then in Dairy Programs, I don't see  
13 it when it -- when it's available, or it may not even be  
14 available to -- to the oversight function of Dairy  
15 Programs.

16 Q. And if you can't see it, what does that  
17 say, in your view, about whether or not USDA can publish  
18 it?

19 A. We wouldn't be able to publish it. I'm  
20 quite sure of that.

21 MR. ENGLISH: I have no further  
22 questions.

23 JUDGE CLIFTON: Thank you. Mr. Vetne.

24 MR. VETNE: Your Honor, I have a request  
25 for official notice at this time in response to

1           that last series of questions of the monthly and  
2           annual retail prices for fluid milk products  
3           reported by the California Department of Food  
4           and Agriculture on their website as reported to  
5           them by ACNielsen, and that is all identified on  
6           their website.

7                     JUDGE CLIFTON: Does it cover just the  
8           California milk?

9                     MR. VETNE: It just covers California  
10          milk.

11                    JUDGE CLIFTON: And they're not subject  
12          to any Federal Order?

13                    MR. VETNE: They're not subject to any  
14          Federal Order. However, it is not the price in  
15          California that -- that causes my request for  
16          official notice. It is the fact that the  
17          California Department of Food and Agriculture  
18          does, as USDA could, enter into a contract with  
19          ACNielsen that allows them to report that data.

20                    The representation has been made by cross  
21          that it can't be reported. The CDFA data  
22          publicly available by a government agency  
23          reports monthly the retail prices and gives its  
24          source as ACNielsen.

25                    JUDGE CLIFTON: I can understand why you

1           might like the Department to enter into such a  
2           contract in the future, but you don't have any  
3           information that there is such a contract now,  
4           do you?

5                   MR. VETNE: I don't know what that  
6           contract is, your Honor. But the record, based  
7           on this examination, suggests that USDA cannot  
8           report ACNielsen data. And I'm -- I'm  
9           representing to the court for this record and  
10          asking official notice of information that  
11          contradicts that series of questions.

12                   JUDGE CLIFTON: Thank you, Mr. Vetne.  
13          I'm not sure it contradicts. Mr. Yale.

14                   MR. YALE: Your Honor, I'm going to  
15          supplement Mr. Vetne's request and request that  
16          official notice be taken from the CDFA, the  
17          California Department of Food and Agriculture's  
18          website, U.S. retail average prices for whole,  
19          reduced fat, and skim milk as prepared for 52  
20          U.S. cities, source ACNielsen Scantrack reports  
21          on refrigerated milk, and it is available on  
22          their website. I just pulled it down myself.  
23          It includes cities such as Albany, Boston,  
24          Atlanta, Chicago, Cleveland, Dallas, all cities  
25          which were reported in Exhibit 53.

1 JUDGE CLIFTON: So it doesn't -- that  
2 particular website does not restrict itself to  
3 California milk?

4 MR. YALE: No. It is called the -- the  
5 website is -- can be found at -- I apologize to  
6 the court reporter as we give these numbers, but  
7 I think it's important --  
8 [http://www.cdfa.ca.gov/dairy/retail\\_prices\\_main.](http://www.cdfa.ca.gov/dairy/retail_prices_main.html)  
9 [html](http://www.cdfa.ca.gov/dairy/retail_prices_main.html). And under that is a menu, Nielsen retail  
10 pricing, U.S. average retail for whole, reduced  
11 fat, reduced, and skim milk and is downloaded in  
12 an Excel format. And that's what I just  
13 identified.

14 JUDGE CLIFTON: Is there any objection to  
15 my taking official notice to that data? There  
16 is none. I take official notice of it.

17 MR. VETNE: For what years?

18 MR. YALE: Let's see what they have.

19 JUDGE CLIFTON: Thank you, Mr. Vetne.  
20 That's helpful.

21 MR. YALE: What I am seeing here -- and  
22 I'm looking to see if the other -- the one sheet  
23 took us to -- let me see what they got. It's  
24 just -- right now it's December 2008,  
25 January 2009, and February 2009. I will see

1           what other months are available. I know they  
2           have it for the cities of California for,  
3           really, an extended period of time. But for  
4           these cities, I will see if there's any  
5           additional information. But for the moment,  
6           that's what shows up on the thing I just  
7           downloaded.

8                   JUDGE CLIFTON: So you are asking  
9           beginning of December of 2008?

10                   MR. YALE: Yes.

11                   JUDGE CLIFTON: Is that an annual figure  
12           or that's a monthly figure?

13                   MR. YALE: That was the monthly figure  
14           for those periods. And that may -- I will look  
15           to see if there's anything else archived.  
16           They're not as thorough as USDA sometimes in  
17           saving things.

18                   JUDGE CLIFTON: All right. Thank you  
19           Mr. Yale. Mr. Vetne.

20                   MR. VETNE: Let me supplement that. The  
21           data has been clearly identified so let me  
22           supplement the request for official notice of  
23           that same data set on the CDFA website to the  
24           extent available from 2000 forward.

25                   JUDGE CLIFTON: From 2000 forward, not

1 going back any earlier than 2000?

2 MR. VETNE: That's correct.

3 JUDGE CLIFTON: That's very helpful.

4 Thank you. I do take official notice as  
5 requested. All right. Any other questions for  
6 Mr. Carman? All right.

7 Mr. Carman, I stand in awe of the work  
8 that you and your coworkers accomplished for the  
9 purpose of this hearing. It would have seemed  
10 impossible to me. Thank you very much.

11 THE WITNESS: Thank you, your Honor.

12 JUDGE CLIFTON: All right. Let's take a  
13 20-minute break now and then we'll have  
14 Dr. Orr's testimony. Please be back and ready  
15 to go at 10:47.

16 (A recess was taken from 10:27 to 10:50.)

17 JUDGE CLIFTON: All right. We're back on  
18 record at 10:50. Dr. Orr, would you state and  
19 spell your name please? Oh, and that microphone  
20 will have to be quite close to you.

21 THE WITNESS: Is that acceptable?

22 JUDGE CLIFTON: That's great.

23 THE WITNESS: My name is Dr. Carolyn Orr,  
24 O-r-r. And I am a Ph.D. scientist with nine  
25 years as a state agricultural policy analyst for

1 state governments.

2 JUDGE CLIFTON: All right. Put that head  
3 of the microphone down in such fashion as this.  
4 And I realize it's conflicting with where your  
5 statement goes, but -- now, let's put it a  
6 little closer towards you and see if that works.

7 THE WITNESS: Is that better?

8 JUDGE CLIFTON: That's better.

9 THE WITNESS: Okay.

10 JUDGE CLIFTON: All right. I'm going to  
11 swear you in.

12 (The witness was sworn.)

13 JUDGE CLIFTON: Dr. Orr, tell me what you  
14 hold a doctorate in.

15 THE WITNESS: My Ph.D. is in animal  
16 science from Texas A&M University.

17 JUDGE CLIFTON: Thank you. You may  
18 proceed.

19 CAROLYN ORR

20 of lawful age, being duly sworn, was examined and  
21 testified as follows:

22 DIRECT EXAMINATION

23 THE WITNESS: Thank you. I grew up  
24 milking 100 cows in a stanchion barn in northern  
25 Pennsylvania. I work with state legislatures

1           today all over the nation that serve as leaders  
2           in agriculture in their legislature. They  
3           understand -- and since many are dairy producers  
4           themselves, they believe that the dairy producer  
5           works harder, longer hours for often less return  
6           than any other food producer.

7           I want to thank you today for allowing me  
8           to represent and testify on behalf of the  
9           Northeast States Association for Agriculture  
10          Stewardship. This is the agricultural arm of  
11          the Eastern Regional Conference of the Council  
12          of States Governments.

13          I want to remind you while you've been in  
14          here meeting, I've been continuing to  
15          communicate with the leadership of the state  
16          agriculture committees. I was present in  
17          Vermont last week when dozens of dairy  
18          farmers -- there's only 150 left in the state --  
19          but dozens of dairy farmers came to the state  
20          legislature for a rally and met with the  
21          governor of the state legislature because  
22          they're in a crisis situation. They're losing  
23          dairies daily.

24          State legislators are the ones that have  
25          to go home to their communities and participate



1           firsthand in the decisions you all make here.  
2           You get to go home to your offices. They get to  
3           go home to hear the dairymen in their area  
4           complain about the collapse of the milk process.

5                     The Northeastern legislatures have a  
6           history of commitment of effort to assist dairy  
7           farmers, what many consider the keystone  
8           industry for agriculture in the Northeast.  
9           Legislatures in the Northeast have provided low  
10          interest loans, cash subsidies, tax credits,  
11          price adjustment mechanisms for dairy producers  
12          over the last seven years. The Northeastern  
13          states have taken steps to support the dairy  
14          industry because the system for setting milk  
15          prices does not take into account the cost of  
16          milk production. Consequently, many times they  
17          are in a negative and unprofitable situation.  
18          It's why the Northeastern Interstate Compact was  
19          developed. And during the time of the Compact  
20          up to 2001, farmers were subsidized when prices  
21          were below target. Since the Compact has  
22          elapsed, states have resorted to a variety of  
23          efforts to support the industry.

24                     States have created Milk Promotion  
25          Boards. They've created Milk Commissions.

1           They've held hearings. They've hired experts,  
2           and they've had proposed changes and several of  
3           the proposals have been implemented. And they  
4           continue to this day. I'm leaving on Wednesday  
5           morning for New Hampshire where the state  
6           legislature is having a summer study session on  
7           diary prices. States are working hard to try  
8           and help their dairy producers.

9           The Maine legislature has a state funded  
10          over-order premium and they proposed a tax on  
11          large retailers, with the proceeds to go to  
12          dairy farmers. They also proposed a property  
13          tax rebate for dairy farm real estate. Vermont  
14          is deliberating over-order premium. Pennsylvania  
15          has had one for years and now their state  
16          agriculture commissioner is taking their dairy  
17          board to court over recent decisions on  
18          over-order premiums.

19          The Massachusetts General Court  
20          instituted a tax credit based on a trigger  
21          price, a linked loan program and policies to  
22          increase locally produced dairy products.  
23          Massachusetts lawmakers also proposed a retail  
24          milk dealers fee, varying, depending on the  
25          price of milk.

1 Vermont, New York, New Hampshire, and  
2 Massachusetts have used state tax dollars,  
3 general funds, for dairy assistance programs.  
4 New York alone spent \$30 million in cash  
5 subsidies for the dairy assistance program in  
6 2007.

7 New Hampshire, Vermont, New York have  
8 focused on hauling and stop charges and  
9 identifying when ownership transfers for milk so  
10 that farmers are not charged for these stranded  
11 costs. It is interesting to note in many state  
12 legislatures, that National Milk Producers  
13 Federation and IDFA have testified against the  
14 efforts of state legislators to address  
15 Northeastern milk producer profitability.

16 Almost all of the Northeastern states  
17 have value-added programs, and even the USDA has  
18 a value-added producer program to encourage  
19 further processing to support the entrepreneur,  
20 the farmer that takes the risk and shortens the  
21 distance to the consumer. Yet it appears that  
22 many of these proposals seek to punish the  
23 entrepreneur for being successful.

24 All of these efforts by states -- all of  
25 these efforts by state legislatures to assist

1           their dairy producers, their keystone industry,  
2           when the real issue is the Federal Milk  
3           Marketing Order often leaves Northeastern dairy  
4           farmers without enough income to cover their  
5           expenses, compounded by reporting errors in  
6           nonfat dry milk prices that the USDA has failed  
7           to redress.

8                        Section 1509 of Federal Public Law  
9           110-246 provided for the continuation of  
10          Agricultural and Other Programs by the USDA and  
11          established a Federal Milk Marketing Order  
12          Review Commission which was to conduct a review  
13          of the Milk Marketing Order system, including  
14          consideration of competitiveness and  
15          transparency in dairy pricing and simplification  
16          of the Milk Marketing Orders. We were told  
17          there's been no funding to accomplish this.

18                      All of this that I've said is a prelude  
19          to the Northeast State Association for  
20          Agriculture Stewardship response to the producer  
21          handling proposals being considered in this  
22          hearing. Many Northeastern state legislators  
23          are concerned about the funds and the time spent  
24          on these proposals when the real issue is the  
25          Federal Milk Marketing Order. The national

1 impact of producer-handler dairy operations is  
2 very small. Their impact in comparison to the  
3 companies requesting this hearing is minor. In  
4 fact, state legislators have significant  
5 concerns about the consolidation and  
6 concentrations among the largest cooperatives  
7 and handlers and its impact on the marketplace.  
8 Producer-handlers bear the true costs of  
9 production and delivery. They produce a product  
10 that meets the demand of their consumers or they  
11 don't stay in business. Their method is  
12 actually more transparent and a more accurate  
13 estimate of the consumer and economic demands  
14 than the Federal Milk Marketing Orders. The  
15 problems in the dairy industry cannot be blamed  
16 on a small number of producer-handlers, no  
17 matter how big they get.

18 Congress addressed National Milk  
19 Producers and IDFA's concerns when it enacted  
20 the Milk Regulatory Equity Act of 2005 and  
21 decided not to further regulate  
22 producer-handlers nationwide. We hope that the  
23 USDA follows Congress' lead and declines to make  
24 any changes as a result of these proposals until  
25 it takes on a more comprehensive review of the

1 challenges facing the entire dairy industry.

2 Some state legislators suggested that we  
3 chastise the USDA or that we question that if  
4 this hearing is a sensible way to spend scarce  
5 tax dollars when we believe that the current  
6 economic crisis that the dairy producers now  
7 face should preclude any changes to the system  
8 until the Milk Marketing Review Commission is  
9 established and reviews the entire program. The  
10 entire system must become more transparent and  
11 in line with consumer demands so that the  
12 producers do not have to endure the roller  
13 coaster price ride that has occurred since the  
14 Northeast Compact elapsed. It is important that  
15 we retain successful businesses,  
16 promote innovation and the jobs and communities  
17 they support. The timing is not right now to  
18 isolate the producer-handler exemption and make  
19 changes in any aspect of the dairy marketing  
20 processes until this has happened.

21 Thank you. I've also included in the  
22 material I've provided a letter from  
23 representative James Phinizy, a New Hampshire  
24 Chair of the House Agricultural Committee and  
25 president -- former president of the Northeast

1 State Association for Agricultural Stewardship.

2 JUDGE CLIFTON: Now, I'm looking. The  
3 first attachment, then, is a two-page letter.  
4 We have it here front and back. And for those  
5 that do not have a copy of Dr. Orr's remarks,  
6 you don't have that to look at.

7 Is there anyone that needs to look at a  
8 copy that doesn't have one? Mr. Carroll. Does  
9 anyone have an extra that -- Mr. Vetne, you  
10 don't have one either? And Mr. Tosi does not.

11 Dr. Orr, I'm going to ask you to tell me,  
12 first of all, how you obtained a copy of this  
13 letter that is signed by James Phinizy?

14 THE WITNESS: Representative Phinizy sent  
15 it to me to include.

16 JUDGE CLIFTON: And what area is he a  
17 representative in?

18 THE WITNESS: New Hampshire.

19 JUDGE CLIFTON: And it's dated May 12 and  
20 he addressed it to Dana Coale. And what is the  
21 other attachment?

22 THE WITNESS: It's mainly for my  
23 information, but for those who are interested,  
24 it's an article from Forbes Magazine on the  
25 hearing in Vermont -- or on the rally in

1 Vermont, the dairy producers that rallied in  
2 Vermont last week while you all were here.  
3 There was a large rally in Vermont that Governor  
4 Douglas and the legislators all attended.

5 JUDGE CLIFTON: And is this a printout  
6 from the website that's shown at the bottom?

7 THE WITNESS: Yes, ma'am.

8 JUDGE CLIFTON: And so that's a Forbes  
9 Magazine website?

10 THE WITNESS: Yes, ma'am.

11 JUDGE CLIFTON: All right. Let's go off  
12 record while those of o you have had not a  
13 chance to see this get a copy to look at. I  
14 think it won't take that long before we begin  
15 cross. It's now 11:00. Let's go off record.

16 (A recess was taken from 11:00 to 11:12.)

17 (Exhibit 94 was marked for  
18 identification.)

19 JUDGE CLIFTON: We're back on record at  
20 11:12. Dr. Orr's statement has been marked as  
21 Exhibit 94 with its two attachments just being  
22 part of that exhibit. Is there anyone who needs  
23 a copy of Exhibit 94 that does not have one?  
24 There is no one. Mr. Yale, thank you for  
25 solving that problem for us.



1 All right. I'd like to invite  
2 cross-examination of Dr. Orr. Who would like to  
3 begin? Mr. Carroll, thank you.

4 CROSS-EXAMINATION

5 BY MR. CARROLL:

6 Q. Good morning.

7 A. Good morning.

8 Q. I'm John Benjamin Carroll. I'm an  
9 attorney for the New England Producer-Handlers  
10 Association. The president of that association is  
11 Mr. James Stearns of Storrs, Connecticut.

12 A. Uh-huh.

13 Q. And we have members in Massachusetts, we  
14 have one in Maine, and we have New York, and some  
15 Pennsylvania. So we're not too far away from --

16 A. Actually, some of your members have been  
17 in many of our meetings.

18 Q. I'm glad to hear that. Now, directing  
19 your attention to your -- to your statement, do you  
20 know -- I'm not sure you're aware. Do you know in the  
21 state of New York, according to statistics that have  
22 been put in this hearing, there are only two  
23 producer-handlers of milk?

24 A. Uh-huh.

25 Q. Are you familiar with the history of it?

1           A.       No, sir.

2           Q.       In 1959, when the Milk Marketing Order  
3 came up in the state, there were 127. We have a feeling  
4 that Milk Marketing Orders are not too good for the  
5 little farmers that want to grow.

6           A.       That's what state legislators say.

7           Q.       Directing your attention to your  
8 statement, the next to the last paragraph in your  
9 statement which says, NMPF and IDFA have testified  
10 against efforts of state legislators to address NE milk  
11 producer profitability, could you expand on that and  
12 tell me what you mean?

13          A.       Specifically New York, Vermont, and New  
14 Hampshire have had hearings all year focused on hauling  
15 and stop charges. Their concern is that those charges  
16 are stranded costs to the producer. They cannot be  
17 passed on.

18                   And in almost every instance, we have had  
19 testimony against the -- the legislators have sought to  
20 transfer those costs from the farmers to the processors.  
21 And almost every instance they have testimony against  
22 that change has come from members of those  
23 organizations.

24          Q.       Directing your attention to the next  
25 paragraph, almost all of the NE states have value-added

1 programs. Can you tell me what you mean by that?

2 A. Programs for producers of agricultural  
3 products to add value to their products, move their  
4 product closer from the farm to the consumer. And these  
5 exist everything from farmers' market programs to  
6 dollars for producers to add processing facilities.  
7 It's -- the USDA obviously has just released their  
8 value-added producer grant program for the 2009 year,  
9 which has additional funds in it.

10 So efforts have been made in almost every  
11 state to help producers move into the -- the -- to  
12 shorten the chain of ownership from their farmgate to  
13 the consumer.

14 Q. All right. And you continue on to say:  
15 And even the USDA has value-added producer programs to  
16 encourage further processing, to support the  
17 entrepreneur, the farmer that takes the risk and  
18 shortens the distance to the consumer. Can you tell me  
19 what you meant by that?

20 A. What I've just said, that many states  
21 have felt that the way to make their producers more  
22 profitable in all fields of food production is to  
23 shorten the distance from the farmgate to the consumer  
24 of that product. And the USDA has supported that system  
25 as well.

1 Q. And is that effort in the interest of the  
2 consumer as well as the interest of the farmer?

3 A. Absolutely. In fact, everything we do in  
4 agriculture is in the interest of the consumer or we  
5 don't exist.

6 Q. Now, you said even the USDA has  
7 value-added producer programs. Can you explain that?

8 A. The value-added producer grant program,  
9 which was just -- the 2009 version was just released  
10 last week, is a program that provides funds to farmers,  
11 agriculture producers, to add value to their products  
12 whatever that product may be.

13 Q. And is that the type of additional value  
14 described earlier?

15 A. Yes, sir.

16 Q. And that's a policy of the United States  
17 Department of Agriculture?

18 A. Yes, it is.

19 JUDGE CLIFTON: Dr. Orr, please allow  
20 counsel's question to die away.

21 THE WITNESS: Okay.

22 JUDGE CLIFTON: That way the typing will  
23 be easier.

24 BY MR. CARROLL:

25 Q. Could you explain again to me what the

1 Northeast States Association for Agricultural  
2 Stewardship of the Eastern Regional Conference of the  
3 Council of State Governments is?

4 A. Yes, sir. The Council of State  
5 Governments is a national organization made up of all  
6 three branches of government, the judicial, legislative,  
7 and gubernatorial or governor's branch. It exists based  
8 on payments made by the states to the organization, the  
9 Council of State Governments.

10 The Council of State Governments is then  
11 broken into four regions, the Eastern region, the  
12 Southern region, the Western region and the Midwestern  
13 region. The regions act autonomously, as well as being  
14 part of the Council of State Governments.

15 Within each region we separate based on  
16 issues. So the agricultural people in the Northeast  
17 have formed the Northeastern States Association for  
18 Agriculture Stewardship.

19 It is made up of the people in -- state  
20 legislators or -- or the Department of Agriculture that  
21 have an interest in agriculture and rural communities.  
22 It has additional dues paid by the agricultural  
23 committee of the state legislators in all Northeastern  
24 states, and that would be everywhere from Pennsylvania  
25 east and Maryland north.

1 Q. Well, could you -- itemize the states  
2 that you represent.

3 A. Actually, I work on a national basis for  
4 the Council of State Governments for other regions as  
5 well. But the Northeastern states would be everything  
6 from Pennsylvania east and Maryland north.

7 Q. Well, would that include Maine and  
8 Vermont?

9 A. Yes.

10 Q. New Hampshire?

11 A. Yes.

12 Q. Connecticut?

13 A. Yes. Rhode Island.

14 Q. Rhode Island?

15 A. Yes.

16 Q. And --

17 A. New York.

18 Q. -- New Jersey?

19 A. Yes.

20 Q. New York?

21 A. Yes.

22 Q. And then to Maryland but not to Virginia?

23 A. No. Virginia is in the south.

24 Q. That's in the Southern region?

25 A. Uh-huh.

1           Q.       Okay. Now, directing your attention to  
2 the statement that you -- or the letter that you have  
3 attached from James Phinizy, with a carbon copy to the  
4 New Hampshire Department of Agriculture Commissioner  
5 Lorraine Merrill, how did you obtain that letter?

6           A.       Representative Phinizy sent it to me. He  
7 was the chair of the Northeastern States Association for  
8 Agricultural Stewardship, and as such has worked with  
9 dairy policy for the last two years. And he sent the  
10 letter to represent --

11          Q.       Was he aware of the statements that you  
12 have made here today?

13          A.       Yes, sir.

14          Q.       And did he support that?

15          A.       All of my statements come from the  
16 committee members of NSAS, not from myself.

17          Q.       All right. Are you aware of the --  
18 that -- at least in the New England market, there are  
19 two market suppliers of milk left, HP Hood and Dean?  
20 Are you familiar with that?

21          A.       Yes, sir.

22          Q.       Is it your thought that it is in the  
23 consumer interest to foster competition with those two  
24 people from the standpoint of the consumer?

25          A.       My thoughts are the thoughts of state

1 legislatures. I represent state legislators.

2 Q. Yes, right.

3 A. In the state legislators' thoughts, the  
4 lack of competition has been damaging to both consumers  
5 and the producers in their area.

6 Q. All right.

7 MR. CARROLL: That's all. Thank you very  
8 much for coming. I deeply appreciate your time  
9 and effort.

10 THE WITNESS: Thank you.

11 JUDGE CLIFTON: Who next will  
12 cross-examine Dr. Orr? Mr. Vetne.

13 CROSS-EXAMINATION

14 BY MR. VETNE:

15 Q. Good morning, Dr. Orr.

16 A. Good morning.

17 Q. I'm John Vetne. I live on Red Sox Lane  
18 in Raymond, New Hampshire, and I represent two  
19 producer-handlers in the Pacific Northwest and one in  
20 Roswell, New Mexico. I just have a couple of -- not a  
21 couple actually, a few questions.

22 The Council of State Governments, is that  
23 affiliated in some way with the National Association of  
24 State Departments of Agriculture?

25 A. No, sir. National Association of State



1 Departments of Agriculture is made up by the State  
2 Department of Agriculture and paid for by the Department  
3 of Agriculture. The Council of State Governments is  
4 paid for by all three branches and represents all three  
5 branches. So NASDA does work with us, but they're just  
6 a small subset, because they're state department  
7 commissioners not legislators.

8 Q. My follow up to that, does -- I think you  
9 referred -- used the acronym NESDA for the Northeast  
10 State Association?

11 A. NSAS.

12 Q. NSAS?

13 A. (Nodding head.)

14 Q. Okay. Does that agricultural stewardship  
15 association coordinate with the National Association of  
16 State Departments of Agriculture?

17 A. More so with NESDA, which is the  
18 Northeast State Department of Agriculture, on these  
19 issues. Dairy appears to be -- seems to be, among the  
20 legislators, a more regional issue. And so most of the  
21 work that NSAS does with departments of agricultural  
22 would be with NESDA, which is the Northeastern division  
23 of NASDA.

24 Q. Okay. Going down, you refer to the state  
25 of -- you say the legislature has a state funded

1 over-order premium and proposed a tax on large  
2 retailers. The state funded over-order premium is an  
3 existing program?

4 A. Uh-huh.

5 Q. And has existed for many years, is that  
6 correct?

7 A. (Nodding head.)

8 Q. Is that a farm level premium?

9 A. Yes, sir, it is.

10 Q. You nodded your head.

11 A. Yes, sir, it is.

12 Q. And proposed, so there is no tax  
13 currently existing?

14 A. It died in the Senate.

15 Q. Okay. Was there not -- has there not  
16 been a tax or a charge on retail sales within the state  
17 of Maine that has gone back into the general fund in  
18 turn, an equivalent amount going to dairy farmers?

19 A. Yes, there has been, but this was an  
20 additional tax on top of the current.

21 Q. Okay. So in addition to an over-order  
22 premium at the farm to processor stage of a transaction,  
23 there also exists within the state of Maine a tax or an  
24 assessment or charge on retail sales in the store  
25 regardless of where it comes from, the proceeds of which

1 go into the general fund? Yes?

2 A. Yes. To the best of my knowledge.

3 Q. Okay. And producers, dairy farmers in  
4 the state of Maine receive money from the general fund  
5 that corresponds more or less with the amount that goes  
6 into the fund from that tax?

7 A. That might have been true previously.  
8 This year they are much in deficit and have had to make  
9 some other arrangements.

10 Q. Ah-ha. So even if it goes into the  
11 general fund this year, because of the state of the  
12 economy, other fiscal demands within the state are  
13 looking at that money for -- for use, correct?

14 A. Yes, sir. To the best of my knowledge.

15 Q. Okay. Towards the end of your prepared  
16 testimony you refer to hauling and stop charges and you  
17 continue that paragraph with an observation: It is  
18 interesting to note that in many state legislatures,  
19 NMPF and IDFA have testified against the efforts of  
20 state legislators to address Northeast milk producer  
21 profitability. My question to you concerning that  
22 sentence is whether you intended that sentence to refer  
23 to the prior sentence, the efforts to legislate hauling  
24 and stop charge changes?

25 A. As they relate to producer profitability,

1       yes, sir.

2               Q.       Okay. Did you intend that last sentence  
3 to refer to any other legislative effort other than  
4 hauling and stop charges?

5               A.       As of my knowledge, that is what  
6 legislators have so told to me for this hearing.

7               Q.       Okay. And it is -- it is at least the  
8 opinion of those you represent that a change in hauling  
9 and stop charge practices will increase producer  
10 profitability?

11              A.       Yes, sir.

12              Q.       Okay. And is that also your personal  
13 opinion?

14              A.       I don't have a personal opinion on it. I  
15 represent state legislators.

16              Q.       All right. Do you know whether in the  
17 Northeast any dairy farmers have sought to secure grants  
18 under USDA's value-added producer grant program?

19              A.       I would not have access to that  
20 information, sir.

21              Q.       And with respect to similar state  
22 programs, do you know whether dairy farmers in the  
23 Northeast have sought to access funds from state  
24 value-added producer grant programs?

25              A.       It is my understanding that in New

1 Hampshire, Vermont, and New York, at least -- oh, and  
2 Pennsylvania, at least, there have been attempts to use  
3 value-added programs by dairy producers.

4 Q. There are existing programs, correct?

5 A. There are existing valued-added programs  
6 in those states, yes.

7 Q. And dairy farmers have at least attempted  
8 to access those funds, correct?

9 A. To the best of my knowledge.

10 BY MR. VETNE:

11 Q. Got it. Okay. Thank you very much for  
12 coming.

13 THE WITNESS: Thank you.

14 MR. VETNE: We have long awaited your  
15 coming. Your name has been mentioned many  
16 times: When is Dr. Orr coming?

17 THE WITNESS: When it dried up, and I  
18 wasn't putting up hay.

19 JUDGE CLIFTON: When Dr. Orr arrived and  
20 saw that Mr. Carman was on the stand, she  
21 wondered if he'd been on the stand ever since  
22 she left.

23 THE WITNESS: He'd aged quite a bit.

24 JUDGE CLIFTON: Who next will  
25 cross-examine Dr. Orr? Mr. Rower. Thank you.

## CROSS-EXAMINATION

1  
2 BY MR. ROWER:

3 Q. Good morning.

4 A. Good morning. Good afternoon almost.

5 Q. Almost. I have a couple of questions.  
6 One is regarding the attachment that you have from  
7 Mr. Phinizy.

8 A. Uh-huh.

9 Q. Is he currently a legislator?

10 A. Not this year. Actually, he's in line  
11 for a federal position in the FSA in New Hampshire, is  
12 my understanding.

13 Q. Okay. I was wondering because this  
14 letter was not on some official letterhead.

15 A. Right.

16 Q. So I wanted to get that. Do you agree  
17 with -- there are three points that he's made in his  
18 letter; one, two and three on the back. Are you  
19 supporting each of those?

20 A. I don't personally support anything. I  
21 represent state legislatures and provide their opinions.  
22 And they -- that is -- if -- their first choice is  
23 nothing to be done. This is their second or third  
24 choice, is if -- if something has to be done, this is  
25 their next step.

1 Q. Okay. But these are the opinions of  
2 Mr. Phinizy as a private citizen?

3 A. No, as a representative of NSAS. He's  
4 still --

5 Q. Oh, of this organization that you  
6 represent?

7 A. Yes. Yes, sir.

8 Q. Okay. What state legislators do you  
9 represent? You said you represent them.

10 A. As far as states or the people?

11 Q. Of both, actually.

12 A. Actually, in -- as an agriculture policy  
13 analyst for NSAS, I represent all of the Northeastern  
14 states east of Ohio and north of -- it would be  
15 Pennsylvania and east and north of Maryland. And  
16 typically our membership is the House and Senate  
17 agriculture committees, as well as the agricultural  
18 commissioner and in some cases, governors, agricultural  
19 liaisons.

20 Q. Of each of the individual states?

21 A. Of each of the individual states, yes.

22 Q. Excuse me. I'm sorry. And you're a paid  
23 analyst, is that correct?

24 A. Yes, sir.

25 MR. CARROLL: Okay. Thank you very much.

1           And thank you for coming.

2                   JUDGE CLIFTON: Are there any other  
3           questions for Dr. Orr? Mr. Tosi. Thank you.

4                   CROSS-EXAMINATION

5 BY MR. TOSI:

6           Q.       Hi, Dr. Orr. Thank you for coming. I  
7           just had another thought here in looking over James  
8           Phinizy's letter. He identifies himself as the former  
9           chair of the Northeast States Association for  
10          Agricultural Stewardship. I understand that this is  
11          Mr. Phinizy's letter. But is this -- when someone is  
12          signing this letter and identifying themselves as  
13          somebody that used to be something, how are we to know  
14          that this represents the position of the organization?

15          A.       The issue is timing. Our chairs change  
16          in May. And the new chairs have not been sworn in yet.  
17          But he's out of -- out of office. And so that the new  
18          chairs have not been sworn in. The new chairs have been  
19          selected. And as soon as they're sworn in, then we'll  
20          get letters and signatures from them to match his.

21          Q.       I understand. So we just happened to  
22          catch the organization while it's between leaders?

23          A.       We change when the sessions end in the  
24          slate legislature, which is just now coming to an end in  
25          most of the states in the northeast.



1 Q. A couple of other questions. In your  
2 direct testimony in the paragraph there that discusses  
3 the Massachusetts General Court instituted a tax credit  
4 based on a trigger price, in that one, in that  
5 paragraph --

6 A. Uh-huh.

7 Q. -- would this be a tax that would also be  
8 placed on producer-handlers in their capacity as a --  
9 being a retailer of milk?

10 A. The tax credit would apply to all dairy  
11 producers based on the -- as Massachusetts proposed it,  
12 it'd be based on the price of milk. When milk  
13 dropped -- prices dropped to a certain level, they would  
14 automatically receive the tax credit, all producers.

15 Q. Okay. And does Massachusetts make a  
16 distinction there between someone that is a dairy farmer  
17 and someone that's a dairy farmer that's also selling,  
18 that's also a handler, if you will, or a processor?

19 A. The state's goal is to keep them all in  
20 business.

21 Q. Okay. And then in the next paragraph  
22 there where you talk about Vermont, New York, New  
23 Hampshire and Massachusetts using state funds to provide  
24 cash subsidies, would those subsidies also be applied  
25 to -- would a producer-handler also be eligible to

1 receive a subsidy from the state?

2 A. Once again, their goal is to keep all  
3 dairy producers in business.

4 MR. TOSI: Okay. That's all I have. I  
5 appreciate you coming. I was the fellow that  
6 called you and left a message and was glad to  
7 see that you were able to make it today.

8 THE WITNESS: Thank you.

9 MR. TOSI: Thank you very much.

10 JUDGE CLIFTON: Mr. Vetne.

11 RECROSS-EXAMINATION

12 BY MR. VETNE:

13 Q. Just one question here. Mr. Tosi  
14 referred to your paragraph that referred, in turn, to  
15 Massachusetts General Court. That is the name that  
16 Massachusetts uses for its legislature, is that correct?

17 A. Yes, sir, that is correct.

18 JUDGE CLIFTON: Thank you, Mr. Vetne.

19 That -- I'd have been confused. All right.

20 Any other questions for Dr. Orr?

21 Mr. Carroll.

22 RECROSS-EXAMINATION

23 BY MR. CARROLL:

24 Q. I think it's your second page. It is the  
25 second page of Exhibit 94. The sentence or the

1 paragraph just before the end, you state, Congress  
2 addressed NMPF and IDFA's concerns when it enacted the  
3 Milk Regulatory Equity Act of 2005 and decided not to  
4 further regulate producer-handlers nationwide. Could  
5 you explain that answer?

6 MR. ENGLISH: I object.

7 JUDGE CLIFTON: Mr. English?

8 MR. ENGLISH: I believe that calls for a  
9 legal conclusion. I didn't question the witness  
10 about this. But I believe that any explanation  
11 necessarily calls for a legal answer. And I  
12 object to the question and to any answer.

13 JUDGE CLIFTON: The objection is noted,  
14 but it is important for -- to know what the  
15 witness meant by that. And you may answer.

16 MR. CARROLL: Thank you, your Honor.

17 A. I'm not a legal scholar, but I do know  
18 what our Federal legislators tell us, and our Federal  
19 legislators tell us exactly what I wrote. And I'm going  
20 to leave it at that.

21 MR. CARROLL: Yes. Thank you very much.

22 JUDGE CLIFTON: Mr. Carroll, before you  
23 leave the microphone, how is Stearns spelled?  
24 You used the gentleman's name.

25 MR. CARROLL: S-t-e-a-r-n-s.

1 JUDGE CLIFTON: Thank you.

2 MR. CARROLL: James is his first name.

3 JUDGE CLIFTON: Thank you.

4 MR. CARROLL: Thank you.

5 JUDGE CLIFTON: Are there any other  
6 questions for Dr. Orr? There are none. Now,  
7 let's turn to the exhibit. The exhibit is 94.  
8 It's one piece. It contains Dr. Orr's statement  
9 and the two attachments. Is there any objection  
10 to all of 94 being admitted into evidence?  
11 Mr. English?

12 MR. ENGLISH: Yes, your Honor. Let me  
13 start with what I think is -- I think is easiest  
14 at least. The third piece of paper, which is a  
15 newspaper article that the witness indicated was  
16 about a protest held in Vermont. Obviously, we  
17 all know milk prices are low. There's nothing  
18 remotely relevant about this particular  
19 newspaper article in this proceeding. And if  
20 relevancy has any bearing left, you know, this  
21 document just doesn't have anything to do with  
22 this proceeding.

23 She, herself, said she just included it  
24 as reference for herself. I object to it.

25 I'm a little on the margin about the

1 second page, the James Phinizy document. I  
2 appreciate the clarification from the questions  
3 from the government that Mr. Phinizy is actually  
4 presently sort of a private person, he's not a  
5 legislator, and he's the former chair.

6 On the other hand, I know that we have  
7 had documents from other government officials,  
8 and so I'm a little less certain but I still  
9 think we ought to ask about it. And I frankly  
10 move to strike the part about the Milk  
11 Regulatory Act. She said this is something she  
12 heard from someone else. She's not a lawyer.  
13 Basically, it's a legal statement coming in  
14 through a nonlawyer.

15 I move to strike the first sentence of  
16 the paragraph, Congress addressed NMPF and  
17 IDFA's concerns when it enacted the Milk  
18 Regulatory Equity Act of 2005 and decided not to  
19 further regulate producer-handlers nationwide.  
20 Those are my objections.

21 JUDGE CLIFTON: Thank you, Mr. English.  
22 Any other comments, either objections to Exhibit  
23 94 being admitted or comments in support?  
24 Mr. Beshore.

25 MR. BESHORE: I join Mr. English's

1 objections and -- you know, in all respects.  
2 This is -- and on the record will make the  
3 hearing -- the record needs to be -- there need  
4 to be distinctions, clear distinctions in the  
5 record between sworn and unsworn statements.

6 JUDGE CLIFTON: Thank you, Mr. Beshore.  
7 Who else would like to be heard on this issue?  
8 Mr. Carroll.

9 MR. CARROLL: My comments in regard to  
10 Exhibit 94, for the record, the testimony  
11 clearly indicates -- as to the letter that  
12 counsel indicates is marginal, it really isn't  
13 marginal. She said that represents the policy  
14 of the organization. The gentleman who wrote it  
15 has clearly stated what that policy is. And  
16 she's in a position to verify that as a policy,  
17 and therefore it's proper to be admitted.

18 As far as the comment about legal, that's  
19 beside the point. The question is, what did the  
20 witness mean. The witness has told us what she  
21 meant, and it cannot be stricken without a loss  
22 of the essential purpose and thrust of her  
23 testimony. Thank you very much.

24 JUDGE CLIFTON: She didn't exactly tell  
25 us what she meant. She indicated that that was

1 the statement that she adopted from someone  
2 else.

3 MR. CARROLL: Yes, but it is -- number  
4 one, hearsay is admissible; number two, has  
5 clearly indicated that she received that from an  
6 authoritative source, from a person whose job  
7 title was to be knowledgeable in those matters.  
8 And, frankly, it's self-evident from the  
9 legislation itself because they did nothing  
10 wherever -- in New England or anywhere else in  
11 the United States, except for the one simple  
12 problem they were presented with. I think it's  
13 an obvious decision. Thank you very much.

14 JUDGE CLIFTON: Thank you, Mr. Carroll.  
15 Mr. Yale.

16 MR. YALE: We would support the admission  
17 of all of it. I mean, obviously the Department  
18 can use it to the weight, to the degree that it  
19 wishes. We've had more extended hearsay  
20 submitted into this record than this even comes  
21 close to being.

22 The witness was here, was available for  
23 cross-examination. The first attachment  
24 provides her, in a sense, the authority of why  
25 she's here. She's here in a representative

1 capacity, so that gives some weight to the  
2 authority.

3 She's explained the peculiarities of the  
4 chairmanships and how these things work. That  
5 does not undermine in any way, in my view, the  
6 authenticity of what's there.

7 The article at the end, I mean, I think  
8 just provides the kind of context in which  
9 they're here. I don't think it says anything  
10 more than that. I don't know anybody that's  
11 going to argue, my God, if you don't do this,  
12 we're going to have riots in the streets or  
13 anything.

14 I think it just provides the kind of  
15 contemporaneous context to the pressures that  
16 her people and her organization is under that  
17 they're trying to address.

18 And I really think the Department has to  
19 with some comity, Federal state comity needs to  
20 be respectful of the state organizations that  
21 are trying to address in a sense the same  
22 problem but from a different viewpoint. And I  
23 don't think we can discount their testimony  
24 because of the ability to actually represent  
25 them is so constrained.



1           Anybody who works with government -- I  
2           mean, it's one thing to represent what a  
3           representative says. It's something else to  
4           represent what a legislature says. And then to  
5           go so far as to represent what three branches of  
6           government from a dozen states do -- I mean, it  
7           sounds like some kind of foreign communique that  
8           has to come out.

9           So I think we have to recognize that  
10          context and why it has to be said as it is. But  
11          I think it's very important for the Secretary to  
12          have in the record this voice of constituent  
13          states in this Federal government of how it  
14          feels about a issue that's important to them.

15          They'll weigh it as they wish. The  
16          evidence was based on evidence that's in the  
17          record, you know, that will go. Because this  
18          gives them a context. And they've had the  
19          opportunity to cross-examine her to see the  
20          scope of that, and I think it all should be  
21          admitted.

22                 JUDGE CLIFTON: Before I hear from  
23          Mr. Vetne, Dr. Orr, regarding the last page, did  
24          you testify that you were present during this  
25          demonstration?

1 THE WITNESS: Yes, ma'am, I was. And I  
2 heard Governor Douglas. The statement from  
3 Governor Douglas is the most important aspect of  
4 this, in our -- in the state legislature's view.

5 JUDGE CLIFTON: All right. Do you  
6 believe this Forbes article is an accurate  
7 reflection of what you observed when you were  
8 there?

9 THE WITNESS: Yes, ma'am, I believe it  
10 was.

11 JUDGE CLIFTON: Mr. Vetne.

12 MR. VETNE: I guess that takes care of  
13 the newspaper article. I'm going to join with  
14 Ben Yale for some slightly different reasons.

15 A number of witnesses have preceded  
16 Dr. Orr, Roger Cryan, Bob Yonkers, testifying  
17 what their organizations have decided and the  
18 positions their organizations have taken. The  
19 organizational sponsors of a position is the  
20 kind of thing that comes into this -- into these  
21 hearings frequently. And the organization's  
22 positions then are, in turn, sometimes tied to  
23 unique facts and sometimes just, you know,  
24 here's the position, here's our argument.

25 Some of this is, as many witnesses'

1 testimony, simply argument. But this is a place  
2 where positions and arguments can be tested and  
3 why.

4 USDA frequently writes its decisions on  
5 Federal Milk Orders, you know, Proposal X was  
6 supported by ABC Company or XYZ Cooperative, and  
7 here's why they did it, here's what they said.

8 This is of that nature. And I would  
9 specifically refer to the -- to the  
10 legislation -- what was it called? The --  
11 referred to at the end.

12 JUDGE CLIFTON: Oh, the -- you're not  
13 talking about the Milk Regulatory Equity Act?

14 MR. VETNE: Yes, Milk Regulatory Equity  
15 Act of 2005. I mean, that legislation has been  
16 referred to by prior witnesses and prior  
17 witnesses have attributed various intents to --  
18 to the legislature just as prior witnesses have  
19 referred to other legislation or decisions of  
20 the Secretary and attributed their belief of the  
21 intent. I think that's perfectly legitimate for  
22 a representative of an organization of state  
23 governments to express their view of what they  
24 thought Congress intended.

25 It doesn't mean that that view governs

1 the analysis of it. However, it helps focus the  
2 analysis, because one thing that the Department  
3 will do, and then subsequently a court might do,  
4 is to look to the legislative history. And I  
5 think that perspective might help focus that  
6 analysis. So I think all of it ought to be  
7 received in the same context that other live  
8 testimony has been received.

9 JUDGE CLIFTON: Thank you, Mr. Vetne.  
10 Mr. Ricciardi.

11 Dr. Orr, you had no idea, did you?

12 THE WITNESS: I said earlier that I  
13 thought state legislatures run slow, but they  
14 run like jack rabbits compared to this one.

15 MR. RICCIARDI: We're moving with all  
16 glacial speed as best as we can.

17 THE WITNESS: You all do this full time.  
18 They only do it part time.

19 MR. RICCIARDI: I understand. They're  
20 going to get better at it. And I join with my  
21 colleagues, Mr. Vetne and Mr. Yale, and add just  
22 a few things. Yes, in fact, Dr. Orr is here on  
23 behalf of a substantial number of states, which  
24 also include the Northeast States Association  
25 for Agricultural Stewardship.

1           Yes, due to a quirk, Mr. Phinizy  
2           apparently is the former chair. But he  
3           effectively is representing, as the chair, the  
4           position of that organization. And she is here  
5           representing the position of that organization.  
6           And therefore, all of the information that's  
7           contained in her statement and the attachments  
8           is, in fact, the position of the organization  
9           that the Secretary should have the ability to be  
10          able to review.

11           The last point on this issue about the  
12          Milk Regulatory Equity Act paragraph on page 2  
13          of Dr. Orr's statement. She, again, is  
14          representing the view of the state legislators  
15          on that issue. Whether it's correct or whether  
16          it's not, it's their view.

17           And by the way, with regard to the  
18          layman's perspective, if you recall Dr. Cryan's  
19          statement, riddled with references to legal  
20          issues, he told me that that was his layman's  
21          view of what those things might mean.

22           And so the Department has the ability to  
23          consider that. The Department should have the  
24          ability to consider this also. Thank you.

25           JUDGE CLIFTON: Thank you, Mr. Ricciardi.

1 I do admit into evidence Exhibit 94 in its  
2 entirety. I do not strike the reference to the  
3 Milk Regulatory Equity Act of 2005. But the  
4 Secretary is cautioned in line with the witness'  
5 answer about where that came from.

6 In other words, there's no right to  
7 cross-examine the people that asked her to relay  
8 that opinion.

9 With regard to Mr. Phinizy's letter, I  
10 have the same caution for the Secretary, and  
11 that is that Mr. Phinizy was not here for  
12 cross-examination.

13 With regard to the last page of the  
14 document, I indicate that the witness was  
15 present for the event that is written up in this  
16 publication, and that makes it different from an  
17 ordinary magazine article or newspaper article.  
18 But I agree with Mr. Yale that its value is for  
19 context, and it serves a valuable niche, I'll  
20 call it, in our understanding of the issues.

21 All right. Anything further? Thank you  
22 so much, Dr. Orr. You may step down.

23 All right. Now, let's see. I think we  
24 can do one more witness. It's 11:49. Would the  
25 next witness be Mr. Taylor perhaps? Would that

1           be good, Mr. Ricciardi?

2                   MR. RICCIARDI: To the extent that we  
3 want to actually have another witness prior to  
4 lunch, I think that Mr. Taylor is probably a  
5 good selection.

6                   JUDGE CLIFTON: All right. Let's do  
7 that. Do we have anything that will be marked  
8 as an exhibit in Mr. Taylor's case?

9                   MR. RICCIARDI: We have, and you should  
10 have there, Judge, two items, actually; one, the  
11 testimony of Warren Taylor that has been  
12 provided to everyone, including the Court  
13 reporter and including the court, and also the  
14 record copy to USDA, as well as another document  
15 which is headed -- it's an attachment document.  
16 The document is FMMOS Hearing - Comments.

17                   And my suggestion would be that we would  
18 mark the Exhibit which has Mr. Taylor's  
19 testimony as the next exhibit, which I believe  
20 is 95. Am I correct?

21                   JUDGE CLIFTON: (Nodding head.)

22                   MR. RICCIARDI: And that the other  
23 document, the FMMOS Hearings - Customer Comments  
24 be marked for identification as Exhibit 96.

25                   JUDGE CLIFTON: Thank you. I have done

1 so.

2 (Exhibit 95 was marked for  
3 identification.)

4 (Exhibit 96 was marked for  
5 identification.)

6 JUDGE CLIFTON: Mr. Ricciardi, Exhibit 95  
7 will be the testimony of Warren Taylor, and  
8 Exhibit 96 will be the attachment which  
9 includes, on its front page, customers and their  
10 e-mail addresses.

11 All right. Does anyone need a brief  
12 break to get ready for that testimony? No. I  
13 think we're ready to go.

14 MR. RICCIARDI: Good.

15 JUDGE CLIFTON: Mr. Taylor, if you would  
16 come forward and take a seat in the witness  
17 chair? Please be seated, and when you are  
18 comfortable, you can state and spell your name  
19 for us.

20 THE WITNESS: My name is Warren Taylor  
21 W-a-r-r-e-n, T-a-y-l-o-r.

22 JUDGE CLIFTON: Let's go off record just  
23 a moment.

24 (Off the record.)

25 JUDGE CLIFTON: All right. Let's go back



1           on record. Mr. Taylor, would you raise your  
2           right hand and I'll swear you in?

3                     (The witness was sworn.)

4                     JUDGE CLIFTON: Thank you.

5           Mr. Ricciardi, you may proceed.

6                     MR. RICCIARDI: Thank you, your Honor.

7                             WARREN TAYLOR

8           of lawful age, being first duly sworn, was examined and  
9           testified as follows:

10                            DIRECT EXAMINATION

11           BY MR. RICCIARDI:

12                     Q.       Mr. Taylor, you indicate in Exhibit 95  
13           that you're the owner of Snowville Creamery. Can you  
14           tell us just a little bit about Snowville Creamery for a  
15           moment, please?

16                     A.       Yes. Snowville Creamery is an LLC, fully  
17           owned by myself. And we -- we built this dairy over  
18           about a year's period of time, started production about  
19           a year and a half ago to produce local, fresh, minimally  
20           processed milk from -- produced by a pasture grazing  
21           herd.

22                     Q.       And have you, in fact, prepared a written  
23           statement, marked now as Exhibit 95, outlining the  
24           background and information regarding Snowville as well  
25           as other positions that Snowville has with regard to the

1 issues raised at this hearing?

2 A. Yes, sir.

3 Q. Okay. Also we have marked as Exhibit 96  
4 a document headed FMMOS Hearings - Customer Comments.  
5 And I just want to ask you a little bit of background  
6 information about this document. These are a  
7 compilation of either letters or e-mails from the  
8 customers of Snowville Creamery, is that correct?

9 A. That's correct.

10 Q. And related specifically to their views  
11 concerning the value of the Snowville Creamery product?

12 A. Yes.

13 Q. And the quality of the product?

14 A. Yes.

15 Q. And these were, as I think you mentioned  
16 here, unsolicited?

17 A. Yes, they are.

18 Q. Okay. And they're compiled in Exhibit  
19 96, and you have received permission to share the  
20 comments of these customers with the Secretary?

21 A. Yes.

22 Q. Okay. At this point, why don't you go  
23 ahead and provide your testimony as reflected in Exhibit  
24 95. I'll go sit down, and then when you're done, I may  
25 have some other questions before other people examine

1 you.

2 A. Thank you.

3 Q. Thank you.

4 A. My name is Warren Taylor. I am the owner  
5 of Snowville Creamery in Pomeroy, Ohio. Snowville  
6 Creamery is an exempt plant, now processing about  
7 130,000 pounds per month of Class I milk. We started  
8 construction of our plant after meeting with our Market  
9 Administrator and confirming plans to become a  
10 producer-handler as volume increased. We believed a  
11 reasonable payback would require at least 500,000 pounds  
12 per month in Class I sales. We began production and  
13 distribution of pasture-grazed minimum processed milk in  
14 December 2007. The business is owned entirely by myself  
15 and my wife, Victoria Taylor. It is now an informal  
16 partnership with the dairy farmer couple of Bill Dix and  
17 Stacy Hall, on whose 350 acre, 230 cow seasonal dairy  
18 farm the milk processing plant was built.

19 We are growing our business, constantly  
20 gaining sales. More importantly, stores see gains in  
21 their total milk sales, showing we are not just  
22 cannibalizing sales from other milk, but increasing per  
23 capita consumption in our new customers. Every week we  
24 receive additional testimonials from customers extolling  
25 the glorious taste of our milk. These testimonials

1 include people who had been drinking soy milk, parents  
2 whose children refused to drink milk or drank very  
3 little, and people who had lost their enthusiasm for  
4 milk years ago. These testimonials demonstrate clearly  
5 and convincingly that all milk is not the same. We are  
6 producing milk that tastes dramatically different from  
7 the vast majority of milk available, conventional or  
8 organic. We have given consumers a new choice, and our  
9 dairy farmers a price well above market.

10           You can call me a dairy nerd. My father  
11 Bert was one of the gentlemen of the 1950 through 1985  
12 American Dairy Industry. He earned a Dairy Technology  
13 degree from Ohio State University in 1953, where he was  
14 on the dairy products judging team that won the national  
15 contest. He went on to help organize and run the annual  
16 National Dairy products judging contest for 20 years,  
17 and was honored with appointment to the Board of  
18 Directors of DIFSA, the Washington, D.C. dairy  
19 organization which preceded IDFA.

20           I grew up in a home where dairy products  
21 were celebrated and appreciated. We had hand-cranked  
22 ice cream regularly. Although meat was a Sunday treat,  
23 there was always plenty of milk and cottage cheese.  
24 Velveeta was unknown in our home. I was raised on fine  
25 sharp Wisconsin, New York, and Vermont cheddar. The

1 owners of Columbus area dairy processing plants were  
2 regular visitors to our home, as we were OSU Dairy Tech  
3 professors and grad students. I received a dairy tech  
4 degree in 1974 and was at the headquarters of the  
5 world's largest fluid milk processor in 1977.

6 In my ten years at Safeway from 1977 to  
7 1987, the dairy industry changed dramatically, as fluid  
8 milk consumption declined, farmer income declined, and  
9 gallon jugs became the norm. Child obesity rates began  
10 to rise as children's consumption of milk declined and  
11 30 percent fat cheese and cheese like products became  
12 the principal end products of America's dairy cows,  
13 instead of Class I fluid drinking milk. Compromises in  
14 quality were made. We learned that when plastic jugs  
15 were introduced, widespread complaints about the flat  
16 oxidized flavor resulting from light exposure could be  
17 greatly reduced by pasteurizing at about ten degrees  
18 Fahrenheit higher temperature, say 175 instead of 165.  
19 The cooked flavor of the higher pasteurization masked  
20 the oxidized failure. Milk become a low cost commodity.  
21 After ten years at Safeway Dairy Division headquarters  
22 and a couple of years as the Director of Application  
23 Engineering for Cherry-Burrell, I started a process  
24 design consulting firm specializing in the dairy  
25 industry. It became the world's largest pure consulting

1 firm doing food process design. We were responsible for  
2 many major projects including the last high capacity  
3 fluid milk plant in America for Santee Dairies in Los  
4 Angeles, much of Dannon Yogurt Company's process design  
5 including the process for what became the Activa  
6 probiotics drink, Daisy Brand Sour Cream's new Dallas  
7 plant, which is the largest sour cream plant in the  
8 world, and the largest fluid milk plant in all of Europe  
9 for Aria Foods. Other projects included Land of Lakes  
10 first UHT and consolidated culture products plant and a  
11 \$120 million aseptic facility for Slimfast. In all of  
12 these projects, my Safeway experience, knowledge of  
13 plant operations, and understanding of the economics of  
14 scale and facility operating costs were key to our  
15 unique contribution.

16 As American investment in dairy plants  
17 declined, I looked to apply my knowledge to design an  
18 efficient small scale farm milk bottling plant in my  
19 community. I hoped to learn whether providing a premium  
20 pasture grazed minimally processed milk might increase  
21 per capita consumption. Other hopes included:  
22 Supporting local family farms by providing a higher  
23 value outlet for raw milk than is offered by large  
24 national cooperatives. Providing jobs for local  
25 residents with safe and satisfying working conditions,

1 opportunity for progress and personal development, and  
2 the pride of helping provide healthful food to the  
3 community. Providing milk as fresh as practical from  
4 cow to consumer, as contrasted with the common usage of  
5 the word fresh to mean not spoiled. Promoting pasture  
6 grazed dairy farming without the use of recombinant  
7 bovine growth hormone, (rBGH), and providing customers  
8 the choice of supporting these principles.

9 In one of the most impoverished and  
10 unemployed counties in Ohio this is a model and  
11 prototype for future arrangements in other rural  
12 locations. The economic spinoff of this local economic  
13 development is great. We have seven full-time employees  
14 and seven part-time employees. The payroll of these  
15 local workers contributes to the local economy and tax  
16 base.

17 Our small local dairy is responsible  
18 and responsive to the community. We believe that  
19 providing -- we believe that providing basic needs of  
20 life should be done in a way to contribute to the common  
21 good. We give consumers the choice of supporting a more  
22 rational, sustainable, and healthful world and self, by  
23 consuming our dairy products. We believe this excellent  
24 milk will reverse children's 30 year decline in fluid  
25 milk consumption, and help solve the current

1 health/obesity crisis. I believe the current decline in  
2 fluid milk consumption is related to minimum cost  
3 production methods and more extreme processing for the  
4 longer shelf life required when distributing from large  
5 centralized facilities.

6 Snowville Creamery makes it possible to  
7 give consumers truly fresh milk, on their retail grocery  
8 store shelves the day after the cows are milked. With  
9 daily deliveries and nearby responsive processing  
10 capability, our consumers enjoy our dairy products  
11 within days of the cows producing the milk. By  
12 contrast, today's dairy products usually reach consumers  
13 one or two weeks after milking. I believe we represent  
14 an exciting and promising future, especially for smaller  
15 family farms: Local differentiated premium milk.

16 Market access. The economics of retail  
17 grocery store delivery with refrigerated distribution  
18 trucks are brutal. The industry cost estimate for a  
19 single delivery with a 40 foot semi truck is \$250. We  
20 believe our costs are between \$25 and \$50 per delivery,  
21 depending upon distance between stores, and distance  
22 between our production facility. Even then we simply  
23 cannot economically supply small mom and pop stores,  
24 health food stores, or convenience stores which commonly  
25 sell \$100 worth of our milk a week. The cost of



1 delivery exceeds the profits until we are delivering at  
2 least \$250 worth of milk a week. The proposals from  
3 NMPF and IDFA are based on the clear understanding that  
4 the only real cost effective high volume sales available  
5 are in the stores which are controlled and supplied  
6 largely by IDFA members. The restrictive verbiage  
7 proposed which prevents producer-handlers from  
8 co-branding is based on protecting the large lucrative  
9 supermarket business and relegating smaller producers to  
10 costly, less than desirable small regulators. That's  
11 not a level playing field.

12           At the typical local store our \$2.99 per  
13 half gallon competes with milk which sells for \$1.99 per  
14 half gallon. At that price we both probably make about  
15 10 percent on the retail gross as profit. At least one  
16 week per month our typical store puts their half gallon  
17 milk on sale for \$1.00. Our milk goes from costing  
18 50 percent more to costing three times as much. When  
19 this happens, our sales drop about 15 percent.  
20 Unfortunately, we get no notification when the milk will  
21 go on sale, so we cannot be prepared to adjust our  
22 deliveries to the store. We routinely must take back  
23 unsold milk when half gallons are on sale. At least one  
24 other week per month the gallon milk is put on sale for  
25 \$2.99 per gallon. When this happens, half gallon sales

1 also drop, usually about 10 percent. Again, this is  
2 disruptive to our marketing and results in unsold  
3 returns. It's not a level playing field.

4 One reason for low dairy farmer income is  
5 the below reasonable loss leader pricing set by  
6 vertically integrated grocery chains such as Kroger and  
7 Safeway. About 70 percent of fluid milk is sold in  
8 plastic gallon jugs at a price which is usually near  
9 cost. An indication of the disconnect between raw milk  
10 pricing and commodity fluid milk pricing is the common  
11 practice of a processing plant bottling a generic  
12 labeled milk which retails for perhaps 50 percent less  
13 than the identical milk in an identical jug with a  
14 different brand label.

15 JUDGE CLIFTON: Let me ask you -- you  
16 read that as 50 percent less.

17 THE WITNESS: Oh, excuse me. I'm sorry.  
18 50 cents less. Thank you.

19 JUDGE CLIFTON: You're welcome.

20 A. While this is an amusing facade of  
21 consumer choice, it more accurately displays the  
22 relative impact of the alleged 15 cents per gallon raw  
23 milk difference -- raw milk cost difference which NMPF  
24 and IDFA purport cause disorderly marketing and unfair  
25 advantage. Nothing, really.

1                   Market support. After struggling and  
2 failing to get access to large regional and national  
3 stores, we began to supply two Whole Foods Markets in  
4 Columbus last August. Within three weeks we were the  
5 biggest selling fluid milk in both stores. Whole Milk  
6 asked us to supply their two stores in Cincinnati.

7                   JUDGE CLIFTON: Would you read that  
8 sentence again?

9                   A. Whole Foods asked us to supply their two  
10 stores in Cincinnati. There again, we became the best  
11 selling milk in both stores in less than a month. We  
12 then began supplying the two Whole Foods Markets in  
13 Cleveland in November and were the best selling milk in  
14 those stores by December.

15                   The difference between Whole Foods and  
16 the other grocery stores we have been serving was their  
17 sincere support of our milk, and their willingness to  
18 give Snowville Creamery shelf space commensurate with  
19 growing sales. Whole Foods is committed to encouraging  
20 local suppliers, and appreciates our principles of  
21 sustainability, animal welfare, and high quality,  
22 wholesome, minimally processed milk. As such, they are  
23 willing to allow us to succeed and even supplant their  
24 own house brand as their largest selling milk.

25                   Given honest access to the market, and a

1 level playing field, we can excel. We are still looking  
2 to receiving the benefits of a level playing field from  
3 major grocery stores.

4 We recently began supplying a grocery  
5 store chain right here in Cincinnati. In one of their  
6 larger stores there are 75 shelves of milk in the dairy  
7 case. 73 of those shelves are filled with Dean Foods  
8 milk including the Trauth Dairy label, the grocery store  
9 generic label, Horizon Organic, Nature's Basket Organic,  
10 and Over The Moon. There are only two other shelves  
11 available there, both supplied with milk from Organic  
12 Valley. These two IDFA members completely monopolized  
13 the milk case until we arrived.

14 It will be interesting to see if we can  
15 establish a toehold in these stores and grow our market.  
16 This grocery store chain seems sincerely committed to  
17 encouraging local food producers. Unfortunately, they  
18 only have four stores in the entire Cincinnati area  
19 which have a demographic promising to our milk and the  
20 size large enough to support the twice weekly deliveries  
21 necessary to properly supply our fresh, relatively short  
22 shelf life milk.

23 The proposals. As an exempt plant, I  
24 support the principles of Proposal 2 from NMPF which  
25 explains that, quote, Given growth in farm size and

1 growing economics of size in milk processing, it is  
2 reasonable to increase the size exemption to  
3 450,000 pounds per month, and we propose to do so, end  
4 of quote. In supporting this concept in Proposal 2, I  
5 also speak for two other Ohio exempt plants, Hartzler  
6 Family Dairy, Inc. in Wooster and H.D. Organics, Inc. in  
7 Utica. We all could serve an increasing consumer demand  
8 for local fresh premium milk if the exempt limit was  
9 raised.

10 While I agree with the basic premise, in  
11 today's world a fluid milk plant of only 450,000 pounds  
12 per month cannot be economically constructed and  
13 operated. Instead, I believe that 1 million-pounds per  
14 month is more realistic in providing sufficient volumes  
15 for an economical operation. Please refer to A Cost and  
16 Returns Evaluation of Alternative Dairy Products to  
17 Determine Capital Investment and Operational Feasibility  
18 of a Small-Scale Dairy Processing Facility, from the  
19 Journal of Dairy Science, 2007. This well prepared  
20 recent study found that even a facility processing  
21 644 million pounds per month would have a substantially  
22 negative net present value or profitability. I quote  
23 the following: Fluid milk plants have closed due to  
24 inefficient economies of scale and because of the  
25 product -- because the product - beverage milk - is

1 essentially an indistinguishable commodity. It is very  
2 difficult for a processor to position a fluid brand to  
3 strategic advantage. The exceptions seems to prove this  
4 rule.

5 The five farm (640,000-pound per month)  
6 fluid plant would need a 6 percent increase in present  
7 value of reserves, which translates to a 24 cents  
8 increase in the price received per gallon of milk sold.  
9 It is unlikely that the fluid processing plants would be  
10 able to overcome the baseline revenue shortfalls or the  
11 high level of expenses to reach a break-even point.

12 As a member of AIDA, I also support  
13 Proposals 23, 24 and 25. Producer-handlers, especially  
14 those operating below 10 million pounds per month, must  
15 depend on their milk having a value added component, due  
16 to lack of large scale efficiencies enjoyed by large  
17 processors. This added value should be reflected all  
18 the way back to producer-handler, without being diluted  
19 by pooling.

20 The Organic Dairy Industry has proved  
21 that value can be added on the farm by the production  
22 method. The FMMOS has been an unfair market distorting  
23 manipulation which has redistributed that wealth and  
24 value to non-organic commodity lowest cost dairy  
25 producers with which organic competes.

1           John Kennedy famously stated that life is  
2           not always fair. The marketplace favors the  
3           older established companies. The increasing  
4           consolidation and growing size of dairy handlers  
5           and processors confirms this fact. Neither  
6           Kroger nor Safeway have built a new high volume  
7           fluid milk plant in over 20 years. Their  
8           capital costs are long since paid off and  
9           depreciated. Any new producer-handlers entering  
10          the marketplace will find the cost of capital  
11          will likely exceed all other costs except raw  
12          milk itself. This economic disadvantage far  
13          exceeds 15 cents per gallon. There is no need  
14          to grandfather producer-handlers.

15                 One of the last new fluid milk plants?  
16                 Built in America was in Nevada, by Dean Foods,  
17                 to take advantage of a market distorting  
18                 manipulation of the 2005 Milk Regulatory Equity  
19                 Act which was supposedly enacted to remove just  
20                 such market distort advantages from  
21                 producer-handlers.

22                 Diversity and customer choice. While  
23                 there always will be a commodity milk business  
24                 based on lowest cost, there has always -- there  
25                 also always -- should be has been other business

1 models based on value-added differentiation,  
2 which is what most producer-handlers follow.  
3 The lowest cost commodity milk business will  
4 always serve the vast majority of consumers.  
5 But a portion of consumers want differentiated  
6 milks, particularly locally produced milks from  
7 farms following business models other than  
8 lowest cost commodity production. These  
9 customers place value on knowing the specific  
10 farm producing the milk and the farming methods  
11 used. They increasingly value pasture grazed or  
12 grass fed milk, for instance.

13 Let's be honest. The commodity milk  
14 market is declining with a continuous decline in  
15 fluid milk consumption. There is no sign that  
16 this trend will change.

17 In contrast, our local, minimally  
18 processed pasture grazed milk is growing. I  
19 have brought 25 unsolicited testimonies from  
20 consumers who find our particular and different  
21 milk has led to their increased consumption.  
22 They know that all milk is not the same, and  
23 that this milk has a much higher value to them.  
24 That value belongs to the small local farmer --  
25 farmer whose production method created it. It



1 will always be a small part of the fluid market,  
2 and no threat to the commodity processors or the  
3 FMMOS.

4 Testimony in these hearings has included  
5 the fact that smaller dairy farmers have a  
6 tremendous cost of production disadvantage, 4 to  
7 5 dollars per hundredweight. If these farms are  
8 able to have any future, it must be through  
9 adding value or government subsidies. They  
10 cannot possibly compete with commodity milk.  
11 They are not on a level playing field. Is our  
12 future one that willingly eliminates all small  
13 dairy farms below 1,000 cows? Perhaps it is if  
14 Proposals 1 and 26 are accepted.

15 I believe in diversity, in a variety of  
16 business models, and choices for both dairy  
17 farmers and consumers in the marketplace. Most  
18 grocery store -- grocery stores, it should be,  
19 in Ohio offer between three and five different  
20 ultra pasteurized out of state organic milks,  
21 but few have a locally produced pasture grazed  
22 cream line milk, although customers want it.  
23 For those customers to be served, small  
24 vertically integrated producer-handlers must be  
25 an available position for entrepreneurial dairy

1 farmers. Thank you for the opportunity to  
2 present my outlook and experience.

3 BY MR. RICCIARDI:

4 Q. Thank you, Mr. Taylor. I actually want  
5 to go through a couple of items in your statement with  
6 you, where there were word changes, so that we can  
7 confirm what actual language you want in Exhibit 95.

8 On page 4, the middle paragraph  
9 beginning, Snowville Creamery. Did you find that?

10 A. Yes.

11 Q. It reads, Snowville Creamery makes it  
12 possible to give consumers truly fresh milk. You read,  
13 when you read it, the word customers instead of  
14 consumers.

15 A. Oh.

16 Q. Do you want --

17 A. Consumers is fine.

18 Q. -- consumers to remain? Thank you. The  
19 judge pointed out what you read on 5. I think you've  
20 corrected that.

21 You mentioned during the course of your  
22 testimony a cross-out, an additional word near the  
23 bottom of page 8, under the Diversity and Consumer  
24 Choice paragraph. After the first clause, after the  
25 comma, when you read it, you deleted the word, has, and

1 you added it in between always and then, so that it  
2 would read: There also always has been other business  
3 models.

4 Is that the way that you want your  
5 statement to read?

6 A. I think that could -- there -- it could  
7 remain as it's typed. There has also always been, yes.

8 Q. Okay. Bottom of page 9 in the last --  
9 next to last paragraph -- actually, the last full  
10 paragraph, you added the word S after store. So it  
11 reads most grocery stores. Is that a change you want to  
12 make?

13 A. Yes, it is.

14 Q. And then, again, in the last sentence  
15 where it says, for those consumers, you again read  
16 customers. Do you want it to say --

17 A. Consumers.

18 Q. Consumers. Okay. Fair enough. All  
19 right. Now, a few follow-up questions for explanation  
20 on your statement before I sit down and others ask you  
21 questions.

22 And for the -- jumping off point for this  
23 issue. Page 6, the middle part of the page you begin  
24 the sentence, given honest access to the market, et  
25 cetera. Do you see that?

1 A. Yes.

2 Q. All right.

3 A. Yes.

4 Q. In terms of a startup business like  
5 Snowville, is it difficult to be able to market your  
6 milk and obtain shelf space in the larger grocery  
7 chains?

8 A. It's -- it's extremely -- it's extremely  
9 difficult. Our experience with Kroger was that we  
10 visited corporate headquarters, talked to the national  
11 dairy buyer, were volunteered that we were welcome to  
12 serve our local store and see how we did.

13 Q. Okay.

14 A. We sold 80 to 100 cases a week within a  
15 month. And they refused to give us another store. It  
16 was clear that if we'd sold 10 cases a week, we could  
17 have had many more stores.

18 Q. All right. Now, you -- you also indicate  
19 that currently, at least, Snowville has a status of an  
20 exempt plant?

21 A. Yes.

22 Q. Correct? And you're not currently a  
23 producer-handler?

24 A. We're below the volume necessary to  
25 become one.

1           Q.       Okay.  And I think you discussed it at  
2       least in general in your statement but I want to ask you  
3       specifically.  Is one of the reasons you're currently  
4       not a producer-handler in that status, leaving aside the  
5       volume you just referenced, the difficulties in  
6       balancing the producer-handler with --

7           A.       Absolutely.  We take milk from the dairy  
8       farm that our plant is located on.  But at this point  
9       we're only using about half of the milk.  So I recognize  
10      if we were -- if we had a producer-handler status, the  
11      additional milk that that plant right now is selling to  
12      an out of state processor would be sold at Class IV.

13          Q.       Okay.  And then, lastly, before I sit  
14      down, again, Exhibit 96 we've spoken about briefly and  
15      you've referenced it on page 9 of your statement.

16                 Again, the front sheet of it contains the  
17      names and e-mail addresses of some of the customers of  
18      Snowville Creamery, correct?

19          A.       Yes.

20          Q.       And the remainder of the document stapled  
21      together are the actual comments, unsolicited comments,  
22      received from those customers?

23          A.       Yes, sir.

24          Q.       And you have obtained their permission to  
25      share those comments with the Secretary?

1           A.       Yes.

2           Q.       In general, then, what is the purpose for  
3 providing this type of information to the Secretary at  
4 this hearing?

5           A.       I think that the fundamental premise of  
6 the Federal Milk Marketing Order system is that all milk  
7 is the same, and the principle of fairness is that all  
8 farmers should be paid the same for milk. And I think  
9 that as a dairy technologist who got out of college when  
10 production methods were starting to change, there's no  
11 question but that there's -- there's tremendous  
12 differences in milk depending on breed and feed, let  
13 alone things like state of lactation.

14                   The milk that is produced today in  
15 confinement dairies on -- with black and white cows  
16 producing C9 gallons of milk a day is fundamentally  
17 different from the milk that comes from brown cows on  
18 grass that are producing four or five gallons of milk a  
19 day.

20                   And as such, I strongly believe that it's  
21 important that the dairy farmers that choose to use  
22 production methods that produce a more costly product,  
23 which may be more desirable to some consumers in the  
24 marketplace, receive the full value for that product.

25                   If -- if the -- if they're forced into

1 the pool, the added value that they produce is  
2 actually -- a portion of that added value is taken from  
3 them and given to the very commodity producers with whom  
4 they have a very difficult time competing anyway.

5 So I think it's fundamental for us to  
6 recognize that this basic premise of the Federal Milk  
7 Market Order system is an anachronism. There is  
8 tremendous differentiation between the nature of milk  
9 that's been produced, and studies that were done over a  
10 decade ago at University of Wisconsin identified, for  
11 instance, five to one differences in conjugated linoleic  
12 acid between grass fed and grain fed milk.

13 Conjugated linoleic acid is one of the  
14 most potent immune boosting substances known to man.  
15 It's a powerful anti-inflammatory and it's widely  
16 recognized in the medical community that it's --  
17 European studies show 70 percent reduction in women's  
18 breast cancer in women who have adequate levels of CLA.  
19 These are things that consumers recognize and no amount  
20 of the Federal Milk Market Order System saying otherwise  
21 is going to convince consumers that there is not a value  
22 of milk from grass-fed cows.

23 Q. So Exhibit 96 is just an effort to  
24 provide at least the information from some  
25 representative comments from some of your customers

1 regarding the value of Snowville Creamery's milk?

2 A. Yes.

3 Q. Okay.

4 A. And our -- and our basic -- our most --  
5 our greatest driver in building this plant -- my  
6 greatest driver was to prove if the -- if the dairy  
7 industry gave consumers better milk, they could reverse  
8 the per capita -- the annual per capita decline in  
9 consumption of fluid milk that has been occurring for 30  
10 years.

11 MR. RICCIARDI: Okay. And then I don't  
12 have any further questions at this point. Other  
13 people may ask you questions. If I have  
14 redirect, I'll come up and ask those questions  
15 of you. Thank you.

16 THE WITNESS: Thank you.

17 JUDGE CLIFTON: Thank you, Mr. Ricciardi.  
18 Who would like to begin the cross-examination?  
19 Mr. Beshore, thank you.

20 CROSS-EXAMINATION

21 BY MR. BESHORE:

22 Q. Good afternoon, Mr. Taylor.

23 A. Good afternoon.

24 Q. I may just have a question or two. If my  
25 notes are correct, I think I heard you say that, quote,



1 the basic premise of Federal Milk Marking Orders is an  
2 anachronism?

3 A. That all milk is the same.

4 Q. So that's the basic premise, that all  
5 milk is the same?

6 A. I believe that is a basic premise, yes.

7 Q. Okay. You're aware -- perhaps not -- of  
8 the Federal Milk Order pricing programs which have  
9 differentials for protein content?

10 A. Oh, certainly.

11 Q. Okay. And butterfat content?

12 A. Yes.

13 Q. Okay. And other solids content, also?

14 A. Yes.

15 Q. So that at least with respect to those  
16 aspects of pricing, the Federal Milk Market Order System  
17 does not price all milk the same, isn't that fair?

18 A. Oh, that's true. But that goes back --  
19 that goes back several decades. The knowledge of the  
20 compositional differentiation in milks from grain to  
21 grass fed is -- is principally within the last ten  
22 years.

23 Q. Okay. So the -- your concern is that the  
24 system is based on knowledge of the contents of milk  
25 that's about ten years old?

1 A. No, it's 30 years old.

2 Q. Okay.

3 A. I mean, I think -- I think component  
4 pricing began about 30 years ago and was probably  
5 roundly adopted about 20 years ago.

6 Q. I thought I understood you to say that  
7 the new knowledge about the compositional content of  
8 milk is about ten years old?

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

10 Q. Okay. Just one other -- one other  
11 question. In -- in one of the -- one of the communiques  
12 in Exhibit 96, it appeared that somebody was writing you  
13 with a concern that your milk was no longer in the store  
14 in New Albany?

15 A. Yes.

16 Q. What store was that?

17 A. This is a Giant Eagle store. One of the  
18 limitations in Giant Eagle stores is we can't sample  
19 milk in the stores without paying what's basically a  
20 \$150 a day fee for somebody's grandmother to be there,  
21 for the taster to be there and pay for the service.

22 It's very difficult. This is another one  
23 of our barriers to entering the market. It's very  
24 difficult. In Giant Eagle we can't taste, we can't  
25 sample, we can't let people experience the difference in

1 our milk without paying an exorbitant amount of money to  
2 the store.

3 Q. So when you were in the store -- when  
4 that condition of being there was implemented then,  
5 you're no longer in the store?

6 A. Well, we chose -- we chose to -- we chose  
7 to stop supplying the store because we weren't able to  
8 grow our sales there sufficiently. And another problem  
9 at that store is -- several other Giant Eagle stores was  
10 that it wasn't uncommon for us to come into the store,  
11 find our milk in the cold box, in the main storage cold  
12 box and the shelves empty.

13 You know, we were not -- we have  
14 tremendous problems being stocked in the stores. It's a  
15 common complaint that, we're out of milk, but the milk's  
16 in the main cold box and not being brought out by the  
17 store employees.

18 Q. Okay. So then you ceased providing your  
19 milk to the stores?

20 A. At that particular store. We had every  
21 intention of going back to it as we have a larger  
22 presence in Columbus.

23 MR. BESHORE: Okay. Thank you very much.

24 JUDGE CLIFTON: Mr. English, you may  
25 cross-examine Mr. Taylor.

## CROSS-EXAMINATION

1  
2 BY MR. ENGLISH:

3 Q. Good afternoon, Mr. Taylor.

4 A. Good afternoon.

5 Q. Charles English. I only have one series  
6 of questions. You testified on page 8 of your testimony  
7 about a new plant built in Nevada by Dean Foods, and you  
8 say, to take advantage of a market distorting  
9 manipulation of the 2005 Milk Regulatory Act. Since you  
10 know a lot about milk plants, do you know that that milk  
11 plant that Dean Foods built was built in 2005?

12 A. No, sir.

13 Q. Do you know whether that plant was in  
14 operation prior to the Milk Regulatory Equity Act  
15 becoming effective in April of 2006?

16 A. No, sir.

17 Q. Do you know how it is that Dean Foods  
18 with that new plant in Nevada can take advantage of  
19 market distorting manipulation by the 2005 Milk  
20 Regulatory Equity Act?

21 A. Nevada is not in the Federal Order.

22 Q. Do you know, sir, how it is that Dean  
23 Foods can take advantage of the market distorting  
24 manipulation of the 2005 Milk Regulatory Equity Act?

25 A. Well, because they're in -- they're

1 not -- the plant is located in a state that is not  
2 regulated. They don't have to pay Class I premiums for  
3 milk which they can then export from that state into  
4 other states where they sell it as Class I milk, such as  
5 California, which is not regulated.

6 Q. Do you know for a fact that that plant in  
7 Nevada actually sells any milk into California?

8 A. I have to confess, I have no -- I have  
9 no -- I have no direct knowledge of that that I could --  
10 that I could put in front of me.

11 Q. And do you know if that plant sells milk  
12 in Arizona, it becomes partially regulated?

13 A. No, I didn't know that, sir.

14 Q. Do you know that if it sells milk into  
15 New Mexico, it becomes partially regulated?

16 A. If you say so.

17 Q. But you didn't know that before you made  
18 the statement?

19 A. No, sir.

20 MR. ENGLISH: I have no other questions  
21 of this witness.

22 JUDGE CLIFTON: Thank you, Mr. English.  
23 Who would next like to cross-examine Mr. Taylor?  
24 Mr. Carroll.

25 CROSS-EXAMINATION

1 BY MR. CARROLL:

2 Q. I want to compliment you, Mr. Taylor. I  
3 am John Benjamin Carroll. I'm attorney for the New  
4 England Producer-Handlers Association, composed of  
5 people like yourself, many of them, in the states of New  
6 York, Pennsylvania, New Hampshire, Vermont, Connecticut,  
7 and we have one person in Virginia, but that's outside.  
8 That's a different marketing area.

9 Again, I want to compliment you on what  
10 you've done. I've spent probably 30 years with  
11 producer-handlers, and I -- I know how hard it is. And  
12 I know how hard you've worked.

13 I want to ask you just a few questions,  
14 if I can, on the major subject of the hearing, which is  
15 the extent of any increase in the exempt category for  
16 own-farm milk. And at page 7 of your statement, in the  
17 first -- or second full paragraph you state: While we  
18 agree with the basic premise, in today's world a fluid  
19 milk plant of only 4,000 -- or 450,000 pounds per month  
20 cannot be economically constructed and operated.

21 Can you explain that answer?

22 A. Well, I -- having just done this, I spent  
23 a million dollars to build the smallest plant that I  
24 could envision after 30 years in the industry and being  
25 an expert in such matters. And having constructed the

1 plant and operating it, operated -- operating it for a  
2 year and a half, there's very little I would do  
3 different.

4 If you're building a plant that's going  
5 to make a truly premium milk, I believe it has to be  
6 high temperature, short time pasteurized, for instance,  
7 as compared to vat pasteurizing. Vat pasteurizing has a  
8 cost in excess of \$100,000.

9 You put together the infrastructure and  
10 the facility necessary to process any amount of milk,  
11 high temperature, short time process, any amount of milk  
12 and bottle, bring to market, skim milk, 2 percent and  
13 whole milk, you're spending over a million dollars. And  
14 depending on your -- your cost of money, and what --  
15 what you're paying for milk, you put all those things  
16 together, and the economics at the half million pound  
17 per month level are -- are, I hope, about a three-year  
18 payback, if you can sell that much milk.

19 Q. All right.

20 A. But the -- but by the same token, the --  
21 the real opportunity is doing something more than basic  
22 three-year payback. And there's tremendous risks and  
23 variabilities in the marketplace.

24 If we'd been given access to mainstream  
25 grocery stores, we probably would have been profitable

1 within six months. As it is, we've been operating 18  
2 months. We've lost a third of a million dollars and  
3 we're still in the red. These are the kind of financial  
4 risks and costs you face in trying to enter the fluid  
5 milk market.

6 And so the -- to me, looking back now  
7 after a year and a half, our plant's easily capable of  
8 doing a million pounds a month. The dairy farm that  
9 we're on, plus a nearby dairy farm that Bill Dix and  
10 Stacy Hall also operate have -- has about three-quarters  
11 of a million pounds available.

12 I think to attract capital, to give an  
13 entrepreneur the confidence to proceed, there's got to  
14 be an up side to -- to any business opportunity. And to  
15 limit the exempt status to 450,000 pounds a month is to  
16 choke it. And to limit it to that, just barely that,  
17 could encourage someone to go into it. And to limit a  
18 facility, just about any facility you could build could  
19 probably do a million pounds a month; to limit  
20 arbitrarily to 500,000 seems to be a market distortion  
21 and a real impediment to encouraging what I think is  
22 a -- is a progressive and exciting opportunity to -- to  
23 change a declining fluid milk industry.

24 Q. And your next sentence is: Instead, I  
25 believe 1 million pounds per month is more realistic in



1 providing sufficient volumes for economical operation.

2 Is that what you've been saying --

3 A. Yes.

4 Q. -- that 1 million is the better figure?

5 A. I think so.

6 Q. On page 8 of your statement, you have a  
7 sentence in the third -- one, two -- third paragraph,  
8 last -- next to the last sentence: Any new  
9 producer-handlers entering the marketplace will find the  
10 cost of capital will likely exceed all other costs  
11 except raw milk itself.

12 Could you give us more information on  
13 that?

14 A. Well, that's been our experience. The  
15 building a fluid milk plant is -- it's a seven-figure  
16 operation. One of the -- one of the costs that I  
17 underestimated was distribution, for instance. We now  
18 own four milk delivery trucks and a milk tanker truck.  
19 Those -- those vehicles put together was just another  
20 eighth of a million dollars. Our expense of capital  
21 right now is in the neighborhood of \$150,000 a year. It  
22 is our second greatest cost, so it's important to get a  
23 return to make a profit.

24 A lot of -- a lot of the  
25 producer-handlers that exist in the country right now

1 have been in place for a generation or more. And  
2 they're in the same position as -- as a lot of the large  
3 existing processing plants. They've been paid for and  
4 depreciated.

5 The entry into the marketplace and the  
6 capital that it requires is a tremendous burden and --  
7 yeah.

8 Q. And is the exemption necessary in order  
9 to allow those entities to engage in that type of  
10 operation?

11 A. I think the -- I think that if you want  
12 to have a dairy industry that really fosters innovation,  
13 creativity, entrepreneurial spirit and differentiation,  
14 we have to have an up side. And so having a reasonable  
15 exemption limit is helpful in letting a dairy farmer  
16 vertically integrate and go directly to his community  
17 with a product.

18 By the same token, I think there's got to  
19 be a step above and beyond that to a producer-handler  
20 status that also has a meaningful volume, and that the  
21 volumes -- the volume limits for both exemption and  
22 producer-handler operations have to be reasonable in the  
23 current marketplace and with current economics to make  
24 those businesses practical and sustainable.

25 Q. Now, directing your attention to one of

1 your products, which is -- as I have -- I read your  
2 customer statement, apparently you sell a product where  
3 there's no homogenization?

4 A. None of our products are homogenized.

5 Q. Is there a reason for that?

6 A. Oh, yeah. Our basic premise is that --  
7 is basically what I was taught in college in the early  
8 1970s in dairy tech, which is that the milk comes  
9 perfect from the cow and it's our duty to mess with it  
10 as little as we can in getting it to our customer.

11 So we follow that premise. So we only do  
12 what is legally necessary to -- to process the milk. So  
13 we choose not to homogenize.

14 Q. Some years ago I participated in a  
15 study -- or one of my clients did, in a study of  
16 homogenized milk as a factor in the rising level of  
17 heart attacks in this country. And there was  
18 considerable print on it. Have you seen those studies  
19 or are you familiar with it?

20 A. I'm not -- I've not read actual studies  
21 on homogenization, per say, but I'm well aware of the  
22 idea that homogenized milk fat is detrimental to human  
23 health.

24 Q. And do you have customers that are aware  
25 of that fact and that are seeking your product for that

1 reason?

2 A. Yes, sir.

3 MR. CARROLL: That's all. Thank you very  
4 much.

5 JUDGE CLIFTON: Thank you, Mr. Carroll.  
6 Who next would like to cross-examine Mr. Taylor?  
7 Mr. Tosi, do you have any questions for  
8 Mr. Taylor?

9 MR. TOSI: No, your Honor. We have no  
10 questions. But Mr. Taylor, thank you for  
11 coming. And I'm happy to see that you're a good  
12 Ohio State University graduate. We were there  
13 at about the same time.

14 THE WITNESS: Thank you. Thank you very  
15 much.

16 MR. TOSI: Thank you.

17 THE WITNESS: Yes, good to see another  
18 Buckeye here.

19 MR. TOSI: Yes, sir.

20 JUDGE CLIFTON: Is there any objection to  
21 the admission into evidence of Exhibit 95?  
22 There is none. Exhibit 95 is hereby admitted  
23 into evidence. Is there any objection to the  
24 admission into evidence of Exhibit 96? There is  
25 none. Exhibit 96 is hereby admitted into

1 evidence.

2 MR. RICCIARDI: Thank you for doing my  
3 job for me, Judge. I don't have any further  
4 questions.

5 JUDGE CLIFTON: Mr. Carroll, did you  
6 think of something?

7 MR. CARROLL: I neglected one area which  
8 I've just been reminded of.

9 JUDGE CLIFTON: All right. You may.

10 RECROSS-EXAMINATION

11 BY MR. CARROLL:

12 Q. I remember you said about your  
13 positioning on grandfathering. There was a  
14 grandfathering proposal. Would you please explain that?

15 A. In its follow-up on your question about  
16 capital, having -- having -- having struggled to enter  
17 the marketplace and experiencing the economics over the  
18 last year and a half, I think there's tremendous  
19 barriers to entry for producer-handlers. And there's  
20 tremendous competition with commodity milk. And very  
21 few producer-handlers who are looking to capitalize on  
22 value added on-the-farm milk will actually be attempting  
23 to compete with commodity milk on a price basis.

24 I think that the -- I think that there's  
25 so many -- there's so many aspects to the unlevel

1 playing field that exists in the marketplace that  
2 risking producer-handlers by grandfathering is  
3 unnecessary, since I don't really see producer-handler  
4 plants threatening the commodity market, a different  
5 commodity market for one.

6 And secondly, that I think, again, to --  
7 to foster customer choice, to give the opportunity for  
8 a -- a new changing growing dairy industry, we have to  
9 have the up side, the place to go for an exempt plant,  
10 if it is successful, if it does grow its market. The  
11 producer-handler model is an important part of our total  
12 diversified dynamic dairy industry of our future, I  
13 hope.

14 MR. CARROLL: Thank you, sir.

15 THE WITNESS: Thank you.

16 JUDGE CLIFTON: Thank you, Mr. Carroll.

17 Mr. Taylor, is there anything else you'd like to  
18 add, for example, prompted by questions that you  
19 were asked?

20 THE WITNESS: It's been -- it's been an  
21 interesting several months. For the last two  
22 years I've worked 100 hours a week, and I can  
23 count the days I've had off on the fingers of  
24 one hand.

25 And when I received the letter from the

1 Federal Milk Market Order Administrator in  
2 February explaining what was coming in these  
3 proposals, it was extremely daunting. And the  
4 amount of time, effort, and money that's been  
5 involved in defending my right to continue doing  
6 what the law said I could do when I put my  
7 million dollars on the line has nearly broken me  
8 and our business.

9 I got out of bed yesterday morning at  
10 6:00 and I haven't been to sleep since Sunday  
11 morning. We had two trucks break down on  
12 Friday. We had a delivery truck flip over on  
13 270 in Columbus this morning. I think it's  
14 absolutely despicable that the dairy industry is  
15 doing this to us. And I can tell you that  
16 everyone I tell the story to feels the same way.

17 There's -- every citizen, every customer  
18 that you explain that a dairy company that  
19 controls 40 percent of the milk in America says  
20 I have an unfair advantage recognizes that it's  
21 wrong, that it's terribly wrong.

22 Our government is to serve our people.  
23 In this case, I believe our government is  
24 serving Dean Foods, and I could not be more  
25 upset about it.

1                   My father was a pilot who commanded a  
2                   medical evacuation squadron for the Pacific  
3                   Theater, and he was fighting tyrannical forces  
4                   that were threatening our democracy. I believe  
5                   I'm fighting the same forces here today. Thank  
6                   you.

7                   JUDGE CLIFTON: Thank you very much,  
8                   Mr. Taylor. I appreciate your taking the time  
9                   away from your business to be here to testify.

10                  THE WITNESS: Thank you.

11                  JUDGE CLIFTON: Mr. Ricciardi, it's  
12                  12:47. This seems to me like a good time to  
13                  take a lunch break.

14                  MR. RICCIARDI: I think it is a perfect  
15                  time to take a lunch break.

16                  JUDGE CLIFTON: All right. Everyone  
17                  please be back and ready to go at 1:47.

18                  (Exhibits 97 - 101 were marked for  
19                  identification.)

20                  (A recess was taken from 12:47 to 2:01.)

21                  JUDGE CLIFTON: We're back on record at  
22                  2:01. We have two witnesses at the witness  
23                  stand and I'd like first for each of you to  
24                  identify himself and spell his name. Would you  
25                  begin please, Mr. Sharpe?



1 MR. SHARPE: I'm Charles N. Sharpe,  
2 S-h-a-r-p-e.

3 MR. BUTTON: Timothy Button,  
4 T-i-m-o-t-h-y, B-u-t-t-o-n, Sr.

5 JUDGE CLIFTON: All right. And the N in  
6 your middle name, Mr. Sharpe, that's N like  
7 never?

8 MR. SHARPE: Yes.

9 JUDGE CLIFTON: I'd like to have you both  
10 take the oath to tell the truth at the same  
11 time, each of you, and remain seated, and try to  
12 speak into the microphone when you answer me.

13 (The witnesses were sworn.)

14 JUDGE CLIFTON: Thank you. Each witness  
15 answered yes. We've marked these exhibits as  
16 follows. The testimony of Charles Sharpe is  
17 marked as Exhibit 97. The testimony of Tim  
18 Button is marked as Exhibit 98.

19 The Star-K Kosher Certification letter is  
20 marked as Exhibit 99. The Heartland Creamery  
21 website excerpt that has at the top right, When  
22 Taste Matters, is marked as Exhibit 100. And  
23 the other excerpt from the website, which begins  
24 with Iowa in a list of locations is marked as  
25 Exhibit 101.

1                   Mr. Miltner or Mr. Ricciardi, which will  
2                   proceed? Mr. Ricciardi, you may proceed.

3                   CHARLES SHARPE, TIMOTHY BUTTON, SR.  
4                   of lawful age, being duly sworn, were examined and  
5                   testified as follows:

6                                   DIRECT EXAMINATION

7                   BY MR. RICCIARDI:

8                                   MR. RICCIARDI: Good afternoon, your  
9                                   Honor. Al Ricciardi. And you have identified a  
10                                  number of documents that have been marked. I  
11                                  intend to start with what has been marked as  
12                                  Exhibit 97, which is the testimony of  
13                                  Mr. Sharpe, and then proceed through the  
14                                  testimony of Mr. Button, Exhibit 98.

15                                 And then we will deal, depending upon the  
16                                 other exhibits, with the respective witnesses as  
17                                 we go along in the examination.

18                                 But let me start with you first,  
19                                 Mr. Sharpe. And you've identified and also  
20                                 indicate that you are here making presentation  
21                                 on behalf of Heartland Creamery. Can you tell  
22                                 me, before you get into your specific statement,  
23                                 what is Heartland Creamery?

24                                 MR. SHARPE: We're a producer of milk  
25                                 that we -- or we're a processor of milk that we

1 produce there on the farm.

2 MR. RICCIARDI: Okay. And you identify  
3 it more specifically in the statement, which  
4 you'll get to in a moment, but you also are here  
5 on behalf effectively of Heartland Ministries.  
6 Can you at least just briefly describe what that  
7 is?

8 MR. SHARPE: Yes. Heartland Ministries  
9 is a ministry we started in 1995 to help people  
10 with drug and alcohol problems and also young  
11 people who had just lost their way and had no  
12 one to really take care of them.

13 MR. RICCIARDI: And in what way is  
14 Heartland Ministries involved with Heartland  
15 Creamery and the other way around?

16 MR. SHARPE: Well, Heartland Ministry is  
17 a separate entity, but we have a -- an  
18 organization, a corporation called Sharpe  
19 Holding that owns the creamery, and of course, I  
20 am the owner of Sharpe Holdings.

21 MR. RICCIARDI: Why don't you go ahead at  
22 this point and read your prepared testimony and  
23 then I'll be back up here to guide you next.

24 MR. SHARPE: All right. Heartland  
25 Creamery is a unique --

1                   JUDGE CLIFTON: I'm sorry. Move that  
2 microphone to the left about 3 inches.

3                   MR. SHARPE: All right. Heartland  
4 Creamery is a unique producer-handler located in  
5 northeast Missouri, about three miles -- or  
6 three hours, I'm sorry, north of St. Louis.  
7 Heartland Creamery is owned by Sharpe Holdings,  
8 Inc., and while organized as a for-profit  
9 corporation, supports the mission and operations  
10 of CNS International Ministries.

11                   Heartland Ministries. I founded the  
12 ministry approximately 13 years ago as a  
13 Christian ministry engaged in outreach to  
14 at-risk people in need of assistance in dealing  
15 with substance abuse (drug and alcohol) and  
16 other issues. Heartland is an international --  
17 or is an intentional community designed to help  
18 hurting people get a fresh start in life. The  
19 Heartland Community provides dedicated high  
20 school and college facilities on site in  
21 addition to counseling and other services. The  
22 Heartland program includes teaching job skills,  
23 providing work experience to assist with  
24 transition back into the larger community when  
25 program participants leave Heartland --

1 Heartland's physical environment. The Ministry  
2 has also become a center of economic activity in  
3 a very depressed rural area, providing numerous  
4 jobs to a region in need of them.

5 We first began operating a dairy, a  
6 working dairy farm, Heartland Dairy, to provide  
7 jobs and training opportunities to our students.  
8 Later, we added a milk processing plant,  
9 Heartland Creamery, and the creamery provides  
10 the same training and employment opportunities  
11 that our farm does.

12 Heartland Creamery. The Heartland  
13 Creamery is a for-profit business, the profits  
14 of which help support the ministry. Our farm is  
15 located in Newark, Missouri, and the creamery is  
16 in LaBelle, Missouri, about 15 miles apart.  
17 Heartland Dairy is now milking approximately  
18 3,000 cows. All of our calves, heifers, and dry  
19 cows are also raised on this site. We also have  
20 a goat herd and produce goat milk and goat  
21 cheese. The combination of our cow herd and  
22 goat herd and processing plant makes our  
23 operation among the most unique in the country.

24 Heartland Creamery produces great milk.  
25 It is fresh, RSBT (sic) free and reliably

1 produced on a single farm. Our processing plant  
2 is very small, but we have distribution in  
3 multiple -- in multiple states, including  
4 Missouri, Kansas, Iowa and Illinois. We produce  
5 milk in glass bottles, in pints, quarts and half  
6 gallons, as well as milk in plastic gallons.  
7 Given our small size, we must purchase our milk  
8 jugs. Our volumes are not high enough to  
9 justify purchasing our own blow-molding  
10 equipment.

11 Our customers are supermarkets, both  
12 chains and independents. Our goal is to grow in  
13 tandem with the Heartland Community.

14 Heartland does not believe that we have  
15 any disruptive impact on the market, either in  
16 terms of effect on blend price to the farmers or  
17 through an unfair competitive advantage against  
18 fully regulated processing plants. We get our  
19 milk at our cost of production, not at the blend  
20 price. It is apparent that in the current  
21 market this puts us at a substantial  
22 disadvantage compared with regulated processors  
23 who are paying Class I prices. We would note  
24 that Dean Foods, for example, reported  
25 record-breaking profits last fall, crediting the

1 low price of milk. That was not the situation  
2 for us at Heartland Creamery.

3 We're also aware that several witnesses  
4 have -- had alleged that we have won business  
5 that they would like to have based on the  
6 allegation of unfair price and advantages we  
7 have as a producer-handler. This is nonsense.  
8 Heartland Creamery has no unfair price advantage  
9 and anyone who comes to our operation can see  
10 that very plainly. We are an extremely small  
11 operation. We -- the General Manager of our  
12 creamery, Tim Button, is here with me, and will  
13 provide more detail on the operation and the  
14 specific business that -- that others have  
15 referred to in this hearing. Tim spent his  
16 career working for Crowley Foods in upstate New  
17 York and for HP Hood in its bottling operation.  
18 He laughed when he saw our little bottling  
19 operation. He had -- we have no advantage of  
20 size and scale compared to the dominant  
21 processors.

22 I find it interesting that Gary Lee of  
23 Prairie Farms testified about the processing  
24 competition from Heartland. But in any event,  
25 the record should reflect the fact that the

1 business won by Heartland Creamery refers --  
2 referred to by Mr. Lee was won in 2007, when we  
3 were a member of DFA and the cooperative  
4 community for which Mr. Lee expressed his  
5 support. Heartland Creamery did not become a  
6 producer-handler until January 1, 2008.

7 I also find it interesting that Warren  
8 Erickson of Anderson Erickson complained of  
9 Heartland winning an account from them. I don't  
10 think any producer-handler should have to  
11 apologize for winning any customer. Customer  
12 contracts are awarded on the base of quality,  
13 service, and price. We provide a winning  
14 combination of each, but in that instance also,  
15 the business that Mr. Erickson discussed was won  
16 principally when Heartland was not a  
17 producer-handler.

18 Competition is a two-way street, as  
19 anyone in the business of selling anything  
20 understands very well. As a producer-handler,  
21 we at Heartland Creamery have competitive  
22 constraints that the regulated market does not,  
23 and vice-versa. There is nothing whatsoever  
24 wrong with that - any more than there is  
25 anything wrong with partnerships competing



1           against corporations. Different business models  
2           have different advantages and disadvantages -  
3           and that is a strength of free enterprise.

4           It is simply not possible to look at the  
5           present situation in the dairy industry and  
6           conclude that producer-handlers have any unfair  
7           advantage over cooperatives or process -- and  
8           processors. For example, I cannot buy milk if  
9           anything goes wrong with our cows or our farm  
10          supply. The regulated market can. We have to  
11          find our own customers for our own milk; pool  
12          producers do not have that burden. We have to  
13          handle our own milk to -- we have to haul our  
14          own milk to our bottling plant; pool producers  
15          do not -- they do not have that burden. We each  
16          pay for the service in different ways, but that  
17          does not mean our competitive positions are  
18          inequitable.

19          I do not believe that national policy  
20          should eliminate choice of business models. I  
21          believe it should remain -- maintain them. We  
22          need to help -- to keep all options open to move  
23          agriculture businesses away from government  
24          support to independent viability. I oppose  
25          eliminating the producer-handler status, as I

1 believe that it provides an opportunity for  
2 building new types of -- of productive economic  
3 activity in the area that need them greatly.  
4 And our area of Northeast Missouri is one such  
5 area.

6 MR. RICCIARDI: Thank you, Mr. Sharpe. I  
7 have some additional questions, but I think if  
8 you would just move the microphone over to your  
9 right, to Mr. Button, so I can ask a few  
10 questions before you provide your statement,  
11 Mr. Button.

12 You've been identified as someone who  
13 works for the Heartland Creamery. Can you tell  
14 us in general what you do there?

15 MR. BUTTON: I oversee the -- excuse  
16 me -- the production, the maintenance,  
17 distribution of the finished product, the  
18 general operation.

19 MR. RICCIARDI: Okay. And that's for the  
20 creamery or the processing portion of the  
21 producer-handler operation?

22 MR. BUTTON: That's correct.

23 MR. RICCIARDI: How long have you been  
24 working with the creamery?

25 MR. BUTTON: A year and nine months.

1                   MR. RICCIARDI: Okay. So you were there  
2                   at or about the time that you went from the -- a  
3                   regulated processor actually to a  
4                   producer-handler?

5                   MR. BUTTON: Yes.

6                   MR. RICCIARDI: Why don't you go ahead,  
7                   if you would, and provide the testimony set  
8                   forth in your statement which has been marked as  
9                   Exhibit 98?

10                  MR. BUTTON: My name is Tim Button. I'm  
11                  the general manager of Heartland Creamery. As  
12                  Mr. Sharpe described, before working as a  
13                  general manager at Heartland, I worked in the  
14                  bottling operation of HP Hood. Before that, I  
15                  was employed in the bottling operations of  
16                  Crowley Foods. Both of those companies are  
17                  great organizations. And yes, I did chuckle  
18                  when I saw the Heartland bottling operation.

19                  Heartland became a producer-handler in  
20                  January of 2008. Before we opened the Creamery,  
21                  Heartland Farm was a producer member of DFA, the  
22                  dominant cooperative operating in Missouri. We  
23                  sold our milk to DFA, as other dairy producers  
24                  do. When we opened Heartland Creamery, we  
25                  became DFA's customer as well.

1                   By late 2005, we were producing,  
2                   handling, bottling and distributing our own  
3                   milk. As a customer, DFA charged us a variety  
4                   of fees on our milk sold back to us. Actually,  
5                   during that time, we trucked our own milk from  
6                   the farm to the plant. DFA picked up and  
7                   marketed what we did not need at the plant. The  
8                   difference in what we got paid for our milk we  
9                   produced and what we paid for the milk we bought  
10                  for the creamery significantly reduced the money  
11                  that we could have reinvested in the business to  
12                  grow and ultimately reduce our profits, which  
13                  would be contributed to Heartland.

14                 As a producer-handler, we continue to  
15                 produce --

16                 JUDGE CLIFTON: I'm sorry. You left off  
17                 that last word, and I think it's important.  
18                 What -- where would the profits go?

19                 MR. BUTTON: Contributed to Heartland  
20                 Ministry, I'm sorry.

21                 JUDGE CLIFTON: Okay. Go ahead.

22                 MR. BUTTON: As a producer-handler, we  
23                 continue to produce, haul, bottle and distribute  
24                 our own milk and we are no longer paying fees to  
25                 the cooperative. Instead we have the full

1 responsibility of finding our own customers, and  
2 balancing our own milk supplies to ensure that  
3 we have sufficient volume to supply our own  
4 customers. We make some cheese and also sell  
5 the excess milk in compliance with the Central  
6 Order regulations, generally through a broker or  
7 customers that we find ourselves. The price we  
8 receive for excess milk sold on the open market  
9 is usually at or below Class III price.

10 Heartland Creamery produces a variety of  
11 fluid milk products: Gallon milk jugs, whole,  
12 2 percent, 1 percent, skim, chocolate, half and  
13 half and heavy cream, milk in glass bottles,  
14 half gallons, quarts, pints, half and half and  
15 cream in pints. We also produce goat milk in  
16 quart bottles. We also produce some goat milk  
17 and cow milk cheese. Our customers choose us  
18 for the same reason customers choose any  
19 supplier - quality, service, and price. We do  
20 not have a price advantage over the regulated  
21 market. As I have said, our processing plant is  
22 very small, our setup is very labor intensive  
23 and our business is not even big enough to  
24 justify having a blow mold. Our bottle costs  
25 are about 10 cents higher than the larger

1 operation with blow molding. Every unit we  
2 produce is handled by hand. We are not  
3 automated.

4 Rather than growing as a result of our  
5 producer-handler status, the opposite is true.  
6 In fact, the size of our herd has shrunk since  
7 we became a producer-handler. At our peak we  
8 were milking approximately 4,200 cows; today we  
9 are milking 3,000. Our Class I volumes have  
10 similarly decreased.

11 We have also recently secured Star-K  
12 Kosher Certification for all of our products,  
13 which are sold under the Samuel Joseph's brand.  
14 A copy of our certification is attached. Our  
15 integrated farm and processing operation is very  
16 well suited to the constant on-site supervision  
17 required to secure and maintain certification  
18 for this important niche mark.

19 I want to address specifically --  
20 specific allegations from two witnesses in this  
21 hearing about business dealings with Hy-Vee  
22 stores. The implication is that we are selling  
23 at a price that cannot be met by fully regulated  
24 handlers. I know that that is not the case  
25 because we serve those accounts as a regulated

1 handler. In many stores, our Heartland branded  
2 milk is priced below the Hy-Vee store brand  
3 price. But we began placing our gallon milk in  
4 Hy-Vee stores in 2005 and in Kansas City Hy-Vee  
5 stores in 2007, during the time when Heartland  
6 Creamery was buying our milk back from DFA and  
7 accounting to the Central Order Market  
8 Administrator as a fully regulated distributing  
9 plant.

10 We were able to place our milk in those  
11 stores for a number of reasons. First, despite  
12 our small plant and its associated higher costs,  
13 we do not have high overhead costs, as do  
14 handlers like Anderson Erickson. Second,  
15 because of the nature of our business, we are  
16 likely willing to operate at a lower margin than  
17 other bottlers, whether cooperative or  
18 proprietary. Third, where we can, we do look  
19 for efficiencies and savings in our operations.  
20 Since we transitioned to producer-handler  
21 status, our pricing strategy has not changed.  
22 It isn't the case that others cannot match our  
23 price, it is that they choose not to.

24 In addition, what we have learned from  
25 the testimonies in the hearing about Heartland

1 providing a small part -- provides a small part  
2 of a large picture. The retail price alone,  
3 which I understand was not even specifically  
4 mentioned, doesn't tell us anything about the  
5 markup by the retailer, the profit margin of the  
6 supplier, or the costs of the supplier. Any one  
7 of those factors, and possibly others, can be  
8 reflected in a retail price or explain why  
9 certain products or suppliers are selected.

10 Accountants move on price -- accounts  
11 move on price, product quality, service, and  
12 other intangible factors. Some customers have  
13 elected to stock our products in part because of  
14 our dedication to the Heartland community.  
15 Others have selected our product based on our  
16 accountability of the product from one single  
17 source. Both as a regulated handler and as a  
18 producer-handler, we gained customers and lost  
19 customers. But in all instances our price was  
20 not one that could not be met by a fully  
21 regulated plant.

22 Neither Mr. Sharpe nor I am an expert in  
23 Federal Milk Marketing Orders. We -- what we  
24 understand is that the combination of proposals  
25 of NMPF and IDFA will eliminate the current



1 producer-handler status and grandfather in only  
2 certain producer-handlers operating at 3 million  
3 pounds of Class I production per month, with  
4 further limitation on labeling and marketing.  
5 We oppose any change to the current  
6 producer-handler definition. But if the  
7 Secretary believes that the current  
8 producer-handler regulations should be changed,  
9 then in conjunction with our other members AIDA,  
10 support the AIDA proposals to exempt own-farm  
11 productions for all handlers or to establish  
12 individual handler pools. While we have limited  
13 retail sales, we support the AIDA proposal to  
14 exempt retail sales by producer-handlers.

15 If the current producer-handler status is  
16 eliminated, Heartland would be likely to be  
17 forced into a situation similar to that we had  
18 before. We would sell our milk to a cooperative  
19 and buy back what we need, in addition to  
20 accounting to the pool. We knew almost two  
21 years ago that situation was our best -- was not  
22 our best long-term option.

23 JUDGE CLIFTON: That's an important  
24 addition, what you just did there.

25 MR. BUTTON: Yeah.

1 JUDGE CLIFTON: Okay. So on the  
2 statement that's part of the record, the record  
3 copy that will go on the website, you want us to  
4 insert the word, not, where?

5 MR. BUTTON: After was.

6 JUDGE CLIFTON: Okay. Next to the last  
7 line of Exhibit 98, the third word, situation  
8 was not --

9 MR. BUTTON: Our best long-term option.  
10 We hope to grow as the community grows and we  
11 intend to do so self-sufficiently. We should be  
12 afforded that opportunity.

13 JUDGE CLIFTON: Thank you, Mr. Button,  
14 and before you leave the room, if you will  
15 initial that change with the USDA representative  
16 sitting at the front table, the far end.

17 MR. RICCIARDI: Thank you, your Honor.

18 Why don't you go ahead and keep the  
19 microphone, Mr. Button, and let's go through a  
20 few items and also some documents, and then I'm  
21 going to ask Mr. Sharpe some questions, too.

22 Let me understand this so the record is  
23 clear. Prior to January of '08, Heartland was  
24 not a producer-handler, is that your testimony?

25 MR. BUTTON: That's correct.

1 MR. RICCIARDI: And prior to January of  
2 '08, Heartland was a member of DFA, is that your  
3 testimony?

4 MR. BUTTON: Yes, it is.

5 MR. RICCIARDI: And Heartland, prior to  
6 January of '08, actually paid into the pool?

7 MR. BUTTON: That is correct.

8 MR. RICCIARDI: Okay. Now, that being  
9 the case, why don't we take a look for a moment  
10 at what's been marked as Exhibit 100. It's  
11 actually a two-page document. I want to focus  
12 for the moment on the first page of that  
13 document. This is the -- a copy of the first  
14 page of the website for Heartland Creamery  
15 currently, and is the website part of the  
16 marketing that Heartland does?

17 MR. BUTTON: Yes.

18 MR. RICCIARDI: Okay. And I note on  
19 Exhibit 100, page 1, that Heartland Creamery  
20 emphasizes at the top, taste, When Taste  
21 Matters, correct?

22 MR. BUTTON: Correct.

23 MR. RICCIARDI: It also talks about, in  
24 bold, milk with no added hormones, flavor, and  
25 choice. Are all of those concepts important to

1 Heartland?

2 MR. BUTTON: Absolutely.

3 MR. RICCIARDI: And are all of those  
4 concepts one of the reasons why Heartland  
5 decided to switch in January '08 to a  
6 producer-handler status?

7 MR. BUTTON: Yes, it is.

8 MR. RICCIARDI: Tell me more specifically  
9 why.

10 MR. BUTTON: Well, we believed that we  
11 could take a high quality product and offer it  
12 in the market for a competitive price. And we  
13 realized that paying the -- some of the extra  
14 fees that were required by DFA, that that was  
15 limiting that ability.

16 MR. RICCIARDI: Limiting your ability,  
17 meaning Heartland's ability, to do what, sir?

18 MR. BUTTON: To offer the product at a  
19 more competitive price.

20 MR. RICCIARDI: And what about your  
21 ability to differentiate your taste, lack of  
22 rbST, flavor, and choice?

23 MR. BUTTON: Well, we have one -- one  
24 dairy. We know the health of all the cows.  
25 It's a consistent milk. It's fresher. We bring

1           it directly from the dairy to the creamery. And  
2           so that -- and obviously it's hormone free. And  
3           so that is allowing people to purchase a product  
4           that is rbST free, purchase a product that's  
5           high in quality and giving them a choice.

6                   MR. RICCIARDI: Okay. Let's move on to  
7           kosher certification. Exhibit 99 appears to be  
8           a letter dated May 5, 2009 from Star-K Kosher  
9           and providing certification to Heartland  
10          Creamery.

11                   Were you involved in the process recently  
12          for Heartland to obtain Star-K Kosher  
13          Certification?

14                   MR. BUTTON: Yes, I was.

15                   MR. RICCIARDI: Okay. And why did  
16          Heartland decide that Star-K certification for  
17          kosher products was important for its business  
18          model?

19                   MR. BUTTON: Well, it was our  
20          understanding that there are not -- as far as  
21          the Star-K Kosher Certification, there were not  
22          many creameries able to do that. And part of  
23          the reason was the fact that we have one farm.  
24          Most larger producer-handlers have multiple  
25          farms, hundreds of farms. And it would be

1           nearly impossible for the rabbi, the mashigiach  
2           to be there and watch that operation. So it  
3           made us a favorable -- put us in a favorable  
4           position for them to be able to come and certify  
5           both the dairy and the creamery.

6           MR. RICCIARDI: And as Exhibit 99 states,  
7           as of May 5, 2009, did Heartland receive Star-K  
8           Kosher Certification?

9           MR. BUTTON: Yes, we did.

10          MR. RICCIARDI: And with regard to the  
11          products that are listed, the 11 products that  
12          are listed on the document, did Heartland  
13          creamery obtain certification on all 11 of those  
14          products?

15          MR. BUTTON: Yes, we did.

16          MR. RICCIARDI: And with regard to the  
17          brand that's indicated there, Samuel Joseph  
18          Dairy, with those products, those 11 products,  
19          is it the intention of Heartland to market the  
20          products listed under the Samuel Joseph Dairy  
21          brand?

22          MR. BUTTON: That is correct.

23          MR. RICCIARDI: And those would be  
24          marketed in what community, sir?

25          MR. BUTTON: These could be marketed

1           anywhere throughout the United States. We have  
2           a broker and distribution center that's working  
3           with us to open it up to any Jewish community  
4           that is interested -- or, excuse me,  
5           distributors of Jewish communities that might be  
6           interested in these particular products.

7           MR. RICCIARDI: Okay. Let's go back to  
8           some testimony that you've given in your  
9           statement with regard to some complaints that  
10          have been made about Heartland Creamery.  
11          And let's give a little bit more background.  
12          Does --

13          MR. BUTTON: The -- sorry.

14          MR. RICCIARDI: Does Heartland Creamery  
15          currently have as a customer the Hy-Vee stores  
16          in a variety of places, including Kansas City?

17          MR. BUTTON: Yes, we do.

18          MR. RICCIARDI: And as I recall your  
19          testimony, Heartland started to serve the Hy-Vee  
20          stores in different locations back in 2005,  
21          right?

22          MR. BUTTON: That is correct.

23          MR. RICCIARDI: And in 2005, what was the  
24          regulatory status of Heartland? You're  
25          regulated at that point?

1 MR. BUTTON: Yes.

2 MR. RICCIARDI: Okay. Thereafter as  
3 Heartland began to serve the Hy-Vee stores, did  
4 you receive other locations from them?

5 MR. BUTTON: Yes, we did.

6 MR. RICCIARDI: And starting sometime, I  
7 believe you said October of 2007, were you also  
8 able to obtain some of the Hy-Vee stores in the  
9 Kansas City market?

10 MR. BUTTON: Yes, we did.

11 MR. RICCIARDI: And at that time, prior  
12 to January of '08, was Heartland regulated?

13 MR. BUTTON: Yes, we were.

14 MR. RICCIARDI: And did Heartland pay  
15 into the pool?

16 MR. BUTTON: Yes, we did.

17 MR. RICCIARDI: And Heartland was able to  
18 obtain the Hy-Vee business without any alleged  
19 price advantage as a producer-handler. Is that  
20 your testimony?

21 MR. BUTTON: That is my testimony.

22 MR. RICCIARDI: Okay. Now, take a look  
23 at Exhibit 101. It's actually a four-page  
24 document that we stapled together. Is that a  
25 representative of store locations for Heartland



1 Creamery currently?

2 MR. BUTTON: Yes, it is.

3 MR. RICCIARDI: And is that, as far -- as  
4 best that you can tell, the current customer  
5 location or store locations?

6 MR. BUTTON: The best as I can tell.

7 MR. RICCIARDI: All right. Question  
8 then. Let's do a touchstone here. As of April  
9 of '08 being the point of reference, and we'll  
10 take it through April of '09, with this  
11 significant cost advantage that people keep  
12 claiming that you have, that, in fact, your  
13 total volume from April of '08 until April of  
14 '09 has gone through the roof because you've got  
15 that 15 cents a gallon advantage, right? Am I  
16 right?

17 MR. BUTTON: No, that's incorrect.

18 MR. RICCIARDI: Okay. Well tell me,  
19 then, in terms of the total volume of Heartland  
20 from April of '08 through April of '09, has it  
21 gone up or down?

22 MR. BUTTON: It's gone down by  
23 10 percent.

24 MR. RICCIARDI: And would that be true  
25 with regard to the customers, too?

1 MR. BUTTON: That is true.

2 MR. RICCIARDI: When you were part of the  
3 regulated community, did you lose customers to  
4 other competitors?

5 MR. BUTTON: I'm sure we did.

6 MR. RICCIARDI: And did you lose them  
7 based upon a variety of factors?

8 MR. BUTTON: Of course.

9 MR. RICCIARDI: Did you win customers  
10 when you were part of the regulated community  
11 against competitors?

12 MR. BUTTON: Yes, we did.

13 MR. RICCIARDI: And did you win those on  
14 a variety of factors?

15 MR. BUTTON: Yes, I'm sure we did.

16 MR. RICCIARDI: Is the same thing true  
17 since you've had producer-handler status?

18 MR. BUTTON: Absolutely.

19 MR. RICCIARDI: Oh, yeah. Take you back  
20 to Exhibit 100. Flip to the second page. We  
21 put these together. Maybe they don't belong  
22 together, but we want to save a little bit of  
23 time. So I spent some time talking to  
24 Mr. Warren Erickson of Anderson Erickson who was  
25 complaining vociferously about Heartland and

1           some customers in Kansas City which he wouldn't  
2           identify. But let's see if we can help the  
3           record.

4                    This is a document from the Anderson  
5           Erickson website entitled at the top, Where to  
6           Buy Anderson Erickson Products. And it talks  
7           about Kansas City. So let's see if we can be  
8           more specific about the complaints. Apparently  
9           Anderson Erickson serves the Wal-Mart  
10          neighborhood markets in that area. Do you serve  
11          them?

12                   MR. BUTTON: We do not.

13                   MR. RICCIARDI: Wal-Mart Supercenter,  
14          same question.

15                   MR. BUTTON: No, we do not.

16                   MR. RICCIARDI: The other -- I don't want  
17          to go through each one of them. Thriftway, do  
18          you serve them?

19                   MR. BUTTON: No.

20                   MR. RICCIARDI: Sunfresh?

21                   MR. BUTTON: No.

22                   MR. RICCIARDI: Price Chopper?

23                   MR. BUTTON: No.

24                   MR. RICCIARDI: Country Mart?

25                   MR. BUTTON: No.

1 MR. RICCIARDI: Hen House?

2 MR. BUTTON: No.

3 MR. RICCIARDI: Chas-Ball?

4 MR. BUTTON: No.

5 MR. RICCIARDI: Apple Mart?

6 MR. BUTTON: No.

7 MR. RICCIARDI: Hy-Vee?

8 MR. BUTTON: Yes.

9 MR. RICCIARDI: Apparently Anderson  
10 Erickson serves Hy-Vee and Heartland Creamery  
11 also serves Hy-Vee. And I think you testified  
12 previously that you started serving them in '05,  
13 correct?

14 MR. BUTTON: Not in the Kansas City area.

15 MR. RICCIARDI: Not in Kansas City. I  
16 apologize. You're correct. Faster than me  
17 today. But in '07, you started in the Kansas  
18 City area?

19 MR. BUTTON: That is correct.

20 MR. RICCIARDI: And, again, as a  
21 regulated -- part of the regulated community?

22 MR. BUTTON: Yes.

23 MR. RICCIARDI: Able to compete with  
24 Anderson Erickson as a regulated -- a regulated  
25 handler paying into the pool?

1 MR. BUTTON: Yes.

2 MR. RICCIARDI: Why don't you pass the  
3 microphone over?

4 Mr. Sharpe, what is the importance of the  
5 Heartland Creamery farm and the Heartland  
6 Creamery processing plant to the members of your  
7 community?

8 MR. SHARPE: Well, it's -- it's very  
9 important from the standpoint of when people  
10 come to us, and we have about 240 people today  
11 in our program in our -- in CNS International  
12 Ministries that are problem -- troubled people,  
13 all of them. And we have to have jobs for them.

14 We originally -- we've had a farm for  
15 many years. As a matter of fact, I was born on  
16 the farm. And we -- we had a large beef herd,  
17 about 7,000 cows, and we spent many years  
18 building the herd. But there's just not enough  
19 work among beef cattle. So we sold the beef  
20 cattle and got into the dairy business strictly  
21 to give jobs to the people that was coming,  
22 because they just -- they keep coming.

23 So it takes about five times the people,  
24 certainly four times the people to run the same  
25 number of dairy cows as it does to run the beef

1 cows. So we went to switch to dairy cows  
2 strictly for -- I really didn't want to be in  
3 the dairy business, but because of these people  
4 that we need jobs for, we switched to dairy.

5 And then we started another business, the  
6 goat dairy. We're the only -- to our knowledge,  
7 we're the only goat and cow dairy and processor  
8 in the United States. I can't guarantee that's  
9 true. But we don't know of another. So that  
10 makes us quite unique.

11 And it gives lots of jobs. The goat  
12 dairy produces a lot of jobs. And, of course,  
13 the creamery produces a lot of jobs. So it's  
14 important to our people, because you can't have  
15 people coming and telling them you're going to  
16 help them when you don't have work for them. So  
17 we have to have work for them.

18 MR. RICCIARDI: So the dairy farm and the  
19 creamery presents an opportunity for people in  
20 their community -- in your community, those  
21 people who are disadvantaged to try to have an  
22 opportunity to learn and work at a trade?

23 MR. SHARPE: Almost all of our people  
24 that work in the dairy, the cow dairy and the  
25 creamery and the goat dairy are either in the

1 program or they have graduated and have stayed  
2 there.

3 MR. RICCIARDI: Okay. And with regard to  
4 the producer-handler integrated operation, to  
5 the extent that any money is made in that  
6 operation, what's to happen to it?

7 MR. SHARPE: It goes to the ministry.

8 MR. RICCIARDI: Okay.

9 MR. SHARPE: 100 percent of it.

10 MR. RICCIARDI: Okay. I want to go over  
11 a few items with you. I think there was a  
12 document in the back of the room. I wanted to  
13 ask you some questions on it. It hasn't been  
14 admitted or identified yet, but I'm sure you'll  
15 get questions on it, so let me see if I can get  
16 some of them answered.

17 Does the dairy currently have 4,500  
18 milking cows, or is it 3,000, as you described?

19 MR. SHARPE: We, today -- at one time we  
20 had right at 45. We may have hit 45. But today  
21 we have 3,000. As a matter of fact, it's 29, I  
22 think, 83 yesterday or Saturday.

23 MR. RICCIARDI: Okay. At 3,000 cows is  
24 the dairy able to produce 24,000 gallons of milk  
25 a day?

1 MR. SHARPE: No, it cannot.

2 MR. RICCIARDI: How much?

3 MR. SHARPE: Well, we're producing about  
4 nearly 200,000 pounds of milk a day, 190 to 200  
5 thousand pounds of milk a day.

6 MR. RICCIARDI: Okay. I want to ask you  
7 about -- well, first of all, let's do it this  
8 way. You don't pretend to be an expert in  
9 Federal Milk Marketing Orders, do you?

10 MR. SHARPE: I'm not even close.

11 MR. RICCIARDI: Okay. Let me ask you a  
12 question about when Heartland was with DFA.

13 MR. SHARPE: Yes.

14 MR. RICCIARDI: Did you ever -- do you  
15 recall having a conversation with a  
16 representative of DFA who called you about some  
17 complaints from other people in the regulated  
18 community about Heartland?

19 MR. SHARPE: Yes.

20 MR. RICCIARDI: And that happened  
21 sometime in 2007?

22 MR. SHARPE: I believe that's right.

23 MR. RICCIARDI: Can you tell me, based  
24 upon that conversation, what the representative  
25 from DFA told you?



1 MR. SHARPE: Well, the call was simply to  
2 try to help us to know what the price of the  
3 market was and -- and to be sure that we was not  
4 losing money that we should be making, because  
5 it was -- I feel it was a sincere call. They  
6 was actually trying to bring us up to speed on  
7 -- on pricing.

8 MR. RICCIARDI: Did they tell you your  
9 prices were too low?

10 MR. SHARPE: Well, some people thought it  
11 was low. I don't know as -- as DFA necessarily  
12 thought it was low. But some -- there was  
13 others that thought it was low.

14 MR. RICCIARDI: Some other competitors --

15 MR. SHARPE: Competitors, yes.

16 MR. RICCIARDI: -- thought it was too  
17 low?

18 MR. SHARPE: Yes.

19 MR. RICCIARDI: So back in 2007, you had  
20 competitors when you were in the regulated  
21 community complaining about your pricing, and  
22 now in 2009, as a producer-handler, you've got  
23 competitors complaining about your pricing?

24 MR. SHARPE: Yeah, it's a little bit  
25 strange to me, but I don't -- I don't understand

1           that. Because we lose -- the thing that's  
2           amazing about it, if we're low, why do we lose  
3           customers quite often because of our price?

4           MR. RICCIARDI: And let's talk about that  
5           for a moment. I don't know if it's better for  
6           you or for Mr. Button to deal with that.  
7           Recently, very recently -- actually pass the  
8           microphone over to Mr. Button. I think he's  
9           more knowledgeable here.

10           You attempt to compete for customers  
11           throughout the area that you market?

12           MR. BUTTON: That's correct.

13           MR. RICCIARDI: And recently were you  
14           attempting to get into a location that you don't  
15           currently serve?

16           MR. BUTTON: Well, it's stores that we  
17           don't currently serve.

18           MR. RICCIARDI: Stores. And that's a  
19           better question. Thank you. And can you tell  
20           me what occurred with regard to your attempts to  
21           get into a store that you -- you don't currently  
22           serve?

23           MR. BUTTON: Our sales representative  
24           went to a store. There was about five stores in  
25           a general location. And we were trying to get

1           our milk -- them to purchase our milk. We had  
2           placed a price with them, and we were waiting  
3           for an answer. This happened within the past  
4           month. And they contacted our salesman back and  
5           said that there was only 2 cents difference, and  
6           they didn't tell us if it was 2 cents high, 2  
7           cents low, just 2 cents difference, and it  
8           wasn't worth it to them to change suppliers.  
9           And we did not go back and make a counteroffer.

10           MR. RICCIARDI: So I understand it, you  
11           are trying to compete for a new store, you gave  
12           them an offer and the response back is, there's  
13           only a 2 cent difference, it's negligible, we're  
14           going to keep our current supplier?

15           MR. BUTTON: That's correct.

16           MR. RICCIARDI: And you didn't go back  
17           and say, I can beat this, I've got this 15-cent  
18           cost advantage, remember?

19           MR. BUTTON: No, we didn't do that.

20           MR. RICCIARDI: Your Honor, I think for  
21           the time being I am done. I will deal with the  
22           exhibits after cross-examination.

23           JUDGE CLIFTON: All right. Don't leave  
24           the podium yet. Mr. Sharpe, you indicated that  
25           24,000 gallons a day is not accurate.

1 MR. SHARPE: That's right.

2 JUDGE CLIFTON: But 190 to 200  
3 thousand pounds a day is accurate?

4 MR. SHARPE: That's right.

5 JUDGE CLIFTON: Now, what factor do you  
6 use for how many pounds a gallon weighs?

7 MR. SHARPE: 8.6 pounds per gallon.

8 JUDGE CLIFTON: 8.6 pounds, okay.

9 MR. SHARPE: We're producing close to  
10 20,000 gallons of milk -- 18 to 20,000 gallons  
11 of milk a day.

12 JUDGE CLIFTON: Okay. Good. Thank you.  
13 That helps. Mr. Ricciardi, anything else about  
14 that?

15 MR. RICCIARDI: No. I will deal with  
16 that on redirect once the cross is done, Judge.

17 JUDGE CLIFTON: Okay. Good. All right.  
18 Who would like to begin the cross-examination of  
19 this panel of Mr. Sharpe and Mr. Button?  
20 Mr. Beshore, thank you.

21 CROSS-EXAMINATION

22 BY MR. BESHORE:

23 MR. BESHORE: Good morning, gentlemen.  
24 My name is Marvin Beshore, and I represent the  
25 National Milk Producers Federation and Dairy

1 Farmers of America. I have just a few  
2 questions.

3 Both of you -- I'll address this to  
4 Mr. Sharpe first, and if you have anything to  
5 add, you are welcome to, Mr. Button. Both of  
6 you, but Mr. Sharpe in particular, have  
7 identified Heartland Creamery as being  
8 supportive of the Christian ministries that you  
9 operate.

10 MR. SHARPE: That's right.

11 MR. BESHORE: In fact, you've indicated  
12 that all of the proceeds from the creamery, all  
13 of the profits go to the ministry.

14 MR. SHARPE: If there are any profits.

15 MR. BESHORE: If there are any. I take  
16 it there have been some?

17 MR. SHARPE: No, there hasn't.

18 MR. BESHORE: There have not been any  
19 profits from the creamery?

20 MR. SHARPE: Not at this point. We  
21 expect to do something about that, but we  
22 haven't at this point.

23 MR. BESHORE: Okay. And when did the  
24 creamery first start?

25 MR. SHARPE: In '05.

1           MR. BESHORE: Now, my question really is,  
2           are -- are you asking the Secretary of  
3           Agriculture to take into consideration the fact  
4           that if you do have any profits, they're going  
5           to go into your Christian ministry?

6           MR. SHARPE: No, I'm -- no, I'm not  
7           asking them to take into consideration that at  
8           all.

9           MR. BESHORE: Okay. Well, I -- I asked  
10          that question because you've made quite a point  
11          of presenting that information.

12          MR. SHARPE: Well, we're just telling  
13          what the facts are.

14          MR. BESHORE: And, Mr. Button, do you  
15          have anything to add to that?

16          MR. BUTTON: No, I don't.

17          MR. BESHORE: When you -- when you  
18          obtained -- this is for Mr. Button, I think  
19          first, and if Mr. Sharpe has anything to add.  
20          When you first made your sales to the Hy-Vee  
21          stores, when you were a regulated plant, were  
22          those sales made at a profitable level?

23          MR. BUTTON: Yes, they were.

24          MR. BESHORE: Okay. And is that -- let's  
25          see. Was there another account besides the

1 Hy-Vee stores that -- that you mentioned -- I  
2 guess the -- maybe the account wasn't named.  
3 But you had some comments with respect to  
4 Mr. Lee's testimony. Is that also with respect  
5 to Hy-Vee?

6 MR. BUTTON: I don't think I made comment  
7 to that. I believe Mr. Sharpe did.

8 MR. BESHORE: I'm sorry.

9 MR. BUTTON: But we do believe that that  
10 was Hy-Vee.

11 MR. BESHORE: Your understanding is that  
12 both Mr. Lee's testimony and Mr. Erickson's  
13 related to your sales to Hy-Vee?

14 MR. BUTTON: Yes.

15 MR. BESHORE: Okay. They were just at,  
16 what, different geographic locations --

17 MR. BUTTON: Yes.

18 MR. BESHORE: -- correct? Okay.

19 MR. BUTTON: And if I might, for the  
20 record, take a half a step back. You asked me  
21 about the pricing. I was not a part of the  
22 creamery. It's my understanding that the milk  
23 was sold at a profitable price.

24 MR. BESHORE: And I assume you've  
25 continued to --

1 MR. BUTTON: Yes.

2 MR. BESHORE: -- price your products that  
3 way because you intend to make a profit?

4 MR. BUTTON: We're hoping to.

5 MR. BESHORE: Now, were you involved,  
6 Mr. Button, in the decision to go from a  
7 regulated plant to a producer-handler?

8 MR. BUTTON: That was already in play  
9 when I arrived on the scene at Heartland.

10 MR. BESHORE: Okay. Would you pass the  
11 microphone to Mr. Sharpe then?

12 MR. BUTTON: Yes.

13 MR. BESHORE: Now, Mr. Sharpe, were you  
14 involved in that decision?

15 MR. SHARPE: Yes, I was.

16 MR. BESHORE: Okay. And would it be fair  
17 to say that the costs -- if you look at costs  
18 involved and cost pluses and minuses in that  
19 analysis, that one of the costs you say you  
20 avoided were some costs of being a member of the  
21 cooperative? Did you say you saved -- by  
22 going -- becoming a producer-handler, you saved  
23 some expenses of the cooperative?

24 MR. SHARPE: I think overall, I'm not  
25 sure that we saved a penny. I really am not.



1           The cost from other things -- first, I'd just  
2           like to clear the air on one thing. We --

3           MR. BESHORE: Maybe you can answer my  
4           question first. And then if you have something  
5           to add.

6           MR. SHARPE: Well, I don't know that we  
7           saved any money.

8           MR. BESHORE: Did you expect to or intend  
9           to?

10          MR. SHARPE: Well, yes, of course, we  
11          expect to. And we still expect to, but we have  
12          to get to a larger volume before that can  
13          happen. Our relationship with DFA was the very  
14          best. I have no complaints whatsoever. They  
15          treated us very well, had wonderful -- was with  
16          them about nine or ten years.

17          But we felt that we needed to move to  
18          another level and process all of our own milk,  
19          which we not yet have done. So we naturally  
20          don't get near as much money for the milk that  
21          we have to sell on Class III as we was before.  
22          So the savings -- from that standpoint up to  
23          this point, there really hasn't been a great  
24          deal of savings. But we intend for that to  
25          happen as we go forward --

1 MR. BESHORE: Okay.

2 MR. SHARPE: -- selling -- bottling all  
3 of the milk that we produce.

4 MR. BESHORE: Okay.

5 MR. SHARPE: But we're not doing that at  
6 this point.

7 MR. BESHORE: And you're doing even less  
8 than you were when you switched over --

9 MR. SHARPE: That's right.

10 MR. BESHORE: -- if I understood you.

11 MR. SHARPE: That is right.

12 MR. BESHORE: Okay. I don't have any  
13 other questions right now. Thank you.

14 JUDGE CLIFTON: Mr. English, you may  
15 cross-examine the panel next.

16 CROSS-EXAMINATION

17 BY MR. ENGLISH:

18 MR. ENGLISH: Good afternoon. Charles  
19 English. Good afternoon, gentlemen.

20 MR. SHARPE: Good afternoon.

21 MR. BUTTON: Good afternoon.

22 MR. ENGLISH: I represent Anderson  
23 Erickson and Prairie Farms. You've indicated  
24 that you went into the Hy-Vee stores in Kansas  
25 City in 2007. Is it true that your volume of

1 milk sold in those Hy-Vee stores in Kansas City  
2 stores went up in 2008?

3 MR. SHARPE: Yes, it did.

4 MR. ENGLISH: In fact, by the end of  
5 2008, Hy-Vee in the Kansas City area has  
6 discontinued the Midwest County Fare, F-a-r-e,  
7 label, is that correct?

8 MR. BUTTON: We'd have to take your word  
9 for it. I haven't been to any of those  
10 supermarkets to determine that.

11 MR. ENGLISH: But you don't have any  
12 information to contradict that?

13 MR. BUTTON: No.

14 MR. ENGLISH: I have no other questions.

15 MR. BUTTON: And one other point that I  
16 would make, it would only be expected that the  
17 sales in 2008 would go up, being we didn't start  
18 in Kansas City until October of 2007. So we  
19 would expect to sell more in 2008.

20 MR. ENGLISH: What I mean is sales  
21 adjusted for month. Did they go up in 2008 over  
22 2007 for Hy-Vee stores in Kansas City?

23 MR. BUTTON: We were only there in three  
24 months in 2007.

25 MR. ENGLISH: I understand. But a

1 monthly volume. Isn't it true in December of  
2 2008 -- you were selling more in December of  
3 2008 than you were in 2007?

4 MR. BUTTON: I would presume that would  
5 be true.

6 MR. ENGLISH: Thank you.

7 JUDGE CLIFTON: Who next will  
8 cross-examine the panel? Mr. Vetne, thank you.

9 CROSS-EXAMINATION

10 BY MR. VETNE:

11 MR. VETNE: Good afternoon. My name is  
12 John Vetne. I represent two producer-handlers  
13 in the Pacific Northwest and one in Roswell, New  
14 Mexico. And I make my home in New Hampshire.

15 MR. SHARPE: Good afternoon.

16 MR. VETNE: Mr. Sharpe, I want to ask you  
17 a question. In response to a question from  
18 Mr. Beshore, you said that the creamery has not  
19 seen any profits yet. Do you recall that?

20 MR. SHARPE: That's right.

21 MR. VETNE: Okay. And you were sitting  
22 next to Mr. Button when he said that the sales  
23 to Hy-Vee were made at a profitable --  
24 profitable level. Did you hear his testimony?

25 MR. SHARPE: I did.

1                   MR. VETNE: Can you reconcile his  
2 testimony with yours, please?

3                   MR. SHARPE: I am sure he had great  
4 intentions. I just have not seen the profit.

5                   MR. VETNE: All right. Can you pass the  
6 microphone over to Mr. Button?

7                   Mr. Button, what do you mean by that?

8                   MR. BUTTON: Well, we were selling the  
9 milk at what we believe to be a profitable  
10 level. Because of inefficiencies and stuff and  
11 breakdowns in the creamery and what have you,  
12 accidents of trucks and truck repairs, that  
13 impacted the bottom line.

14                   MR. VETNE: When you used the word,  
15 profitable level, were you looking just at the  
16 bottling part of the operation as opposed to  
17 sales to cheese plants and -- and your balancing  
18 costs?

19                   MR. BUTTON: Well, what we were looking  
20 at is the actual milk market and what the price  
21 of the milk was on the -- what the -- Class I  
22 milk prices.

23                   MR. VETNE: Okay. So the contract that  
24 you had with your buyer, you thought was at a  
25 good price?

1 MR. BUTTON: Correct.

2 MR. VETNE: Okay. You did not intend, as  
3 I understand now your testimony -- tell me if  
4 I'm correct -- you did not intend to state that  
5 at that price your producer-handler operation  
6 made a profit?

7 MR. BUTTON: That is correct. And I  
8 would like to clarify that I don't believe  
9 there's any contract.

10 MR. VETNE: Okay. By that, you mean  
11 there's no written document?

12 MR. BUTTON: (Nodding head.)

13 MR. VETNE: I believe if you sell milk  
14 and you get paid for it, you probably have a  
15 contract.

16 MR. BUTTON: Yes.

17 MR. VETNE: That's a different --  
18 different issue. Okay. Let's see who -- that  
19 was Mr. Sharpe. You said you produce around  
20 200,000 pounds per day. Is that your farm  
21 production?

22 MR. SHARPE: That's the farm production.

23 MR. VETNE: Okay. And your Class I use  
24 of that farm production is 18 to 20 thousand  
25 gallons per day, is that correct?

1 MR. SHARPE: No. Say that again, please.

2 MR. VETNE: Okay. You responded -- later  
3 on, you used a reference of 18 to 20  
4 thousand gallons per day?

5 MR. SHARPE: Yes.

6 MR. VETNE: Multiplied by 8.6 is quite a  
7 bit less than 200,000. So my question to you  
8 is, is 18 to 20,000 the amount that you bottle?

9 MR. SHARPE: No. We -- we are producing  
10 about 190 to 200 thousand pounds of milk a day.

11 MR. VETNE: At the farm?

12 MR. SHARPE: At the farm.

13 MR. VETNE: And what portion of that goes  
14 into a consumer package as Class I?

15 MR. SHARPE: We're probably producing  
16 about -- well, you -- I'll let him answer that  
17 question.

18 MR. BUTTON: It's probably closer to 13  
19 to 15 hundred.

20 MR. VETNE: 13 to 15 hundred what?

21 MR. BUTTON: Gallons, sorry.

22 MR. VETNE: Gallons. And that 13 to 15  
23 hundred gallons of the 18 to 20 thousand gallons  
24 produced at the farm, does that 13 to 15 hundred  
25 gallons include your half and half and creams?

1 MR. BUTTON: Yes, it does.

2 MR. VETNE: So even of the 13 to 15, not  
3 all of is it Class I?

4 MR. BUTTON: That's correct. We also  
5 manufacture ice cream mix and different style  
6 cheeses.

7 JUDGE CLIFTON: Make sure that microphone  
8 is closer in the next answer.

9 MR. BUTTON: Sorry.

10 MR. VETNE: Mr. Button, of your total  
11 production on a monthly average basis, what  
12 portion is Class I under the Federal Order --

13 MR. BUTTON: It's approximately  
14 50 percent.

15 MR. VETNE: 50 percent. And are any of  
16 the gallon figures either one of you provided  
17 inclusive of your goat milk gallons?

18 MR. BUTTON: It is not considering the  
19 goat.

20 MS. SHARPE: (Shaking head.)

21 MR. BUTTON: No.

22 MR. VETNE: Your Honor, both witnesses  
23 answered no. I just want the record to reflect  
24 that.

25 JUDGE CLIFTON: Yes. And to the extent



1 Mr. Sharpe's was not audible, he affirmed what  
2 Mr. Button said with the shaking of his head.

3 MR. SHARPE: It's no.

4 MR. VETNE: Mr. Sharpe, what do the  
5 initials CNS stand for?

6 MR. SHARPE: Charles N. Sharpe.

7 MR. VETNE: CNS International Milk  
8 Ministries, okay. And Sharpe Holdings,  
9 Mr. Sharpe, does it hold anything else?

10 MR. SHARPE: Well, Sharpe Holding has an  
11 insurance company.

12 MR. VETNE: No other agriculture  
13 business?

14 MR. SHARPE: Oh, yes. We have about  
15 17,000 acres of land that we farm.

16 MR. VETNE: For crop?

17 MR. SHARPE: Yes. And to support the  
18 dairy.

19 MR. VETNE: Okay. Do you sell crops from  
20 that land or is it used for feed for the cows?

21 MR. SHARPE: Mostly used for the feed.  
22 We sell some, but not much.

23 MR. VETNE: I'm not sure which one of you  
24 answered this. We've now clarified that -- I  
25 think, that Heartland has not shown a profit.

1 Compared to the time when you were operating as  
2 a regulated handler and after you became a  
3 producer-handler, has the profitability improved  
4 or the losses decreased?

5 MR. SHARPE: No. We -- there has been no  
6 change.

7 MR. VETNE: And that's because, as I  
8 understand one of your answers, that the  
9 percentage of Class I is relatively low?

10 MR. SHARPE: That's right. If we can --  
11 if we can bottle all that we produce on the  
12 farm, it'll make a great difference.

13 MR. VETNE: I understand that you started  
14 processing milk in 2005, is that correct?

15 MR. SHARPE: That's right.

16 MR. VETNE: Okay. And when you started  
17 processing milk in 2005, when did you start  
18 planning to process milk? Or did you develop a  
19 business plan to be a bottler?

20 MR. SHARPE: Well in -- well, actually  
21 2004 is when we started the plan. And we built  
22 the plant in 2004.

23 MR. VETNE: Okay. And when did your  
24 business plan include becoming a  
25 producer-handler --

1 MR. SHARPE: Well, from the -- from the  
2 beginning, but we just was not prepared to do  
3 that, so it took till 2008 to make that happen.

4 MR. VETNE: Okay. I'm not familiar with  
5 the Hy-Vee stores, so let me ask you this. Are  
6 the Hy-Vee stores -- is the Hy-Vee store chain a  
7 grocery chain similar to Kroger, Meijer market,  
8 the big grocery store?

9 MR. SHARPE: Yes, it is. It's a fairly  
10 high-end chain.

11 MR. VETNE: Okay. Mr. Sharpe -- could be  
12 all -- what percentage of the -- the employees  
13 that are on the farm or in the plant are  
14 employees who are there for recovery purposes?

15 MR. SHARPE: I would say 95 percent and  
16 maybe more than that. It would be at least 95.

17 MR. VETNE: Okay. Is the -- is the wage  
18 scale for those employees union scale or  
19 anything close to that?

20 MR. SHARPE: No. We -- they're all there  
21 in rehab. We pay a minimum wage.

22 MR. VETNE: You pay a minimum wage across  
23 the board to --

24 MR. SHARPE: Across the board, yes.

25 MR. VETNE: You pay more than minimum

1 wage to those who are not in rehab, is that --

2 MR. SHARPE: Yes, yes.

3 MR. VETNE: Which that would include some  
4 of the senior management and technicians and so  
5 forth, is that correct?

6 MR. SHARPE: That's right.

7 MR. VETNE: Okay. Now I have a few  
8 Button questions.

9 Your testimony, Mr. Button, indicated  
10 that DFA picked up and marketed what you did not  
11 need at the plant; that is, milk from your own  
12 farm, correct?

13 MR. BUTTON: Correct.

14 MR. VETNE: And on that milk, when you  
15 were paid, was there not a hauling deduction on  
16 your milk check from DFA?

17 MR. BUTTON: As it turned out, they hired  
18 our people to haul the milk for them because the  
19 tankers were at our facility.

20 MR. VETNE: So you took your milk to  
21 somebody else?

22 MR. BUTTON: Through DFA.

23 MR. VETNE: And you were paid as a hauler  
24 by DFA?

25 MR. BUTTON: That is correct. That was

1 part of the equation as far as the milk pricing.

2 MR. VETNE: Okay. So your farm milk  
3 check when you received the check from DFA, that  
4 did not include hauling?

5 MR. BUTTON: They credited it back.

6 MR. VETNE: Okay. So it was taken care  
7 of on both ends?

8 MR. BUTTON: Correct.

9 MR. VETNE: Net zero?

10 MR. BUTTON: To the best of my knowledge.

11 MR. VETNE: Mr. Button, at -- at which of  
12 the Crowley operations were you employed?

13 MR. BUTTON: I actually worked over 28  
14 years for the same corporation. I worked out of  
15 Binghamton, New York, for their corporate  
16 office.

17 MR. VETNE: That was my question, the  
18 corporate office. Is Hood also in the Northeast  
19 or --

20 MR. SHARPE: Hood is in the Northeast.

21 MR. VETNE: All of your experience prior  
22 to moving to Missouri. Don't you like the way I  
23 said that?

24 MR. BUTTON: Yeah.

25 MR. VETNE: All of your experience has

1           been in the Northeast?

2                   MR. BUTTON: That is correct.

3                   MR. VETNE: Every unit we produce is  
4 handled by hand. What does that mean? Does  
5 that mean you've got somebody following the  
6 bottle filling it?

7                   MR. BUTTON: No. As it comes off the  
8 filler machine, we are actually catching it by  
9 hand and physically placing it into each crate.  
10 We don't have an automatic caser. We don't have  
11 an automatic stacker. We stack them. We don't  
12 have an automatic conveyor strip to transport  
13 them to the warehouse. We transport physically.

14                  MR. VETNE: The automation does, however,  
15 include the filling and the capping, is that  
16 correct?

17                  MR. BUTTON: Yes.

18                  MR. VETNE: So it's after that process  
19 that the --

20                  MR. BUTTON: Yes.

21                  MR. VETNE: -- jugs are picked up by  
22 hand?

23                  MR. BUTTON: Yes.

24                  MR. VETNE: Your -- the St. Joseph's  
25 brand that you hope to -- or that you are

1 marketing as kosher, is that a brand that's  
2 owned by the Star-K kosher people?

3 MR. BUTTON: It is not.

4 MR. VETNE: Who owns that brand?

5 MR. BUTTON: I prefer not to answer that  
6 question.

7 MR. VETNE: Well, let me ask you this.  
8 That's a good answer, by the way. Do you know  
9 whether any regulated processor is packaging  
10 milk under the St. Joseph's kosher brand?

11 MR. BUTTON: They are not.

12 MR. RICCIARDI: Your Honor --

13 JUDGE CLIFTON: Mr. Ricciardi, would you  
14 like to be heard?

15 MR. RICCIARDI: I would only mention this  
16 to my friend.

17 MR. VETNE: I'm a nosy guy.

18 MR. RICCIARDI: I know. I'm not  
19 bothering you about that. It's a koshered  
20 product, it can't possibly be St. Joseph.

21 MR. VETNE: Well, why not? He was  
22 Jewish.

23 So in response to my last question, yes  
24 or no, whether the Samuel Joseph brand is  
25 processed by any other regulated handler and --

1 and as to that, you know that it is not  
2 processed?

3 MR. BUTTON: It is not processed.

4 MR. VETNE: So your answer was not  
5 that -- you did not intend to say you don't  
6 know. You do know and is it not? Is that  
7 correct?

8 THE WITNESS: It is not.

9 JUDGE CLIFTON: He asked you is that  
10 correct, and you said, it is not.

11 MR. VETNE: That's good. Thank you.  
12 Okay.

13 MR. SHARPE: Do it one more time.

14 MR. BUTTON: Yeah.

15 MR. VETNE: You do know whether it is  
16 and, in fact, it is not processed by any  
17 regulate handler, is that correct?

18 MR. BUTTON: That is correct.

19 MR. VETNE: Okay. I know -- you know,  
20 just talking here, I know what you mean and we  
21 have a sense of what we're saying, but when  
22 that -- those black and white transcript come  
23 out, there's no interpretation. And sometimes  
24 the meaning is totally opposite of what was  
25 intended.



1           The bottom of the -- looks like the  
2           second page of your testimony, you said some  
3           customers have elected to stock our product in  
4           part because of our dedication to the Heartland  
5           community. By Heartland community, you are  
6           referring to the faith-based recovery program?

7           MR. BUTTON: Yes.

8           MR. VETNE: And do you believe or know  
9           that some customers purchase your product  
10          because of that connection?

11          MR. BUTTON: We know.

12          MR. VETNE: We know. And, in fact,  
13          anybody that goes to your website would know  
14          because that is at the top of your home page in  
15          the italics near the bottom of that line: The  
16          profits from Heartland Creamery is used to  
17          support our faith-based work with troubled  
18          adolescents and adults. It's right there on the  
19          home page.

20          MR. BUTTON: Correct.

21          MR. VETNE: And, again, at the end of  
22          your testimony, Mr. Button, you say: We hope as  
23          our community grows -- we hope to grow as our  
24          community grows.

25          Again, you are referring to the

1           faith-based community, not to the neighborhood  
2           in which you're located?

3                   MR. BUTTON: That is correct.

4                   MR. VETNE: With respect to the kosher  
5           certification, one more question. You recently  
6           received a letter certifying your products as  
7           kosher in Exhibit 99, dated May 5, 2009. When  
8           did that process of seeking and getting kosher  
9           certification start?

10                   MR. BUTTON: I couldn't tell you exactly.  
11           It was probably sometime around March.

12                   MR. VETNE: You first thought of doing  
13           kosher milk in March? Mr. Sharpe, you have an  
14           answer to that?

15                   MR. SHARPE: Yeah. These folks really  
16           sought us out because of the uniqueness of our  
17           layout. They were as interested in our goat  
18           milk as they are our cow milk. And because of  
19           the high -- what is considered high kosher --  
20           there's several levels of kosher. This is high  
21           kosher. The rabbi has to be on the site all the  
22           time. So it -- because of the uniqueness of our  
23           layout, the closeness of all the dairies and the  
24           creamery, one man can oversee all of it, and  
25           that's -- that's how this come about.

1 MR. VETNE: All right. Now, let me ask  
2 you the question that I asked Mr. Button. Bring  
3 the microphone back, Mr. Sharpe.

4 My question was, when did this process  
5 start? You've told me that they came to you,  
6 they sought you out. When did that first  
7 happen? When was the first contact made?

8 MR. SHARPE: I -- I'm not -- I'm not  
9 sure. But it was early this year or late last  
10 year.

11 MR. VETNE: That's good enough. Thank  
12 you very much.

13 JUDGE CLIFTON: Mr. Sharpe, I would like  
14 you to look at your statement, Exhibit 97, at  
15 the paragraph that is right in the middle. The  
16 paragraph begins with: We first began operating  
17 as a working dairy farm --

18 MR. SHARPE: Yeah, yes.

19 JUDGE CLIFTON: -- and so forth. I think  
20 when you read that sentence, you said as your  
21 last word, students, to provide jobs and  
22 training opportunity to our students. And I see  
23 what is actually on your statement is residents.  
24 So my question is, the at-risk people to whom  
25 you provide these jobs and training

1           opportunities, are all of them residents who  
2           live at the farm?

3           MR. SHARPE: Yes. Yes, they are.  
4           They -- they live there. It's an 18-month  
5           program. And then many, of course, stay on  
6           after.

7           JUDGE CLIFTON: Okay. Thank you.  
8           Mr. Vetne.

9           MR. VETNE: Mr. Sharpe, for residents  
10          that stay on after, after they finish the  
11          18-month program, are those residents part of  
12          the minimum wage workforce that you referred to?

13          MR. SHARPE: No, they're not.

14          MR. VETNE: And when they stay after, do  
15          they pay rent?

16          MR. SHARPE: No, we furnish all housing  
17          and utilities for everyone.

18          MR. VETNE: For everyone?

19          MR. SHARPE: Yes.

20          MR. VETNE: Do some people that graduate  
21          live off campus?

22          MR. SHARPE: No, they all live there. If  
23          they work there, they live there.

24          MR. VETNE: How many -- what's the  
25          residency capacity?

1 MR. SHARPE: Well --

2 MR. VETNE: How many people do you have  
3 living and working there?

4 MR. SHARPE: We have -- we have over 200  
5 employees in Heartland and the farm. It's a --  
6 it's -- it's over 200. I would say maybe 260.

7 MR. VETNE: Okay. How many -- how many  
8 residents do you have that are in treatment at  
9 any one time?

10 MR. SHARPE: We, right now, we have 240  
11 in treatment.

12 MR. VETNE: So you have some folks in  
13 treatment that don't live on the farm?

14 MR. SHARPE: No, they all live there.

15 MR. VETNE: They all live there?

16 MR. SHARPE: They live there.

17 MR. BUTTON: The missing equation are  
18 some of those are minors.

19 MR. SHARPE: Yes, some of them are  
20 children, so that doesn't count.

21 MR. BUTTON: Some of them are minors, so  
22 they don't physically work. They're going to  
23 school.

24 MR. SHARPE: They go to school.

25 MR. VETNE: Okay. Thank you.

1 MR. SHARPE: We have about 120 in the  
2 program that are children. They go to school,  
3 so that's not part of it.

4 MR. VETNE: Got it. Thank you.

5 JUDGE CLIFTON: I do believe you have  
6 taken on more than anybody else I've heard  
7 testify. That's quite an undertaking indeed.

8 MR. SHARPE: I would like to just say  
9 this since you've mentioned it. My wife and I  
10 have had an average of 12 teenage girls that  
11 lived in our home for the last ten years, that  
12 live with us, not our children.

13 JUDGE CLIFTON: Who would next like to  
14 cross-examine the panel? Mr. Rower.

15 CROSS-EXAMINATION

16 BY MR. ROWER:

17 MR. ROWER: I believe my question might  
18 best be answered by Mr. Button. As a  
19 faith-based business, do you receive any real  
20 estate tax reductions that a commercial dairy  
21 farm or a commercial bottler would not expect  
22 normally to receive?

23 MR. BUTTON: No. We're taxed just as any  
24 other, not a --

25 MR. ROWER: Just to follow up. Excuse

1 me. I apologize for interrupting. Do you  
2 receive any wage subsidies in addition to paying  
3 minimum wage for most of your labor?

4 MR. BUTTON: I don't think so.

5 MR. ROWER: I'm aware of some  
6 businesses --

7 MR. SHARPE: We receive nothing. We  
8 finance everything ourself. We get no help from  
9 the government or anyone else.

10 MR. ROWER: That answers the question.  
11 Thank you very much. I have no other questions.

12 JUDGE CLIFTON: Are there any other  
13 questions for Mr. Sharpe or Mr. Button? There  
14 are none. Mr. Ricciardi? Mr. Miltner.

15 CROSS-EXAMINATION

16 BY MR. MILTNER:

17 MR. MILTNER: Mr. Sharpe, I want to make  
18 sure the record has a clear picture of  
19 everything that Heartland encompasses so just a  
20 couple of questions.

21 MR. SHARPE: All right.

22 MR. MILTNER: CNS International  
23 Ministries administers Heartland Ministries?

24 MR. SHARPE: That's right.

25 MR. MILTNER: And Heartland Ministries

1 has a planned community in Northeast Missouri  
2 that's called Heartland, is that right?

3 MR. SHARPE: That's right.

4 MR. MILTNER: And so Heartland  
5 encompasses the farm and the dairy group, is  
6 that right?

7 MR. SHARPE: Yes.

8 MR. MILTNER: And a school?

9 MR. SHARPE: Yes.

10 MR. MILTNER: And a church?

11 MR. SHARPE: And a church.

12 MR. MILTNER: And a Bible college?

13 MR. SHARPE: And a Bible college, yes.

14 MR. MILTNER: And some other business  
15 that provide for a little bit of tourism in the  
16 area?

17 MR. SHARPE: We have two restaurants and  
18 a museum, car museum. Of course the biggest  
19 event, the biggest attraction in the community  
20 is the dairy because it's a carousel. We milk  
21 60 cows at a time every eight minutes and that's  
22 kind of unusual.

23 MR. MILTNER: And so when you talked  
24 about the Heartland community, it's -- it's not  
25 just the people in the community, it's not just



1 a group of people we're talking about, but it's  
2 actually a small town, is that right?

3 MR. SHARPE: Yes. There's about 500  
4 people there.

5 MR. MILTNER: Okay. And that part of  
6 Northeast Missouri is -- is impoverished, to  
7 give it a description, generally?

8 MR. SHARPE: Yes, it is.

9 MR. MILTNER: And so the work you've done  
10 has provided a good number of jobs, not just for  
11 the people that are going through your program  
12 but for some other folks in the area as well, is  
13 that right?

14 MR. SHARPE: Oh, yes.

15 MR. MILTNER: And is it safe to say a lot  
16 of people in that area would be happy to get a  
17 steady job that paid even minimum wage?

18 MR. SHARPE: We have -- we have people  
19 coming every day wanting work. Now, we only pay  
20 minimum wage to the people in the program.

21 MR. MILTNER: And those that are not in  
22 the program get a different wage?

23 MR. SHARPE: Yes, they do.

24 MR. MILTNER: With those folks, would  
25 many of them take the job even if it paid

1 minimum wage?

2 MR. SHARPE: Yeah, there'd be a lot of  
3 them that would, yes.

4 MR. MILTNER: I want to make sure the  
5 record is clear on this point, too.

6 You said your cows put out 190,000 pounds  
7 of milk a day, is that right?

8 MR. SHARPE: That's right.

9 MR. MILTNER: And about half of that is  
10 bottled at the plant, is that right?

11 MR. SHARPE: I think close to half, yes.

12 MR. MILTNER: Okay. Roughly 50 percent  
13 of what you produce on the farm goes into your  
14 bottle, is that right?

15 MR. SHARPE: Yes, is used in some form,  
16 cheese or whatever.

17 MR. MILTNER: Okay. So some of it  
18 actually goes into cheese?

19 MR. SHARPE: Yes.

20 MR. MILTNER: The cheese is a small  
21 fraction of what you do?

22 MR. SHARPE: That's right.

23 MR. MILTNER: Now, that doesn't go into  
24 either your bottle products or your cheese you  
25 sell. I think in your statement it says the

1           Class III price, but it's the Class III price or  
2           lower, is that right?

3           MR. SHARPE: That's right.

4           MR. MILTNER: And the volumes at Hy-Vee  
5           have grown since you first got into those  
6           stores, especially in the Kansas City area at  
7           the end of 2007?

8           MR. SHARPE: I imagine they have grown  
9           some. When you first start up, they're never as  
10          good as they are a little bit later on.

11          MR. MILTNER: That's what I want to get  
12          into. Do you find generally, as you get into a  
13          new store, the volume of your product picks up  
14          as people become more familiar with it?

15          MR. SHARPE: Oh, yes.

16          MR. MILTNER: And as to a customer that  
17          has multiple outlets, is it your experience that  
18          they'll allow you to kind of test market your  
19          product in a few stores and see how it goes, and  
20          then offer you the possibility of serving other  
21          outlets?

22          MR. SHARPE: That's the way it usually  
23          works, yes.

24          MR. MILTNER: Is that the way it's  
25          happened with Hy-Vee?

1                   MR. SHARPE: Hy-Vee, usually if we go in  
2 a place like Kansas City, isn't long till all  
3 the stores accept us. But we -- we don't start  
4 with all of them. But we get there pretty  
5 quick.

6                   MR. MILTNER: So you can get in to the  
7 market, you get your foot in the door, you prove  
8 that your product is desired by consumers, and  
9 in return, they've offered you the opportunity  
10 to sell at other stores?

11                  MR. SHARPE: Yes. Well, when we go in a  
12 store, the first thing we do is take our people,  
13 our promotional people, and we promote our milk  
14 in the store, and just have a taste and have the  
15 people, as they come through the dairy area, to  
16 try our milk. And most everybody will try it.

17                  MR. MILTNER: And after that, do you find  
18 that the sales pick up?

19                  MR. SHARPE: Well, they usually buy a  
20 gallon if they've tasted it.

21                  MR. MILTNER: And does that effect  
22 continue on even after that weekend tasting?

23                  MR. SHARPE: Well, yeah. We do very well  
24 once we get in a store.

25                  MR. MILTNER: Thank you. Can I ask

1 Mr. Button a couple of questions?

2 Mr. Button, when you operate a dairy  
3 plant, are you familiar with the concept of the  
4 fixed costs of the plant and the variable costs  
5 of the plant?

6 MR. BUTTON: Yes.

7 MR. MILTNER: And every gallon that goes  
8 out the door has a -- has a cost attached to it,  
9 is that right?

10 MR. BUTTON: Yes.

11 MR. MILTNER: There's a value of the milk  
12 that's in the bottle?

13 MR. BUTTON: Yes.

14 MR. MILTNER: There's a cost to the  
15 bottle and the cap and the label, and there's a  
16 cost to process it through?

17 MR. BUTTON: (Nodding head.)

18 MR. MILTNER: And you have to add on some  
19 overhead costs, some fixed costs of the plant,  
20 is that your experience?

21 MR. BUTTON: Yes.

22 MR. MILTNER: So when you price your  
23 product, obviously if it costs you \$350,000 to  
24 operate your plant for a year, you can't slap  
25 all that on, all that cost on the first gallon

1           that goes out the door, right?

2           MR. BUTTON: Correct.

3           MR. MILTNER: So Mr. Vetne asked you to  
4 reconcile your statement that you tried to sell  
5 your product at a profitable level, but the  
6 plant didn't make a profit that year.

7           So when you price your product, you try  
8 to come up with a cost and a price that covers  
9 the cost of the milk, the cost of the packaging,  
10 the cost to process it, and some allocation of  
11 overhead, is that right?

12          MR. BUTTON: Yeah, that's correct.

13          MR. MILTNER: And if you misjudge values,  
14 or things happen as you described, your fixed  
15 costs change, and could that result with the  
16 plant not being profitable at the end of the  
17 year even though every sale was priced at a cost  
18 you believe to be profitable?

19          MR. BUTTON: Yes.

20          MR. MILTNER: Thank you. I have nothing  
21 else.

22          JUDGE CLIFTON: You are going to move the  
23 exhibits in?

24          MR. MILTNER: I was. I always forget to  
25 do that and was reminded to do it and I didn't.

1           So I would like to move admission of all the  
2           exhibits, please.

3           JUDGE CLIFTON: All right. Let me see if  
4           Mr. Beshore wants to ask his question before or  
5           after I ask if there are any objections.

6           MR. BESHORE: After is fine.

7           JUDGE CLIFTON: After. Let me first  
8           start with the two statements. Is there any  
9           objection to Mr. Sharpe's testimony, which is  
10          Exhibit 97, or Mr. Button's, which is Exhibit  
11          98? There is none. Exhibit 97 and 98 are  
12          hereby admitted into evidence.

13          And now the Star-K Kosher Certification.  
14          That's Exhibit 99. Is there any objection to  
15          being admitted into evidence? There is none.  
16          Exhibit 99 is hereby admitted.

17          Now, the next two are from the Heartland  
18          Creamery website, Exhibit 100. Let me ask first  
19          about it. Is there any objection to the  
20          admission into evidence of Exhibit 100? There  
21          is none. It is admitted into evidence.

22          Exhibit 101 is a list of stores starting  
23          with Iowa locations. Is there any objection to  
24          the admission into evidence of Exhibit 101?  
25          There is none. Exhibit 101 is admitted.

1 Mr. Beshore, you may inquire.

2 RECROSS-EXAMINATION

3 BY MR. BESHORE:

4 MR. BESHORE: Just one item I wanted to  
5 ask you about, the first page of which is from  
6 your Heartland Creamery website. And it  
7 indicates it's printed yesterday, I guess.

8 It says, the first line of text after the  
9 heading, Located in northeast Missouri, amid  
10 fields of corn and soy beans, our farm land is  
11 home to over 6,000 Holstein cows and 750 goats.  
12 Do you see that?

13 MR. SHARPE: Yes.

14 MR. BESHORE: Now, Dr. Cryan from the  
15 Federal Milk Producers Association testified  
16 earlier and he testified that he had accessed  
17 your website, both of them, Heartland Creamery  
18 and Sharpe Holdings, Inc., on May the 2nd and at  
19 that time it indicated that you're milking about  
20 4,500 cows although the total number was around  
21 6,000, I think. Is your website a little behind  
22 in terms of numbers of head?

23 MR. SHARPE: It's very definitely behind.  
24 We're milking 3,000 cows. And at one time we  
25 were milking -- I didn't even realize this



1           myself. I don't look at this website very  
2           often.

3           MR. BESHORE: Right.

4           MR. SHARPE: So we will correct that  
5           immediately. But we're milking 3,000 cows.

6           MR. BESHORE: Okay. And I don't question  
7           that. I mean, you are here to testify now and  
8           we're trying to use the best information prior  
9           to that time which was your published website.  
10          The 6,000 cows is not -- that's not up to date  
11          either, I take it?

12          MR. SHARPE: Well, we have -- this is  
13          cows, calves, everything on the farm. We have  
14          about 7,000 head on the farm.

15          MR. BESHORE: So you've got more young  
16          stock than milking stock?

17          MR. SHARPE: Yes. We're keeping all of  
18          our calves and heifers to put back in the herd.

19          MR. BESHORE: In anticipation of building  
20          the herd back?

21          MR. SHARPE: That's right.

22          MR. BESHORE: Okay. Thank you very much.

23          JUDGE CLIFTON: Thank you, gentlemen. Is  
24          there anything else you would like to add before  
25          you step down, either of you?

1 MR. SHARPE: Thank you.

2 MR. BUTTON: Thank you.

3 JUDGE CLIFTON: Thank you very much. You  
4 may step down. I appreciate it. It's time for  
5 a break. But before we take it, I want to  
6 determine who will be our next witness. Is  
7 Mr. Arkema here? Would he logically be our next  
8 witness? Our next witness is Paul Arkema from  
9 Country Dairy in Michigan. Mr. Yale.

10 MR. YALE: Your Honor, I would like to  
11 excuse myself. I'm going to be leaving during  
12 this break, and I object to anything I don't  
13 like that comes in after this and move to  
14 strike.

15 But I say that facetiously. I just want  
16 to share the Department -- the set up for the  
17 hearing was excellently done. Your Honor has  
18 done a wonderful job. The Department has so far  
19 done a good job. I'll save that grade until we  
20 see the decision. But I appreciate all the  
21 courtesies that have been done in this, and wish  
22 I could be here for the decision, which I hope  
23 is sooner rather than later. Thank you very  
24 much.

25 JUDGE CLIFTON: Mr. Yale, I thank you

1           you. I will be thanking everyone else later.  
2           And I don't mean to leave you out of that just  
3           because you're not here. Please be back in 15  
4           minutes. Please be back at -- we'll call this  
5           3:35. Please be back at 3:50.

6                       (A recess was taken from 3:35 to 4:00.)

7           JUDGE CLIFTON: All right. We're back on  
8           record. It's 4:00. I'd like the witness,  
9           please, to identify himself and spell his name.

10                    THE WITNESS: My name is Paul Arkema.  
11           It's Paul, A-r-k-e-m-a.

12                    JUDGE CLIFTON: What association do you  
13           have with Country Dairy, Mr. Arkema?

14                    THE WITNESS: Would it be okay, your  
15           Honor, if I just read my statement?

16                    JUDGE CLIFTON: Sure. Let me swear you  
17           in.

18                    (The witness was sworn.)

19                    JUDGE CLIFTON: Thank you. You may  
20           proceed.

21                               PAUL ARKEMA  
22           of lawful age, being duly sworn, was examined and  
23           testified as follows:

24                               DIRECT EXAMINATION

25                    THE WITNESS: Good afternoon. My name is

1 Paul Arkema, and I'm here to speak to the  
2 proposals and the issue before this hearing and  
3 on behalf of Country Dairy. I and my  
4 brother-in-law, Rob Eekhoff, function as the  
5 managing owners of this fourth generation family  
6 farming operation. And we are actually located  
7 in New Era, Michigan, north of -- north and west  
8 of Grand Rapids about an hour. We're located in  
9 Oceana County, which is the second or third  
10 poorest county in the State of Michigan.

11 In 1983, our father-in-law, Wendell Van  
12 Gunst, frustrated by the disparity in the value  
13 he saw charged for milk at retail versus the  
14 price he received in his mailbox, built his own  
15 processing facility.

16 In doing so, he shouldered the risk of  
17 marketing his milk entirely on his own, a point  
18 that was driven home to him at the time through  
19 a letter from his co-op, stating that his milk  
20 would have no home through them when he  
21 processed his first gallon of milk.

22 26 years later, our family still faces  
23 the same challenge, to profitably market the  
24 milk we produce, knowing that if we don't, the  
25 Federal Market Order rules provide that we only

1           need receive the lowest possible class value,  
2           less any handling, discount, or balancing fee if  
3           a plant or co-op choses to pick up that milk for  
4           us.

5                        So I sit before you today as a fourth  
6           generation family farmer and a second generation  
7           producer-handler. My family bears the same  
8           risks and costs that all dairy farmers face when  
9           we set out to produce a gallon of milk: Weather  
10          uncertainty, radical cost fluctuations in fuel,  
11          fertilizer and seed, market volatility in milk  
12          prices.

13                       But in addition we face the risks and  
14          costs of processing and marketing our milk,  
15          processing facility and equipment maintenance  
16          costs, quality assurance fees and expenses,  
17          packages costs fluctuation; essentially the same  
18          challenges other processors in our state face.

19                       And while our facility may be less  
20          expansive than the processors who see us as a  
21          threat, we process in a week only a fraction of  
22          what they process in day. Frankly, we face the  
23          challenge to achieve a lower cost of production  
24          per gallon and it's a challenge that we'll  
25          probably never achieve. We face that challenge

1 to produce -- to produce a cost -- or produce a  
2 gallon of milk for the same cost that our more  
3 efficient, larger competitors are able to do.

4 But these risks are all challenges of  
5 farming and processing and all of those are ones  
6 in which we chose to engage. But we chose to do  
7 that under the rules of the Federal Marketing  
8 Order system. And now in the hearing that seeks  
9 to eliminate producer-handlers and the so-called  
10 unfair marketing opportunity that we supposedly  
11 exploit, I find it ironic that changing the  
12 rules is being considered and that doing so  
13 could be considered fair.

14 But I'm thankful that I live in a country  
15 where such changes are discussed and  
16 thoughtfully deliberated upon by reasonable  
17 people, and I thank the panel for the  
18 opportunity to speak to the specifics of how  
19 Country Dairy operates as a producer-handler  
20 and to offer a little different view of the  
21 situation than what was provided last week by  
22 one of our competitors, Jim Wernet of Bareman's  
23 Dairy, which has always proved themselves to be  
24 a very respectable competitor. We enjoy working  
25 up against them. They do a good job.

1           I mentioned earlier that as a dairy  
2 farmer, I face the risk of market volatility in  
3 milk prices. For as long as Country Dairy has  
4 processed milk we have adjusted our prices to  
5 our customers to follow the change in the  
6 Federal Market Order pricing.

7           Have we always gone up or down exactly as  
8 the FMO price moved? No, we have not. But  
9 based on the 15 years that I've been involved in  
10 marketing milk in Michigan, our competition  
11 doesn't always either.

12           In a free market economy, a person with  
13 something to sell should be able to set the  
14 price at which they are willing to sell it.  
15 Both we and our competitors take advantage of  
16 that opportunity.

17           From time to time, our cows bless us with  
18 higher production. Or if we, as managers, earn  
19 our keep and do a good job and manage those  
20 cattle well and they produce more, then we have  
21 more milk to deal with.

22           We're faced with the choice of disposing  
23 of milk and receiving no value or taking less  
24 for our milk. Pragmatically, historically,  
25 we've chosen to market our milk, and being

1           optimists, we look at the reduced revenue that  
2           we might receive as an investment in our valued  
3           retail partner and as an opportunity to market  
4           our brand to the retailer's customers. But we  
5           also are capitalists and the so-called fire  
6           sales are not a part of our business plan.  
7           Makes absolutely no sense.

8                     Our goal. Our goal is to sell our milk  
9                     at the best profitable price that our customers  
10                    still consider to be a value worth paying. For  
11                    26 years, our family has pursued offering our  
12                    customers value.

13                    Like many dairy farmers across the  
14                    nation, we take excellent care of our cows,  
15                    because they are our livelihood. When our cows  
16                    are clean and healthy and well-fed and happy,  
17                    they produce very high quality milk.

18                    When we bring this extremely good milk  
19                    into a rigorously clean dairy plant and process  
20                    it, we know our customers can count on, and that  
21                    they appreciate the taste and longevity of the  
22                    milk we process.

23                    We know because they tell us. They call  
24                    or write or e-mail and communicate to us their  
25                    feelings about our product. And we've listened.



1           We listened when our customers called  
2           nearly nonstop when recombinant bovine  
3           somatotropin, also know as rbST, or bovine  
4           growth hormone was approved for use in dairy  
5           cattle in 1994. We listened to them express  
6           their concerns about the use of this technology  
7           to produce the milk they bought for their  
8           family.

9           They told us that they wanted the choice  
10          to choose milk produced without this product,  
11          and we listened. With the oversight of the  
12          Michigan Department of Agriculture, we signed  
13          and filed affidavits promising not to use rbST  
14          in our cows, and we labeled our product as such.

15          The increase in the size of our herd that  
16          Mr. Wernet mentioned in his testimony last week  
17          has occurred during that last decade. That  
18          growth is due largely to customer driven demand  
19          for our product because our customers perceive  
20          and experience quality and value in our  
21          products, not because our products are cheap.

22          In fact, Country Dairy pursued its goal  
23          of selling our milk at the best profitable price  
24          that our customers considered to be a value  
25          worth paying specifically during this period,

1           achieving a 15 to 20 percent -- or, I'm sorry, a  
2           15 to 25 cent premium for our products because  
3           we produce them without rbST.

4                     In 2001, this distinctive aspect of our  
5           product became a talking point for discussions  
6           with a distributor interested in distributing  
7           our products for us. Up until this time,  
8           Country Dairy's vertical integration had  
9           included distribution. But Hudsonville,  
10          Michigan based Cedar Crest Dairy wanted a line  
11          of dairy products to sell that was unique, and  
12          Country Dairy fit that bill. Our two companies  
13          penned an exclusive distribution agreement and  
14          worked out a pricing formula that is based  
15          directly on the Class I value of milk.

16                    Through diligent and consistent marketing  
17          to the end user, an increasing appreciation for  
18          the unique nature of Country Dairy milk has been  
19          embraced. We have pursued and received higher  
20          retail shelf premiums because our customers  
21          consider our milk a valuable purchase.

22                    And each month, Country Dairy's price to  
23          Cedar Crest fluctuates with the Class I value of  
24          milk. So from Country Dairy and Cedar Crest's  
25          perspective it was with some amazement that we

1 read Mr. Wernet's rendition of the competitive  
2 issue that he said he recently faced.

3 He indicated that a C store customer  
4 received an offer from Cedar Crest to sell milk  
5 for \$1.90 if the customer would retail that milk  
6 for \$1.99. In fact, this customer approached  
7 Cedar Crest asking for a price at which they  
8 could market milk for a two-week promotion at  
9 1.99. And I have e-mail documentation  
10 confirming that that was the way that  
11 transpired.

12 Now, I really bring this back to the  
13 panel's attention for two reasons, the first of  
14 which is to present the situation from what I  
15 believe is a decidedly different angle. But  
16 more significant than the he said-she said  
17 nature of what I've just told you is the light  
18 that this marketing conversation between a  
19 supplier, Cedar Crest, and a C store or a  
20 customer, shines on what is occurring in our  
21 markets in Michigan right now.

22 Major grocers in Michigan are marketing  
23 milk at retail prices below the promotional  
24 price just discussed. These grocers are buying  
25 their milk from the largest processor in the

1 nation.

2 I'm obviously not privy to the pricing  
3 between those two parties, so I can't confirm at  
4 what price the processor is selling to the  
5 grocer. The grocer may be exercising his right  
6 in a free market economy to sell a product at a  
7 loss. But it is also possible that the  
8 processor may be selling to the grocer very  
9 close or below Class I value plus premiums, plus  
10 processing, and delivery costs. I don't know.

11 However, when customers like the C store  
12 I just discussed see those prices week in and  
13 week out in on the shelves of the bigger  
14 players, they believe they -- there must be a  
15 better price that they can get. They're  
16 business people. They should be asking that  
17 question of their suppliers.

18 But let me clearly state, Country Dairy,  
19 as a producer-handler, is not the disruptive  
20 marketing force setting the tone for market in  
21 these areas. If anyone is setting that tone, it  
22 is the larger grocers with their own processing  
23 facilities or grocers buying from the nation's  
24 largest processors.

25 Indeed Country Dairy and Cedar Crest had

1           been seeking to expand in the marketing areas  
2           where we presently have little market share.  
3           Cedar Crest's sales team is being told that its  
4           delivered prices are too high in comparison to  
5           the largest national processor's regional brand  
6           when it is delivered.

7                     There are prospects who are intrigued by  
8           the uniqueness and the value that the Country  
9           Dairy brand could bring to their business, but  
10          the price they require, from our perspective, is  
11          untenable long term.

12                    Might Cedar Crest see if they can get an  
13          inroad with that prospect short term? They  
14          might. But only as an investment in what could  
15          be a valuable customer, an option that they have  
16          every right to exercise, and is no more  
17          disruptive than what is occurring to the large  
18          processors right now.

19                    In conclusion, I don't believe that  
20          producer-handlers present a disruptive force in  
21          the market. And with our pricing model, I truly  
22          believe Country Dairy's prices typically are at  
23          parity or higher than our competition.

24                    While we may not pay into the pool values  
25          for milk, in exchange we shoulder a significant

1 risk without the safety net of the pricing  
2 orders that other producers have. And as with  
3 any investment, with higher risk should come the  
4 potential for greater reward. Producers who  
5 step up to the challenge of marketing their own  
6 milk as processors and do so profitably have  
7 engaged the American Dream, played within the  
8 rules, and benefit the economy every bit as much  
9 as any other enterprise.

10 We believe the allowance for the  
11 producer-handler status should remain in the  
12 Federal Market Order provisions. Thanks for  
13 listening to my statement.

14 JUDGE CLIFTON: Thank you very much,  
15 Mr. Arkema. The court reporters will need some  
16 spellings of the names you used, both locations  
17 and people, and if you'll do that when we go off  
18 record.

19 All right. I'd invite cross-examination.  
20 Who would like to begin cross-examination of  
21 Mr. Arkema? Mr. Vetne, thank you.

22 CROSS-EXAMINATION

23 BY MR. VETNE:

24 Q. Good afternoon, Mr. Arkema.

25 A. Good afternoon.

1 Q. Just for a geographical reference, I grew  
2 up in Battle Creek. There used to be a Sullivan's Dairy  
3 there, buy their ice cream. You might know them.

4 A. I don't. I invite you to come up and try  
5 some of our ice cream.

6 Q. Now, I live in New Hampshire, and I  
7 represent folks in the Pacific Northwest. Am I correct  
8 that you have on occasion -- Country Dairy has on  
9 occasion sold milk for which it did not have -- produced  
10 on its farm for which it did not have a market in its  
11 bottles?

12 A. In raw form, are you asking?

13 Q. Yes.

14 A. Yes.

15 Q. And I think you mentioned something about  
16 cooperatives being willing to take that?

17 A. They -- they have worked with us. Yes,  
18 they have.

19 Q. Is that basically your only outlet for  
20 surplus milk?

21 A. If we have raw or surplus milk, we  
22 approach the market and see what we're able to achieve  
23 on-the-spot basis.

24 Q. Just south of your location in New Era is  
25 one of the largest cheese plants, if not the largest, in

1 Michigan, the Leprino cheese plant?

2 A. Correct.

3 Q. Did you offer milk to them?

4 A. We have sold milk to them.

5 JUDGE CLIFTON: What is the name of that  
6 plant, Mr. Vetne?

7 MR. VETNE: Leprino, L-e-p-r-i-n-o.

8 Q. Do you sell milk direct to them or  
9 through cooperatives?

10 A. It would be through Michigan  
11 cooperatives.

12 Q. Usually the milk has an exclusive supply  
13 contract with Leprino?

14 A. I'm not aware of that.

15 Q. You don't know that? Do you package  
16 anything other than beverage milk, such as creams?

17 A. We do.

18 Q. Heavy cream, whipping cream, half and  
19 half?

20 A. Correct, all of those.

21 Q. What portion of your total farm  
22 production is in Class I, i.e., cream is not Class I, so  
23 I'm looking for the beverage mix.

24 A. Without having my last Federal Market  
25 Order report in front of me, it's going to be 98 to



1 99 percent.

2 Q. From your last or is that typical of  
3 every month?

4 A. Typically.

5 Q. 98 to 99 percent. So all of your creams  
6 are from the 2 -- 1 or 2 percent left over?

7 A. Are you asking about all -- all of the  
8 milk that we market? Rephrase that question for me so  
9 I --

10 Q. Okay. Yeah. There are two steps  
11 involved in my question. One is, you produce milk on  
12 the farm, some of which may go to manufacturing plants  
13 on occasion. You take milk to your plant, some of which  
14 is used in Class II products, such as heavy cream,  
15 whipping cream, half and half?

16 A. Correct.

17 Q. What portion of the total produced on  
18 your farm, on a typical basis, goes into Class I fluid  
19 milk products?

20 A. In bottled form through our plant?

21 Q. Yes.

22 A. Again, without looking at the last  
23 report, it's going to be a high percentage. I mean, it  
24 will not be, you know, more than 2 percentage points off  
25 of the 98 percent.

1 Q. So you have some -- you have some losses  
2 in your plant, some shrinkage between the farm and your  
3 plant --

4 A. Sure.

5 Q. -- in the pipes?

6 A. (Nodding head.)

7 Q. You have some cream, half and half, and  
8 you have occasional sales for manufacturing. All of  
9 that would be encompassed in the 4 percent that's not in  
10 the bottle as beverage milk?

11 A. No. Typically, because we don't like to  
12 ship milk out in raw form, I don't think about it that  
13 way. I mean, honestly, the numbers that I'm talking  
14 about there would refer to a typical month in which we  
15 don't have one of those big silver tankers in our yard.

16 Q. Do those silver tankers come on a  
17 seasonal basis when they come or holidays?

18 A. It tends to be. Tends to be.

19 Q. I'm not sure if I wrote this down  
20 correctly but you used the term, I think 15 to 25 --

21 A. Cents.

22 Q. -- cents, okay. A premium price over the  
23 competition. Is that the wholesale price that you  
24 believe that you offer milk for compared to what the  
25 large regulated processors offer milk for?

1           A.       I actually referenced two different --  
2 well, I referenced a period in there where we were  
3 marketing our milk with a premium. And that was  
4 actually prior to Cedar Crest's involvement with us in  
5 the exclusive marketing arrangement.

6           During that period of time prior to that  
7 agreement with them, we were about a dime to 25 cents  
8 higher, depending on the market that we were going into.

9           Q.       Okay. And where did you acquire you  
10 knowledge about your competitors' wholesale pricing?

11          A.       The same place everybody gets our  
12 pricing. It's out on the streets.

13          Q.       Okay. People that you sell to would tell  
14 you, here's what they're charging us, how close can you  
15 come, something like that, is that true?

16          A.       Something like that.

17          Q.       When did Cedar Crest -- that Cedar Crest  
18 arrangement with Country Dairy start?

19          A.       That was about 2001.

20          Q.       Okay. Prior to that, was all of your  
21 milk marketed under a Country Dairy brand, your own  
22 unique brand?

23          A.       Yes.

24          Q.       And subsequent to 2001 has that  
25 continued?

1           A.       We have additional labels in the mix that  
2 we use right now.

3           Q.       Okay. A portion of it is -- is the  
4 majority Country Dairy?

5           A.       The majority is Country Dairy.

6           Q.       Okay. And some of it is the store brand?

7           A.       Correct.

8           Q.       Is some of it a brand for any other --  
9 co-packed for any other processor?

10          A.       Not for another processor.

11                   MR. VETNE: Okay. That's all the  
12 questions. Thank you very much for coming.

13                   JUDGE CLIFTON: Thank you, Mr. Vetne.

14                   Who next will cross-examine Mr. Arkema?

15                   Mr. English, thank you.

16                                   CROSS-EXAMINATION

17 BY MR. ENGLISH:

18           Q.       Good afternoon, sir. Charles English.

19           A.       Good afternoon.

20           Q.       Following up on some of the questions  
21 from Mr. Vetne, your answer on the label was, not from  
22 another processor. Do you sell milk under a label to a  
23 retailer where the same retailer gets the same label  
24 from another processor?

25           A.       Not in the same region. So in other

1 words, I have a relationship with -- with a grocer who  
2 has different regions from which he purchases milk.

3 Q. When you use the word, region, within  
4 Michigan or within different parts of -- geographic  
5 parts of the United States?

6 A. Within different parts of the United  
7 States.

8 Q. Okay. So within the Michigan area, you  
9 do not have a label that is being -- that is shared in  
10 the sense that a retailer has another processor using  
11 that label within Michigan?

12 A. There is a label that would have that.

13 Q. In Michigan?

14 A. Yes.

15 Q. Okay. And is that product also sold  
16 through your exclusive distributorship?

17 A. Yes.

18 Q. Now, I understand that there was a time  
19 when some individual processor were rbST free, but it  
20 would be fair to say that many processors now claim  
21 their milk is rbST free? Correct?

22 A. Correct.

23 Q. Are there any processors in Michigan who  
24 are not making that claim today?

25 A. I would not be the authority to answer

1 that question.

2 Q. Are you aware of any processors who are  
3 not making that claim today?

4 A. I'm not sure what Prairie Farms' status  
5 is.

6 Q. Is April the flush season, part of the  
7 flush season in Michigan, or has the flush not come on  
8 yet?

9 A. The flush season can vary depending on  
10 just when the animals have been bred back and when they  
11 decided to calf them. In general, April through May is  
12 probably a pretty good flush time line.

13 Q. And during that time you are at  
14 98 percent Class I? For April 2009, you were 98 percent  
15 Class I?

16 A. For April, probably not. I mean, April  
17 would have been one of the months where there were some  
18 of those nasty tankers in the yard.

19 Q. I'm sorry, empty what?

20 A. Empty tankers in the yard, those big  
21 silver things we don't like to see.

22 Q. Were you still above 93 percent for  
23 April?

24 A. I think we were. Again, I don't have  
25 those numbers in front of me. And I'm not sure what

1 that would indicate.

2 MR. ENGLISH: I have no further  
3 questions. Thank you.

4 JUDGE CLIFTON: Thank you, Mr. English.  
5 Who next has questions for Mr. Arkema?  
6 Mr. Beshore.

7 CROSS-EXAMINATION

8 BY MR. BESHORE:

9 Q. Good afternoon, Mr. Arkema. My name is  
10 Marvin Beshore. I represent National Milk Producers  
11 Federation and Dairy Farmers of America. Just a couple  
12 of questions.

13 Mr. -- Mr. Wernet testified, I think,  
14 that you had around a thousand cows. Is that -- is that  
15 correct? Or how many cows are you milking there at  
16 Country Dairy these days?

17 A. We have about 1,400 right now.

18 Q. Okay. So what -- what's your monthly  
19 gross volume of -- of milk from those 1,400 cows?

20 A. It will run between 2.4 and  
21 2.6 million pounds.

22 Q. Okay. Besides the Country Dairy label,  
23 what other labels do you package under?

24 A. One of them I'm not at liberty to say  
25 based on the arrangement I have with the customer. But

1 we have a label that we do under the Cedar Crest brand.

2 Q. Okay, Cedar Crest. Now, so Cedar Crest,  
3 that's the distributor's brand, I take it?

4 A. Correct.

5 Q. What other dairies do they distribute  
6 for?

7 A. There are several.

8 Q. Okay. Could you tell us who those are?

9 A. I know they have some product that they  
10 purchase for their school business from Country Fresh  
11 and perhaps also from Paririe Farms. I'm not sure if  
12 there are others in addition to them or not.

13 Q. What size packages do you package at  
14 Country Dairy and types?

15 A. Packaged sizes or --

16 Q. Both, sizes and types of container.

17 A. We do gallons, half gallons, and quarts  
18 in high density polyethylene and we do pints in HD -- or  
19 in PET, polyethylene.

20 Q. Okay. What products, in terms of the --  
21 the various fluid milk products, flavored milk products,  
22 what's your product line?

23 A. What do we do?

24 Q. Whole milk?

25 A. Whole milk.



1 Q. 2 percent?

2 A. Whole milk, 2 percent, 1 percent, fat  
3 free, strawberry, chocolate, half and half, whipping  
4 creams that we've discussed.

5 Q. All of those in all sizes of containers?

6 A. Not necessarily. It's market driven,  
7 depending on what the customer needs or what makes the  
8 most sense for us to bring to market.

9 Q. Okay. Now, the recent communications  
10 with the convenience store -- between the convenience  
11 store and Cedar Crest, were you personally involved in  
12 any of those communications or is this just something  
13 you learned about from Cedar Crest, or how'd that go?

14 A. That was something that I learned about  
15 through being made aware of the testimony from  
16 Mr. Wernet.

17 Q. Okay. So you weren't aware of it before  
18 that time?

19 A. I was not.

20 Q. Did you get the sale? Did Cedar Crest  
21 get the sale?

22 A. To my knowledge, I don't know. I assume  
23 they did, because Cedar Crest is a customer-driven  
24 company. And if a customer called and requested that  
25 and they thought it was going to be a benefit to the

1 customer, yeah, they probably gave it to them.

2 Q. Okay. And what's the cost of the milk  
3 that's going to go out of the store there at \$1.99?  
4 What was the in-the-store asking price; \$1.90 a gallon,  
5 is that correct?

6 A. That's the understanding that I have from  
7 the -- from the testimony and from the e-mails that I've  
8 seen.

9 MR. BESHORE: I think that's all I have.  
10 Thank you very much.

11 JUDGE CLIFTON: Thank you, Mr. Beshore.  
12 You may also have to help with the spelling of  
13 those materials that the jugs are made from.

14 THE WITNESS: Okay.

15 JUDGE CLIFTON: All right. What other  
16 questions for this witness? Mr. Ricciardi,  
17 thank you.

18 CROSS-EXAMINATION

19 BY MR. RICCIARDI:

20 Q. Mr. Arkema, Al Ricciardi on behalf of  
21 AIDA. Is -- you were talking about the competitive  
22 situation in your marketing area with the supermarkets.  
23 Is Meijer, M-e-i-j-e-r, one of the larger supermarkets  
24 in your area?

25 A. Yes.

1 Q. And are you familiar who supplies Meijer  
2 with their private label milk?

3 A. To the best of my knowledge, it's Dean  
4 Foods.

5 Q. Now, in your market in the Sunday  
6 newspapers are there flyers that are provided by the  
7 various supermarkets, including Meijer, regarding costs  
8 of the products that they intend to market at the  
9 stores, including milk?

10 A. Yes.

11 Q. And have you seen the flyers from  
12 yesterday at Meijer with regard to the Meijer gallon  
13 milk in all varieties excluding chocolate and organic?

14 A. I have, from my conversation, heard that  
15 they exist. I've not seen them personally.

16 Q. Okay. Are you familiar that they -- the  
17 marketing for Meijer is at \$1.98 a gallon?

18 A. We're -- we're accustomed to seeing that,  
19 when the value of raw milk goes as low as what it is,  
20 that the big grocers tend to put on those kind of  
21 specials fairly regularly. And actually \$1.98 is not as  
22 aggressively as they will sometimes tend to do.

23 Q. Have you seen it at a lower price?

24 A. 1.70, \$1.78. Those kind of prices are  
25 not unheard of.

1 Q. Shelf price?

2 A. Correct.

3 Q. Are you familiar with Family Fare,  
4 F-a-r-e, supermarkets?

5 A. Yes.

6 Q. And tell us who Family Fare is in the  
7 Michigan market.

8 A. They are one of the largest grocer,  
9 wholesale, both distributors and owners of grocery  
10 stores, throughout Michigan.

11 Q. And who supplies them, to your knowledge,  
12 with their Spartan label milk?

13 A. I believe that's Dean Foods.

14 Q. And are you familiar that Family Fare has  
15 been advertising their gallon milk at \$1.98?

16 A. I'll take your word for it.

17 Q. Okay. With regard to your marketing area  
18 in Michigan, the type of pricing that we're talking  
19 about, is that something that you have to deal with on a  
20 competitive basis?

21 A. When -- when those kind of flyers exist  
22 in the newspaper, does that affect how our customers  
23 respond, is that your question?

24 Q. A much better question. Why don't you go  
25 ahead and answer it?

1           A.       Yes.  The -- you know, it's not unusual  
2       for customers to call, you know, on a regular basis.  
3       And I'm getting this information now from Cedar Crest,  
4       because they're the ones for responsible the price out  
5       to the customer.  But my understanding is that that's a  
6       regular occurrence, when prices like that are advertised  
7       in the papers.

8           Q.       A couple of other follow-up points.  I  
9       think Mr. English asked you about whether or not, at  
10      least currently, most people that are processing milk in  
11      Michigan are processing rbST free milk.  Let me ask you  
12      about a specific time frame and Whole Foods back in '06  
13      and '07.  At that point were you requested by Bareman  
14      Dairy to become involved in supplying milk to Whole  
15      Foods?

16          A.       Yes, we were.

17          Q.       And was one of the reasons because in '06  
18      and '07, at least, they didn't have rbST free milk?

19          A.       That's correct.

20          Q.       And did you actually pay a commission to  
21      Bareman Dairy?

22          A.       That was not a commission that Country  
23      Dairy was involved with.

24          Q.       Okay.  To the extent there was one,  
25      Country Dairy didn't pay it?

1           A.       Correct.

2           Q.       You've had the opportunity to read the  
3 statement from Mr. Wernet marked and admitted as  
4 Exhibit 77?

5           A.       Yes.

6           Q.       Which is one of the reasons you're here?

7           A.       Correct.

8           Q.       Directly and indirectly, he indicated  
9 that Country Dairy effectively had fire sales to their  
10 customers as part of their marketing practice. It's in  
11 his statement. It's what he said. Is that true?

12          A.       Fire sales is a curious term to me.

13          Q.       Why?

14          A.       Because typically when I think of a fire  
15 sale, I think of something that is unusable and is going  
16 to be dramatically discounted, almost to the point of  
17 being, you know, pennies on the dollar. If a 10 or 15  
18 cents or 20 cent discount on milk when we were long  
19 during the time where we were doing the distribution  
20 directly ourselves would be considered a fire sale, then  
21 we probably ran a fire sale every now and then.

22          Q.       In attempting to meet the competitive  
23 marketplace in Michigan?

24          A.       In attempting to meet the competitive  
25 marketplace, yeah.

1           Q.       You are asking the Secretary to take into  
2 consideration the real competitive issues in Michigan  
3 and the competition in the milk industry in making any  
4 decision?

5           A.       That's essentially what is a concern to  
6 me that -- indicating that producer-handlers are a  
7 disruptive influence in the marketing situation that  
8 exists in Michigan, I believe is really a very -- a very  
9 small, almost significant component of the disruption in  
10 the marketing that I would see going on for our business  
11 that's occurring from the larger producers and  
12 processors.

13           Q.       Which would -- which would include, as  
14 you testified, the largest processor in the country,  
15 Dean Foods?

16           A.       Correct.

17           MR. RICCIARDI: I don't have any further  
18 questions. Thanks.

19           JUDGE CLIFTON: If I might inquire, what  
20 disorderly marketing do you see in Michigan?

21           THE WITNESS: At this point, you know,  
22 our product would be on shelves in some of those  
23 grocery stores at a price that would -- would  
24 not be at all disruptive in undercutting the  
25 value of milk in the marketplace. So, you know,

1           in certain cases, our product could be, you  
2           know, 50 cents to, you know, in some cases a  
3           dollar and a half higher on the shelf than what  
4           a house brand might be. And when the house  
5           brands goes on special at \$1.98 or \$1.79, to me  
6           that's a disruptive influence in the market.

7           It's one that they have, you know, the  
8           option to do, I would say. But it does create a  
9           situation in which I think that's more  
10          disruptive to the overall value of milk than  
11          what the higher price is.

12                 JUDGE CLIFTON: And why is a price like  
13                 \$1.98 a gallon or \$1.79 a gallon a disruptive  
14                 price?

15                 THE WITNESS: Essentially that's a price  
16                 below where we would feel like we can make a  
17                 profit.

18                 JUDGE CLIFTON: Thank you. Mr. Vetne.

19                         REXCROSS-EXAMINATION

20           BY MR. VETNE:

21                 Q.       When you just now referred to the house  
22                 brand being on sale for \$1.79 to \$1.98, would that be a  
23                 house brand produced, processed, bottled by somebody  
24                 other than Country Dairy?

25                 A.       Yes.



1 Q. Okay. And in response to a question by  
2 Mr. Ricciardi concerning fire sales, you said when you  
3 used to distribute your own product, you may have  
4 offered milk at a 15, 20 cent discount when you were  
5 long, and if that's considered a fire sale, you used to  
6 do that?

7 A. Correct.

8 Q. You recall that? Since 2001, you have  
9 been distributing through Cedar Crest. Since 2001 do  
10 you sell milk to Cedar Crest at fire sale prices?

11 A. I do not.

12 Q. Okay. So if there's any fire sale it  
13 would be Cedar Crest's own marketing strategy?

14 A. Correct.

15 Q. If there's any discount, let's put it  
16 that way. Your price doesn't vary based on their  
17 marketing strategy?

18 A. Correct.

19 JUDGE CLIFTON: Who else has questions  
20 for Mr. Arkema? Mr. Tosi.

21 CROSS-EXAMINATION

22 BY MR. TOSI:

23 Q. Good afternoon, Mr. Arkema.

24 A. Good afternoon.

25 Q. I didn't catch -- the spelling of your

1 last name, Arkema, please?

2 A. It's A-r-k-e-m-a.

3 Q. Thank you, Mr. Arkema. A few questions.  
4 Do you consider yourself to compete with Dean Foods, for  
5 example? You've mentioned Dean several times in your  
6 cross-examination. Do you consider yourself in  
7 competition with Dean on the basis of price?

8 A. I consider us in competition with them by  
9 virtue of the fact that they're in the marketplace and  
10 so are we. We're competitors by virtue of trying to  
11 sell to the same customer. I think the product that we  
12 are trying to sell and bring to a customer is of a -- of  
13 a value that we try very diligently to get a value for  
14 that our customers are willing to pay.

15 So I'm not sure I exactly understand the  
16 nature of your question. Are we a competitor on the  
17 basis of price? Every ounce of our marketing desire is  
18 to not be that. Do we have to occasionally? Yeah.

19 Q. Yeah. One of the reasons that I asked  
20 that question, I've heard a mix of issues that I think  
21 that -- that I think that you have raised.

22 For example, some of the questions that  
23 Judge Clifton asked you about, you know, what's  
24 disruptive about \$1.79 sale price on a gallon of milk,  
25 or \$1.99, for example. And I was trying to put that in

1 context with, you know, there's certain things that a  
2 grocery store will do to try to attract customers into  
3 the store --

4 A. Certainly.

5 Q. -- with an attractive price on milk, for  
6 example, knowing that once they're in the store, the  
7 likelihood of them buying something else in the store at  
8 a higher markup would probably occur. That's why I was  
9 asking that question.

10 A. And I think the consistency with which  
11 that occurs in those larger grocers would lead me to  
12 ask, are they really willing to lose that much money on  
13 a consistent basis purely for the sake of door swings?

14 Q. Yeah, it's an interesting question. You  
15 probably would like the answer to that. We probably all  
16 would.

17 A. Exactly.

18 Q. In the beginning of your testimony, you  
19 said things about the high quality of your milk. If we  
20 were to go into a grocery store that you supplied and  
21 let's say that it was also supplied by Dean Foods, for  
22 example, a brand that you know to be -- having been  
23 supplied by Dean Foods, would -- would we notice a price  
24 difference between your milk and a similar -- like a  
25 gallon of milk from your label versus one that's been

1 supplied by Dean Foods?

2 A. Yes. And we're alongside other -- other  
3 producer or other processors. Our milk typically is  
4 going to be 50 cents to, in some cases, a dollar and a  
5 half higher.

6 Q. So in that regard, when you are selling  
7 your product to, like, a major chain, for example, that  
8 there's this understanding, if you will, or the  
9 perception of that, that your product is a higher  
10 quality product?

11 A. Yes.

12 Q. Okay. With regard to the other proposals  
13 we had, there were something like 28 proposals, I think,  
14 that have been noticed in our hearing notice. If the  
15 Secretary decided that perhaps something needed to be  
16 done, are there any other proposals that you have an  
17 opinion on or that you would support?

18 A. It's been a while since I've read though  
19 all the proposals. Most of the time my day is taken up  
20 with keeping the processing plant running and overseeing  
21 the rest of the operations of our business.

22 From my perspective, the basis of the  
23 capitalism of our society and what drives it is  
24 providing incentives and not imposing disincentives to  
25 growth and opportunity. And when caps and limits are

1 put on what a producer-handler can feasibly do  
2 profitably, I think that is something that should be  
3 allowed to be pursued.

4 Q. Okay. Are you aware of any other  
5 handlers in Michigan in the area where you market your  
6 milk -- are you aware of anybody that you are competing  
7 with that would be of a size that's similar to you  
8 that's fully regulated?

9 A. Producer-handlers or just --

10 Q. Just any handler that does the same sort  
11 of business as you, who bottle milk and sell it to the  
12 stores.

13 A. Bareman's Dairy, I would be somewhat  
14 familiar with. I'm not intimately familiar with any of  
15 them.

16 Q. Do you think they're probably about the  
17 same size as you?

18 A. Oh, no. They're significantly larger  
19 than we are.

20 Q. Are you aware of anybody else you are  
21 competing with that you know to be regulated that is  
22 about the same size as you?

23 A. I believe that there may be a couple of  
24 operations on the east side of the state, but I honestly  
25 don't know what their volumes are in comparison to ours.

1 I know that their prices typically tend to be higher  
2 than what would be seen in a lot of the grocery stores.  
3 They would also be seen as more of a premium quality  
4 brand.

5 MR. TOSI: Okay. That's all I have. I  
6 appreciate you taking the time to come all the  
7 way down from Michigan and participate with us.

8 THE WITNESS: Thank you for hearing me.

9 MR. TOSI: Thank you.

10 JUDGE CLIFTON: Mr. Vetne.

11 FURTHER RECROSS-EXAMINATION

12 BY MR. VETNE:

13 Q. I forgot one question, Mr. Arkema. How  
14 many employees do you have in your combined farm and  
15 packaging bottling operation?

16 A. With all of the activities that we have  
17 under the Country Dairy activity, we've got about 105 to  
18 120 depending on the season of the year.

19 Q. Some are part-time employees?

20 A. Some would be part-time employees, yes.

21 MR. VETNE: Thank you.

22 THE WITNESS: Okay.

23 JUDGE CLIFTON: And, Mr. Arkema, what is  
24 your job within the dairy?

25 THE WITNESS: What day is it today? It

1 ranges. My -- my area is primarily in oversight  
2 of the processing plant, the final operations,  
3 the processes and then just general management  
4 with my partner and brother-in-law.

5 JUDGE CLIFTON: Are there any other  
6 questions for Mr. Arkema? There are none.  
7 Thank you so much, Mr. Arkema.

8 THE WITNESS: Thank you.

9 JUDGE CLIFTON: Let's go off record while  
10 he helps the court reporters with some  
11 spellings.

12 (A recess was taken from 4:50 to 4:55.)

13 JUDGE CLIFTON: Mr. Carroll, would you  
14 come to the podium, please? Mr. Carroll, before  
15 you begin, I'd like you to explain what it is  
16 that you intend to do and then see if there's  
17 any objection.

18 MR. CARROLL: Well, I intend to make a  
19 short statement, covering the prehearing  
20 position of our parties -- which we already had  
21 a prehearing proceeding -- and also our  
22 refinement of our position on our proposals for  
23 the clients that I represent. And then we have  
24 always taken the position that Orders Numbers 1  
25 and Number 5 needed specific findings and on

1 facts relevant to them, their own area. That's  
2 all I have to say.

3 JUDGE CLIFTON: All right. And the  
4 reason you want to do this as a statement now  
5 rather than in a brief is what?

6 MR. CARROLL: Well, I want to give  
7 everyone notice of our position while we're all  
8 here. Secondly, I think it's important for my  
9 clients that I rephrase -- or not rephrase --  
10 reincorporate the statements that I made in the  
11 prehearing and so that there's no question that  
12 we have not waived those claims.

13 And then the other matters are just  
14 housekeeping so that everybody knows how we have  
15 come out of this. I think changes have been  
16 made by others at the podium, and I just want to  
17 do the same.

18 JUDGE CLIFTON: Is there any objection to  
19 Mr. Carroll proceeding in that fashion?  
20 Mr. English.

21 MR. ENGLISH: Actually, your Honor, it's  
22 not an objection. It is in the form of a  
23 recognition of the Rules of Practice under  
24 900.9 A provide what is effectively an  
25 opportunity for a oral statement or oral



1 argument separate from briefing and in the  
2 discretion of the judge. And I just note, of  
3 course, since it's not evidence or anything I  
4 don't want to get up today and disagree with  
5 anything. Obviously I'll reserve our right for  
6 briefing, but I also appreciate what Mr. Carroll  
7 is doing as opposed to getting in the witness  
8 stand. I think it's appropriate.

9 JUDGE CLIFTON: I wish you all could work  
10 out the proposals in similar fashion to the  
11 procedures. All right. Is there anyone else  
12 that would like to be heard on the manner in  
13 which Mr. Carroll wishes to proceed?

14 Mr. Carroll, do you have any objection to  
15 my considering this an oral statement?

16 MR. CARROLL: No, not at all.

17 JUDGE CLIFTON: All right.

18 MR. CARROLL: No thank you.

19 JUDGE CLIFTON: You're welcome. You may  
20 proceed.

21 ORAL STATEMENT

22 MR. CARROLL: For the record, I'm John  
23 Benjamin Carol. I've appeared through these  
24 proceedings on behalf of the New England  
25 Producer-Handlers Association, Mountain Dairy,

1 and Monument Farm Dairies, one in Vermont, the  
2 other in Connecticut and the dairies in Virginia  
3 that I've previously appeared for.

4 Prior to this point in time and in the  
5 prehearing, I entered what really amounts to a  
6 special appearance pointing out in my view that  
7 there were certain claims we did not waive by  
8 way of proceeding. I just want to make a  
9 statement that those claims we still have not  
10 waived and we are resting our claim in part on  
11 that.

12 The -- there was a proposal by  
13 Mrs. Cooper, who is Secretary of the New England  
14 producers, which she made independently. And I  
15 have a -- when I do my brief, I will have a  
16 letter -- I have a letter already from her  
17 authorizing me to represent the New England  
18 Producer-Handlers. I'll attach that to my  
19 brief. But I'll also dispose of her proposal as  
20 part of the New England Producer-Handlers  
21 proposal because that happened after she sent  
22 the letter.

23 I thought everybody would want to keep  
24 this thing as cleaned up as possible.

25 Our position for the two handlers in

1 Vermont and Connecticut, it's obvious, their  
2 testimony is that they can't survive the  
3 regulation and of course they want to maintain  
4 the present exemption, number 1.

5 Failing remaining -- obtaining the  
6 present exemption, they would need some form of  
7 protection under the exempt provision, and so  
8 we'll be briefing that in light of the testimony  
9 and the record which we'll review. But we'll be  
10 putting a number on that just to protect them on  
11 the down side.

12 I expect the Virginia exempt person  
13 presently will rise up in wrath at the thought  
14 that he could never be a producer-handler unless  
15 he was clever enough to have known that they  
16 were going to pick a date in 2009, based upon  
17 2008. So that -- I will be briefing that.

18 From a legal viewpoint, we have always  
19 pointed out, and we do again, that our version  
20 of the regulatory authority of the Secretary  
21 over own-farm milk differs from the Secretary.  
22 I have taken numerous cases to court. I have  
23 never -- I had a cert to the United States  
24 Supreme Court on that question, was held for two  
25 years, which shows that somebody was thinking

1           about it and then it was denied. So that issue  
2           is still, from our viewpoint, an open issue,  
3           which we would litigate without thinking if we  
4           are forced to do so.

5                     Everyone has talked about the Small  
6           Business Act. We'll be briefing that as well.  
7           But it is our view that under the record that's  
8           been developed, that the problem of regulation  
9           needs to be referred to the small business  
10          committee, the joint small business committee.

11                    And we also have pointed out in earlier  
12          times, the Sherman Anti -- Anti Clayton --  
13          Sherman Clayton Antitrust Acts, under that  
14          decision, the Noerr-Pennington case, reserving  
15          all rights under those actions. That's all I  
16          have and I thank you very much.

17                    JUDGE CLIFTON: What is that case, please  
18          that you just cited?

19                    MR. CARROLL: Noerr-Pennington.

20                    JUDGE CLIFTON: Which is spelled how?

21                    MR. CARROLL: N -- I believe it's  
22          N-o-r-r, dash, P-e-n-n-i-n-g-t-o-n.

23                    MR. BESHORE: N-o-e-r-r.

24                    MR. ENGLISH: He's got Pennington right,  
25          but not Noerr. N-o-e-r-r. And those of us

1 participating are relying on Noerr-Pennington.

2 JUDGE CLIFTON: Mr. Carroll, thank you so  
3 much. I appreciate the brevity, and I  
4 appreciate that you found a way to accomplish  
5 what your clients need without becoming a  
6 witness. I think that's helpful.

7 All right. Mr. Vetne, would you come to  
8 the podium as well? And, Mr. Vetne, you've  
9 distributed two documents. Exhibit 102 should  
10 be the longer document.

11 MR. VETNE: Right.

12 JUDGE CLIFTON: I'm going to mark that as  
13 Exhibit 102, and then the one-page document,  
14 which is on the letterhead of National Milk  
15 Producers Federation, a letter dated in 2005,  
16 I'll mark that as Exhibit 103.

17 (Exhibit 102 was marked for  
18 identification.)

19 (Exhibit 103 was marked for  
20 identification.)

21 JUDGE CLIFTON: Mr. Vetne, do you want to  
22 proceed? Do you want to proceed in a similar  
23 fashion to Mr. Carroll?

24 MR. VETNE: No, I do not. I want to  
25 proceed in a similar fashion as Roger Cryan,



1 of lawful age, being duly sworn, was examined and  
2 testified as follows:

3 DIRECT EXAMINATION

4 MR. VETNE: Okay. My name is John Vetne,  
5 as you all know. And this record reflects I'm  
6 counsel for three small producer-handlers.  
7 These producer-handlers do not have on staff  
8 economists or milk marketing experts. I  
9 previously mentioned Roger Cryan.

10 Many of the larger processors and trade  
11 associations do and are able to explain how  
12 proposals fit into the current scheme of things  
13 and what was intended and what is intended.

14 So I have taken the opportunity to have  
15 the proposals and explanatory material submitted  
16 to the Department on my letterhead, all of which  
17 I drafted and have those marked collectively.

18 There were two. On the top of page --  
19 Exhibit 102, there's a date, February 16, and  
20 the date was March 16. That was a temporal  
21 error, not a typographical error. It was  
22 submitted March 16. And then it was  
23 supplemented again on March 25. That's  
24 collectively Exhibit 102, which contains the  
25 language of the proposal and reasons for the

1 proposal made.

2 And Exhibit 103 is a letter written by  
3 National Milk Producers to then Secretary of  
4 Agriculture, Mike Johanns, concerning the  
5 Pacific Northwest recommended decision. Charlie  
6 Flanagan, when he gave his testimony, referred  
7 to a letter that NMPF had written to the  
8 Secretary in which it -- NMPF characterized the  
9 Pacific Northwest and Arizona decision as fair.

10 And this is that letter. And I'll tell  
11 you where it can be found. It's a copy printed  
12 off the USDA website. The website -- through  
13 AMS Dairy, one can access rulemaking and then  
14 access dairy rulemaking, and then access  
15 regional rather than national hearings. And  
16 under regional hearings for the Pacific  
17 Northwest and Arizona, the most recent one  
18 there, as you click on it, is the Pacific  
19 Northwest and Arizona producer-handler hearing.

20 And under that there are multiple pages  
21 for comments, exhibits, post-hearing briefs and  
22 so forth.

23 Exhibit 103 appears on a page of that  
24 record under ex parte communications. It's --  
25 ex parte communication number 5, letter from



1 Jerry Koazk. My understanding, it was listed as  
2 an ex parte communication. It doesn't show a  
3 copy to the hearing clerk, but it was apparently  
4 submitted after the date of the briefing. There  
5 was also on the -- the government rulemaking  
6 site comments, a stamped receipt for comments  
7 from National Milk Producers post recommended  
8 decision and that does not appear on the AMS  
9 site under comment.

10 So my assumption is that they submitted  
11 this as comments to the rulemaking site but it  
12 was posted as an ex parte communication on the  
13 AMS site because it's on timeliness. I'm not  
14 sure. But that's where I found it. It's on the  
15 AMS site for that proceeding underneath ex parte  
16 communication number 5.

17 JUDGE CLIFTON: And would you spell Jerry  
18 Kozak's name?

19 MR. VETNE: K-o-z-a-k.

20 JUDGE CLIFTON: Thank you. So on Exhibit  
21 102, the date of the first page, the date of the  
22 letter actually should be March rather than  
23 February.

24 MR. VETNE: The actual date it was sent  
25 was March 16, 2009. It was in response to the

1 invitation to submit proceeds. And this was the  
2 response on behalf of Mallorie's.

3 JUDGE CLIFTON: Now, you say that's the  
4 date it was sent.

5 MR. VETNE: That's the date -- the date  
6 of transmission and the date of the letter were  
7 actually March 16. The month shown on there was  
8 my error.

9 JUDGE CLIFTON: All right. And are you  
10 going to ask that Exhibit 102 be displayed on  
11 the website?

12 MR. VETNE: Well, they're currently on  
13 the website but not as an exhibit. So, yes, I  
14 would like -- I would like that because, as I  
15 indicated previously, it serves the same  
16 explanatory purpose and content purpose and  
17 context purpose, historical purpose as  
18 Mr. Kozak's testimony, for example. So I  
19 request that both 102 and 103 be received.

20 JUDGE CLIFTON: All right. So would you  
21 like the copy that would appear on the website  
22 to show March with your initials?

23 MR. VETNE: No.

24 JUDGE CLIFTON: You want to leave it  
25 February?

1 MR. VETNE: This is as submitted. I  
2 don't propose -- I don't propose to correct it.  
3 Let the whole world see my error. Just leave it  
4 as it is.

5 JUDGE CLIFTON: All right. All right.  
6 And you indicated that in addition to what we  
7 now see in Exhibit 102, you would explain any  
8 change in position by any of your clients?

9 MR. VETNE: Yes, that's my purpose. Not  
10 just change in position but for answering  
11 questions such as Mr. Rower had the other day  
12 about what the meaning of person is. Typically  
13 there are questions as to, you know, what was  
14 intended here, what's the basis for that, how's  
15 this fit in.

16 As well as Mr. Flanagan testified  
17 concerning a modification of a proposal, I want  
18 to explain how that fits in. Because he's --  
19 he's, frankly, not competent to do that. He  
20 doesn't have the experience that staff experts  
21 have or that I have in this.

22 Let me proceed with a couple of things  
23 there. First of all, listening to the testimony  
24 this last couple of weeks and going back and  
25 looking at the -- at the various rules, I

1 developed a little concern about all of the  
2 proposals that call for some kind of cap or some  
3 kind of grandfathering. When that cap or that  
4 grandfather exemption no longer applies, when  
5 somebody goes over the cap or otherwise doesn't  
6 comply with the cap or grandfather provision,  
7 what would be the impact under various dairy  
8 farmers for other markets provisions?

9 There are some rules for dairy farmers of  
10 other markets under which -- under which a  
11 producer might not be pooled in a month or in  
12 a -- in -- in a next month or a following month.  
13 If milk were received at a nonpool plant and a  
14 producer-handler defined as a nonpool plant, an  
15 exempt plant is a nonpool plant -- I haven't --  
16 I haven't looked at those in detail, but I do  
17 want to express what I think was an implicit  
18 part of the proposal here, that should a --  
19 should a cap be adopted, should the rules be  
20 changed, should there be a grandfather  
21 provision, that a dairy farmers for other  
22 markets provision in any order should not be  
23 applied so as to disqualify that producer's milk  
24 as producer milk during a month in which that  
25 producer's plant becomes regulated.

1           And I -- frankly, I admit I'm not sure  
2           that would happen, but I'm concerned that it  
3           might. So I mentioned it for benefit of the  
4           record and USDA.

5           Secondly, Mr. Flanagan suggested at the  
6           end of his testimony that there be a second cap.  
7           The terms hard cap and soft cap have been used.  
8           I think soft cap has been used with derogatory  
9           intention.

10           Hard cap, as -- the cap, as used in our  
11           proposal, that is Mallorie's Proposal Number 17,  
12           is a hard cap on the amount -- on the volume of  
13           milk that can be exempted if -- if there is a  
14           grandfathering.

15           The primary position, as Mr. Mallorie  
16           explained, of all three is that there be no  
17           change.

18           The secondary position is if there needs  
19           to be a change elsewhere, none is needed for the  
20           Pacific Northwest, and the other markets might  
21           do well following the example of the solution  
22           adopted at Pacific Northwest.

23           But if producer-handlers are eliminated  
24           by the adoption of Proposals 1 and 2 and if, in  
25           addition, a grandfathering provision is

1           considered to protect the investment of those  
2           who are existing producer-handlers, and were  
3           existing producers when the invitation to submit  
4           proposals came out, then the grandfathering  
5           provision as proposed by Mallorie's is  
6           preferable to that proposed by National Milk for  
7           a number of reasons. I think that's explained  
8           by -- in the testimony.

9           That has actually a hard cap. But in  
10          addition, it also provides for graduated -- the  
11          amendment proposed by Mr. Flanagan, rather than  
12          have perpetual volume of exempt milk, and I  
13          think the folks from California talked about  
14          the -- well, in their view talked about the  
15          competitive disadvantage that could exist if  
16          there was a 20 or 30 million-pound plant that  
17          had a large volume that was exempt. Quite  
18          frankly, that hadn't -- hadn't occurred to folks  
19          that have 1 or 2 or 3 million pounds.

20          But we could understand -- Mr. Flanagan  
21          could understand the -- the need to guard  
22          against that. So the proposal was made to cap  
23          any exemption at 6 million pounds, which means  
24          that if -- if a plant becomes regulated at  
25          3 million pounds Class I, and then grows to

1           6 million pounds, Class I, either from his own  
2           production or somebody else's production, rather  
3           than -- if the contribution to the pool is 86  
4           cents for a fully regulated plant, rather than  
5           go from zero to 86 cents for an extra gallon or  
6           extra pound, that plant would gradually pay --  
7           pay more as it grew to 6 million pounds.

8                        So by the time it got to  
9           6 million pounds, for all of its milk it would  
10          be paying 43 cents. That's -- half of it would  
11          be exempt and half of it would be nonexempt.  
12          And at that point -- beyond that point the  
13          exemption would no longer be available. I think  
14          that takes care of the problem described by the  
15          California witnesses.

16                       Larger than that -- there's plenty of  
17          reason for it to be larger than that, because of  
18          the extra costs of small plants compared to  
19          large plants. This is a very conservative  
20          level. It addresses the small -- the Regulatory  
21          Flexibility Act, because these plants are really  
22          a subset of small handler businesses, small  
23          business being defined as 500 employees or less.  
24          Many of these have only a handful of employees.

25                       So this small set -- subset of businesses

1 has high expenses, high costs of processing, and  
2 as they grow larger, they start to approach, but  
3 cannot achieve, according to Mr. Hettinga,  
4 comparable cost efficiencies until they get to  
5 about 30 million pounds. The proposal is to cut  
6 it off at 6 million pounds. So that's how those  
7 two things fit together. Sort of a return to a  
8 graduated tax.

9 So the reason I'm up here is to -- to see  
10 if there's any questions about how this -- how  
11 this works, how this fits in. If there are any,  
12 I'll be happy to be take them. And if not, I'll  
13 be even happier to step down.

14 JUDGE CLIFTON: Who would like to ask  
15 Mr. Vetne questions? Mr. English, thank you.

16 MR. ENGLISH: Actually, I don't want to  
17 ask questions if -- although he strayed a little  
18 farther than I wanted him to, if this is limited  
19 to an explanation of the proposal.

20 If the Exhibit 102, other than the  
21 explanation and the alternative, the text in the  
22 alternative is being -- is going to be admitted  
23 for the truth of the assertions -- there are --  
24 the first at least 4 1/2, 4 2/3 pages; I'm not  
25 sure about the explanation piece, that is sort



1 of in the form of argument; fact sort of applied  
2 to argument that might have been better guised  
3 as what I was discussing with Mr. Carroll. And  
4 that's why I appreciate what Mr. Carroll did  
5 under the rule.

6 If that is going to be admitted for the  
7 truth of the assertion, then the very thing I  
8 warned about last week is of some concern. I  
9 think we have probably some extensive  
10 cross-examination coming.

11 But if we can have some clarity as to  
12 what's going to happen here -- this is why I'm  
13 concerned about counsel coming on as witnesses.  
14 If the first part is going to be just what was  
15 submitted and is not being submitted for the  
16 truth of the assertion that needs to be  
17 questioned here today, I have no questions.

18 JUDGE CLIFTON: Mr. Beshore, let me hear  
19 from you and then I'll -- after I've heard from  
20 everyone, then I'll hear from Mr. Vetne.

21 MR. BESHORE: Our position and my  
22 thoughts are in line with those of Mr. English.  
23 I think the line -- the line for attorneys  
24 testifying should be no argument, period.

25 If attorneys are going to argue from the

1 stand -- well, that's a line that we think  
2 should not be crossed with respect to these  
3 proceedings. If they have factual testimony,  
4 fine. Otherwise, it should be statement as  
5 Mr. Carroll made in brief.

6 The first, I don't know however many  
7 pages after the opening letter of Exhibit 102  
8 is, I think, fairly described as arguments,  
9 substantial portions of it, quoting -- you know,  
10 citing cases and interpreting them, et cetera.

11 If it's going to come in, it should not  
12 come in, in our view, as sworn testimony. Or,  
13 you know, we'd be obligated, I suppose, to look  
14 at it as being necessary to cross-examine. So  
15 if that doesn't come in, I don't know that I  
16 have any questions.

17 But I certainly join Mr. English's  
18 statements of concerns and objection.

19 JUDGE CLIFTON: Mr. Miltner.

20 MR. MILTNER: Before I say a whole lot, I  
21 think it's Mr. Vetne's decision on what he wants  
22 to introduce into the record. I think the idea  
23 that attorneys cannot argue from the stand is  
24 not entirely true. But I think that if they do  
25 so without qualification, they would be subject

1 to cross-examination.

2 And so no one needs to be an attorney to  
3 stand at this podium, nor does somebody need to  
4 be a nonattorney to sit in the witness chair.  
5 And we have had experts at many hearings sit on  
6 both sides, both -- I've seen attorneys do it  
7 and I've seen economists do it, and I've seen  
8 plant managers do it.

9 So the decision is Mr. Vetne's about what  
10 he wishes to have admitted into the record and  
11 incorporated into his statement.

12 But I think it would be wrong to say that  
13 simply because Mr. Vetne holds a law license or  
14 simply because he's asked questions in this  
15 proceeding, he cannot sit in the witness stand.  
16 But if chooses to do so, he should be subject to  
17 the same cross-examination as any other witness.

18 JUDGE CLIFTON: Thank you, Mr. Miltner.  
19 Does anyone else want to comment before I  
20 inquire of Mr. Vetne whether he wants portions  
21 of Exhibit 102 treated as his evidence?  
22 Mr. Ricciardi.

23 MR. RICCIARDI: Your Honor, you asked the  
24 relevant question, which is what are the  
25 documents intended to be utilized for?

1           Obviously we'll hear from Mr. Vetne on that in a  
2           moment.

3                     But I will join with my colleague,  
4           Mr. Miltner, to say two things. First, the fact  
5           that you do have a law license may disqualify  
6           you from some things, but it should not  
7           disqualify you from being able to go ahead and  
8           present the information at this hearing.

9                     Secondly, apparently not having a law  
10          license does not disqualify anyone from giving  
11          their opinion with regard to what the law is.  
12          So I think that we have to end up applying  
13          whatever standard we're going to apply.

14                    And to the extent that Mr. Vetne intends  
15          to introduce Exhibits 102 and 103 in an  
16          unqualified manner, then the court needs to --  
17          your Honor needs to deal with that -- that  
18          issue. But he should be able to go ahead and  
19          make whatever statement he wants to.

20                    JUDGE CLIFTON: Thank you, Mr. Ricciardi.  
21          Mr. Vetne, how do you want to proceed?

22                    MR. VETNE: Your Honor, I requested that  
23          the exhibits be marked and ask that they be  
24          received on an unqualified basis. And I have  
25          explained that before I got up here.

1           The larger players in this industry have  
2           on-staff economists, on-staff lawyers. Steve  
3           Rowe for Northwest Dairy Association is a  
4           lawyer, advises that organization. He came up  
5           here as a witness.

6           Roger Cryan came up here. And actually  
7           his testimony is very much like Exhibit 102:  
8           Here's where we think things fit, here's why  
9           we're doing it, here are some observations we  
10          made, here's what I think the law is.

11          I have three small clients, your Honor.  
12          The suggestion -- the suggestion that my clients  
13          cannot use somebody who has experience, who can  
14          represent them in this proceeding -- and I don't  
15          have to be a lawyer to be their advocate in this  
16          proceeding, I just happen to be a lawyer. But I  
17          also have 35 years of experience in this  
18          industry and with these regulations. That a  
19          small player cannot have somebody with  
20          experience, who happens to have a law degree, do  
21          for them what Mr. Cryan has done for National  
22          Milk Producers or Mr. Rowe did for Northwest  
23          Dairy Association, it's abhorrent. It's another  
24          effort to use the power of the market and the  
25          power of the purse, just as I think these

1 proposals are, to disadvantage small businesses  
2 to the advantage of large businesses.

3 So if that there are questions concerning  
4 the facts submitted -- submitted on behalf of  
5 Mallorie's and on behalf of Nature's Dairy and  
6 on behalf of Country Morning, the parties have  
7 had this information concerning them and  
8 concerning the reasons for their proposal in  
9 their possession for over a month. I announced  
10 on the first day that I would rely on these  
11 submissions and provide some explanation in the  
12 past.

13 Anybody could have asked any of my  
14 witnesses concerning the content of these and  
15 what they understood them to mean and how  
16 that -- how that fit. And if they were able to  
17 answer, they could have answered. They might  
18 have deferred to me or not. But the opportunity  
19 has been here to ask the principals about their  
20 business concerning everything here.

21 Like I said, this is -- this is no  
22 different than Mr. Cryan. And if -- if the hair  
23 is going to be split so that I cannot do  
24 something comparable for my small clients  
25 that -- that other witnesses have done for their

1 clients or employers, that would be very  
2 disappointing.

3 So we're talking about Exhibit 102. I  
4 haven't heard any objection to 103. So that's  
5 my take on 102.

6 JUDGE CLIFTON: All right. We -- we took  
7 Dr. Cryan's testimony, direct testimony, on one  
8 day. And then when we did cross-examine  
9 Dr. Cryan, we went to 9:00 that night. I don't  
10 want to do that tonight. So the big issue now  
11 is should Mr. Vetne's cross-examination proceed  
12 now? It's 5:33, or should we take that up at  
13 8:00 in the morning?

14 And Mr. Vetne, I presume you're here  
15 tomorrow?

16 MR. VETNE: I am.

17 JUDGE CLIFTON: All right. How does  
18 everyone want to proceed? Mr. English.

19 MR. ENGLISH: I don't know what plans  
20 people have made. I don't -- I think I can take  
21 care of it because I can get a reservation at  
22 the Hilton. My understanding is this hotel  
23 doesn't have rooms tomorrow night. So if people  
24 have counted on getting out tomorrow night, that  
25 may be difficult.

1                   If we're going to go forward and  
2                   cross-examine 102, then Mr. Vetne is going to  
3                   get cross-examined like any other witness and  
4                   that may take a while.

5                   JUDGE CLIFTON: Mr. Carroll.

6                   MR. CARROLL: Could I raise a problem or  
7                   a personal --

8                   JUDGE CLIFTON: Yes, please. Please come  
9                   to the microphone.

10                  MR. CARROLL: My plane leaves tonight at  
11                  8:00. And I'm waiting for the Dairy Farmer of  
12                  America witness. My good friend here can handle  
13                  cross-examination without any help whatever from  
14                  us, but my son would be here if it were needed.  
15                  I would like to get that testimony in and done  
16                  and then go home. I'm not saying it's  
17                  comfortable for other people. It's just what I  
18                  would like to do.

19                  JUDGE CLIFTON: You think that we could  
20                  complete Mr. Hollon's testimony tonight?

21                  MR. WOODY CARROLL: There's  
22                  cross-examination.

23                  MR. CARROLL: I think I can get my cross.  
24                  The statement is nine pages long. It'll  
25                  probably take 15 minutes to read it. I'm



1           guessing.

2           JUDGE CLIFTON: All right. Thank you for  
3 that suggestion. Let me hear from some others.  
4 Mr. Beshore.

5           MR. BESHORE: I object to him proposing  
6 Mr. Hollon, you know, while Mr. Vetne is on the  
7 stand. Mr. Hollon's testimony has been  
8 distributed this morning as the rules provide.  
9 So Mr. Carroll has, I think, provided  
10 cross-examination to his co-counsel who will be  
11 here tomorrow.

12          JUDGE CLIFTON: All right. Mr. Miltner.

13          MR. MILTNER: Your Honor, as I have my  
14 list, the only witness remaining other than --  
15 than Mr. Vetne is Mr. Hollon. Is that the same  
16 as you have?

17          JUDGE CLIFTON: Yes.

18          MR. MILTNER: I would hope that, despite  
19 30 years of being an advocate in this  
20 proceeding, we would come nowhere close to  
21 spending an entire day cross-examining Mr. Vetne  
22 on this limited statement, and that Mr. Hollon  
23 and Mr. Vetne could both be completed by  
24 mid-afternoon tomorrow. If that's not the case,  
25 then there's something terribly wrong.

1 JUDGE CLIFTON: Mr. English.

2 MR. ENGLISH: I have been very slim in my  
3 cross-examination. And maybe if I'm given the  
4 evening I will try to see if I can cut it down.  
5 I had hoped that the approbation about this  
6 issue could have dealt with this.

7 I do think there is a way of dealing with  
8 this issue, distinguishing from the legal  
9 argument attached to it. That's the real  
10 problem here is that, yes, a lawyer gives  
11 something more imprimatur.

12 Therefore, a lawyer cross-examining a  
13 lawyer is going to have a difficult time with  
14 the cross-examination. I'm not going to promise  
15 how long it's going to take. I know that in the  
16 past instance this took six or seven hours.  
17 That wasn't my fault. Mr. Stevens objected to  
18 it at the time.

19 I think it was a mistake then. I think  
20 everyone in the room thought it was a mistake  
21 then. And I think it's a mistake now. But if  
22 that's what's going to happen, that's what's  
23 going to happen. It's not my fault. I will  
24 protect my clients' interests and I will  
25 cross-examine this witness.

1 JUDGE CLIFTON: Mr. Beshore.

2 MR. BESHORE: I think we should adjourn  
3 for the evening, continue with Mr. Vetne's cross  
4 in the morning followed by Mr. Hollon. Maybe  
5 overnight we can sort it out a while, but this  
6 problem has been foisted upon us by Mr. Vetne.

7 And I would say his testimony is no  
8 different than Mr. -- I mean, Mr. Rowe's  
9 testimony is not at all like Mr. Vetne's 102  
10 statement and argument, legal arguments. I  
11 mean, that argument was raised and there was  
12 nothing to it. And Dr. Cryan's testimony is not  
13 legal argument of this nature either.

14 JUDGE CLIFTON: Mr. Ricciardi.

15 MR. RICCIARDI: I step to the podium as  
16 the voice of reason this evening, Judge. And  
17 actually, until he started to go to the point of  
18 arguing about this testimony of Mr. Rowe and  
19 Dr. Cryan, I was actually going to get up here  
20 and say, I agree wholeheartedly with my  
21 colleague, Mr. Beshore. But I agree  
22 wholeheartedly with half of what he said.

23 We need to stop for the evening, get back  
24 into this at 8:00 in the morning, deal with the  
25 issue with regard to Mr. Vetne and then

1 Mr. Hollon. And I do have -- and I handed the  
2 copy out to my colleagues.

3 I do have one issue on the letter from  
4 Dennis Wolff, Office of the Secretary,  
5 Commonwealth of Pennsylvania, concerning  
6 Kreider, which I think we can deal with  
7 fairly -- fairly briefly. But I wanted to make  
8 sure that the -- that you're aware of that --  
9 make sure that we do that tomorrow when we dot  
10 the Is and cross the Ts, Judge.

11 JUDGE CLIFTON: All right. Thank you.  
12 I'm going to allow Mr. Vetne to put on  
13 Exhibit 102 as evidence and he'll be subject to  
14 cross-examination just like any other witness.  
15 So it may take us a while. I agree that we  
16 should call it a day. So we'll -- it's now  
17 almost 5:40. And we'll come back at 8:00 in the  
18 morning. We'll complete Mr. Vetne before we go  
19 on to Mr. Hollon.

20 MR. VETNE: Your Honor.

21 JUDGE CLIFTON: Who is talking?

22 Mr. Vetne?

23 MR. VETNE: May I ask 103 be received? I  
24 don't think there's any issue about that.

25 JUDGE CLIFTON: Is there any objection to

1           the admission into evidence of Exhibit 103?  
2           There is none. Exhibit 103 is hereby admitted  
3           into evidence.

4                         JUDGE CLIFTON: All right. Thank you  
5           all. And I'll see you at 8:00 in the morning.

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7                                 PROCEEDINGS ADJOURNED AT 5:39 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.

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S. Diane Farrell, RMR, CRR